7 August 2018

By email to: consumersafeguardsreview@communications.gov.au

Consumer Safeguards Review
Department of Communications and the Arts
GPO Box 2154
CANBERRA ACT 2601

Dear Secretariat,

Consumer Safeguards Review (Part A) – Consumer Redress and Complaints Handling

WEstjustice and Consumer Action Law Centre ('Consumer Action') welcome this opportunity to make a submission to the Department of Communication and the Arts ('Department') on its Consumer Safeguards Review in the Telecommunications Industry ('Consumer Safeguards Review'). The submission is in response to the consultation paper on the topic of Consumer Redress and Complaints Handling (Part A) ('Consultation Paper').

Consumer protection mechanisms in the telecommunications market are failing Australians. The Consumer Safeguards Review is an important and timely opportunity to move from self-regulation to direct regulation in a sector that now provides an essential service, and to ensure our consumer protections are fit for a fast-paced digital world.

People are more dependent on their telecommunications services than ever, including fixed-line, mobile and broadband services. At the same time, telecommunications are subject to rapid technological change, and evolving consumer needs in ways that are different from other utilities. In that context, it is not surprising that the current framework, which relies on self-regulation, has become outpaced by rapid change in technology and the marketplace since it was enacted in 1997.

Large increases in complaints to the Telecommunications Industry Ombudsman ('TIO') reveal the extent of community dissatisfaction in the provision of essential telecommunications services. In its 2016/17 Annual Report, the TIO reported a 41 per cent increase in complaints.

We broadly support the call for greater direct regulation of complaints handling procedures within telecommunications providers (Proposal 1), and we have proposed provisions for incorporation into the new *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*. We do not, however, support the contention implied by the Consultation Paper, that greater direct regulation of complaints handling procedures would result in fewer unresolved complaints, or necessarily in consistently better outcomes for consumers. Compliance with existing code obligations is poor, and even where a complaints handling

procedure is complied with, mere compliance with procedural requirements does not inevitably equate to a substantively fair outcome.

We are strongly opposed to the proposal to replace the TIO with an 'independent EDR body' focused on complex complaints (Proposal 2). This will do little to fix the problems that stem from the self-regulatory framework and risks huge disruption, with scant detail on the purported benefits for consumers. While there is room for improvement, we support the TIO and the well-established industry-based external dispute resolution ('EDR') model.

Restricting access to EDR (whether by the TIO or a new body) to 'complex complaints' would be a significant and unwarranted reduction in access to justice for telecommunications consumers. It would leave thousands of Australians to navigate courts and tribunals, which are slow, expensive and largely inaccessible without legal representation, or simply abandon their dispute altogether.

In addition to addressing the issues for comment proposed by the consultation paper, this submission provides commentary and recommendations on redress and complaints handling in the industry more broadly. Our insights and responses are derived from our experience as consumer advocates in both individual casework and in law reform and policy.

We have had the opportunity to read the submission of the Financial & Consumer Rights Council Inc ('FCRC') on this topic, and we make reference to the comments and recommendations of that submission throughout our own.

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About WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach across the West. We provide a range of legal services including legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform and advocacy.

WEstjustice has a hybrid specialist–generalist model. Whilst delivering a generalist legal service, we also have six core specialist areas: consumer, employment, tenancy, family violence, fines and crime. We have a particular focus on working with newly arrived migrants and refugees, and a large portion of our clients speak a language other than English. We continue to work to highlight the needs of this group in the areas of consumer, energy and telecommunications markets.

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws and policy, and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Summary of Recommendations

RECOMMENDATION 1:

a) We endorse FCRC's Recommendation 1 that the Consumer Safeguards Review identify policy implications of the telecommunications sector providing utility services, and make recommendations that will meet community standards regarding consumer rights in a utility sector, with a strong regulatory regime:
   - Establishing and maintaining universal access to basic services;
   - Establishing required performance standards, including compensation for service failures;
   - Establishing strong, accessible and independent redress and complaints handling processes external to industry interests, along with meaningful enforcement mechanisms; and
   - Establishing obligations to provide a wider range of meaningful assistance to customers in hardship.

b) In addition, we recommend that the regulatory regime:
   - Establish direct regulation and oversight of sales;
   - Establish a meaningful process for assessing the suitability and affordability of telecommunications products; and
   - Ensure fair remedies and appropriate penalties for breaches of these requirements.

RECOMMENDATION 2: Amend the ACMA Complaints-Handling Standard to clarify that:

a) The onus is placed on the provider to identify that a consumer is making a complaint;
b) Timeframes for IDR should commence from the outset of the complaint, being the first expression of dissatisfaction from the consumer (not when the consumer is finally able to contact the 'correct' complaints 'team');
c) Customer service staff must be empowered to immediately escalate a complaint to IDR if they are unable to resolve the complaint; and
d) The provider must actively inform consumers of their right to escalate a complaint within an IDR framework, and to the TIO if the complaint remains unresolved.

RECOMMENDATION 3: Debt Collection Guideline 9 of the ACCC/ASIC Debt Collection Guidelines should be incorporated into direct regulation of telecommunication service providers, with compensation payable to consumers in the event of breach.

RECOMMENDATION 4: Telcos should be required, by direct regulation, to provide basic documents relevant to the dispute and other personal information:

a) without onerous procedural hurdles;
b) within 14 days, or 30 days where the document is older than 12 months, of request;
c) free-of-charge or, alternatively, free for a copy of contracts, correspondence, call records and client interaction notes. If fees are to be levied for the provision of documents, the ACMA Complaints-Handling Standard should specify what fees may be levied and how.

RECOMMENDATION 5: Where frontline staff are unable to immediately resolve a complaint, customers should be provided:

a) facilitated referral to IDR, and direct contact details for the person or department who will be responding to their complaint;
b) advice as to IDR timeframes;
c) advice that a complaint may be escalated to EDR if it cannot be resolved at IDR within IDR timeframes.

RECOMMENDATION 6: We endorse FCRC's Recommendation 3 that the Consumer Safeguards Review support the TIO's current reforms to funding, complaint handling, and systemic issues, and undertake an assessment of their impacts after 2 years.

RECOMMENDATION 7: Develop performance indicators for hardship practice, adopting a principles-based approach to reporting that focus on outcomes for consumers over mere compliance.

RECOMMENDATION 8: We endorse FCRC's recommendation that the ACMA and TIO, in consultation with consumer organisations, develop consistent and thorough processes of complaint data collection, analysis and reporting.

RECOMMENDATION 9: The periodic review of the TCP Code should: be conducted by an independent reviewer; include early public consultation on the terms of reference to ensure all relevant issues are identified; be funded separately and include funding and support for extensive consumer advocate involvement. Industry should be consulted on the Code review, but not control or dominate the process.

GENERAL COMMENTS

Telecommunications services are essential utility services

Access to telecommunications services has become necessary for financial and social inclusion in Australia. Basic social and other services are now routinely delivered and administered online, and as a result the availability of to those services is severely restricted if a person is unable to access the internet. In addition to the examples of essential mobile phone use identified in the Department's Background Paper A,[1] we note the following areas in which our clients rely on consistent telecommunications services:

- seeking employment and engaging in a job application process;
- reporting income and job search to Centrelink (failure of which can result in cancellation of payment);
- receiving and paying bills;
- communicating with social workers;
- arranging medical and legal appointments; and
- using telephone interpreter services.

For the most vulnerable in our community, telecommunications services are also necessary for basic safety and wellbeing. In circumstances of prolonged family violence, telephones are a lifeline to emotional and material support, as well as to services like taxis or rideshare which may be urgently required. Persons with severe physical or psychological disability often rely totally on telephone and internet communication to maintain social participation, and to access healthcare services.

The case for direct regulation

Industry self-regulation has failed to provide consumer safeguards appropriate to the provision of an essential utility service. Years of industry-dominated development and review of codes has resulted in a latticework of instruments that: are vaguely drafted,[2] leave significant gaps in consumer protections;[3] and are poorly understood by telco representatives and consumers alike.

The protections offered by the Telecommunications Consumer Protection Code ('TCP Code') fall short of the protections afforded to consumers in comparable sectors that are more directly regulated.[4] Financial hardship provisions are narrow, and credit assessment

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[1] PWC for Department of Communications and the Arts 2018: Current telecommunications safeguards and regulatory environment.

[2] See e.g. Clause 4.3.1 of the TCP Code (Sale Practices), particularly in relation to the requirement for ongoing monitoring.

[3] E.g. Clause 6.2 of the TCP Code (Responsible provision of Telecommunications Products) requires a provider to conduct a 'credit assessment', which is defined as 'the process by which a Supplier determines the level of credit to be provided by it (if any) to a Consumer.' This credit assessment safeguard is, therefore, meaningless.

[4] 'The hardship protection contained in the [TCP Code] are not as comprehensive as the basic protections that have been implemented in the essential services sector. In particular, they are far less prescriptive about the form of payment assistance that telecommunications companies must offer to hardship customers – particularly in comparison to those state-based framework that require energy and water retailers to consider making available options such as debt waiver in addition to alternative payment arrangements': P Ali, E Bourova and I

requirements are meaningless. The effect of weak or narrow drafting is that there is often no real prospect of effective enforcement action, even where enforcement of provisions is notionally available by registration of the code to ACMA (such as in the case of the TCP Code).

An effective regulatory framework is one that provides incentives for good business conduct, and supports strong and responsive compliance and enforcement action where there is poor conduct. Importantly, the regulator needs to have the capacity to act quickly to eradicate poor practices and misconduct before such conduct becomes widespread across the industry.

The compliance mechanisms in the TCP Code are insufficient to achieve meaningful consumer protection. They are significantly below the standard of other consumer industry compliance bodies such as those in the banking and insurance industries (which themselves are broadly accepted as bare minimums). We agree with the view that compliance with the TCP Code is 'largely premised on industry goodwill.' [5] Accordingly, the TCP Code compliance mechanisms require a substantial overhaul.

Moreover, from the consumer's perspective, the complexity and multiplicity of codes is unhelpful to consumers trying to understand their procedural and substantive rights in a dispute with their provider. As a result, consumers are less able to effectively self-advocate than in sectors where their rights are clearly codified.

In these conditions, the attitude of providers towards consumers has remained that of a provider of a luxury or non-essential product. Target and commission-based selling creates perverse incentives and puts profit before good customer outcomes. When people are impacted by inappropriate sales practices – leading to unmanageable bills for complicated bundled services they never wanted, disconnection, debt and impaired credit reports – there is little accountability from the provider and no redress for the consumer. Poverty and family violence are cursorily recognised in hardship applications, and complaint processes are time consuming and often ineffective.

We agree with the FCRC's observation that 'the telecommunications sector is out of step with community standards in its treatment of consumers' and suggest that these failings are a direct result of self-regulation by an industry which has demonstrated a persistent reluctance to assist or prioritise its customers.

As elaborated below, we support the role of the TIO both the current regulatory environment, and in a proposed environment of greater direct regulation.

Ramsay, 'Financial Hardship: The Legal Frameworks' (Research Report, Financial Hardship Project, Melbourne Law School, The University of Melbourne, June 2014) 38, available at: https://ssrn.com/abstract=2460376.

[5] Financial Counselling Australia, 'Hardship Policies in Practice: A Comparative Study' (2014), 14-16; P Ali, E Bourova and I Ramsay, 'Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies' (2015) 23 *Competition and Consumer Law Journal* 23, 41, available at: https://ssrn.com/abstract=2657409.

RECOMMENDATION 1:

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   - Establishing strong, accessible and independent redress and complaints handling processes external to industry interests, along with meaningful enforcement mechanisms; and
   - Establishing obligations to provide a wider range of meaningful assistance to customers in hardship.

b) In addition, we recommend that the regulatory regime:
   - Establish direct regulation and oversight of sales;
   - Establish a meaningful process for assessing the suitability and affordability of telecommunications products; and
   - Ensure fair remedies and appropriate penalties for breaches of these

PROPOSAL 1: INDUSTRY COMPLAINTS HANDLING

Q1. How can telecommunications providers be encouraged to deal with and resolve their customer complaints without the need for recourse to external escalation?

We support the principle that telecommunications providers should bear the primary responsibility for resolving customer complaints through internal dispute resolution ('IDR').

Effective IDR benefits both consumers and providers. Resolution at first instance by a provider retains consumer confidence in the service, reduces stress, confusion and cost, and reduces the prospect of complaint fatigue.[6] The provider, in turn, can avoid costs from prolonged IDR contact and External Dispute Resolution fees, as well to identify and rectify systemic or recurring issues internally.

Despite these mutual benefits, there has been industry-wide failure to provide effective IDR for straightforward and complex disputes alike. Our experience as consumer advocates has been one of frustration in the face of opaque and ineffective escalation processes. This experience is reflected in the high volume of TIO complaints, the abysmal findings in

[6] 'Complaint fatigue' can occur when a person abandons a meritorious complaint due to procedural, time, cost or other barriers to resolving a complaint, or due to a lack of faith that the complaints body is likely to resolve it.

FCRC's 'Rank the Telco' report,[7] and new research by the Australian Communications Consumer Action Network ('ACCAN').[8]

CASE STUDY 1: Elsa's story

Elsa* (name changed) is 70 years old and battling cancer, as well as complications from surgery. She is unable to leave her home without significant effort. Elsa has been a customer of this major telco for decades. In March 2017, she contacted the telco to ask about internet plans. Elsa wanted an internet connection so that she could be more connected to services and support. The sales representative recommended a particular bundle and another service, which she understood was essentially a troubleshooting service.

Ever since signing up for the bundle, Elsa's internet and even her landline connection have been unreliable and disconnected regularly. Elsa has had to resort to using her neighbour's phone. Given her ill health, an unreliable telephone connection could amount to a serious safety risk. Because of these connection problems, she was also unable to fully benefit from a home computer coaching course. Most of her 7 coaching sessions were spent on the phone with the telco, trying to get the internet to work.

We are instructed that several technician visits did not resolve the problem. The last technician, who provided the telco's business card, told her to contact him directly for follow up, advice that she followed. The telco now disputes that it authorised his visit. According to Elsa, the telco is now trying to retrospectively charge her for the technician visit (at a cost of $120) because she cancelled the troubleshooting service.

After countless hours on the phone to the telco, Elsa is fatigued by the process of dealing with the company. She has given up on connecting to the internet.

Source: Consumer Action

a) Procedurally effective IDR

Telecommunication providers should be required, by direct regulation, to have procedurally effective IDR that meets the Australia/New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations* at a minimum. We are encouraged that the new *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* ('CHS') mandates minimum requirements on providers when handling complaints. We consider that the CHS provides greater clarity about IDR requirements than its predecessor (Part 8 of the TCP Code); however, we refer to the detailed IDR requirements stipulated by the Australian Securities and Investments Commission ('ASIC') as a condition of registration

[7] FCRC, Rank the Telco: Victorian financial counsellors rank the financial hardship policies and practices of telecommunications providers (April 2017), available at: http://www.fcrc.org.au/member-news-report/rank-the-telco-2017.

[8] ACCAN, *Can you hear me? Ranking the customer service of Australia's phone and internet companies – Research report* (23 July 2019), available at: http://accan.org.au/Can%20You%20Hear%20Me_v6_accessible.pdf.

for financial service providers,[9] and submit that the new standard should be drafted more prescriptively.

To specifically address the issues arising in our casework, we recommend the following clarifications to the CHS.

RECOMMENDATION 2: Amend the Telecommunications (Consumer Complaints Handling Standard) 2018 to clarify that:

a) The onus is placed on the provider to identify that a consumer is making a complaint;
b) Timeframes for IDR should commence from the outset of the complaint, being the first expression of dissatisfaction from the consumer (not when the consumer is finally able to contact the 'correct' complaints 'team');
c) Customer service staff must be empowered to immediately escalate a complaint to IDR if they are unable to resolve the complaint; and
d) The provider must actively inform consumers of their right to escalate a complaint within an IDR framework, and to the TIO if the complaint remains unresolved.

b) Compensation

It would be open for regulation to provide for compensation for non-compliance with the procedural requirements of the CHS (including escalation pathways and timeframes), and we consider that there is an opportunity to incorporate compensation provisions to this effect either into the CHS or into the *Telecommunications (Customer Service Guarantee) Standard 2011* ('CSG'), provided the CSG was also extended to apply to mobile services.

The availability of compensation would not only provide consumers with a nominal remedy for the inconvenience caused, but would also provide a powerful incentive for compliance with the new regulatory requirements. It is currently within the TIO's jurisdiction to resolve CSG disputes, and as such a CSG (or analogous CHS) compensatory remedy would provide for limited material action against providers that breach the standard without requiring the intervention of the regulator.

We note that the CHS was adopted in June 2018, less than two months prior to the preparation of this submission. Providers have had limited time to respond to the CHS's organisational requirements, and the responsiveness of providers to these requirements is therefore yet to be properly tested.

c) Enforcement action

Now that ACMA has better regulatory tools available in respect of complaints handling due to the CHS, it is important that ACMA has a stronger enforcement culture to provide the appropriate incentives to ensure compliance. Telecommunication consumers need a bold and proactive regulator that will take action for breaches of the CHS and that engenders a culture of compliance that has been sorely lacking in this industry.

[9] ASIC, Regulatory Guide 165 Licensing: Internal and external dispute resolution (Feb 2018).

Q2. What barriers currently exist that prevent providers from addressing complaints at the first point of contact or through an internal escalated process?

The following is a non-exhaustive list of barriers to resolution of disputes by providers identified in our casework:

a) Refusal or failure to accept authority documents

Authority to Act documents signed by our clients clearly authorise our centres to request and disclose information about our clients to third parties. However, when dealing with telecommunication providers, our authority documents are routinely refused by frontline customer service staff, precluding us from representing our client and delaying resolution of the dispute.

Most major providers do not have a dedicated complaints telephone number or email address. The first point of contact for a complaint is therefore typically a customer service hotline, with appalling wait times (discussed below). Frontline customer service staff at one major provider have consistently told WEstjustice that it is not possible for call centre staff to view a document sent by email or fax, and that a client is required to be present on the phone before the matter can be discussed.

Given that privacy arguments are often raised by telecommunication providers resisting receipt of authority documents, we consider it pertinent to point out that we do not encounter the same resistance to accepting our authorities when they are provided to financial institutions, or when they are provided to Victoria Police.

Even once an authority document has been provided, customer service staff often seem to be untrained on the meaning of authority documents, and the purpose of legal or financial counsellor representation more broadly. WEstjustice has recorded multiple concerning examples of customer service staff making comments to the effect of 'your power of attorney has been accepted'.

Once provided, the authority documents should be retained by the provider to enable caseworkers to make further submissions and enquiries as a matter progresses. Despite this, when calling to progress or enquire about a complaint, significant time and energy is spent arguing about whether or not we are authorised to represent our client.

While both the CHS [10] and the TCP Code [11] require that consumers may appoint a representative, providers are apparently unable or unwilling to put in place the infrastructure required for appointed representatives to easily provide authority documents.

The ACCC/ASIC Debt Collection Guideline 9 provides:

a. A debtor has a right to have an authorised representative (such as a financial counsellor, financial advisor, community worker, solicitor, guardian or carer) represent them or advocate on their behalf about a debt.

[10] At 8(l)
[11] At 3.4.1

b. Except in the circumstances outlined in paragraph (d) and (e) of this section, you should not:
    - contact a debtor directly after you know, or should know, that the debtor is represented;
    - refuse to deal with an appointed or authorised representative, whether by direct refusal or by placing unnecessary obstacles in the way of the authorised representative, for example, by insisting on a particular style or form of authorisation when the written authority provided already includes the necessary information. …

Despite this, telcos continue to contact and harass represented customers to demand payment, even where the alleged debt is the subject matter of the dispute. Incorporating Guideline 9 as a regulatory standard would require telcos to develop sufficient infrastructure for receiving and retaining written authority documents.

CASE STUDY 2: Candy' story

Candy* (name changed) is a 30-year-old refugee. She has been in Australia for about 7 years. Her English, legal, and financial literacy are low. Candy approached WEstjustice after reviewing her bank statement and noticing that for the past year her telecommunications provider had been deducting $50 per month by direct debit from her bank account separately and in addition to her mobile phone bill of $80 per month, which she paid at the post office.

By the time Candy approached WEstjustice, she had taken significant steps to try and resolve the issue. She had called her provider to ask why she was being debited. Her provider told her that there were two accounts in her name: a $50 per month plan and an $80 per month plan. Candy denied having two plans, and explained that she only had one telephone and was only aware of the $80 per month plan. She asked for more information about the $50 per month plan, but she was told that this could not be provided to her as she was not able to provide the account number.

Over the following months Candy and her social worker contacted her provider on at least 14 occasions, by phone, in writing, and in person, seeking an explanation for, and cancellation of, the direct debiting. The provider repeatedly told Candy that unless she could provide her account number, no one at the provider would discuss the account with her. Candy explained that she did not know what this alleged account was, or why she was being billed. Despite being able to show that money was being taken from her bank account by the provider, the provider claimed that Candy had failed to sufficiently verify herself as the account holder.

Problems continued after Candy approached WEstjustice: the provider would not accept WEstjustice's authority document, or discuss the account, until the authority document included the account number. This information could not be provided because Candy had no knowledge of this account. This position was maintained by the provider even once a TIO complaint had been raised: the provider declined to respond to the complaint because the account number had not been provided. The provider maintained this position for a further six months, before the account number was finally provided to WEstjustice, and WEstjustice was able to submit an authority form containing this detail.

Candy's case has now been resolved with the provider.

Source: WEstjustice

CASE STUDY 3: Josie's story

Josie* (name changed) is a 55 year old refugee. She is a single mother to a teenage daughter, as well as legal carer and guardian to two grandchildren. At the time of WEstjustice's assistance to Josie, a family violence intervention order excluded a person from Josie's home. Josie approached WEstjustice after becoming frustrated with her telephone provider which had sent her multiple confusing bills containing information that Josie thought conflicted with what her provider had told her over the phone. Josie had since approached a second provider, and requested to port her landline phone number to that provider, and engage that provider as her landline and internet provider. Two months had passed, and Josie's original provider was still billing her, despite the second provider also commencing billing. Josie sought WEstjustice's assistance in clarifying her billing situation, as well as disputing a debt alleged by her first provider. Josie had called her first provider on numerous occasions already, and was so distressed by the confrontational, confusing and contradictory representations made, that she was unwilling to call them anymore in attempts to resolve her issue.

WEstjustice attempted to contact Josie's first provider by phone to discuss her matter. The provider's customer service staff said that they could not discuss the account with WEstjustice as WEstjustice was not Josie's authorised representative. WEstjustice explained that it had a signed authority document which could be provided by fax or email. The provider's staff advised that they could not receive emails or faxes, and the only way that a representative could be authorised was in orally or in store by the account holder. WEstjustice pointed out that this was in breach of the Debt Collection Guideline and requested to speak with a manager. The promised 'call back' from manager did not occur. WEstjustice also sent an authority document by email to an account available via the provider's website. No response was received. In total, WEstjustice's authority was refused on eight occasions.

WEstjustice finally resorted to making a direct request of a contact within the provider to assist in having an authority added to the file.

(Josie's story is continued below)

Source: WEstjustice

RECOMMENDATION 3: Debt Collection Guideline 9 of the ACCC/ASIC Debt Collection Guidelines should be incorporated into direct regulation of telecommunication service providers, with compensation payable to consumers in the event of breach.

b) Access to documents

To resolve a dispute, consumers often need access to basic documents and information held by the telecommunications provider. Caseworkers request documents for various purposes including: to assist a client to review and understand their contract with a provider; to assist a client to understand the basis of an alleged debt; to assess whether or not a debt is owed; and to substantiate claims made by either side.

The Australian Privacy Principles[12] provide for access to documents held about a person by an entity. Documents about a person include: contract documents, correspondence, recorded phone calls, and client interaction notes. Despite this statutory requirement to provide documents, there is significant resistance across the industry for the provide documents when sought.

Barriers to access of documents erected by providers include:

i) *Procedural hurdles*

One provider has a requirement that even once a TIO complaint has been raised, a separate request for personal information documents must be made online individually by a client to a department completely separate from the complaint or IDR process.

We recommend that complaints handling staff should be required to either respond to requests for documents themselves, or be responsible for delivering the information request to the provider's privacy department, and delivery of the documents to the consumer once released by the privacy department.

ii) *Delays*

Even where requested documents are provided, it is often after considerable delay. Stricter timeframes on the provision of documents by providers to consumers are needed. By comparison, in consumer credit matters, the National Credit Code[13] provides strict and timeframes for the provision of basic documents, generally 14 or 30 days depending on the type and age of the document. For example, a copy of the credit contract must be provided with 14 days of request if that credit contract was created in the preceding 12 months, or 30 days if the document is older.[14] We recommend that the corresponding timeframe requirements be incorporated to the CHS.

iii) *Fees*

Some providers seek payment of an administrative fee for access to call recordings or client interaction notes, and place onerous evidentiary requirements on applications for waiver of that fee.

Part 8.1.1 of the TCP Code currently provides that a supplier must implement, operate and comply with a Complaint handling process that:

(i) is consumer focused and easy to use;
(ii) is free of charge, other than for:
  A. the call costs referred to in clause 8.1.1(a)(vii)A;
  B. the provision of information where:
    - a Consumer or former Customer requests access to information held by the Supplier about the Consumer or former Customer which was collected by the Supplier more than 2 years prior to the date of the request, unless the Complaint relates to an interference with the privacy of the Consumer under the Privacy Act by the Supplier; or

[12] Schedule 1 of the *Privacy Act 1988* (Cth).
[13] Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).
[14] National Consumer Credit Protection Act (2009), Sch 1 s 185

- the free provision of the information in the form or quantities requested is inconsistent with the Supplier's Standard Form Customer Contract or the relevant summary of the Offer referred to in clause 4.1.1, unless the Complaint relates to an interference with the privacy of the Consumer under the Privacy Act by the Supplier;

in which circumstances, the Supplier may levy a charge to recover its costs. The Supplier must inform the Consumer or former Customer of the proposed charge and notify the Consumer or former Customer of the option to pursue the Complaint and pay the charge or to discontinue the Complaint. The Supplier must tell the Consumer or former Customer about the options for external dispute resolution before levying any Charge under this paragraph.

This curiously drafted provision is habitually ignored by providers, and has not been replicated in the CHS, which is silent on the matter of fees for access to documents.

We recommend that the CHS incorporate a standard that clarifies what fees if any may be levied by providers in respect for requests for information. We recommend that no fees should be sought in response to requests for contracts, correspondence, call records or client interaction notes.

RECOMMENDATION 4: Telcos should be required, by direct regulation, to provide basic documents relevant to the dispute and other personal information:

a) without onerous procedural hurdles;
b) within 14 days, or 30 days where the document is older than 12 months, of request;
c) free-of-charge or, alternatively, free for a copy of contracts, correspondence, call records or client interaction notes. If fees are to be levied for the provision of documents, the ACMA Complaints-Handling Standard should specify what fees may be levied and how.

CASE STUDY 4: Lon's story

Lon* (name changed) approached WEstjustice with issues in relation to two accounts with her provider: a mobile phone and a landline. Lon was experiencing serious financial hardship. Her relationship had broken down due to family violence, and she was struggling to make mortgage repayments, pay bills, and care for her children. She was at risk of losing her home and extremely distressed about her financial situation.

Lon was confused about her phone accounts: she had called her provider on a number of occasions to ask about how to pay her bills for her mobile phone and was advised that she did not have a mobile phone account. By the time Lon saw WEstjustice, her mobile phone no longer made or received calls. Lon also had an issue in relation to her landline account, as she disputed the final bill for that account because her provider had given her contradictory advice by phone. Lon had already made a TIO complaint by the time she saw WEstjustice, and had received an email response from her provider.

WEstjustice helped Lon to reply to her provider's response to her TIO complaint, seeking further clarification in respect of both accounts, and requesting client interaction notes for both accounts. The provider's representative responded that it could not receive a

request for client interaction notes by email, and that a request would need to be made via the provider's website or by post. The provider's website stated that a fee may be imposed for requests for client interaction notes, but that a hardship application could be made in respect of that fee.

WEstjustice wrote to Lon's provider on her behalf, requesting client interaction notes and seeking fee waiver for the information request. Lon's financial circumstances were set out in detail, as were her extenuating personal circumstances.

WEstjustice later received a telephone call from a representative of the provider. The representative appeared to have confused the request for fee waiver for a debt waiver request in respect of the alleged account balances. When this was clarified with the representative, the representative became defensive and told WEstjustice that insufficient evidence of financial hardship had been provided in any case, and that WEstjustice would need to provide a financial ledger and three months' of bank statements. The representative also said that unless the hardship demonstrated that the hardship was of a short-term basis, no fee waiver would be available.

WEstjustice responded to the provider's representative by referring to Part 8.1.1 of the TCP Code. The provider's representative stated that that provision did not apply as no complaint had been raised by Lon or by WEstjustice on Lon's behalf. When WEstjustice pointed out that a TIO complaint had been made in this matter, and moreover that the written request for documents was at the direction of the provider's TIO response, the representative became hostile and made a personal attack on the capacity of the WEstjustice advocate. When WEstjustice asked for the matter to be transferred to a different representative as a further complaint, the representative responded that this was not possible and that the matter could not be escalated beyond her.

Lon's case is ongoing.

Source: WEstjustice

c) Hold time delays

ACCAN's 'Can you hear me' report, released 23 July 2018, found that a customer contacting a provider by phone to raise an issue or complaint spends on average 1.2 hours before reaching the correct person or department. A 1.2-hour average wait time is unacceptable: it is a powerful disincentive and barrier to consumers who wish to raise an issue with their provider.

Caseworkers from both Consumer Action and WEstjustice report that hold time delays, particularly repeated hold time delays as a call is transferred between departments within a provider, are an ongoing cause of frustration and drain on our limited resources.

d) Frontline staff not empowered to resolve or escalate issues

It is not unusual for clients to approach our services not out of confusion about their legal rights or responsibilities in a telco dispute, but rather out of frustration at their inability to progress their complaint beyond frontline staff who are unable or unwilling to understand or

resolve the query. Given the hold times described at (2)(c) above, we consider this frustration justified.

RECOMMENDATION 5: Where frontline staff are unable to immediately resolve a complaint, customers should be provided:

a) facilitated referral to IDR, and direct contact details for the person or department who will be responding to their complaint;
b) advice as to IDR timeframes;
c) advice that a complaint may be escalated to EDR if it cannot be resolved at IDR within IDR timeframes.

e) Failure to appoint designated staff to a complaint and poor record keeping

ACCAN's finding that 58% of consumers who were required to contact their provider more than once about an issue were required to re-submit details of their complaint at each contact is consistent with our experience as consumer advocates dealing with telecommunication providers.

Even once a matter has been escalated to an IDR or specialist team, responses to calls or emails are rarely from the same representative, and the consumers and advocates alike are required to repeatedly set out the basic background to a dispute and the resolution sought.

Both provision of a dedicated complaints officer, and improved record keeping, would address this issue.

We note that when client interaction notes *are* received upon request, the notes returned tend to be vague, difficult to decipher, and focused on the action (or inaction) of the provider, rather than the questions or issues raised by the consumer.

CASE STUDY 5: Elsa's story continued

Consumer Action is assisting Elsa with her dispute. Attempts to confirm even basic information, such as if legal correspondence had been received, have been needlessly time-consuming and frustrating due to the telco's poor complaint handling processes. The complaints team insisted that it could only receive complaints through its online form, despite contrary statements on its website and no ability for the online form to accept relevant attachments.

The telco closed Elsa's complaint without responding satisfactorily to her claims that it breached the Australian Consumer Law and the ASIC/ACCC Debt Collection Guidelines. Frustrated with 7 months of connection problems and poor dispute resolution, Elsa ported her landline to another provider. The telco added $349 early termination fee and, despite her terminal illness, immediately commenced collection activity, which was extremely distressing to Elsa.

Elsa's dispute is ongoing.

Source: Consumer Action

f) Failure to comply with IDR timeframes

While both the CHS and its predecessor provide timeframes for complaint management, delays by providers are common, including on some occasions total failure to respond to emails or requests for call back.

We consider the availability of compensation for failure to meet the regulated timeframes would not only provide a remedy for the consumer but also induce compliance.

g) Multi-tiered IDR

Large providers, in particular, appear to have multi-tiered IDR response teams and departments. Consumers and their advocates experience confusion and frustration when a complaint is shuttled between obliquely named teams, each of which requires a re-explanation of the consumer's problem. Information provided by these teams is also sometimes contradictory.

One provider alone has discrete teams including: 'Escalated Complaints', 'Special Assistance', 'High Risk Complaints', 'Complex Complaints', 'Customer Relations', 'Credit Management', 'Billing', and 'Billing and Credit Management Special Assistance'. The hierarchy and/or escalation pathway between these teams is often unknown to caseworkers (let alone unrepresented consumers) and it is unclear who has authority to resolve a matter, even once a matter has been escalated to the TIO.

Consumers should not be required to repeatedly explain their concern to each member of a network of departments within a provider. Should a matter not be resolved at first client interaction, and accordingly escalated to IDR, the onus should be placed squarely on the provider to take the complaint to a team with the authority to resolve it.

If the complaint cannot be resolved by *any* team within the stipulated time frame (that is, from the point at which it is first escalated by the consumer), referral to external dispute resolution is appropriate, and the consumer should be actively advised of the availability of this avenue.

h) Unwillingness to investigate, accept, or resolve, the basis of the dispute

The issues raised above demonstrate a cultural lack of willingness to investigate, accept or resolve the basis of a dispute. Even once a dispute has been escalated beyond frontline customer service staff, the attitude towards advocates and unrepresented consumers alike tends to range from dismissive to defensive to hostile. Telco representatives often seem more focused on getting rid of a complaint than understanding it. There is combative resistance to accepting the prospect of fault by a provider, or providing documents sought by advocates trying to investigate and understand a dispute. In addition to the deleterious effects of this conduct on consumer perceptions of the industry, opportunities for providers to internally recognise and resolve systemic issues are missed.

Similar problems occur in negotiating hardship arrangements. The Rank the Telco Report, in which Victorian financial counsellors rated the financial hardship performance of the major telecommunications providers, found that:

> Financial counsellors report that, when dealing with customers in financial difficulty, providers focus on retrieving debt, rather than negotiating fair and reasonable arrangements that can keep people connected to essential telecommunications services. This approach manifests in problems that begin with the sale of products and services and extend through to attitudes, communication and the assistance options offered.[15]

Q3. How should responsibility for resolving consumer complaints involving multiple parties in the supply chain be achieved or enacted?

We support regulation requiring greater communication and collaboration between providers and other parties where appropriate to resolving a consumer's complaint. WEstjustice has had significant difficulty assisting clients where two providers at the same position in the supply chain are involved, for example, delays and disconnections in the porting of a phone number where each provider declined to resolve or deal with the complaint, instead blaming the other for the ongoing issues. We note the recent changes to the TIO's terms of reference, which enable it to better resolve disputes involving multiple parties in the supply chain.[16]

CASE STUDY 6: Josie's story continued

WEstjustice called both Josie's first and second provider seeking an explanation for the double billing. Josie had already spoken to the both providers on a number of occasions. As far as Josie understood the second provider's representations, the second provider asserted that the first provider would not 'release' her telephone line.

Josie's first provider stated told WEstjustice that no transfer request had been received. WEstjustice assisted Josie to make a TIO complaint about the second provider's failure to port her line and transfer her account, despite continued billing. The TIO's first stage of dispute resolution required the second provider to contact WEstjustice within a stipulated time frame. This did not occur, but Josie's phone was disconnected while WEstjustice waited for a response.

WEstjustice contacted Josie's first provider, which said that the phone had been disconnected automatically by the first provider's system, and that it may be because of a port-out request had been received, but this could not be confirmed.

WEstjustice contacted the TIO and noted that the stipulated time for reply by the second provider had passed. WEstjustice also advised that Josie's phone was now disconnected. The TIO indicated that the complaint would be escalated to conciliation.

Josie's phone remained disconnected for nine weeks while Josie and WEstjustice waited for a response from the TIO and the second provider. Josie was extremely distressed by this delay: there was family violence in her home, and she was not accustomed to using a mobile phone. Moreover, Josie could not afford to purchase sufficient credit for the

[15] FCRC, above n 7 [Rank the Telco], 5.
[16] See TIO, *Revised Terms of Reference published today* (24 October 2017), available at: https://www.tio.com.au/publications/news/terms-of-reference-change.

mobile phone. When WEstjustice was finally contacted by the second provider, the second provider claimed that the issue of disconnection had not been raised, and that therefore the delay in resolving the issue was not the fault of the second provider. This was disputed by WEstjustice.

Josie's case has now been resolved.

Source: WEstjustice

Q4. Should there be additional rules in the ACMA's Complaints-Handling Standard compelling providers to make every effort to resolve customer complaints before the consumer escalates the matter to an external dispute resolution body?

We support the principle that providers should make genuine best efforts to resolve issues in IDR, however consider an 'every effort' provision might not only be vague to the point of unenforceability but may also improperly pressure providers to delay resolution of the complaint, or create barriers to accessing the TIO or other EDR.

As elaborated in our answers to Proposal 2, we frequently assist clients in complaints (both simple and complex) that would never have feasibly resolved in IDR. Examples include: where there is fundamental difference of opinion between consumer and provider about which party is at fault; where there is a dispute of fact about what representations where made by either a consumer or provider; and where there is a dispute between provider and consumer about the operation of a code, standard or law. In such cases, a prolonged IDR will be of negative utility, exacerbating delays and increasing the risk of complaint fatigue.

We suggest that the amendments and clarifications recommended in our answers to (1) and (2) above are more appropriate in prescriptively requiring providers to take the steps to necessary for reasonable efforts to resolve complaints in IDR.

Q5. What do customers need to know about their provider's complaints handling policies and procedures?

Providers should ensure consumer can easily ascertain:

- Where to obtain a copy of the complaints handling policy;
- How to lodge a complaint (including any dedicated complaints phone numbers, email addresses or other channels to providers);
- How to provide an authority document;
- Timeframes for IDR;
- The structure and hierarchy of the provider's IDR network;
- The process of internal complaint escalation, and how to request this;
- The process of external complaint escalation to the TIO or other EDR;
- Remedies available to them should the provider fail to meet IDR requirements; and
- How to access interpreter services.

Generally, for the reasons set out in (2) above, it is the quality, content, and compliance with policies and procedures that are failing consumers, not a lack of access to or knowledge of the policy.

Q6. When and how should consumers be made aware of a provider's complaint handling and procedures?

Consumers should be advised of complaint handling and procedures:

- At the time of contracting (for example, inclusion of complaints handling policy with contract in a similar manner to provision of privacy policy);
- Upon request at any time;
- When a complaint is raised with the provider;
- When a provider engages in credit management activity, including the issuing of default or disconnection notices;
- At any other time the provider engages in action that may be perceived as adverse by the consumer (for example where delays, service failures, or disconnections occur).

The complaint handling policy should also be freely available online via the providers website.

Q7. How will providers ensure their own staff are trained in the complaint handling policies and procedures and will be supported by appropriate complaint handling systems?

Staff should be adequately trained and supported in understanding and implementing the baseline CHS requirements, as well as the providers own complaints handling policy (which may extend upon the baselines set by the CHS). Staff should have access to the CHS, the TCP Code and the provider's own policy at all times, to enable consumers and advocates to direct staff to specific provisions in instances of non-compliance. Staff, particularly frontline sales staff, should be trained on the main provisions of the Australian Consumer Law, such as the consumer guarantees of fitness for purpose and prohibitions on misleading representations and unconscionable conduct.

Staff incentives should align with good consumer outcomes, and providers should prioritise increasing support and oversight of frontline staff in complaints handling.

PROPOSAL 2: EXTERNAL DISPUTE RESOLUTION

Q1. Should the current TIO arrangements be transformed to an independent EDR body for handling complex complaints?

We are strongly opposed to the proposal to transform the TIO arrangements to an 'independent' EDR body for handling 'complex complaints'.

We agree with FCRC that (in summary):

- The effectiveness of the CHS to improve industry responses to complaints has not yet been tested, and it is yet to be seen what changes if any there will be to the volume of complaints (both complex and non-complex) that remain unresolved by IDR;
- The TCP Code already provided for a complaints-handling process that was enforceable by the regulator and, despite this, the volume of complaints escalated to the TIO remains high;
- The requirements imposed by the CHS are procedural. Compliance with a regulated complaints-handling procedure does not necessarily equate to a substantively fair or reasonable outcome.[17]

It's not clear from the Consultation Paper what an 'independent' EDR scheme would look like. Unfortunately, there is far too little detail in the paper to provide specific comments on the proposal.

The fact that the TIO is industry funded body does not itself render the TIO an ineffective or non-independent external dispute resolution body. Rather, we consider the greatest impediment to the TIO in appropriately or efficiently resolving disputes has been the absence of strong, clear codes or appropriately empowered regulators within the telecommunications sector. Industry self-regulation has failed to empower its EDR body with a sufficiently robust set of rules. In this regard, we reiterate our call for better direct regulation across the industry.

a) Support for the TIO

As detailed in Background Paper 2, there are different models internationally for resolution of telco disputes.

In Australia, the industry-based ombudsman model is well-established and highly effective, particularly in the banking, energy and water sectors. It is our strong view that, in providing access to justice, the establishment of mandatory industry-based EDR schemes has been one of the more significant advances in consumer protection in Australia the past 20 years. Consumer advocates have long supported the benefits of industry EDR schemes, which provide free, fair, fast, and accessible dispute resolution and are an extremely important alternative to courts and tribunals, which are expensive, slow and largely inaccessible without legal representation.

Though consumer advocates have raised the perception that the TIO aligns itself with providers more than consumers,[18] and room for improvement remains, we remain supportive of the TIO.

The TIO must meet the Government's own *Benchmarks for Industry-Based Customer Dispute Resolution* ('EDR Benchmarks'),[19] re-released by the Minster for Small Business in

[17] FCRC, Submission to Consumer Safeguards Review – Part A: Redress and Complaints Handling (25 July 2018).
[18] ACCAN submission to the Telecommunications Industry Ombudsman Independent Review (30 June 2017), 10.
[19] Australian Government, The Treasury, *Benchmarks for Industry Customer Dispute Resolution* (February 2015), available at: https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution/.

2015. The benchmarks are: accessibility; independence; fairness; accountability; efficiency; and effectiveness. [20] These well-established principles and the accompanying Key Practices[21] have underpinned effective EDR in many industry sectors.

The 2017 Independent Review of the TIO ('TIO Review') found that the TIO meets the EDR Benchmarks. We refer to the findings of the TIO Review, which set out in detail the measures taken by the TIO that demonstrate compliance with these benchmarks.[22]

Unlike other ombudsman models, such as the Small Business and Family Enterprise Ombudsman, the TIO meets the criteria for describing a body as an Ombudsman endorsed by the Members of the Australian and New Zealand Ombudsman Association ('ANZOA').[23]

b) Changes in progress at TIO

We agree that there is room for improvement within the TIO, but submit that there has been insufficient time to critically assess the effect of changes to the TIO's funding model, and the TIO's response to the recommendations made by the TIO Review. Both the funding changes and the responses to TIO Review are aimed at improving the efficacy of the TIO in resolving complaints and increasing the TIO's role in delivering systemic change in the industry.

i) *TIO funding model*

Recent changes to the TIO funding model may address prior concerns that case fees incentivised providers to offer mid-level 'no-fault' payments to consumers to resolve complaints, prior to TIO conciliation. Put simply, providers appeared to be paying off the customer instead of meaningfully resolving the issues raised. As a result, the substance of complaints remained unanswered and systemic issues remained unaddressed by the provider.

The new funding model, which came into effect on 1 July 2018, changes the funding mix at the TIO. Membership fees will now cover 70% of the TIO's costs, while case fees will be 30% of overall costs. Case fees are expected to reduce; however, the level of the membership fee will be based on the amount of complaints from the prior year, so fees are still related to complaint numbers. The intention is to change the provider response from "paying off the customer to resolve the complaint" to "actually fixing the problem".

As these funding changes came into effect during the present consultation, there has clearly been insufficient time to assess the effectiveness of these promising changes.

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[20] These six benchmarks were incorporated into the legislation establishing the new financial sector EDR scheme, the Australian Financial Complaints Authority, as general considerations relevant to its authorisation and oversight by ASIC: s 1051A Corporations Act 2001.

[21] Australian Government, The Treasury, *Key Practices for Industry Customer Dispute Resolution* (February 2015), available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/key_pract_ind_cust_dispute_resol.pdf

[22] TIO Review p 91 – 98.

[23] *Essential Criteria for Describing a Body as an Ombudsman – Policy statement* endorsed by the Members of the Australian and New Zealand Ombudsman Association (February, 2010). For example, the Small Business and Family Enterprise Ombudsman is unable to make binding determinations and does not meet ANZOA's definition of an 'Ombudsman.'

ii) *Response to TIO Review*

The TIO Review, released August 2017, comprehensively assessed the TIO's role and performance in areas including:

- Accessibility of dispute resolution
- Efficacy and effectiveness of the complaints handling process
- Dispute resolution timeframes
- Fairness of dispute resolution
- Complaints data management
- The TIO's role in identification of systemic issues
- The clarity and appropriateness of the TIO's Terms of Reference

The TIO Review consulted broadly, receiving submissions from industry and consumer advocate organisations, as well as individuals.

The TIO Review made 29 recommendations, including recommendations that directly addressed: reducing conciliation and investigation timeframes, streamlining straightforward matters, improving technical competency at the TIO, escalating matters of systemic non-compliance with providers, improving public transparency, and increasing the size and capacity of the TIO's systemic complaints team.

In December 2017, the TIO released its response to the TIO Review: all 29 recommendations were either supported or supported in principle, and the TIO proposed practical future steps towards the implementation of a significant proportion of the recommendations.[24]

Notably, we understand that the TIO has already taken steps to introduce a more responsive complaints process, including the introduction of fast-track and triage teams. It has also invested more heavily in systemic complaints, and has recently released its first Systemic Insight report.[25]

We broadly support the findings and recommendations of the TIO Review, and are encouraged by the responsiveness already demonstrated by the TIO to those recommendations. The TIO has had insufficient time to fully respond to the recommendations, and moreover, there has been insufficient time to assess the effectiveness of the responses made so far.

[24] Responses to the Recommendations of the 2017 Independent Review of the Telecommunications Industry Ombudsman (December 2017), available at: http://m.tio.com.au/__data/assets/pdf_file/0004/253642/Response-to-Independent-Review-of-the-Telecommunications-Industry-Ombuds....pdf.

[25] TIO, *Systemic Insight: Loss of telephone numbers during migration to the NBN* (Report, 18 July 2018), available at: https://www.tio.com.au/publications/news/systemic-insight-loss-of-telephone-numbers-during-migration-to-the-nbn.

c) Concerns about the creation of a new EDR body

The consultation paper does not provide any detail as to the proposed governance or jurisdiction of a new EDR body. We are accordingly unclear on the ways in which the new body would be substantively different from the TIO.

Our general concerns about establishing a new body include that significant time and resources will be required to replace a model that already meets the necessary benchmarks. Were the body limited to complex complaints, it would offer a reduced service to consumers, produce narrower complaints data, and remove a powerful incentive to industry to resolve straightforward complaints with consumers.

d) Concerns relating to the restriction to complex complaints

The proposal to restrict an EDR body to the determination of the undefined category of 'complex complaints' would amount to a significant and unwarranted reduction in access to justice for telecommunications consumers. We are strongly opposed to this proposal.

In our experience, matters requiring escalation to the TIO are not limited to the categories of 'matters which have not resolved at IDR due to flawed IDR processes' or 'matters that have not resolved at IDR because they are too *complex* to be resolve by the provider*'*.

There are multiple other categories of complaint that, despite the issues being relatively straightforward, cannot be resolved at IDR, including where:

- a provider fails to provide a refund to a consumer despite accepting fault for agreeing to do so;[26]
- a provider fails to provide effective IDR, or fails to comply with IDR requirements;
- there is fundamental difference of opinion between consumer and provider about which party is at fault;
- there is a dispute of fact about what representations where made by either a consumer or provider;
- the provider fails to provide fair and reasonable hardship arrangements; and
- there is a dispute between provider and consumer about the operation of a code, standard, or the Australian Consumer Law.

Where no call recording is available, consumers and providers are often at a stalemate as to what representations were made by the provider, and accordingly, how the matter should be resolved. A common example from WEstjustice's casework is whether or not key contract provisions (including length of contract term, and early termination fees) were advised within a telesale of a bundled phone and plan contract to a consumer. This example can hardly be described as complex; however, we submit that matters of this type are nonetheless appropriate for referral to the TIO for independent determination.

[26] See for example the two case studies provided by the TIO Review (p 52) in support of a streamlined EDR process for straightforward complaints.

Moreover, precluding TIO (or other EDR) escalation of straightforward complaints would remove one of the most significant incentives to providers to work with consumers to resolve disputes without litigation.

Restricting access to EDR for simple complaints would leave consumers to navigate slow, complex and legalistic tribunals and courts or, more likely, abandon meritorious disputes altogether. Research commissioned by WEstjustice and Consumer Action found that the there are "very substantial barriers" that inhibit people from accessing justice at the Victorian Civil and Administrative Tribunal ('VCAT').[27] As the research showed, when assessed against the EDR Benchmarks that the TIO meets, VCAT was found wanting.

Q2. In addition to resolving complex complaints, should the independent EDR body be proactively engaged in driving industry improvements, identifying systemic complaints and analysing root causes or recurring issues?

We support the role of the TIO (or any alternative EDR body) in driving industry improvements, identifying systemic complaints and analysing root causes or recurring issues. The TIO has been historically weak in this role compared to other industry ombudsman schemes; we are, however, encouraged by the TIO response to the TIO Review regarding its recommendations in respect of system issues work.

The EDR Benchmarks identify systemic issues reporting as fundamental to the accountability benchmark, and the TIO Review emphasised this core function of the TIO.[28]

The TIO Terms of Reference specifically provide for systemic issues to be raised by the TIO with TIO members once identified and require TIO members to consider the recommendations made by the TIO and take steps to resolve the issue. In the event that issues remain unresolved, the TIO is empowered to share information about the systemic issues with other bodies, including the regulator.[29]

The TIO Review made specific recommendations in respect of the resourcing and role of the TIO systemic issues team. The recommendations were all either supported or supported in principle by the TIO.[30] The TIO also supported the recommendation that where a provider makes it clear that it does not accept the TIO's view that its practice constitutes systemic non-compliance, the TIO should promptly escalate the matter first within the provider, and if the issue remained unresolved, to the Regulator.[31]

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[27] Cameronralph Navigator, Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal: Residential Tenancies and Civil Claims List (Research report prepared for Consumer Action Law Centre, Tenants' Union of Victoria and WEstjustice, July 2016) available at https://consumeraction.org.au/review-tenants-consumers-experience-victorian-civil-administrative-tribunal/.

[28] TIO Review, p 63.

[29] Telecommunications Industry Ombudsman Terms of Reference, incorporating amendments of 25 October 2017.

[30] Response to 2017 Independent Review of the Telecommunications Industry Ombudsman, see in particular response to Recommendations 18, 19 and 20.

[31] Response to 2017 Independent Review of the Telecommunications Industry Ombudsman, response to Recommendation 21.

We note this particular narrative response from the TIO: 'the TIO supports suggestions to strengthen systemic investigations by taking more assertive action to address systemic non-compliance by providers'.[32]

We hope that the implementation of the TIO recommendations will result in increased systemic issues work by the TIO, and increased visibility of systemic issues.[33] So far, insufficient time has elapsed to properly assess the TIO's response to the Review.

We note the draft terms of reference for the new financial services EDR scheme, the Australian Financial Complaints Authority ('AFCA'), permits AFCA to direct a financial firm to take or refrain from any action as a result of a systemic issue finding.[34] The TIO should consider adopting this approach.

RECOMMENDATION 6: We endorse FCRC's Recommendation 3 that the Consumer Safeguards Review support the TIO's current reforms to funding, complaint handling, and systemic issues, and undertake an assessment of their impacts after 2 years.

Q3. Should the charging structure of complaints lodged with the EDR body be structured to encourage providers to exhaust all practical steps to directly resolve the complaint with the consumer before referring to the EDR body? How can this be achieved?

The new TIO funding arrangements are designed to address this matter. As set out in our answer to Proposal 2 Question 1, there has been insufficient time to assess the effectiveness of these new funding arrangements.

Q4. What process should be followed before a consumer lodges a complaint with the EDR body?

If a provider is unwilling or unable to resolve a consumer's complaint at first instance, the provider should immediately facilitate referral of the consumer to the provider's IDR.

If a provider fails to escalate an unresolved complaint to IDR, a consumer should rightly make an EDR complaint on this basis. If a complaint is escalated to IDR, but IDR does not resolve the complaint within the timeframes stipulated by the CHS, EDR escalation is appropriate.

Q5. What process should the EDR body follow in the event it receives a complaint from a consumer where the consumer has not followed the provider's complaint handling procedures?

A consumer is presently unable to lodge a TIO complaint without confirming that an approach has already been made to the provider. We are content for this requirement to

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[32] Response to 2017 Independent Review of the Telecommunications Industry Ombudsman, response to Recommendation 21.
[33] See eg TIO, *Systemic Insight: Loss of telephone numbers during migration to the NBN*, above n 27.
[34] AFCA, *Rules of Complaint Resolution Scheme (Draft, June 2018)*, Rule A.17.4, available at: https://www.afca.org.au/custom/files/docs/1527568173029/australian-financial-complaints-authority-draft-rules.pdf.

remain. We have proposed that escalation to IDR should be a requirement of front line staff of a provider if they are unable to resolve a complaint. There should not be an onus on the consumer to force providers to escalate unresolved complaints.

Presently, the TIO's first step in dealing with consumer complaints is to refer the matter to the provider and seek that the provider contact the consumer directly to make a further attempt at resolution. This is, in effect, a facilitated referral into a provider's IDR network in any case. There would be no utility, and indeed unnecessary delay would result, were additional steps added to this process.

Q6. What process should the EDR body follow in the event it receives a complaint from a consumer where the provider has not followed its own complaint handling procedures?

In the event that a provider has not followed its own complaint handling procedures prior to a complaint being raised to EDR by a consumer, the TIO should proceed to resolve the complaint and the raise the issue of non-compliance with IDR separately with the provider. The EDR body should record failures by providers to comply with CHS IRD requirements, and where a systemic problem is apparent a report should be made to the regulator.

The EDR body should also be empowered to award compensation to the consumer where a provider has failed to meet baseline IDR standards regulated by the CHS.

PROPOSAL 3: DATA COLLECTION, ANALYSIS AND REPORTING

Q1. How should the EDR body provide complaints data to the ACMA for analysis and reporting (eg monthly, quarterly)?

No comments. This question is outside of the expertise of our organisations.

Q2. Are there any unforeseen or unintended consequences of the proposal for a centralized repository and reporting of industry complaint information?

No comments. This question is outside of the expertise of our organisations.

Q3. Do the proposals in this paper address the major issues of concern with the current arrangements regarding complaints and complaints handling? If not, what additional measures should be included?

Improving hardship practices must be a priority for the telecommunications industry. To monitor and improve hardship practice in the telecommunications industry, we recommend that ACMA develop performance indicators for the reporting by retail telecommunications providers of their hardship practices. There is real benefit to not only consumers but the industry to have transparent reporting about hardship practices, so that stakeholders and industry can have confidence that the quality of hardship assistance is high.

The abysmal findings of the Rank the Telco Report reflect our own casework experience. The report's major finding was that:

> The standard of hardship practice is strikingly poor across the telecommunications industry: results are lower than in any previous ranking report. … Compared with water, banking, energy and even debt collection, telecommunications providers are falling short in their treatment of customers in financial difficulty.[35]

Lessons can be learned from the Victorian energy sector, which has a well-established principles-based framework for reporting on hardship performance by energy retailers. The framework aims to look beyond the effectiveness of credit providers' internal compliance systems, and into the extent to which their hardship practices are achieving the consumer protection objectives of the regulatory framework itself. Drawing on the energy sector, the Financial Hardship Project at the University of Melbourne has recommended adapting these performance indicators for the consumer credit sector.[36]

Reporting alone will not resolve the problem. The obligations on telcos to provide hardship assistance must be brought into line with those imposed in other sectors providing essential services, such as the energy and water sectors.[37]

RECOMMENDATION 7: Develop performance indicators for hardship practice, adopting a principles-based approach to reporting that focus on outcomes for consumers over mere compliance.

RECOMMENDATION 8: We endorse FCRC's recommendation that the ACMA and TIO, in consultation with consumer organisations, develop consistent and thorough processes of complaint data collection, analysis and reporting.

Q4. What considerations should be taken into account in implementing the proposals outlined in this paper, including practical timeframes for implementation?

No comments.

Q5. Are there any other issues that should be brought to the Government's attention?

We have many concerns about inadequate consumer safeguards in the telecommunications sector, beyond complaints handling and redress mechanisms, that require direct regulation. These include concerns about sales practices, credit assessment, hardship practices and many others. We will address these concerns in Part C of this Review.

We note that a draft revised TCP Code is currently open for comment. Despite the best efforts of the (outnumbered) consumer representatives on the TCP Code Review Working Group, many of our concerns have not been addressed in the draft revised Code. Consumer advocates have little faith that the imbalanced and industry-dominated process for review of

[35] FCRC, *Rank the Telco*, above n 7, 5.
[36] E Bourova, I Ramsay and M Roberts, 'Reporting on Hardship Practice in the Consumer Credit and Energy Sectors: An Analysis' (2017) 25 *Competition and Consumer Law Journal* 71.
[37] P Ali, E Bourova and I Ramsay, 'Financial Hardship: The Legal Frameworks' (Research Report, Financial Hardship Project, Melbourne Law School, The University of Melbourne, June 2014) 38, available at: https://ssrn.com/abstract=2460376.

the TCP Code will deliver fit-for-purpose consumer safeguards.[38] The TCP Code Review represents a wasted opportunity for reform;[39] it would have been more effective to conduct this Safeguards Review initially, including the proposed review of the efficacy of self-regulatory arrangements, before reviewing the TCP Code.

RECOMMENDATION 9: The periodic review of the TCP Code should: be conducted by an independent reviewer; include early public consultation on the terms of reference to ensure all relevant issues are identified; be funded separately and include funding and support for extensive consumer advocate involvement. Industry should be consulted on the Code review, but not control or dominate the process.

Please contact Tess Matthews on [redacted] or at [redacted] if you have any questions about this submission.

Yours sincerely

Denis Nelthorpe AM
Chief Executive Officer
WEstjustice

Gerard Brody
Chief Executive Officer
Consumer Action Law Centre

[38] Consumers' Federation of Australia, *Time for a Reboot for the troubled telco* sector (Media release, 4 December 2017) available at: http://consumersfederation.org.au/time-for-a-reboot-for-the-troubled-telco-sector/ ; ABC News, *Telcos should face same regulation as water and energy, consumer groups say (*4 December 2017), available at: http://www.abc.net.au/news/2017-12-04/should-the-internet-be-considered-an-essential-service/9221616.

[39] ACCAN, *Draft Telecommunications Consumer Protections Code released for public comment* (Media release, 9 July 2018) available at: http://accan.org.au/our-work/1520-draft-telecommunications-consumer-protections-code-released-for-public-comment; ACCAN, *TCP Code Review: Consumers must come first* (9 July 2018) available at: http://accan.org.au/hot-issues/1518-tcp-code-review-consumers-must-come-first.