



Submission – Consumer Safeguards Review Part C – Choice and fairness

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By email: consumersafeguardsreview@communications.gov.au

financialcounsellingaustralia.org.au | www.financialcounsellingaustralia.org.au

Level 6, 179 Queen Street
Melbourne
VIC 3000

Contact person for this submission

Fiona Guthrie

phone: [REDACTED]

mobile: [REDACTED]

About Financial Counselling Australia and Financial Counselling

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the State and Territory financial counselling associations.

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1 Introduction

We welcome the last part (Part C) of the review of consumer safeguards for telecommunications services in Australia. Telecommunications are an essential service and effective choice and substantive fairness are key consumer rights. This submission responds to the proposals in the consultation paper: Consumer Safeguards Review Part C - Choice and Fairness (the consultation paper).

We also support the detailed provisions of the ACCAN submission.

2 Executive Summary

We support the main proposals (proposals 1,2 and 3) for reform for the telecommunications industry which include comprehensive mandatory and enforceable rules with improved effectiveness. We call on the Government to acknowledge that telecommunications are an essential service in the rules.

3 Financial counselling and telecommunications

Financial counsellors assist people in financial difficulty. Financial counsellors have substantial experience assisting people with:

- financial difficulty with ongoing telecommunications costs
- making repayment arrangements on telecommunications debts
- dealing with debt collectors appointed by telecommunications providers
- disputing mis-selling of telecommunications services
- representing people in telecommunications disputes (including in the Telecommunications Industry Ombudsman (TIO))
- referring people for legal assistance (when needed)
- making complaints to regulators, for example the ACCC.

Financial counsellors assist people from a range of backgrounds and include people:

- on low incomes (Centrelink and casual work)
- with a disability
- culturally and linguistically diverse
- Aboriginal and Torres Strait Islander
- live rurally and remotely

4 The problems with telecommunications

Financial counsellors see a range of systemic problems with telecommunications services. Some of the main systemic problems are:

- post-paid plan contracts that are unaffordable
- upgrading people from affordable contracts to unaffordable contracts
- selling people additional phones, tablets and other gadgetry that is not needed

- bill shock problems where people get large bills they cannot afford to repay
- problems with prepaid services still representing poor value
- problems with bundling phone purchase with a post-paid plan which includes problems with transparency and cancellation fees
- taking advantage of disadvantage issues (where the telecommunications provider takes advantage of people experiencing vulnerability to sell unsuitable products)
- difficulty raising disputes and staying within the TIO process

Financial counsellors predominantly work with people with medium to low incomes. We remain particularly concerned about unaffordable and unsuitable contracts that put people in financial difficulty. We consider that these systemic issues necessitate a comprehensive legislative response.

5 Case study: Telstra and systemic misconduct

In November last year Telstra apologised for systemic misconduct in selling telecommunications services to indigenous people.¹ This apology was in response to a long campaign by financial counsellors that identified serious systemic issues with the conduct of Telstra. Many case studies were collected and referred to the ACCC for investigation. The ACCC investigation remains ongoing.² Since ABC news broke this story, further people have come forward with stories of mis-selling and unaffordable debts.

Although the mis-selling cases presented to the ACCC focused on Aboriginal and Torres Strait Islander communities, financial counsellors have reported similar mis-selling to people across Australia. This is not “just” a situation where Telstra took advantage of Aboriginal and Torres Strait Islander people, it is a systemic problem with the approach of Telstra to sales.

We acknowledge that Telstra is currently working to improve its sales practices. This is welcomed. However, the current laws failed to prevent this widespread harm.

We also have no doubt, based on feedback from financial counsellors, that the “culture” problem in Telstra that led to the above identified systemic misconduct is also replicated in other telecommunications providers. The case for comprehensive rules/legislation to improve consumer protection is reinforced given the Telstra systemic misconduct.

6 Telecommunications is an essential service

Telecommunications is an essential service. It is similar to water and energy, people in Australia must have access to telecommunications to function and participate in society. It follows that this must be acknowledged in legislation and all drafting of provisions for any new rules/legislation must have this as a guiding principle.

6.1 Why telecommunications is an essential service

¹ See <https://www.abc.net.au/news/2019-11-07/telstra-apologises-at-aboriginal-economic-development-forum/11681306>

² See <https://www.crn.com.au/news/telstra-partners-under-investigation-for-ripping-off-vulnerable-customers-537591>

It is no longer arguable that telecommunications is not an essential service. There are many reasons and the main arguments are set out below:

The COVID-19 Global Pandemic

The current pandemic has made the necessity of telecommunications completely apparent. Effective contact tracing requires easy access to people via telecommunications. People need telecommunications for managing COVID-19 including ringing for medical advice and managing their basic needs in isolation or quarantine.

People also need telecommunications in this pandemic to keep in touch with their family, contact friends, attend school/higher education and work when there are ongoing restrictions (or even lockdown). The essential nature of telecommunications has been acknowledged by the Government in a statement released in response to the pandemic.³

It is unknown currently how long the pandemic will significantly impact people's lives. It could be some years. It is likely that the pandemic will have an impact on working from home and communications permanently. It also follows that the legislation should also reflect preparedness for similar challenges like the pandemic in the future.

Work and education

Telecommunications are now essential for work, school and higher education.

Centrelink

Centrelink, Job Agencies and JobActive all mostly require access to telecommunications. People who do not have access to basic telecommunications services are significantly disadvantaged (in both cost and time) when interacting with Centrelink related services.

Rural and remote

Telecommunications is essential for people living rurally and remotely. This includes keeping in contact with family and the community, attending school and higher education, running a business and accessing help in an emergency.

Family violence and mental health

Women fleeing family violence or otherwise managing their safety need access to telecommunications. This has been acknowledged already in programs to provide phones and credit to women at risk of or who are already suffering through domestic violence.

Most mental health support is built around telecommunications. If people are seeking help, they need access to telecommunications. This is particularly important given that mental health crises do not conform to scheduled visits to a GP or other relevant health professional.

6.2 Acknowledging and drafting mandatory rules based around telecommunications as an essential service

The next step is for this review to recommend that:

³ See Communications Statement at https://www.communications.gov.au/sites/default/files/joint_statement_-_final.pdf.

1. It is acknowledged that telecommunications is an essential service
2. The new mandatory rules incorporate telecommunications as an essential service as a guiding principle in making the mandatory rules.

7 Regulating telecommunications as an essential service

The current regulatory framework for telecommunications is not fit for purpose. It does not represent adequate consumer protection for people using telecommunications. This is because telecommunications is not regulated as an essential service.

The consultation paper refers to mandatory rules. This is an understatement of what is required. An essential service needs comprehensive legislation modelled on best practice. The following changes are needed to bring the telecommunications regulatory framework up to being best practice consumer protection:

1. Licensing of telecommunications providers.

The Regulator must be able to manage poor practice and exclude telecommunications providers that do not meet the required standards.

2. Move from self-regulation to direct and comprehensive direct regulation

Amend the *Telecommunications Act* to introduce comprehensive direct regulation of telecommunications providers.

3. Comprehensive best practice consumer protection legislation.

This legislation would cover all aspects of the relationship with the telecommunications provider including disclosure, affordability, minimum product standards, financial hardship, cancellation, customers who may be vulnerable, sales and advertising standards, and dispute resolution (to name some topics).

4. Enhance and continue with ACMA's rule making powers

ACMA needs flexibility to deal with emerging telecommunications issues.

5. Make sure the regulator has enforcement powers and the budget to effectively enforce

Regulators must be effective and well-resourced to avoid consumer harm. There must be a large suite of regulatory powers and large penalties for failure to comply. The regulator must be prepared to regularly enforce and litigate. This was a major learning from the Financial Services Royal Commission and needs to be reflected in telecommunications.⁴

6. Enable ACMA to write regulatory guidance

An issue with all regulation is interpretation. ACMA should write guidance that interprets the legislation to provide clear guidance to industry. This could be modelled on the Regulatory Guidance issued by ASIC. The Regulatory Guidance would be enforceable in the TIO.

⁴ See ASIC changing approach to enforcement following the Financial Services Royal Commission summarised in a speech, see <https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/>

7. *The role of industry codes*

Industry codes are not the right vehicle for setting minimum consumer protection standards. The current Telecommunications Consumer Protection Code (TCP Code) is a quasi-regulation set and finalised by the telecommunications industry. It is completely inappropriate to have the telecommunications industry set basic consumer protections. It is noted that many requests (for example by ACCAN) for basic consumer protections are not covered in this Code.

The role of industry codes is to enable industry to go above and beyond minimum standards to build confidence in the industry.⁵ Currently, the telecommunications industry is instead spending time managing a Code that covers basic consumer protections. This leaves telecommunications in a very immature phase of responding to regulation. Contrast the telecommunications industry with for example, the banking industry that uses their Code to deliver outcomes that are in addition to basic consumer protections.⁶

8 **Proposal 1: Content of the Rules**

There must be comprehensive consumer protection legislation that covers consumers (including small business) in their dealings with telecommunications providers.

8.1 **Question 1: What are the essential matters to be covered by the rules?**

We understand the rules to be enforceable legislation. The legislation must cover all aspects of consumers dealing with telecommunications providers. The list of matters in Part 6 section 113 of the Telecommunications Act is a guide but should not limit the scope. It is essential that the list be reviewed in detail with consultation on improvements to the scope.

The proposed rules must also include the concept of fairness as a guiding principle in conduct obligations. This is consistent with the approach of the TIO and a move in financial services (which should be replicated in telecommunications) to ensure that telecommunications consider fairness in product design and conduct.

Examples of matters that are not included in the section 113 list are:

- Extensive obligations to ensure all people can access telecommunications as an essential service. This would include:
 - setting product standards to ensure all people can access an affordable:
 - pre-paid service that remains available for local calls (regardless of credit balance) and does not expire
 - post-paid service that provides basic functions including national calls and data. These services should not be changed to add unwanted features and raise the price. They would operate in a similar to a [basic bank account](#).
 - Specific rules on disconnection and rules around keeping people connected
 - Affordable access to basic phones

⁵ See for example the comments on the role of codes in ASIC Regulatory Guide 183 at <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf/>

⁶ This is discussed in section 4.2.2. of the Telecommunications Consumer Safeguards: International and sectoral comparisons of consumer protections for choice and fairness in the retail relationship between customers and their providers, 10/8/18 (PWC Report). It is noted that the report incorrectly states that

- Specific attention to a list of disclosure requirements, for example, improving disclosure on bundled phone purchases with a phone plan
- Detailed obligations on affordability assessments
- Technological and conduct obligations to prevent mis-selling including unsolicited sales
- Enhancing financial hardship obligations including a mandated process and specific rules about when a repayment plan must be available
- Bans and specific protections on the sale of insurance and extended warranties⁷
- The performance indicators lack detail and need to be assessed on what value is delivered
- Internal dispute resolution and external dispute resolution needs far more detail, for example see ASIC Regulatory Guide 165⁸
- For privacy, further disclosure is required so people know about the release of any personal information including metadata and release of information pursuant to a warrant
- Debt collection practices do not make it clear that the sale of telecommunications debt also needs to be covered. For example, in financial services the debt collector that buys a debt is also bound by the same contract and the requirement to be a member of an external dispute resolution scheme
- The ASIC/ACCC Debt Collection Guideline should be mirrored directly in the proposed rules.
- Comprehensive measures to prevent bill shock
- Specific attention and protection for people who may be experiencing vulnerability which may include people experiencing domestic and family violence, people with a disability, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people, women, older people, and people on a low income
- Making sure that payment mechanisms are sufficiently broad, consistent with good financial literacy and avoid putting people into financial hardship. For example, the forced use of direct debits can mean a person may have to go without necessities, such as food or rent. Many who are currently managing their finances would not be able to do so effectively if forced to take on direct debit arrangements. A key tool in managing financial difficulty is being able to prioritise and manage payments. When a person cannot manage payments, it can mean that a telecommunications provider is paid to the exclusion of other necessities.
- Telecommunications and credit reporting. Telecommunications defaults cause a great deal of difficulty for people seeking credit. The amount of the default is usually small but it can mean that people cannot get credit for a car or home. Further work is needed around managing this harm that appears to be out of proportion to the default.
- Clear rights for financial counsellors to represent their clients and accept authorities.

The above list is not exhaustive. There is no doubt that the section 113 list needs further detail.

8.2 Do the existing regulations need to be redesigned?

As stated above the current regulatory framework needs to be redesigned.

8.3 To what extent should third parties be captured by any new rules

Relevant third parties must be captured by the redesigned rules. A failure to regulate third parties simply leads to loopholes and regulatory arbitrage and avoidance.

⁷ See for example the product intervention being considered by ASIC at <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-179mr-asic-consults-on-proposed-product-intervention-order-for-the-sale-of-add-on-motor-vehicle-financial-risk-products/>

⁸ See <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/>.

9 Proposal 2: How the rules are made

The process for making rules should be reformed to improve effectiveness.

Industry codes and piecemeal regulation has comprehensively failed to protect people from harm. We recommend that comprehensive telecommunications consumer protection legislation is enacted. ACMA must be able to develop directly enforceable industry standards.

10 Proposal 3: How the rules are enforced

Enforcement is a key tool to encourage compliance and clarify how the rules apply.

We recommend that enforcement include:

- The ability for ACMA to take direct enforcement action when there is non-compliance with a rule/legislation. There should be no requirement to issue directions.
- An ability to act quickly to prevent harm
- An appetite for litigation to test the law and set clear standards
- Effective use of the media to keep the public informed of actions
- Significant available civil penalties and infringement notice penalties to discourage “commercial decisions” to not comply with the rules
- A complete set of enforcement tools including an ability to force production of information, forced independent audits and reviews, responses to questions and actions to provide remedies
- Comprehensive reporting requirements to identify problems
- The ability to remove a licence and force the telecommunications provider to leave the industry
- ACMA works with other regulators (and particularly the ACCC) to share information and work together on enforcement.

11 Proposal 4: What happens to the old rules?

In principle, we agree that legacy obligations can be adjusted if no longer relevant.

We confirm that we support ACCAN’s comments and approach to this issue.