



21 January 2019

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 B) – Reliability Safeguards

WEstjustice welcomes 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 made in response to the consultation paper on the topic of Reliability of Services (Part B) ('Consultation Paper').

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. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.

WEstjustice provides targeted and tailored services to disadvantaged clients, using a hybrid generalist-specialist model. We have a particular focus on working with newly arrived migrants and refugees, and a large proportion of our clients do not speak English as a first language. Our work reveals that this group requires continuing advocacy in their engagement with consumer institutions and markets, including in telecommunications.

Structure of this submission

The insights of WEstjustice on the subject of service reliability are derived from our experience as consumer advocates in the telecommunications sector. The issues for comment in the consultation paper range from the appropriateness of proposed consumer remedies, to the practical feasibility of proposed repair timeframes, to industry data collection and reporting. Rather than address the specific issues for comment that fall within the scope of our expertise, we provide comments and recommendations that address the themes and overarching principles of the consultation paper.

In summary, our submission sets out the arguments that we consider support the development of an automatic consumer remedy framework, structured similarly to the *Telecommunications (Customer Service Guarantee) Standard 2011* ('CSG'), to apply to all telecommunications services. We make the case for automatic missed appointment and pro rata compensation for consumers in clearly codified circumstances.

WEstjustice has had the opportunity to read the Australian Communications Consumer Action Network's ('ACCAN') draft submission to the Consultation Paper, and we make reference to the ACCAN submission at various points throughout our own submission.

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1. Telecommunications is an essential utility service

We endorse Principle 1 of the Consultation Paper: that telecommunications is an essential service, and that industry incurs a responsibility to keep consumers connected as a consequence of delivering an essential service. We further agree with the Consultation Paper's assertion that broadband services are now at least as important to consumers as voice services, and that the separation of voice and broadband services in current reliability safeguards is out of step with modern consumer use. Consumers should be provided with a level of protection commensurate with the contemporary significance telecommunications services in day to day life, and the reliance that is now unavoidably placed upon these services.

As argued in our submission¹ to Part A of the Consumer Safeguards Review, telecommunications services (including internet and mobile services) have 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 use identified in the Department's Background Paper A,² we note the following areas in which our clients rely on consistent telecommunications services:

- Reporting income and job search to Centrelink (failure of which can result in cancellation of payment);
- Searching and applying for work;
- Receiving and paying bills;
- Communicating with social workers;
- Arranging medical and legal appointments; and
- Using telephone interpreter services.

For the vulnerable in our community, telecommunications are also necessary for basic safety and wellbeing. In circumstances of prolonged family violence, phones 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, as well as to access healthcare services and the National Disability Insurance Scheme.

Despite this, consumer safeguards in telecommunications fall short of those provided in comparable utility service sectors, such as energy and water. A regulatory framework that provides consumers with the level of protection properly expected for an essential service is overdue.

2. Disconnection results in harm to consumers

Arising from the essential role that telecommunications play in daily life, loss or failure of connection can have serious adverse financial and social impacts on consumers.

¹ Joint submission of WEstjustice and Consumer Action Law Centre

² PWC for Department of Communications and the Arts 2018: Current telecommunications safeguards and regulatory environment

Pecuniary losses include money paid to a retailer in exchange for no service or an inadequate service, money spent on an alternative service, losses relating to the inability of a consumer to complete work from home, and losses of a business arising to inability to use the internet, eftpos, or make or receive calls.

Non-pecuniary losses to consumers include loneliness or distress arising from inability to contact friends and family, frustration and time lost in inability to complete day-to-day tasks (including online transactions), loss related to inability to access to services including Centrelink, NDIS, and healthcare services, the inability to complete and submit course work, and time spent (and distress incurred) trying to rectify or resolve the service problem.

Financially marginalized consumers often suffer the greatest loss, as they are least able to effectively mitigate with alternative services.

Case study: 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 aged under 10. Josie came to Australia after spending many years in a refugee camp in Africa. Her knowledge of Australian legal and regulatory systems is low. Her technological literacy is very low. 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 fixed line 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.

WEstjustice called both Josie's first and second provider seeking an explanation for the double billing. Josie's first provider told WEstjustice that no port-out request had been received. WEstjustice assisted Josie to make a Telecommunications Industry Ombudsman ('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 was likely to be because of a port-out request had been received. WEstjustice contacted the TIO and advised that the stipulated time for reply by the second provider had passed, and that Josie's phone was now not working at all. The TIO indicated that the complaint would be escalated to conciliation.

Josie's phone remained disconnected for over nine weeks while Josie and WEstjustice waited for a response from the second provider, which was on notice that Josie's phone was disconnected via the TIO complaint. No interim or alternative service was provided. Josie was extremely distressed by this period of disconnection: there was family violence in her home and she was unable to contact friends and relatives. Moreover, she was unable to

contact or be contacted by WEstjustice, who were trying to help her resolve the issue.

Josie eventually purchased a cheap mobile phone and prepaid credit to alleviate the situation, but this caused her further distress, as she had difficulty using the phone (she was not accustomed to using a mobile phone at all), and she couldn't afford to purchase sufficient credit. On occasions when she attended WEstjustice seeking an update, Josie was frustrated and tearful.

Josie's matter was finally resolved. Her telephone is now working and she has received a CSG payment from the second provider.

The pecuniary and non-pecuniary consumer harms that result from disconnection or failure of telecommunications are difficult to quantify. The majority of the examples of the pecuniary losses set out above are hypothetical consequential losses (loss of opportunity to derive profit for a day of business, loss of commercial opportunities etc.). Furthermore, many of the non-pecuniary losses suffered, such as the loss communication with family, are unique to the use and provision of telecommunications.

The unique features of the telecommunications industry, and of the harm suffered in circumstances of disconnection, create a clear case for improving reliability safeguards by tailored direct regulation of the sector.

3. Incentivizing providers: traditional market measures are insufficient

While WEstjustice supports stronger reliability reporting requirements, and improved transparency and accessibility of reliability data (see below at (7)) these measures alone will be insufficient to safeguard consumers in relation to service reliability. We support the general proposition of the consultation paper that penalties and compensatory remedies are required to incentivize industry to provide appropriately reliable services.

The notion that perfect competition between providers will drive optimal service quality is premised on assumptions of 'perfect information' available to consumers and 'perfect rationality' exercised by consumers. Historically, governments and regulators have relied on this theory as the basis for increasing disclosure requirements on industry in an attempt to push industry to self-correct to greater consumer protection. Perfect rationality assumes that consumers, presented with all relevant information about a service (reliability, coverage, cost, discounts and offers, bundled products, etc.), will effectively balance all the information to make the 'best choice', and that consumer choices will push the market to optimal service quality.

More recently, studies in behavioral economics have demonstrated that consumers' cognitive capacities are far from perfect; rather, rationality is 'bounded'³ and consumers are prone to biases when faced with uncertainty or complexity.⁴ Moreover, as observed by

³ See for example Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203.

⁴ Consumer Policy Research Centre, 'Five preconditions of effective consumer engagement - a conceptual framework' (Report, 2018), 4.

Maker et al. 'reliance on disclosure as a consumer protection mechanism has been undermined by empirical work that suggests consumers make little meaningful use of written information about the goods and services they are purchasing.'⁵

Particular features of telecommunications market exacerbate difficulties for consumers in 'rational' decision-making.⁶ These include:

- Information asymmetries
- Product complexity (incl. bundling)
- Present-bias
- Over confidence bias
- Certainty bias
- Barriers to switching (incl. lack of provider availability in remote areas, and early termination fees)⁷

We submit that even perfectly transparent fault and disconnection reporting will be insufficient alone to incentivize industry improvement on reliability measures. As set out below, we consider that codified maximum timeframes for connection and repair (/minimum reliability standards), enforced by a penalty scheme and accompanied by a compensatory scheme, are required to protect consumers and drive change.

4. Maximum timeframes are needed to clarify acceptable service standards

Aside from the limited services covered by the CSG, consumers must frame complaints about service reliability as failures to meet the guarantees provided by the Australian Consumer Law ('ACL'). WEstjustice submits that ACL framework is impractical for protecting consumers in terms of service quality and reliability in the telecommunications market.

a) Consumer guarantees under the ACL

The ACL implies guarantees of 'due care and skill'⁸, 'fitness for particular purpose'⁹, and 'reasonable time for supply'¹⁰ into all consumer contracts for services. Reliability issues in telecommunications may be characterized as failing to meet one or a combination of these guarantees. For example, a failure to connect a service for a number of weeks may breach the guarantee for 'reasonable time for supply', whereas repeated service faults resulting in a patchy and unusable service may be either a breach of the requirement to deliver services with 'due skill and care', or a breach of 'fitness for purpose', or both.

⁵ Yvette Maker et al, *'From Safety Nets to Support Networks: Beyond 'Vulnerability' in Protection for Consumers with Cognitive Disabilities'* (2018) 41(3) University of New South Wales Law Journal, 818, 835.

⁶ See in general Ofcom, 'Automatic Compensation: Protection consumers from service quality problems' (Report, 2017), 19.

⁷ Discussion of these principles available in Consumer Policy Research Centre, 'Five preconditions of effective consumer engagement - a conceptual framework' (Report, 2018) and Office of Fair Trading UK, 'What does Behavioral Economics mean for Competition Policy?' (Report, 2010).

⁸ ACL, s 60

⁹ ACL, s 61

¹⁰ ACL, s 62.

Remedies for breach depend on whether the failure is considered 'major'. If a failure is 'major' a consumer may terminate the contract¹¹ or recover compensation for reduction of value of the service.¹² If a failure is not major, a consumer may seek that the supplier remedy it. If the non-major failure is not remedied, then the consumer may terminate his/her contract.¹³ Damages for reasonably foreseeable loss that result from a failure to meet a guarantee are also available.¹⁴

The ACL does not provide service fault rates or delay thresholds to guide when a service reliability matter constitutes a failure to comply with a guarantee for supply of services, or when that failure will constitute a major failure. Should a consumer and trader disagree about whether a breach has occurred, escalation of the matter to an independent decision maker (the TIO or a Court) is required. In this reactive framework, consumers are required to act to enforce their rights. This process can be time consuming, inconvenient and stressful, especially for vulnerable consumers who are less able to effectively self-advocate.

In the highly technical delivery of telecommunications, determination about delay reasonableness or recurring faults presents difficulties for both consumers and decision-makers in assessing the strength or merit of a 'breach of guarantee' claim. This problem is compounded by the fact that there is limited case law on the application of consumer guarantees in the supply of telecommunications.¹⁵ This lack of clarity results in a waste of resources on the part of each of consumers, traders and decision-making bodies in pursuing, arguing, and determining these disputes.

Section 65 of the ACL indicates the legislative intent that regulation alternative to the ACL consumer guarantees be developed in respect of supply of telecommunications. The Commonwealth Attorney-General's office has explained: "This provision allows the Minister to make regulations for exemption of supplies of gas or electricity or telecommunication services. Due to the special policy considerations that apply to these essential services, industry-specific legislation has been developed at both the Commonwealth and State and Territory levels to deal with consumer issues in relation to these supplies."¹⁶

A clearly codified framework of acceptable repair and connection timeframes would alleviate the need for complex and protracted technical and legal arguments. Removing ambiguity and simplifying the procedure would not only improve the complaint experience for consumers, but is likely to reduce operational costs for both providers and decision makers in arguing and reaching determinations.

We do not support the proposal that providers should be able to seek approval from the ACMA to offer services with different reliability timeframes on a product-by-product basis. We agree with ACCAN's submission that "A minimum standard provides fair and equal

¹¹ ACL, s 267(3)(a).

¹² ACL, s 267(3)(b).

¹³ ACL, s 267(2).

¹⁴ ACL, s 267(4).

¹⁵ Noted by ACCAN in its policy position on customer service and reliability standard 'A guarantee for the future' (2016), available via: <http://accan.org.au/our-work/policy/1166-future-guarantee>

¹⁶ Commonwealth of Australia Attorney-General's Department, 'The Australian Consumer Law: A guide to provisions' (2010), available at:

[file:///C:/Users/tess/Downloads/aclguidetoprovisions%20\(1\).pdf](file:///C:/Users/tess/Downloads/aclguidetoprovisions%20(1).pdf).

access to all consumers. One standard is simple for retailers to communicate, and for consumers to understand their rights. Furthermore, it reduces the burden on the regulator to monitor and enforce the standard, increasing the likelihood of compliance.” We further agree with ACCAN that, “Any reliability standards should be set following a public consultation process” and that, “enabling providers to submit products for approval to the ACMA would ... [subvert the] public consultation process.”

We support ACCAN's Recommendation 4: One set of minimum connection and repair timeframes to apply to all fixed line products without exceptions

5. Penalties v compensation: discrete schemes

Penalty and compensatory schemes are legally and philosophically discrete. A penalty scheme is punitive and directed at the wrongdoer; whereas a compensatory scheme is remedial and directed at the wronged party, compensating him/her for the loss he/she suffered.

We are concerned by the apparent conflation of these principles in both the consultation paper and accompanying background paper.

While compensation can play a dual role (remedial to consumers, while also effective as an incentive to industry¹⁷), penalties sought by a regulatory body punish the trader without providing individual consumer recourse.

Moreover, penalty regimes require pursuit of a trader by the regulator. An individual consumer affected by conduct in breach of the regulations cannot bring his/her own action for a penalty. Regulatory action is slow, reactive, and distant from the individual consumer who has already suffered loss. While the action may successfully drive industry change, the prospect of future industry change does little to compensate the consumers who suffered harm as a consequence of the original failure.

We strongly support that proposition that mandatory timeframes be accompanied by strong penalties available by regulator enforcement.

We separately submit that an automatic compensation scheme is necessary to adequately compensate consumers for harm suffered when mandatory timeframes are not met (and alternative or interim services are not provided).

6. The case for automatic consumer remedies

Even where the issue of whether or not a reliability failure constitutes a breach of acceptable standards is resolved by mandatory maximum timeframes, the matter of appropriate consumer remedies for breach remains complex. As set out at (2) above, the nature of harm

¹⁷ Notably, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* provides that damages for the purpose of developing a scale of damages for the CSG can include punitive damages (see s 114).

to consumers following reliability failures is unique to the telecommunications sector, and can include a range of pecuniary and non-pecuniary elements.

A. Contract termination for frequent or recurring faults

WEstjustice supports ACCAN's Recommendation 5: Include a specific provision in the consumer safeguards instruments that provides telecommunications customers the right to exit a contract without penalty on the grounds of recurrent faults.

While this right notionally currently exists under the ACL, enforcing or establishing that right involves a complex determination of questions of facts and law (see 4 above). Recurrent fault thresholds set by unambiguous direct regulation is needed to clarify when and how this right can be exercised.

B. Alternative or interim services

We agree with the proposal that alternative or interim services should be provided where mandatory timeframes cannot be met. However, we share ACCAN's concern that this may not be practically possible for all retail service providers, and will consequently be difficult to uniformly apply. As set out below, we are further concerned that no other remedy (namely, compensation) has been proposed for instances where a retailer fails to provide an alternative or interim service.

C. Compensation

We submit that missed appointment *and* pro rata compensation are necessary to remedy the harm suffered by consumers from reliability failures.

Compensation should be available to consumers where mandatory maximum timeframes/ minimum reliability standards are breached. WEstjustice is deeply concerned that, aside from 'missed appointments', this matter does not appear to have been canvassed or considered by the consultation paper. As pointed out by ACCAN, under this arrangement compensation available for consumers will be significantly less than the current CSG.

We note that the CSG already provides an exemption from making a damages payment where an interim or alternative service is supplied (see CSG Cl. 7). Despite this, there continue to be instances of prolonged disconnection where no alternative or interim service is provided, resulting in a CSG payment (see case study: Josie's story, as well as the Telstra CSG volume and payments information contained in ACCAN's submission at Table 5). Given that non-compliance occurs in circumstances where the compensatory incentive already exists, it is safe to assume that it would continue were the incentive to be removed.

We accordingly submit that the proposal that retailers provide consumers with an alternative or interim service where mandatory timeframes cannot be met is insufficient to protect consumers, and that pro rata compensation must be available where no alternative service is supplied.

i) Quantifying harm for damages

Consumers must be entitled to recover for the harm suffered when a breach of standards occurs, however the unusual nature of the harm associated with disconnection renders this process complex.

Ordinarily, damages for non-pecuniary loss are not available as a contractual remedy,¹⁸ though a relevant exception to this rule exists where damages for disappointment and distress are available when they relate to inconvenience caused directly by the breach of contract.¹⁹

Further, in order for non-pecuniary damages (if these are available at all) to be awarded, they must be proved and quantified. This places an onerous and impractical evidentiary burden on consumers.

Notably, the TIO position statement on compensation²⁰ clarifies:

1. TIO will generally only consider compensation claims for quantifiable amounts;
2. Where the TIO identifies that a complainant has experienced a high degree of frustration and inconvenience during the course of their complaint, the TIO may consider it appropriate for a service provider to offer a goodwill gesture to help resolve the complaint (in addition to resolution of substantive complaint issues); and
3. The TIO expects a complainant to substantiate their complaint about an unresolved claim for compensation with appropriate documentation.

An automatic compensatory regime accompanying the mandatory framework would address the issue of quantifying appropriate compensation by removing the burden on consumers to prove and quantify the diverse tangible and intangible consequences of a loss of service.

For CSG services, these considerations are currently balanced by the ACMA in development of the CSG scale of damages under s 117 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* ('TCPSSA'), which provides for both missed appointment, and pro rata compensation. Notably, the current scale of damages is significantly higher than a mere refund of the amount payable to the retailer for that period of service. We consider that this demonstrates reflection by ACMA of the complex harm experienced by consumers.

ii) Proposed compensation scales

a) *Compensation for missed appointments*

We strongly support the provision of automatic compensation for missed appointments, as proposed by the consultation paper.

¹⁸ Paterson, Robertson and Duke, *Principles of Contract Law* (Lawbook Co, 5th ed, 2015), 613 – 614.

¹⁹ See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

²⁰ Telecommunications Industry Ombudsman position statement: Compensation claims and the TIO (available at: https://www.tio.com.au/data/assets/pdf_file/0013/9013/Compensation-and-the-TIO.pdf)

WEstjustice support's ACCAN's Recommendation 2, that:

- a) There should be automatic compensation for missed appointments;
- b) Compensation for missed appointments should be \$100 as a baseline;
- c) The ACMA should have the flexibility to revise the compensation amount for missed appointments.

b) Pro rata compensation

We agree with ACCAN's proposition that current CSG compensation amounts be maintained and applied to the new mandatory maximum connection and repair timeframes (for broadband as well as fixed line services).

We further agree that that ACMA review of these figures is appropriate, given the increased scope of services for which the compensation would be available.

WEstjustice support's ACCAN's Recommendation 6, that:

- a) Customers receive automatic compensation for missed timeframes.
- b) Compensation amounts be set initially at current CSG levels for voice and broadband services.
- c) ACMA conduct a review to determine appropriate future compensation arrangements.

7. Making sense of reliability reporting

Despite our reservations about the ability of reliability reporting to drive industry change on its own, we support the general proposition that reliability-reporting outcomes are a necessary part of consumer safeguards, and that improved reporting will, to an extent, promote consumer choice.

In order to be practically useful to consumers, reliability data must be easily comprehensible and comparable. We agree with ACCAN's suggestion that information should be clearly and simply defined and standardized, and should be available in an easily searchable format, such as an online database.

We further agree with ACCAN's contention that reliability information is most useful to consumers when measured (and reported) at the local level.

We support ACCAN's Recommendation 7, that:

Network providers publish and report reliability information (including planned maintenance) by suburb and technology.

Please contact Tess Matthews on (03) 9749 7720 or at tess@westjustice.org.au if you have any questions about this submission.

Yours sincerely,

A handwritten signature in black ink that reads "Denis Nelthorpe". The signature is written in a cursive style with a large, prominent 'D' at the beginning.

Denis Nelthorpe AM
Chief Executive Officer
WEstjustice