AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ACCC submission on the ACMA's draft Statement of Expectations for the telecommunications industry on consumer vulnerability

September 2021

1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide comments to the Australian Communications and Media Authority (ACMA) on its draft statement of expectations for the telecommunications industry on consumer vulnerability (ACMA's SoE).

The ACCC is the economy-wide competition and consumer regulator responsible for enforcing the *Competition and Consumer Act 2010* (CCA). We protect Australian consumers by fostering competitive, efficient, fair and informed Australian markets, including telecommunications markets. This includes our work in investigating and enforcing breaches of the Australian Consumer Law (ACL) in Schedule 2 to the CCA. The ACL provides protections for consumers and obligations on businesses when selling goods and services. Among other things, it prohibits false, misleading and unconscionable advertising and sales practices.

We welcome the ACMA's SoE as an important step in improving consumer safeguards by setting clear expectations for how telecommunications providers should support vulnerable consumers. Specifically, the SoE provides clear guidance to industry participants about the business practices that can disadvantage consumers experiencing vulnerability.

The ACMA could consider including a way to review, measure and report on the effectiveness of the SoE to increase accountability and enable new strategies or priorities to be identified where necessary. As outlined in our submission to Part C of the Government's Consumer Safeguards Review, we consider that there is a strong need for wider reform to the telecommunications consumer safeguards framework. In particular, we consider that more direct enforcement tools would strengthen the current regulatory framework.

That said, we understand that the ACMA's SoE is the first of a series of steps intended to improve the way the telecommunications sector supports consumers. We strongly endorse these steps to address the poor record of the sector in providing good customer service.

Recent ACCC consideration of consumer vulnerability

We have recently consulted with industry, regulators and consumer organisations to update the ACCC's economy-wide *Don't take advantage of disadvantage* Guide (ACCC Guide) which will be published in the coming months. This has included close consultation with the ACMA. Clause 3.4 of the Telecommunications Consumer Protections Code (TCP Code) requires telecommunications providers to have regard to best practice as set out in the ACCC Guide.

The ACCC Guide is intended to help all businesses better understand vulnerability, how it can come about and how best to assist consumers experiencing vulnerability. It outlines the legal responsibilities businesses have to consumers, but is not a comprehensive guide of all obligations under the ACL. The ACMA's SoE will set similar benchmarks for the telecommunications industry and inform its approach to enforcing the TCP Code.

The release of the ACMA's SoE is particularly timely given the many and recent examples of poor conduct by telecommunications providers that have resulted in severe detriment, including financial distress, for consumers experiencing vulnerability. Earlier this year, the Federal Court ordered that Telstra pay $50 million in penalties for engaging in

unconscionable conduct when it sold mobile phone contracts to more than 100 Indigenous Australian consumers who did not understand and could not afford the contracts.[1]

We have also observed poor telemarketing and sales practices, where telecommunications providers made misrepresentations or used deceptive conduct to cause consumers to enter into contracts they did not want. Our actions against Superfone this year, SoleNet and Sure Telecom in 2016/2017, Zen Telecom in 2014 and Utel Networks in 2013, demonstrate that there is a persistent issue with telecommunications providers' business practices causing detriment to consumers.[2] Providing clear guidance to the telecommunications industry about what regulators expect from providers when dealing with vulnerable consumers is an important first step.

This submission focusses on the following key issues: identifying consumers in vulnerable circumstances and priority areas for setting expectations for telecommunications providers.

2. Identifying consumers in vulnerable circumstances

The ACCC agrees with the approach the ACMA has adopted to identifying vulnerability. Importantly, the SoE recognises that vulnerability is situational, that it may be temporary at different times or can result from more permanent circumstances. We also agree that people do not experience vulnerability only because they belong to a particular demographic or cultural group. People can experience vulnerability in some situations but not others, depending on their circumstances at the time.

Business practices and market characteristics can also exacerbate or cause consumer vulnerability. Any consumer can experience vulnerability when faced with complex marketing or difficult choices, where they might find it difficult to determine what they are being sold or what choice is best for them. This is particularly relevant in the telecommunications sector where complexity is a key characteristic of the market structure, products and technology.

While the factors identified on page 8 of the ACMA's SOE cover a broad range of matters that may alert a sales representative of a potential vulnerability, we think it is preferable that particular cultural or demographic groups not be separately identified. Rather, the personal or social characteristics identified in the ACMA's SoE must be understood in the context of the particular challenges that those groups might face.

Many consumers experience a variety of challenges and it is those challenges that need to be identified, acknowledged and responded to in order to drive change and deliver meaningful consumer outcomes. For example, in identifying vulnerability, the ACMA could focus less on specific demographics or personal characteristics of consumers and more on the market environment. We consider it important that businesses are aware of how their practices may exacerbate or cause vulnerability if they do not have regard for the challenges facing some consumers.

The recent case against Telstra highlights how business practices can create or exacerbate the challenges some consumers face as a result of cultural characteristics. For example, many Indigenous consumers would prefer an oral explanation of a contract, rather than written contract, or may indicate a gratuitous concurrence in a one-on-one transaction, regardless of agreement. These characteristics can be taken advantage of by sales representatives if regard is not given to recognition of these cultural preferences.

[1] ACCC v Telstra (2021)

[2] See ACCC v Superfone (2021), ACCC v SoleNet and Sure Telecom (2016/2017), ACCC v Zen Telecom (2014), ACCC v Utel Networks (2013).

Our Indigenous liaison officers, and Indigenous consumers with whom we have consulted in our enforcement and compliance activities, would prefer that an indigenous background not be identified as a vulnerability. That is, Indigeneity in and of itself, should not be used, or allowed to be perceived, as a metaphor for disadvantage or vulnerability. Rather, there are some cultural characteristics that may place consumers at a disadvantage when dealing with business sales tactics. Similar vulnerabilities may arise for culturally and linguistically diverse consumers who do not have English as a first language and will similarly place them at a disadvantage. The ACCC is also aware of poor business practices impacting these communities.

Our experience has shown that some behaviours might indicate a vulnerability in responding to business practices and are likely to increase the challenges faced by some consumers in the retail sale of telecommunications goods and services. These include:

- the consumer not having English as a first language
- the consumer being from a culture that prioritises oral communication over written communication
- sales representatives failing to properly explain the terms of a (written) contract in a way the consumer understands
- a propensity towards gratuitous concurrence where the consumer answers yes regardless of actual agreement
- the consumer's remoteness to the retailer contributing to difficulties in enforcing consumer guarantee rights
- sales representatives taking advantage of a consumer's cultural use of silence in a conversational context and
- high pressure sales tactics.

We have outlined some ways in which businesses should address some of these challenges below.

3. Priority areas for setting expectations for telecommunications providers

Avoid sales incentives and commissions

Priority area 2 of the ACMA's SoE outlines expectations about selling practices. It includes an example intended to discourage businesses from designing sales incentives programs that reward staff or agents for upselling additional unneeded products or services to vulnerable consumers.

We consider that commission-based sales are a business practice likely to incentivise sales staff to engage in poor conduct at the consumer's expense. We saw the extensive harm that sales incentives and commissions had on consumers in the recent Telstra unconscionable conduct case.[3] For example, sales incentives and enforced sales targets saw sales staff working in licenced Telstra-branded stores manipulate credit assessments, add on services that a consumer would never use, for example overseas calling cards, and misrepresent products as free. We consider the ACMA's SoE could be strengthened to emphasise to businesses that the use of sales incentives and commissions significantly increases the risk

[3] ACCC v Telstra (2021)

of causing or exacerbating vulnerability and that telecommunications providers should carefully consider their use in the consumer market.

Improved customer support channels for vulnerable consumers

We strongly support the ACMA's expectation that telecommunications providers offer improved consumer access to staff trained in dealing with vulnerable consumers, including via phone channels. In certain circumstances, this may include having access to an Indigenous customer representative or translation services.

During the start of the pandemic, we saw that many consumers were adversely affected by the reduction in call centre support when attempting to access hardship packages that telecommunications providers had announced. The adverse impact on consumers ranged from complete loss of service to longer wait times for some requests to complete, such as service transfers.

We also saw that telecommunications providers increased the use of digital contact centres to manage costs and provide alternative pathways of contact when call centres were unavailable. We consider that there are limits to how far digital contact channels can be used without compromising consumer support, particularly for vulnerable consumers or those in financial hardship, with alternative accessibility needs, low digital literacy or who speak English as a second language. As such, we consider it important that phone channels are available and managed by staff trained in engaging with vulnerable consumers.

Disconnection and throttling practices are a last resort

We strongly support the ACMA's expectation that telecommunications providers offer consumers facing disconnection all appropriate solutions and options to avoid disconnection. As noted above, at the start of the pandemic we saw some consumers unable to get in contact with their telecommunications provider to access hardship arrangements. As a result some consumers were disconnected from their services without the opportunity to apply for a hardship arrangement.

Noting the critical importance of digital engagement for all consumers, and particularly for consumers experiencing vulnerability, we suggest the ACMA consider the merits of expanding the definition of "disconnection" to include throttling practices. We note that some telecommunications providers heavily reduce data speeds for customers who have missed billing dates to encourage payment. We consider that telecommunications providers should only apply such data speed reductions as a last resort, and only take this action after consultation with the affected consumer.

Other considerations

We wish to also highlight that many Australians experiencing vulnerability are impacted by scams and cybercrime. The telecommunications sector has been working together with regulators to combat scams over the last couple of years. However, phone based scams continue to cause widespread harm to Australians often leading to longer term financial hardship. We are concerned that it is often people experiencing vulnerability who are impacted or targeted by scams. In 2021 phone based scams have increased by 130% with 97,000 reports received (to 22 August). Financial losses have increased by 101% with $56 million reported lost to phone based scams. Consumers aged over 65 years old have lost more money than other age groups.

We recommend that the ACMA consider whether the SoE should also include an expectation that telecommunications providers give clear and easily accessible information

to customers on a regular basis about how to avoid scams and what to do if they fall victim to scams. Telecommunications providers are in a unique position to inform vulnerable consumers and assist them if they fall victim to a scam. We have seen instances of consumers who find themselves in vulnerable situations after becoming a victim of a phone based scam or being harassed by scammers to such an extent that they lose confidence in telecommunications services. In some instances consumers have not been able to access their telecommunications provider or their telecommunications provider has not given them appropriate assistance. Victims of fraud, cybercrime and identity theft are at increased risk of financial hardship and ongoing vulnerability. Telecommunications providers should ensure that consumers can make contact easily and obtain clear advice to reduce the long term impacts that may result.