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12 December 2019

By email: haveyoursay@acma.gov.au

Ms Linda Caruso
General Manager, Communications Infrastructure Division
Australian Communications and Media Authority
PO Box 78
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Dear Ms Caruso

ACMA compliance priorities 2020-21 (consultation 36/2019)

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to contribute to the development of ACMA compliance priorities for 2020 – 2021. We are supportive of the ACMA's continuation of agency-wide compliance priorities as well as its renewed focus on telecommunications consumer protections from the current financial year. We receive 2 – 3 new calls per week through our legal assistance and worker advice lines or the National Debt Helpline about clients who are negatively affected by unaffordable phone debt.

Telecommunication services, much like energy, should not be treated as providers of a luxury product. Phones are necessary for basic safety and wellbeing (for example, domestic violence helpline, transport, emergency and wellbeing services). Industry regulation is only as good as its compliance mechanisms. In our casework, we consistently see widespread non-compliance with the Telecommunications Consumer Protection (**TCP Code**). When raising breaches of the Code in legal correspondence, telecommunications providers generally do not seem concerned about the consequences of breach. We agree with the view that compliance with the TCP Code is 'largely premised on industry goodwill'.¹ Therefore, an increasingly strong compliance and enforcement focus on the telecommunications sector is critical.

We have set out our responses to the consultation questions in detail on the following pages.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, 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

¹ 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>.

work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

What are the matters of significant public interest or concern?

Selling practices – Credit assessment

As raised with the ACMA prior to its approval, the new Telecommunications Consumer Protection Code (**TCP Code**) provides insufficient consumer safeguards that are far below those enacted for other essential services. However, now that we are in the first year of 2019 TCP Code operation, it is critical the ACMA focuses its compliance and enforcement efforts on ensuring the gains that have been made in consumer protection are effective. Selling practices must remain on ACMA's compliance priority agenda.

This priority must focus on credit assessment to determine the effectiveness of the new provisions to the Code, and to ensure telcos have changed their practices. More than ensuring policies and critical information summaries are available, there must be monitoring of providers' conduct in (mis)selling, service provision, and (poor) customer service.

Financial hardship

Compliance with the new financial hardship provisions of the TCP Code are critical and must remain part of the compliance priorities, especially as part of these provisions will only come into effect from 1 January 2020. An important compliance factor will be customer access—a telco customer should not be required to engage a financial counsellor or lawyer to access financial hardship arrangements. We note that certain locations in Victoria have waitlists of 2 – 3 months to see a financial counsellor and believe it is likely that this is the case in other states and territories.

It is also important for the ACMA to ensure telecommunications providers understand that many Australians prioritise their phone bills over other bills for social connectedness. For this reason, some customers may need to request a hardship variation even though their payment history does not show missed payments. At Consumer Action, we regularly see clients who accumulate large credit card debt to pay phone bills, who take out payday loans to pay, or who go without food for their family because that money goes toward their phone bills.

Complaints handling – dispute resolution

Customer access to clear and fair internal and external dispute resolution must be a priority. Poor customer service practices, and lack of access to documents, have been an ongoing source of frustration for our caseworkers, and a significant drain on our limited time and resources. They are also powerful disincentives and barriers to consumers who wish to communicate or raise issues with their provider. In particular, delay, administrative fees for accessing documents and poor record keeping are all identified issues.

Compliance must include the Complaints Handling Standard, the TCP Code *and* other requirements. For example, we understand through our casework that there is still a deep-rooted problem with telcos accepting authorities from professional advocates. This has been highlighted in the ineffective Industry Guidance Note (**IGN 017**) on Authorised Representatives and Advocates released by Communications Alliance prior to public consultation in late July this year. We support the Australian Communications Consumer Action Network (**ACCAN**)'s advocacy on this issue. The ACMA should ensure telco compliance with the Australian Competition and Consumer Commission (**ACCC**) and Australian Securities and Investments Commission (**ASIC**) Debt Collection Guideline for Collectors and Creditors, particularly as compliance with it is explicitly incorporated into the TCP Code. While this issue may seem of minor concern, it causes significant access to justice issues. Mikaela's story on the following page demonstrates this point.

Mikaela's story

Mikaela (name changed) is in her 70s and battling terminal cancer, as well as complications from surgery. She also suffers from depression and anxiety and is unable to leave her home without significant effort. Mikaela lives in public housing and her sole source of income is from Centrelink. She was a customer of one telecommunications/internet provider for decades. In early 2017, Mikaela contacted her provider to ask about internet plans so that she could be more connected to services and support.

In mid-2017, Mikaela made a complaint to the TIO based on unresolved issues with her internet connection and landline. As part of the resolution, the provider offered to give Mikaela credit; however, they refused to provide proof of the credit in writing. Soon after, Mikaela started receiving overdue notices from the provider. By the time she reached our service, she apparently owed over \$800.

During this time, the provider and/or their collection agencies repeatedly harassed our client, continuing to contact her even after Consumer Action was on the record as her representative, and after we told them that they were breaching Victorian debt collection laws by contacting her directly. The phone provider's harassment caused our client significant distress.

Ultimately, in around December 2018 the provider sold the debt to a debt collection agency.

Consumer Action contacted the debt collection agency, which agreed to waive Mikaela's phone debt and remove any related default listings from her credit report. After we filed proceedings against the provider in relation to claims of prohibited debt collection practices, they made an offer to resolve the matter. The matter has now settled resolved on a confidential basis.

Separately, we want to ensure acceptable internal and external dispute resolution (**IDR** and **EDR**) is available to telco customers who are self-represented as well as represented by a professional advocate, similar to financial hardship arrangements as above. We are aware that some of the major phone providers now offer improved IDR that customers can access with the help of a financial counsellor or lawyer. However, customers must also have the opportunity to access the same resolutions on their own. Other telecommunications providers offer insufficient IDR. Overall, there is an industry-wide failure to provide effective IDR for straightforward and complex disputes alike.

In relation to EDR, the Telecommunications Industry Ombudsman must be backed to fulfil its remit by the ACMA. For example, telecommunications providers should not be able to avoid EDR by simply refusing to accept an authority document.

Interaction with vulnerable consumers

The time is now for telecommunications companies to focus on their customers experiencing vulnerability, including low-income customers, Aboriginal and/or Torres Strait Islander customers, older customers, customers experiencing family violence, customers with poor health including mental ill-health, customers with disabilities. Other industries have begun to proactively address the fact that industry practices can and do exacerbate vulnerability, while the telecommunications sector has made only marginal improvements (for example in the TCP Code). However, it is important these protections are enforced. For too long people been taken advantage of, as has been highlighted by the fact the ACCC is investigating Telstra for systemic mis-selling to Aboriginal and/or Torres Strait Islander people.

The effect of noncompliance is clearly demonstrated through the lens of young people and newly arrived migrants to Australia, for whom a post-paid phone

contract is often their first credit contract in Australia. A lack of proper credit assessment may lead to overwhelming phone debt, which will then impair their ability to obtain further credit, leading to their almost immediate exclusion from mainstream finance and pushing them into a debt trap.

Unsolicited sales and telemarketing

Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand. We commend the ACMA on its current unsolicited communications priority, including lead generation and telemarketing in the solar industry. Unsolicited sales often target the community's most vulnerable. This compliance and enforcement priority should be maintained, and should include SMS and unsolicited online contact as well as cold-calling. Unsolicited selling and cross-selling of financial products are of particular concern, as highlighted by key recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**)² following the harm caused by cold-calling of life insurance exposed by the Royal Commission.³ ASIC acknowledged the harm by banning the outbound phone sales of life and consumer credit insurance ahead of the broader Royal Commission reforms.⁴ However, issues remain with the unsolicited selling of financials products and services – from consumer leases to funeral insurance to debt management services.⁵ We highlight our [recent media release](#) urging the Federal Government to ban unsolicited selling across all goods and services.⁶

Compliance data and evaluation

Another significant public interest matter is improved detailed tracking and evaluation of compliance and enforcement of the telecommunications sector. Data on the effectiveness of compliance and enforcement actions will help to understand the loopholes and gaps in telecommunications sector regulation.

What are the potential and actual causes of harm to consumers?

- High pressure and even misleading sales tactics practised by the telco industry that lead to customer debt and financial harm. Sales staff are often highly trained and motivated by commission-based payment structures. Because of this, sales staff are not concerned that the good or service should be appropriate or affordable for the consumer.
- A lack of credit assessment in the provision of expensive, and often, additional and unnecessary, phone products that lead to unaffordable phone debt.
- Unsolicited telesales of inappropriate products are an enduring cause of confusion, distress and hardship.
- Inadequate hardship assistance trivialises unaffordable debt and adds further stress to consumers.
- Inadequate complaints and dispute resolution processes cause enormous harm to consumers.
- Aggressive debt enforcement can impact mental health and have other deleterious effects.

What are the high level risks of non-compliance, including from technological developments?

- Continuation of the status quo, which has resulted in systemic mis-selling of unaffordable phone debt.
- Growing levels of phone debt and associated effects (more detrimental payday loans, more skipped meals, higher levels of social exclusion as phones become even more important in our everyday lives).

² *Final Report*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Vol 1, February 2019) Recommendation 3.4 and 4.1 – No hawking of superannuation and no hawking of insurance products.

³ <https://www.abc.net.au/news/2018-09-12/push-for-outright-ban-on-cold-call-sales-of-financial-products/10236174>.

⁴ <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-317-unsolicited-telephone-sales-of-direct-life-insurance-and-consumer-credit-insurance/>.

⁵ Consumer Action Law Centre and Financial Rights Legal Centre, *Joint submission to ASIC Consultation Paper 317: Unsolicited telephone sales of direct life and consumer credit insurance*, 29 August 2019: <https://consumeraction.org.au/20190829-asic-life-insurance/>; Consumer Action Law Centre, *Submission to ASIC on draft legislative instrument and revised Regulatory Guide 38*, 18 November 2019: <https://consumeraction.org.au/20191119-unsolicited-sales-ban/>.

⁶ Consumer Action Law Centre, 'ASIC bans cold-calling telephone sales of life, funeral and consumer credit insurances' (Media Release, 4 December 2019): <https://consumeraction.org.au/20191204-asic-cold-calling-ban/>.

- Access to justice based on ineffective and insufficient dispute resolution.

What are the emerging issues where we can encourage compliant behaviour, deter non-compliance or boost public confidence?

Dispute resolution

The Complaints Handling Standard has now been in force for 18 months. ACMA should use strong enforcement measures to ensure the move to a legislated standard is not without teeth. For example, ACMA should consider enforceable undertakings and civil litigation where there has been a breach of this standard.

There is an emerging issue of consumers achieving acceptable outcomes when represented by a financial counsellor or lawyer, but have difficulties achieving these on their own. For example, some major telcos have instituted escalated complaints or special assistance teams that, in our experience, have been generally helpful when contacted by professional advocates. But, as we operate the National Debt Helpline in Victoria, we also assist people to self-advocate. Unfortunately, this has revealed a discrepancy in access, which means that a person advocating on their own behalf can never achieve an outcome they would receive if they were represented. This is incredibly problematic for access to justice.

Collaboration with other regulators

Consumers expectations are that community members are protected, regardless of which regulator has remit. Increasingly, regulators should look to collaborate to navigate the best outcomes for consumers. This will be both efficient for the regulators and effective to ensure protection. For example, telcos need to comply with the range of laws, regulations and guidance that are applicable to them – not just the regulations that are telecommunications-specific. In our experience, telcos are not necessarily aware of more general legal requirements, such as the misleading and deceptive conduct provisions of the Australian Consumer Law. The ACMA should work with other regulators, including state-based regulators, for effective deterrence of non-compliant behaviour.

We also encourage the ACMA to thoroughly review increased compliance and enforcement activity in response from the critical feedback regulators received during the Royal Commission. Commissioner Hayne wrote:

"it is well-established that 'an unconditional preference for negotiated compliance renders an agency susceptible to capture' by those whom it is bound to regulate. As one leading American scholar has written, 'corporate behaviour moves quickly to take advantage of any perceived softening.'"

What are the technological or market developments that test the effectiveness of the regulatory framework?

Sales market developments

With the increasing push from telecommunications providers for consumers to package add-on tech products such as drones, smartwatches and smart speakers, the Code needs to do more to protect existing customers from questionable upselling practices. This includes add-on phone insurance and insurance-like products that exploit loopholes to avoid insurance regulation. Compliance with the spirit of the Code provisions will also need to be closely watched for existing customers, which are excluded from many of the credit assessment provisions.

⁷ Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Vol 1, February 2019) p 424.

We are aware that telephone companies are looking at 'buy now pay later', which is unregulated credit, for phones. This development must be watched as it could be a mechanism for avoidance of the already meagre credit assessment requirements of the TCP Code.

TCP Code development

The working Committee that reviewed the TCP code was imbalanced, with four voting industry representatives and only two voting consumer representatives. The TCP Code was developed without the benefit of transparent and public consultation prior to its drafting about the issues that the community face. These are contrary to the processes of review adopted by other industry sectors such as banking and insurance. As a result, the current process inevitably created a code that does not foster a clear and enforceable set of consumer protection. This will certainly test the effectiveness of the regulatory framework.

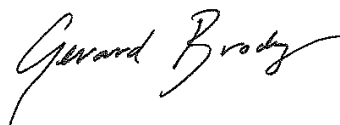
In what specific areas can we clarify the scope and reach of the law?

- Does the TCP Code form part of the contractual relationship between the telecommunications provider and customer (as codes in other sectors do)?
- Are the Key Commitments to Consumers (part of the Introductory Statement to the TCP Code) enforceable under the Code?
- Detail on what a phone provider must do after an outcome of a credit assessment that would result in a customer only being able to meet their financial obligations by incurring substantial hardship (TCP Code 6.1.2 (a) and (b)).
- Remedies for telecommunications providers breaching the code by providing unaffordable phone contracts.
- Cross over with relevant general laws and regulators, such as the consumer law and privacy law.
- Unsolicited telemarketing and sales.

Please contact Senior Policy Officer **Brigette Rose** at **Consumer Action Law Centre** on 03 9670 5088 or at brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE