

Consumer Safeguards Review Part C / Choice and Fairness

Legal Aid NSW submission to the
Department of Infrastructure,
Transport, Regional Development and
Communications

28 September 2020

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, pro bono legal services and 27 Women's

Domestic Violence Court Advocacy Services.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Australia Government Department of Infrastructure, Transport, Regional Development and Communications Consumer Safeguards Review Part C / Choice and Fairness Consultation Paper.

This submission provides responses to relevant consultation questions and outlines Legal Aid NSW's casework experience assisting vulnerable consumers who have acquired mobile telephones and associated plans and vulnerable consumers who are experiencing financial hardship.

Proposals for reform

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

Issues for comment

- 1. What are the essential consumer protection matters that should be covered by the rules? Part 6 (section 113) of the *Telecommunications Act 1997* (Cth) (Tel Act) lists a range of matters that may be dealt with by industry codes and standards. The Telecommunications Consumer Protections Code (TCP Code) covers some but not all of those matters. Are these the right starting points?**

Legal Aid NSW submits that the essential consumer protection matters that should be covered by the rules are those areas that have the most significant impact on socially and economically disadvantaged and vulnerable consumers. Specifically, these are:

- The selling practices of telecommunication products, which includes an affordability assessment, consideration of the actual needs and objectives of the consumer and an active assessment of who the end user of the product will be. The failure to engage in ethical selling practices has the risk of causing significant harm to consumers.
- Policies dealing with financial hardship, which would include more clear, universal procedures for consumers to apply for financial hardship assistance and to negotiate a variation of their payments.
- Policies dealing with the telecommunication providers approach to domestic and family violence.
- Debt collection and debt management policies - this should include policies that restrict a telecommunication providers ability to, almost immediately, sell a debt to a debt collection agency. This has a significant impact on vulnerable consumers in financial hardship and creates further difficulties in situations when the det is being incorrectly pursued.

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- Policies to minimise the sending of unsolicited commercial electronic messages, which should include the ability to put barriers in place. Unsolicited messages such as this have a significant impact on vulnerable clients, in particular, people with a cognitive impairment.
 - An acknowledgement that telecommunication is an essential service and that there are measures in place to ensure that all consumers can remain connected. Consideration should be given to the availability of a basic, low cost mobile telephone plan, similar to a basic bank account. Such a product could be developed with input from both industry and consumer advocates.

The matters covered by the TCP Code are a good starting point, but a number of matters are not dealt with or not dealt with in sufficient detail. It is of concern that these consumer protection matters are covered by a voluntary Code and Legal Aid NSW submits that consideration should be given to the creation of stronger, mandatory protections, for example, in the form of an industry standard.

The following case studies highlight the need for the above consumer protection matters to be covered by the rules, and how the current lack of protections can detrimentally impact on vulnerable consumers.

Case Study - Daisy

Daisy, a 20 year old Aboriginal woman in receipt of a Centrelink Carers Pension, attended a large telco retail store with her 16 year old sister, Rose. Daisy showed identification documents but was not asked about her income and was not required to show any evidence of her ability to be able to afford a mobile phone plan. Daisy was just asked if she thought she could afford the offered plan, which had a minimum monthly charge of \$199; and she said “yes”.

Daisy does not recall whether the details of the mobile phone plan were explained to her. Daisy was not made aware that there was a contract for the mobile plan, a separate lease contract for the mobile phone device and that the mobile plan came with international data roaming, which she did not want or need.

Daisy told the sales representative that the phone was for Rose and Rose actively chose the plan with the most data. Daisy was not offered any alternative, or more affordable, plans. Rose lost the mobile phone a short time later and Daisy is being pursued by the telco provider for over \$5,500.

Case Study - Bernie

Bernie lives in a country town in western NSW. Bernie was experiencing financial hardship and was struggling to pay his contract for his mobile phone handset and the associated plan.

Bernie was advised by his telco provider that he was required to pay out his contract for his mobile phone handset in full before the telco would negotiate a payment arrangement for the associated plan.

Case Study - Ava

Ava was a client of Legal Aid NSW's Domestic Violence Unit. Ava recently left her husband due to domestic violence. Ava is from a non-English speaking migrant background and was living in a women's refuge with her child from the marriage.

During her marriage, Ava entered a \$40 per month mobile phone contract with a large telco provider. Ava's husband wanted a mobile phone and insisted that the contract would be in Ava's name. Ava agreed to this arrangement under pressure and in the context of the domestic violence and financial abuse.

Ava's husband called the telco provider and as he had an authority under Ava's account, he applied for a new phone in Ava's name. Then Ava's husband spoke with the telco representative and identified that the phone was not for the account holder. Ava's bill was increased by \$70 per month for a 24-month term. After the phone was approved and given to Ava's husband, he sold the phone and used the money for his own benefit.

Ava's husband subsequently contacted the telco provider, without Ava's knowledge, and applied for another phone in Ava's name. In total, Ava's husband applied for, and obtained, five smartphones in Ava's name. Ava never had any use or benefit of the phones, with her husband selling each phone and using the proceeds for himself. Ava was left with a bill of over \$200 per month, and no capacity to pay.

Case Study - Amira

Amira is from a culturally and linguistically diverse background and has two young children. Amira experienced severe domestic violence from her former partner, including an incident with a weapon. Amira and her children were forced to flee the family home and Amira had applied for an Apprehended Domestic Violence Order against her former partner.

Amira stated that in a single day her partner forced her to attend a retail store of three large telco providers and Amira entered a total of five mobile phone contracts, in her sole name. Amira's partner took the mobile phones and sold them, all for his own benefit.

Amira states that she was not asked any questions about her income or her ability to afford any of the contracts. Amira is in receipt of a Centrelink benefit and unable to meet the costs of the mobile phone contracts.

Case Study - Jacob

Jacob is a young Aboriginal teenager that sought a mobile phone plan with a large telco. Jacob went to prison soon after getting the plan and stopped using the phone and stopped making his monthly payments. A debt soon accrued, and the telco sold the debt to a debt collector. When Jacob was released from custody, he contacted Legal Aid NSW for help with his debts.

When Legal Aid NSW contacted the debt collector, they said Jacob had two phone plans that he had a debt for. Jacob was certain that he only had one phone plan with

this telco provider. The debt collector referred the matter back to the telco provider. The telco provider was difficult to deal with and provided documents of two phone plans that were allegedly purchased by Jacob just a day apart with nearly identical phone numbers.

Legal Aid NSW advocated for Jacob and upon further investigation by the telco provider, it was discovered that the original contract had been duplicated and the debt was halved.

Case Study – Jane

Jane is a young woman with an intellectual disability. Jane received a text message one day saying she had won the lottery. Jane did not have the capacity to identify this text message as a potential scam. Jane replied to the text message and was told she had to pay \$1500 to collect her winnings.

Jane paid the \$1500. It wasn't until Jane discussed this situation with her support worker that she was made aware of these types of scams via text message.

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

Legal Aid NSW would be supportive of a re-design of the existing consumer protection rules or the creation of new rules, provided that such rules were mandatory and enforceable. It is also problematic that the TCP Code is voluntary and there are limited, often ineffective, consequences for non-compliance with the Code. The Code does not adequately protect consumers in the way regulation or industry standards or determinations can. We consider that there is a need for greater enforceability in order to increase the likelihood of compliance, and to ensure better outcomes for vulnerable consumers.

This is particularly the case in relation to the selling practices of telecommunication products and the approach to financial hardship. In Legal Aid NSW's case work experience, we see numerous examples of vulnerable consumers being sold both products they cannot afford, as insufficient affordability assessments are undertaken; and products they do not need, as limited enquires are made about the consumer's needs and objectives. The following case studies highlight these issues.

Case Study - Mary

Mary had recently arrived in Australia from Iraq and is on a refugee visa. Mary has no English language skills. Mary attended a large telco retail store with a recent acquaintance from her community, who spoke English well.

Mary's acquaintance had persuaded her to place the mobile phone contract in her name and had said he would use the phone and pay the associated bills. Mary's acquaintance was the sole communicator with the telco staff member. The telco staff

member did not arrange an interpreter in order to communicate with Mary. As a consequence the terms and conditions of the contract were not explained to Mary, she did not understand the implications of having the contract in her name and nor was she made aware of the costs of the contract or when she was required to pay.

Mary was not asked to provide any documents verifying her income and she was not asked to confirm that the phone was for her use. The staff member pointed to the place where Mary was required to sign; and she signed the contracts. After this, Mary's acquaintance left the store with the mobile phone and Mary never had any use of the phone but she incurred a debt of approximately \$2500.

Case Study – Abdul

Abdul was on a \$39 per month plan, when he attended a large telco retail store and sought the sales advice of staff to cancel his existing plan and enter into a new one. He was advised that he could do this, that the staff would simply cancel the existing plan, and no further payments were required to be made, because he was purchasing another product with the same telco provider.

Based on this advice, Abdul agreed to cancel his existing plan and enter into a more expensive contract with the telco. Abdul was not asked in any way to verify his income or discuss his ability to afford a more expensive plan. After Abdul received the first bill, it was clear that the previous account had not been cancelled and the telco continued to charge \$39 per month for the previous plan.

When Legal Aid NSW's Refugee Service assisted Abdul to contact the telco, we were advised that the staff at the store have no power to cancel contracts and that Abdul would have to incur a cancellation fee.

Case Study – Reza and Anna

Reza and Anna, both clients of Legal Aid NSW's Refugee Service, attended a large telco retail store and each entered into a mobile phone plan, which they were advised would cost \$68 per month, per phone. They were told the plan would include 4GB of data and unlimited calls on each phone. They were informed by the staff member that this was a special offer ending that day. However, from the very first bill Reza and Anna received, the amount they owed exceeded the amount that they were told they would be paying.

They accepted the initial explanations of staff at the store that the first bill was high because the cancellation fees of their previous contracts were added and that the second bill was also high because they had probably gone over their data limit, even though they did not agree that this was the case. When Reza and Anna's bills continued to show various amounts, exceeding what they were advised, a staff member at the store advised them that they both needed to add additional products to their account to rectify their bills.

Reza and Anna agreed because they trusted the salesperson's advice but unsurprisingly, this did not resolve the issue and they continued to receive unexpectedly high bills. Further, Reza and Anna began to notice unknown numbers

appearing on their bills. Eventually, they began receiving calls and text messages from the telco provider demanding payment of approximately \$1570.

By this point, staff at the store actively avoided Reza and Anna when they attempted to resolve the issue and inappropriately advised them not to worry about the calls and text messages stating, “Don’t worry about it, these are just advertisements”.

Case Study - Miriam

Miriam, a recently arrived refugee from Iraq, attended a large telco retail store to purchase a handset only. She chose a specific mobile phone. Miriam advised the salesperson that she did not require a SIM card, because she wanted to retain her current mobile number.

She was assured that she could only pay for the cost of the handset, and she signed a contract to that effect. Approximately three weeks later Miriam returned to the store and signed a further contract for another handset of the same brand and series for her husband. Again, she advised she did not need or want a SIM card because her husband wanted to retain his number.

However, once Legal Aid NSW’s Refugee Service had obtained a copy of Miriam’s documents from the telco provider directly, it was apparent that Miriam had entered into a contract for a different, more expensive handset, which she has never had in her possession.

Miriam was advised by the telco that she could pay off the handsets at a rate of \$50 per month for both. Two months after entering into both these contracts Miriam started receiving invoices for the handset she did not own and for calls she did not make. Six months after entering into both contracts she had accrued a debt of \$4,400, despite making regular payments (of more than \$50 a month) on her account.

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

Issues for comment

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

Legal Aid NSW supports a greater role for direct regulation, such as industry standards, in those areas that cause the most consumer harm, particularly for vulnerable consumers, such as the responsible selling of telecommunication products and the approach to financial hardship. There could be a role for a voluntary Code in relation to technical issues associated with telecommunication products, but voluntary Codes are no longer sufficient to deal with consumer protections. An advantage from a consumer’s perspective is that more direct regulation would carry greater consequences for non-compliance, which should in turn encourage compliance.

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

The code making process could be driven by the regulator with input from industry and consumer advocates. However, as stated above, Legal Aid NSW sees consumer outcomes being improved if the areas of greatest impact to consumers are covered by direct regulation, rather than a voluntary Code.

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

Legal Aid NSW does not necessarily perceive a difficulty with the current constraints on ACMA's power to make industry standards.

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

Issues for comment

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

Legal Aid NSW does not see a need for additional regulatory and/or enforcement tools being necessary for ACMA if the essential telecommunication specific consumer protection rules are mandatory and directly enforceable by ACMA.

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

The Consultation Paper notes that the Court imposed penalty maximum amount and the infringement notice maximum amount are too low to act as a deterrent against failing to meet consumer protections and the amounts are not reflective of the harm done to consumers, where that conduct is profitable. Legal Aid NSW would support an examination of existing penalty amounts to ensure that they continue to operate as an effective deterrent. We would also support further consultation to address the factors identified in the Consultation Paper which appear to constrain ACMA's compliance and enforcement, and options for reform.

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

Issues for comment

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

Legal Aid NSW considers that legacy regulatory obligations regarding landline services should continue to be mandated by regulation. This is of particular

significance and assistance for consumers in remote and regional areas. Legal Aid NSW is regularly made aware of this while assisting people affected by natural disaster, including the recent 2019/20 bushfires, where a number of clients only had access to a landline as they did not have a mobile phone or internet service.

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

Legal Aid NSW is concerned that if the obligations in relation to landline services are not mandated, they may not be provided by the market as there would be very limited financial incentive to provide them.

General issues for comment

1. Do the proposals in this paper address the major issues of concern around choice and fairness and consumer safeguards?

Yes. Legal Aid NSW is concerned that the current voluntary TCP Code has not provided sufficient protection for consumers, particularly vulnerable consumers, in relation to the key areas of responsible selling and financial hardship. We have outlined our concerns above.

2. Are there any unforeseen issues or unintended consequences of the proposals?

Legal Aid NSW is concerned that there is potential that the costs to industry, associated with tighter regulation, may be passed on to consumers. We are also concerned that telecommunication providers may undertake high level affordability assessments which may involve requesting access to a consumer's credit reporting information. The impact on vulnerable consumers with a poor credit history should be considered though this could be alleviated by the availability of a low- cost basic telecommunication product.

We would welcome consideration of measures that would address these unintended consequences.