

Consumer Safeguards Review

Submission by Legal Aid Queensland

Consumer Safeguards Review – Part C- Choice and Fairness: Consultation Paper

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Department of Infrastructure, Transport, Regional Development Communications – Consumer Safeguards Review – Part C – Choice and Fairness: Consultation Paper.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit provides advice and representation in banking and finance, credit and debt, insurance and consumer law including clients who experience significant detriment following entering into contracts for telecommunications products.

Questions:

Proposal 1 - Telecommunications-specific consumer protection rules should cover essential matters between consumers (including small businesses) and their communications providers.

P1Q1 - What are the essential consumer protection matters that should be covered by the rules?

Part 6 (section 113) of the Tel Act lists a range of matters that may be dealt with by industry codes and standards. The TCP Code covers some but not all of those matters. Are these the right starting points?

LAQ considers that section 113 contains most essential consumer protection matters that should be covered by the rules and agrees it is a useful starting point. In addition to the matters in section 113, LAQ considers responsible sales practices, customer service, and protections specific to vulnerable consumers to be essential consumer protection matters that should be covered by the rules.

LAQ supports the view of the Department that the rules should focus on areas where commercial and other market incentives for good service and fair treatment are lacking.¹ LAQ submits,

¹ Consultation Paper, p 24.

industry-led-regulation has proven inadequate to prevent consumer detriment caused by poor customer service and irresponsible sales practices. The TIO's 2018-19 annual report demonstrates the high levels of consumer dissatisfaction in these areas, for example:

- 13,976 complaints concerning no or delayed action and 13,509 complaints concerning service and equipment fees were made in relation to internet services; and
- 12,905 complaints concerning service and equipment fees and 11,675 complaints concerning no or delayed action were made in relation to mobile services.

LAQ considers that direct regulation is needed to remedy these failures including:

- Industry-wide guaranteed minimum service and performance standards; and
- Responsible sales practices.

These changes should be supported by proactive regulation by ACMA.

P1Q2 - Do the existing consumer protection rules governing the retail relationship e.g. in the TCP Code and various standards and service provider determinations need to be redesigned, or are new rules required, to address increasingly complex supply chains? If so, why?

Direct regulation where the current consumer protection rules have not achieved the intended outcomes. This would necessitate a redesign of the current rules to accommodate direct regulation. The existing obligations on providers should also be strengthened along with greater enforcement options for consumers. We have set out what obligations need to be strengthened below.

LAQ agrees with the department's view that choice and fairness are primarily a matter for retailers.² While it may be appropriate to create rules or standards to address supply chain complexities, Legal Aid Queensland considers the primary focus should be on reducing consumer harm by creating incentives for retailers through enforceable obligations and compensation for consumers.

Contracts and pre-contractual disclosure

The disclosure requirements for contracts should be standardised and clarified. The language in the TCP Code under rule 4.2 concerning the requirement to provide a Critical Information Summary (**CIS**) is vague and ineffective. For example, rule 4.2.2(b)(iii) requires the supplier to include "where applicable, the exclusions and any important conditions, limitations, restrictions or qualifications for that Offer, such as mobile Data auto top-ups". Important conditions should be standardised and included in all contracts, not just "where applicable". At a minimum, the supplier should be required to disclose all applicable and ascertainable fees including service suspension fees.

LAQ supports the mandatory pre-contractual disclosure of obligations and consumer rights being imposed on the supplier of services under the consumer protection rules. For example, minimum

² Consultation Paper, p 24.

guaranteed service and performance standards, and the promotion of the supplier's financial hardship policy.

Customer Service

LAQ supports the introduction of minimum guaranteed service and performance standards levels with compensation payable by the service provider to the consumer in the event the standards are breached. This approach is similar to the approach set out in the National Energy Retail Law. These guaranteed standards should be given the consumer when they enter the contract.

LAQ supports the introduction of measures to ensure consumer enquiries are dealt with in a timely and effective manner. The TCP Code is currently outcomes focused, requiring suppliers to take such actions as "monitoring average wait times ... to keep the average wait times to a reasonable minimum in the circumstances". Research conducted by ACCAN suggests that consumers spend an average of 21 days to resolve their issue, with lowest average by query being 10.4 days for changing or renewing a plan, and the highest being 33 days on average for equipment issues. In addition to guaranteed minimum service standards, providers should be required to report internal statistics on average wait times to ACMA. These figures should be made public to encourage competition.

Responsible sales and credit assessment

LAQ supports direct regulation to better align sales incentives with customer needs. This could be in the form of a suitability assessment at the point of sale with guidance provided by ACMA. LAQ has encountered clients who have been inappropriately signed up for services that may be unaffordable or not for their benefit. This can be as a result of domestic and family violence, a lack of comprehension on behalf of the client, or unfair sales practices that target vulnerable consumers. There should be a requirement for providers, with the informed consent of the consumer, to take documented steps to inquire into the consumer's circumstances and needs. Compensation should be available in the event of breach. Compensation should include the waiver of any cancellation fees.

LAQ supports the strengthening of the credit assessment processes under the TCP Code. The current credit process is deficient in that it only requires that at a minimum, suppliers obtain details of the customer's capacity to repay based on their nominal income or savings and to conduct a credit check. Where the product or service is deemed sufficient to require a credit assessment, the supplier should be required to take into account the consumer's expenses and liabilities and make reasonable efforts to verify this information.

Financial Hardship

LAQ supports the implementation of minimum requirements for hardship policies and an obligation to provide information about a provider's hardship policy to customers:

- at the time of entering the contract;
- when a consumer misses a repayment.

There should also be a requirement to provide details of the provider's internal complaints contact and information about the role of the TIO at these times..

The current requirements under the TCP Code relating to financial hardship policies are inadequate. Providers are only required to select a minimum number of hardship options for inclusion in their policy. These options do not create any obligations on the provider to offer

meaningful hardship assistance to consumers. LAQ supports the minimum requirements for financial hardship set out in ACCAN's recommendation to the latest review of the TCP Code.

Complaint handling procedures

Complaint handling procedures are particularly important where there is an active market disincentive for providers to facilitate complaints. The *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* replaced the requirements previously set out in the TCP Code. We submit that it is important that complaints are defined widely and a failure to acknowledge complaints or respond within the mandated timeframes should result in the consumer receiving compensation.

Telecommunications companies must provide their internal complaints contacts online. There cannot be an obligation to provide unique identifiers such as a "pin" before a person is able to lodge a complaint either with the TIO or with a telecommunications company

P1Q3- To what extent should third parties such as communication 'apps' providers be captured by any new rules, and why?

LAQ considers that third party communication providers should be regulated in the same way as mobile premium services. It is important that for any regulation to be effective that compliance with the regulations or Code be effectively monitored to ensure compliance by the service providers.

Proposal 2 - The telecommunications consumer protection rule-making process should be reformed to improve its effectiveness.

P2Q1 -What role should direct regulation, industry codes and guidelines play in a revised safeguards framework?

LAQ supports a model that favours direct regulation over "self-regulation". TIO complaints statistics evidence the Code's failure in this regard. Apart from the 2015/16 financial year where there were 112,518 new complaints made to the TIO, the statistics demonstrate that number of new complaints being made have been consistently high being between 124,000 and 168,000 per year for the past few years. The consistently high numbers point to a failure in the current regulatory system and a failure of self-regulation. Furthermore, in the 2018/19 financial year, of the 132,387 new complaints made, 34.1% were due to customer service for either failure to act or delayed action.

These statistics demonstrate that the present regulatory model that predominantly relies on self-regulation, does not offer consumers with adequate protections and relies too heavily on service providers doing the right thing while disproportionately constraining the ability of the ACMA to adequately regulate the industry.

We support direct regulatory powers being given to ACMA that allow for matters such as:

- Minimum standards and compensation for service failures;
- Requirements to provide adequate hardship assistance; and
- Enforcement mechanisms.

P2Q2 - How could the code-making process be strengthened to improve consumer outcomes and industry compliance?

LAQ suggests amending the test for registering a code in section 117 the *Telecommunications Act 1997* (the Act) by providing that a code should only be registered where it meets best practice guidelines including but not limited to governance, administration and review.

The mechanisms currently in place under section 117 of the Act leave open the risk of cursory compliance by service providers and industry bodies to satisfy the Act. This mechanism does not provide adequate protection or consideration of consumers. For example, section 117(f) of the Act merely requires an industry body to publish and show that it *considered* public submissions on a proposed code. The nature of this obligation does not give ACMA sufficient grounds to scrutinize and decline the registration of potential codes. By extension, this has constrained the ability of the ACMA to compel industry bodies to register and comply with codes that adequately protect consumers.

We submit that the Act should be amended to provide for compulsory direct regulation and provide for ACMA to issue enforceable infringement notices without requiring a penalty-less warning as a necessary pre-requirement. If codes are to remain a part of the regulatory framework, then the Australian Securities and Investment Commission (ASIC) regulatory guide on codes must be met. Furthermore, the Australian Competition and Consumer Commission (ACCC) requirements must be met in the development of those codes, particularly around the compliance framework.

P2Q3 Are current constraints on ACMA's power to make industry standards regulating consumer safeguards appropriate?

It is unclear whether there are current constraints on the ACMA's powers to make industry standards. However, despite widespread failures to deal with, for example poor complaint handling, ACMA did not make an industry standard to deal with the failures of the self-regulatory system in that area. If ACMA already has adequate powers to make industry standards, then the issue is one of appropriate resourcing for ACMA for the development, monitoring and enforcement functions associated with the introduction of a new industry standard.

We submit that ACMA should take a more proactive approach in its exercise of its powers to engage in direct regulation to ensure that appropriate consumer safeguards are in place.

Proposal 3 - The essential telecommunications-specific consumer protection rules should be mandatory and directly enforceable by ACMA, and the enforcement options available should encourage compliance.

What additional regulatory and/or enforcement tools should be made available to ACMA?

LAQ submits that the Act should be amended to enable ACMA to directly enforce code breaches without requiring it to first issue an unenforceable warning. LAQ also submits that any infringement or penalty notices should be tiered to accommodate for the size and viability of a service provider's business.

Are the currently available civil penalty and infringement notice maximums appropriate?

LAQ submits that the current civil penalty and infringement notice maximums are not appropriate. We support the consolidation of the amounts payable for civil penalties and infringement notices to reflect amounts currently payable for civil penalties. Under the present regime, if an industry participant contravenes a direction to comply with a code, ACMA can seek pecuniary penalties through the Federal Court of up to \$250,000 for each breach. Conversely, ACMA may only issue

an infringement notice of up to \$13,320 for each breach. Furthermore, the risk of a service provider being made to pay these amounts only arises if the service provider contravenes a non-monetary direction to comply (see submissions under proposal 2). LAQ submits that civil penalties and infringement notices should each carry the same upper limit of \$250,000.

The consolidation of the amounts payable through either civil penalties or infringement notices would have the desired effect of acting as a deterrent preventing service providers from engaging in conduct that is in breach of the Code. By extension, this would more adequately protect the rights and interests of consumers and resolve the current inconsistency that exists between the high civil penalties achievable through an onerous court process and the significantly lower infringement notices that can be issued by the ACMA.

LAQ submits that where service providers face a more immediate risk of paying a steep penalty through an infringement notice, there will be a higher rate of compliance and a higher likelihood that service providers and industry bodies will work more closely with ACMA to ensure that their practices adhere to the industry code. This would, by extension, more adequately and expeditiously protect consumers.

Proposal 4 -The legacy obligations of declining relevance should be removed or adjusted as Telstra's legacy copper network is phased-out.

P4Q1 Which legacy regulatory obligations should continue to be mandated by regulation?

P4Q2 If obligations are not mandated, would these services continue to be provided by the market?

LAQ supports the department's view that the regulatory obligations of free access to emergency call services, number portability, calling line identification, and standard terms and conditions should be maintained. We submit that a requirement to provide Directory Assistance should also be included the mandatory obligations.

If the obligations were not mandated, service providers will have no incentive to offer these services for free. As such, there is a strong possibility the services would still be offered but will attract fees and charges. Given the consumers most likely to use the services, such as directory assistance, are the more vulnerable in our society such as:

- older Australians,
- people living remotely. and
- people living with disabilities,

the costs of these fees will cause financial difficulty for these consumers and make it more difficult for them to access an adequate service.

Although Sensis offers white pages, this product would be unsuitable for consumers who are not literate or live remotely where delivery of this product would be unavailable such as outstations and aboriginal communities.

We also note that Telstra and Optus provide free access to directory assistance for consumers with disabilities or other special requirements. However, for a consumer to satisfy the requirement to get access to the free call, the consumer must first complete paperwork to prove their need for assistance. This extra paperwork creates further hurdles for the vulnerable consumer and means

some people who would otherwise be able to access the service cannot access the service because they may not have the supports necessary to help them fill the necessary paperwork.

P4Q3 Which obligations/services have, in practice, been replaced in the market by other services?

Pre-Selection is an obligation that allows consumers of fixed phone services to manage their usage by choice of different providers to supply local, distance and international calls. If a consumer uses a mobile or switches to the NBN they would no longer be able to use Pre-Selection.

The NBN Co is currently phasing out and replacing Telstra's copper network service with the exit from the copper network in May 2022.

With the NBN roll out, consumers will have the ability to shop around for better deals. However, Pre-Selection should remain for those consumers who live in areas where there is bad reception or no mobile coverage.

P4Q4 Which obligations, if no longer mandated, should be subject to transitional or grandfathering arrangements? What form should such arrangements take and how long should they remain in place?

LAQ has no submissions to make in response to this question.

P4Q5 Is it appropriate for Telstra to continue to provide low income measures in relation to fixed line phone services for the duration of its contract as the USO provider?

LAQ's position is that Telstra should continue to provide low income measures in relation to fixed line phone services. The low-income measures should be included until the USO contract is finalized.

We often assist consumers who do not have mobile services and rely on fixed land line phones to communicate. These consumers are digitally excluded for a range of reasons which include:

- The cost of the mobile services
- Living in regional and remote areas where mobile service is patchy or not available
- Age – both seniors and youth
- Suffering from a disability that makes using the technology difficult
- Vision impaired and cannot use mobile technology
- Inexperience in using the technology
- Consumers who live in areas prone to black out and loss of power who need fixed line telecommunications service
- Consumers who rely on safety critical devices and medical devices.