



ACCAN response to Consumer Safeguards Review Part C / Choice and Fairness

Submission by the Australian Communications Consumer Action
Network to the Department of Infrastructure, Transport, Regional
Development and Communications

25 September 2020

V 1.1

(See correction note p.3)

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Correction note

V 1.1 updates the previous version in which data on page 14 was incorrect. The figures for time and cost to consumers and other references have been corrected.

Executive Summary

Telecommunications services are essential services.

There is an established and growing body of evidence that suggests that phone and internet access is vital to the functioning of communities and societies.^{1 2 3} A review of the Universal Service Obligation (USO) undertaken by the Productivity Commission found that telecommunications infrastructure and services play a fundamental role in the way Australians work, study, and participate in the economy.⁴ Similarly, the social and community significance of digital connectivity cannot be overstated, with over 90% of Australian young people reporting that losing access to their mobile phone would impact their day-to-day and social lives.⁵

Choice between providers and fair treatment by those providers are the key tenets of a well-functioning market that can deliver trusted, available and inclusive products and services.⁶ However, the complex patchwork of telecommunications consumer protections is not robust enough to reflect the essentiality of telecommunications, nor the importance of keeping people connected. This is due to a variety of factors, including:

- The insufficient weighting of consumer interests and needs in rules development,
- Indirect and light-touch rules enforcement, and
- Information asymmetries between providers and their customers, particularly in relation to the nature of services, and providers' regulatory obligations.

Substantial reform is necessary to re-shape the telecommunications environment into one that supports consumers to make informed and appropriate choices about their phone and internet services, and one in which all communications consumers are treated fairly. Balance between consumer need and industry interests must be restored to this end. If choice and fairness are to be better supported in the telecommunications market, information asymmetries, market concentration, poor customer service, and the inadequate treatment of customers experiencing vulnerability are systemic issues that must be addressed through robust policy interventions. Failure to do so will cost consumers, industry and government dearly in financial and non-financial terms.

¹ Barraket et al. 2019, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2019*, RMIT University and Swinburne University of Technology, Melbourne, for Telstra https://digitalinclusionindex.org.au/wp-content/uploads/2019/10/TLS_ADII_Report-2019_Final_web_.pdf

² Walton et al. 2013, 'A digital inclusion: Empowering all Australians', in *Australian Journal of Telecommunications and the Digital Economy*, vol. 1, no. 1, https://telsoc.org/sites/default/files/tja/pdf/ajtde_2013_1_1_09-walton_kop_spriggs_fitzgerald.pdf

³ World Economic Forum 2020, *Accelerating Digital Inclusion in the New Normal*, http://www3.weforum.org/docs/WEF_Accelerating_Digital_Inclusion_in_the_New_Normal_Report_2020.pdf

⁴ Productivity Commission 2017, *Telecommunications Universal Service Obligation*, Report No. 83, Canberra, <https://www.pc.gov.au/inquiries/completed/telecommunications/report/telecommunications.pdf>

⁵ Lonergan Research 2020, *Youth Check-In: Exploring Young People's Experiences of Phone and Internet Services*, prepared for ACCAN (unpublished)

⁶ Consumer Policy Research Centre 2018, *Five Preconditions of Effective Consumer Engagement – A Conceptual Framework*, https://cprc.org.au/wp-content/uploads/Preconditions_Full_Report.pdf

Our submission argues that:

- Telecommunications are essential services, and telecommunications consumer protections must reflect that essentiality,
- The telecommunications market has failed to adequately support choice and fairness,
- Changes to the contents, development and enforcement of telecommunications rules need to be made, and
- Many of the legacy obligations currently in place continue to deliver benefits for consumers, but obligations of limited relevance may be removed. Some obligations may be better addressed in general consumer protections rules like industry standards, rather than rules-based legislation.
- Telstra's low-income measures should continue. A separate review of telecommunications affordability provisions should be undertaken by the Government.

In preparing for this submission, ACCAN formally consulted with its members and other community organisations, as well as segments of the telecommunications industry and Government.

The first part of this submission will offer general comments and recommendations on the issues of choice and fairness in telecommunications. The second part will address the discussion questions outlined in the Part C: Choice and Fairness Consultation Paper (hereafter, **the Paper**), and will refer back to Section 1 where appropriate.

List of recommendations

Recommendation 1: The ACMA should more frequently and extensively audit providers' customer service and complaints handling arrangements, and higher penalties for non-compliance should apply.

Recommendation 2: Telecommunications consumer protections surrounding managing vulnerability should be reviewed by the ACMA in consideration of best practice approaches in other essential services.

Recommendation 3: The ACMA should develop and administer a telecommunications retail licensing scheme, binding upon all RSPs in the residential and small business market.

Recommendation 4: A trusted and independent party should be resourced to develop and maintain an online plan comparison tool about telecommunications services to support consumer choice.

Recommendation 5: A directly regulated Telecommunications Consumer Protections Framework must be established. Matters related to consumer choice, competition, fairness, and managing access to services should be regulated through a suite of directly enforceable service provider determinations and standards.

Recommendation 6: Matters to do with consumer protections must be dealt with by directly enforceable regulatory instruments developed by the ACMA.

Recommendation 7: Changes to the code development process should be made to support the efficiency and the effectiveness of code-making.

Recommendation 8: Industry codes and guidelines should be reserved for inter-operator and technical matters, and secondary issues not directly related to providers' retail and contractual relationships with customers.

Recommendation 9: Changes to the code development process should be made through ACMA requirements for code registration and the ACMA code reimbursement scheme. This would support better efficiency and effectiveness of industry codes and guidelines of interest to consumers.

Recommendation 10: Constraints to the ACMA's ability to make industry standards should be adjusted to allow for more timely and direct regulatory responses.

Recommendation 11: The enforcement process should be adjusted by the removal of the notification to comply requirement and allow ACMA to act on identified breaches as a first step, to support timely and direct enforcement.

Recommendation 12: RSPs' reporting requirements should be expanded to include public reporting on financial hardship, disconnections, credit management, customer service and complaints data where individual RSPs are named.

Recommendation 13: Penalties for infringements of consumer protections rules must be in line with comparable industries to reflect the essentiality of telecommunications, and provide a genuine disincentive for consumer harm through non-compliance.

Recommendation 14: Legacy obligations of enduring relevance should remain enforceable rules.

Recommendation 15: Telstra's obligation to provide low income measures should continue.

Recommendation 16: A comprehensive review of telecommunications affordability provisions is needed to assess the effectiveness of existing measures, and address new ways to deliver affordable services to people on limited incomes.

Recommendation 17: Telstra should be required to offer a basic mobile service retailing at less than \$30 per month, with generous data inclusions, in recognition of its monopoly status in regional Australia.

1. General comments

The Australian Communications Consumer Action Network (**ACCAN**) thanks the Department of Infrastructure, Transport, Regional Development and Communications (**the Department**) for the opportunity to comment on its review of choice and fairness in the telecommunications environment. ACCAN strongly supports the majority of proposals and principles outlined in the Paper.

1.1. Telecommunications services are essential services

As of June 2019, 89% of Australian adults accessed the internet, with 74% of adults going online three or more times a day.⁷ There were 7.8 million fixed voice services in operation, and 35.8 million mobile data and voice services in operation.⁸ Australians wholly rely on their phone and internet connections for a multitude of functions including:

- Work and education,
- Access to government services,
- Economic participation, like engaging in e-commerce and banking,
- Physical and mental health service delivery,
- Social and community participation, and
- Emergency services and essential supports for people with disability.

ACCAN's work focuses on the significance of connectivity. Our mission is to advocate for communications products and services that are trusted, inclusive and available; this is based on the fundamental premise that all people must be able to choose to be connected.⁹

What's the cost to consumers of not being connected?

A person is digitally excluded when they do not have the opportunity to access and use Internet-based digital technology and reap its full benefits. Applying a methodology for valuing time spent by commuters, recent research undertaken for ACCAN approximated that in 2019, the average Australian lost \$25.38-\$66.23 in time and out-of-pocket costs through interacting with government services in a face-to-face setting, rather than online.¹⁰

⁷ Australian Communications and Media Authority 2020, *Australian Communications and Media Authority Communications Report 2018-2019*, ACMA, <https://www.acma.gov.au/sites/default/files/2020-09/Communications%20report%202018-19.pdf>

⁸ Ibid.

⁹ Australian Communications Consumer Action Network 2016, *The Connected Consumer*, policy position, <http://accan.org.au/our-work/1245-the-future-of-consumer-focused-communication-services>

¹⁰ Ward, M 2020, *The Economic Costs of Digital Exclusion*, prepared for ACCAN with funding from Google, unpublished.

Conversely, it found that:

- Working from home one day a week creates a saving equivalent of \$1,296.62 - \$2,132.12 per annum, through time savings and out-of-pocket expenses.
- The average Australian can save \$19.15 – \$51.68 by replacing a face to face doctor’s appointment with a telehealth appointment.

What are the benefits for government, the private sector and individuals in online service delivery?

A report by Deloitte estimates that the benefit of moving from 60% to 80% of online delivery of government services is worth \$17.9 billion in government savings over a ten-year period, while costing \$6.1 billion in new ICT and transitional arrangements.¹¹

Other economic benefits associated with high broadband uptake have been well-established, including:

- increases in average personal incomes of 0.85% GDP per capita,¹²
- creation of new businesses, with 1900 to 5400 businesses formed and an additional 3400 to 6400 individuals to create new employment opportunities for themselves in areas with high NBN rollout,¹³
- increased tax revenues and reduced unemployment through higher economic activity,
- potential cost savings for government in the order of \$20.5 billion,¹⁴ and
- reduced costs for individuals and households when accessing online services.

This list is not exhaustive, but demonstrates the primary role that connectivity should continue to play in the Australian economy.

Recent case studies demonstrating the essentiality of communications

COVID-19 lockdown

The COVID-19 pandemic prompted an unprecedented change in the way people work, learn, access services and interact in Australia. Towards the end of March 2020, as cases and community transmissions of the virus grew, many people were forced to stay at home and go online for essential activities. The importance of connectivity, and the extreme risks to health and wellbeing experienced by those with no or limited connectivity, has been well documented by media and grey literature.

¹¹ Deloitte Access Economics 2015, *Digital government transformation*, <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-digital-government-transformation-230715.pdf>

¹² Greenstein, S & McDevitt, R 2012, *Measuring the Broadband Bonus in Thirty OECD Countries*, OECD Digital Economy Papers, <https://www.oecd-ilibrary.org/docserver/5k9bcwkg3hwhf-en.pdf?expires=1600668580&id=id&accname=guest&checksum=24A5CFEAA8E1E9D5FDE22E3E547E388E>

¹³ NBN Co 2018, *Connecting Australia: A report by AlphaBeta Consulting*, http://www.connectingaustralia.com.au/pdf/Connecting_Australia_Report.pdf

¹⁴ Deloitte Access Economics 2016, *Digital Government Transformation*, <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-digital-government-transformation-230715.pdf>

During March, ACCAN commissioned a survey which revealed over half (51%) of Australians were working or studying from home because of COVID-19.¹⁵ The majority (97%) of people working or studying from home required the internet to do so.

Andy Penn, CEO of Telstra, has commented that the COVID-19 lockdown has forced the pace of digital connectivity, arguing that Australia has made more progress in the last three months than it has in the previous five years when it comes to digital engagement and online services.¹⁶ The core role that communications have played in the lockdown has exposed and exacerbated pre-existing inequalities surrounding digital skills, device access, and access to connectivity.¹⁷

During this time, ACCAN has heard from many consumers struggling to afford a home broadband connection. Additionally, we became aware of consumers who were disconnected or faced disconnection due to financial hardship during the COVID-19 lockdowns, with limited supports from their provider, resulting in significant detriment.

Case study: Disconnected consumer during COVID-19

Sally (name changed) runs a small business and has a home broadband service with Belong. She began to lose business and experience financial hardship in May 2020 due to the COVID-19 pandemic. 12 days after missing a payment, Belong disconnected her service without warning. She immediately contacted Belong to inform it that she was experiencing financial hardship, and needed help paying her bills. She couldn't search for jobs without her internet connection, and had difficulty organising Centrelink payments. Belong told her that the service would be reconnected if she paid the amount owed, a response which is in breach of the Telecommunications Consumer Protections (TCP) Code. Belong said its system disconnects customers automatically due to non-payment. Sally made a formal complaint to Belong and her service was reconnected.

Natural disasters and emergencies: 2019-20 bushfire season

Public safety is paramount, particularly during natural disasters, and the resilience of communications infrastructure can help to protect members of the community. The 2019-20 bushfire season was an unprecedented natural disaster that showcased the essentiality of communications for protecting life and property. Access to emergency calling, public payphones, and NBN Co's roaming satellite hotspot truck, the 'Road Muster', were all essential components for keeping people connected to emergency services, news sources, friends and family members.¹⁸

¹⁵ Lonergan 2020, *ACCAN Express Omnibus*, unpublished

¹⁶ Boyd, T 2020, *Pandemic shows up digital divide*, Australian Financial Review, <https://www.afr.com/chanticleer/pandemic-shows-up-digital-divide-20200709-p55alj>

¹⁷ Wester'ly Coalition 2020, *Wester'ly 5 Key Asks*, https://uploads-ssl.webflow.com/5eb9ede557871367e7944ea9/5f026cfbadc66d7f1e886a6a_Wester%27ly%20Briefing%20Paper.pdf

¹⁸ IT News 2020, *NBN Co sends Road Muster truck to NSW south coast*, <https://www.itnews.com.au/news/nbn-co-sends-road-muster-truck-to-nsw-south-coast-536085>

1.2. The telecommunications market does not support choice and fairness

Despite the proven essentiality of telecommunications, there are structural and systemic failures in the way phone and internet services are delivered and regulated that have a severe impact on choice and fairness in the telecommunications market. This is due to the following underlying market conditions which indicate that a changed approach is required.

Information asymmetries and issues with disclosure

Information asymmetries are created when one party has more information or knowledge than another party during an exchange, like a financial transaction. There is consensus that where information asymmetries exist, consumer markets cannot be truly competitive. This is because consumers experience difficulty exercising choice and will likely bear additional financial and non-financial costs.¹⁹

Deep information asymmetries exist between telecommunications providers and consumers. This is a result of the increasing complexity of communications services and the market, coupled with unsatisfactory levels of customer service as demonstrated by Telecommunications Industry Ombudsman (TIO) complaint levels, ACMA reports of complaints received by telecommunications providers, research, and regular feedback from ACCAN members.^{20 21 22}

The impact of information asymmetries that ACCAN sees on a routine basis include:

- The complex nature of telecommunications products and services, for example, broadband speeds or contract terms,
- Difficulties for consumers and small businesses obtaining services that are most appropriate for their needs,
- Lack of clarity about the true financial cost of services, like early contract cancellation fees,
- The time it takes to set up or connect services,
- Providers' regulatory obligations (for example, to do with complaints handling or dealing with financial hardship), and
- Providers' internal policies and procedures.

Considering the role of information asymmetries when assessing consumer protections is important, because it impacts consumers' ability to exercise choice, and creates opportunities for providers to treat consumers unfairly.

¹⁹ Colton RD 1993, 'Consumer information and workable competition in telecommunications markets', in *Journal of Economic Issues*, vol. 27, no. 3, pp. 775-792.

²⁰ Telecommunications Industry Ombudsman 2019, *Telecommunications Industry Ombudsman Annual Report 2018-19*, TIO, <https://www.tio.com.au/sites/default/files/2019-09/TIO%20Annual%20Report%202018-19.pdf>

²¹ Colmar Brunton 2018, *Can You Hear Me? Ranking the customer service of Australia's phone and internet companies*, prepared for ACCAN, <https://accan.org.au/our-work/research/1523-can-you-hear-me-ranking-the-customer-service-of-australia-s-phone-and-internet-companies>

²² Roy Morgan, *Net Trust Score Monitor June 2019*, <http://www.roymorgan.com/findings/8199-roy-morgan-risk-monitor-november-2019-201911110700>

Traditionally, telecommunications consumer protections have managed information asymmetries through disclosure obligations. For example, through the provision of a Critical Information Summary (CIS). There is a growing body of evidence that demonstrates how disclosure alone is not a suitable way to manage information asymmetries and reduce resulting consumer detriment.

This is because:

- Disclosure generally does not accommodate people who may have difficulty interpreting information as it is presented, due to vulnerabilities, hardship, language barriers or disability,
- Disclosure does not account for ‘real-world decision-making’, and instead ‘competes’ for consumer attention,^{23 24 25}
- Disclosure generally adopts a ‘one size fits all’ approach to communicating with customers.²⁶

An example of the impact of information asymmetries on choice and fairness comes from our consultations with the disability sector. People with disability often experience deep barriers due to inadequacies in the way information is provided. Many provider websites are not wholly accessible, and often CIS documents cannot be read by screen readers. Some providers are unfamiliar with communicating appropriately with people with disability, or create barriers for customers when appointing a representative. This means that many consumers with disability have difficulty exercising choice, and may be subject to unfair treatment by providers through the existence of information asymmetries.

Market concentration

Market concentration heavily impacts the choices available to consumers, and costs them dearly in financial and non-financial terms.

Wholesale arrangements

Developments in the provision of home broadband services mean that NBN Co is the monopoly wholesaler for most broadband services and is able to dictate its own terms regarding product design, price and network performance. These conditions also apply in areas where telecommunications infrastructure is operated by a non-NBN wholesaler, for example, in the Telstra Velocity Network footprint. Retail providers are limited to whichever products, services, and service standards exist at a wholesale level.

²³ Consumer Policy Research Centre 2020, *The Experiences of Older Consumers: Towards Markets That Work For People*, https://cprc.org.au/wp-content/uploads/Markets-for-People-Report_2July2020_compressed-1.pdf

²⁴ Australian Securities and Investment Commission (ASIC) and Dutch Authority for the Financial Markets (AFM 2019), *Disclosure: Why It Shouldn't Be the Default*, <https://download.asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf>

²⁵ Harrison et al. 2016, *Confident, But Confounded: Consumer Comprehension of Telecommunications Agreements*, prepared for ACCAN, https://accan.org.au/files/Reports/Confident%20Confounded_accessible%20WEB_03.11.16.pdf

²⁶ Ibid.

Case study: Consumer experiences of Fibre-to-the-Node (FTTN) NBN connectivity

Susan (name changed) lives with her partner and school-aged children in south-east Queensland. Her partner works from home and her children rely on the internet to complete their homework. In October 2019, Susan and her family migrated their service to the NBN and took out a \$70 50/20 Mbps service via FTTN. Susan soon realised that despite paying for a 50/20 Mbps service, her service speeds were averaging a 15-17 Mbps download speed and a 1-3 Mbps upload speed. This had a major impact on her and her family's ability to use their connection.

Susan contacted her provider to complain. Her provider investigated the issue and informed Susan that her area was in need of a network upgrade, as her FTTN connection couldn't sustain speeds higher than what she was receiving. It told her that NBN Co was aware of the issue and needed to install micro node which would require groundwork, and this was planned for September 2021. Susan's provider offered her a discounted service, which Susan took. Susan has no choice but to wait until her service is upgraded in order to get the service speeds she and her family require.

There are other areas in which wholesale market concentration contributes to consumer detriment. Wholesale pricing structures squeeze the retail margins of smaller providers in particular, meaning there are limitations to the level of support (for example, financial hardship measures such as debt waivers) that small providers can offer customers. These issues could be alleviated by NBN Co agreeing to a permanent financial hardship or relief waiver arrangements with retail service providers.

Retail arrangements

Telstra retains what is essentially a monopoly over fixed voice and mobile services in large areas of regional Australia. Our regional and remote members describe immense frustration with the price premiums regional, rural and remote consumers bear through heavy reliance on Telstra. This reliance is twofold: firstly, for many remote consumers, Telstra is generally the only available provider for mobile and fixed voice services, particularly in the NBN satellite footprint. Secondly, due to the history of Telstra's monopoly status and a smaller number of providers servicing the regions, some consumers are simply unaware of other providers in the market – another example of information asymmetry, and another factor impacting choice and competition. This issue is somewhat relevant to the other two dominant mobile network operators, Optus and TPG Telecom (previously Vodafone). ACCAN receives feedback from members that many consumers are not aware of smaller, often pre-paid, Mobile Virtual Network Operators (**MVNOs**). Alternatively, some consumers on limited incomes are required to take out a service with a major provider because they need a handset on a payment plan, and cannot afford one upfront.

Even when consumers are aware of other providers in the market, they do not necessarily have access to accurate information regarding mobile coverage. This information asymmetry maintains Telstra's monopoly power as the mobile provider with the largest footprint, as consumers would be unwilling

to commit to an MVNO which is unable to guarantee them coverage. Telstra's monopoly power has resulted in less choice and higher price for consumers. This is evident as there are just 8 plans under \$40 on Telstra's network, compared to 46 using Optus and Vodafone's networks.²⁷ Low income consumers living in Telstra-provisioned areas have significantly less choice.

Customer service and complaints

As highlighted in the Paper, good customer service remains the exception rather than the rule in telecommunications. The Paper details the parlous rates of complaints about phone and internet services. This is demonstrable evidence of the extent to which the existing consumer protections regime has failed to safeguard consumers.

These numbers are expected to climb due to the onset of the COVID-19 pandemic. ACCAN has significant concerns about the detriment consumers in vulnerable circumstances have been and are experiencing when dealing with providers' customer service during the pandemic. A nation-wide COVID-19 survey run by the Consumer Policy Research Centre found that in August 2020, 5.7 million Australians reported having a recent negative experience with their telecommunications provider, up by 1.6 million from July.²⁸ The most commonly reported problems by consumers when contacting telecommunications providers included long wait times (17%), unhelpful service (9%), difficulty navigating the website or phone system (8%) or a general lack of ability to resolve challenges (7%).

What does poor customer service cost consumers?

Recent research undertaken by ACCAN found that between February 2019 and February 2020, consumers spent 7.6 million hours in contact with their telecommunications provider in order to resolve issues.²⁹ Where the data is available, it shows that a large proportion of the time is spent on hold.³⁰ Using a survey which showed the average time consumers spent in contact with their provider to resolve issues,³¹ and previous research which placed a value on consumers' time,³² ACCAN estimated that the time consumers spent trying to resolve issues with their provider cost between \$106 - \$132 million between February 2019 and February 2020.³³

A systemic complaints handling issue ACCAN has become aware of through direct feedback from consumers is some providers' unwillingness to escalate issues as formal complaints. This is exacerbated by consumers' lack of awareness about providers' obligations when dealing with complaints.

²⁷ Bureau of Communications and Arts Research 2020, *Affordability of communications services for low income households* <https://www.communications.gov.au/publications/affordability-communications-services-low-income-households>

²⁸ Consumer Policy Research Centre 2020, *August Snapshot*, https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19_AUGUST-RESULTS-SNAPSHOT_21Sept2020.pdf

²⁹ ACCAN, 2020, *The Cost of Still Waiting*, unpublished.

³⁰ Colmar Brunton, 2020. *Still Waiting... Costing wait times for telecommunications consumers*, https://accan.org.au/files/Submissions/2020/Still%20Waiting_v1.1.pdf

³¹ Ibid.

³² ACCAN & Synergies 2019, *Please hold: costing telco customer wait times*, <https://www.synergies.com.au/wp-content/uploads/2019/08/Public-report-Please-hold-costing-telco-customer-wait-times.pdf>

³³ ACCAN, 2020, *The Cost of Still Waiting*, Unpublished

Case study: Regional consumer left without reliable service for 4 months

Amanda (name changed) is an iiNet phone and internet customer living in the Perth hills area. She contacted iiNet at the end of 2019 to switch over to the NBN. When Amanda switched, she experienced extremely unreliable phone and internet service. Her internet dropped out frequently, with dropouts lasting from a few hours to several days at a time. Her fixed phone service wasn't working at all, and she had no mobile coverage in her home. Frustrated, she contacted iiNet multiple times to complaint about her unreliable service over a 4-month period, but the issues persisted. At no point did iiNet offer to treat her issue as a formal complaint, or refer her to the TIO. Amanda didn't know she could make a formal complaint, and kept contacting iiNet for technical assistance.

One morning, Amanda realised that her infant daughter was having breathing difficulties. Her phone connection, VoIP via the NBN, didn't work, and the Perth suburb she lives in has very limited mobile coverage, so she wasn't able to call 000. Luckily, she was able to apply first aid.

For a total of four months, Amanda experienced constant internet dropouts and no phone service, with no mobile coverage to rely on. Despite contacting iiNet numerous times, her issue was never escalated to an internal complaint.

Complaints handling rules are adequately set out in the ACMA Complaints Handling Standard. However, case studies like this provide evidence of the need for greater regulatory oversight and auditing of providers' customer service, and higher penalties for non-compliance with consumer protections rules to provide a genuine disincentive for breaches.

Recommendation 1: The ACMA should more frequently and extensively audit providers' customer service and complaints handling arrangements, and higher penalties for non-compliance should apply.

Managing customers experiencing vulnerability

What does this evidence say about vulnerability?

Vulnerability can arise from personal circumstances or market failures, and can affect any person at any time.³⁴ Connection to essential services is even more important for people in vulnerable circumstances. Regulators and service providers play an important role in managing vulnerability by

³⁴ Consumer Policy Research Centre 2019, *Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator*, <https://cprc.org.au/wp-content/uploads/Exploring-regulatory-approaches-to-consumer-vulnerability-A-CPRC-report-for-the-AER.pdf>

developing practices, products and services that seek to curtail hardship, rather than compound it or create additional problems.³⁵

There are a variety of best practice responses to consumer vulnerability available to regulators and essential service providers, whether this vulnerability is due to:

- Short-term or chronic financial hardship,
- Fleeing domestic and family violence,
- Experiencing physical and/or mental health issues,
- Living with disability, and
- Inequalities stemming from cultural and linguistic diversity.

Best practice responses by regulators and essential service providers to reduce consumer vulnerability include:

- **inclusive design**: where products and services are flexible and easy to understand, providers are clear and tailored in their communication, and providers make proactive contact about suspected vulnerability,
- **product design and intervention powers**: where certain product design elements (for example, inclusivity as described above) is mandated,
- **best interests and clear advice obligations**: where providers are required to provide clear advice and act with the customer’s best interests as a priority,
- **default and/or basic offers** to limit customer confusion, and
- **market literacy schemes**.³⁶

What happens in practice?

Regular feedback from ACCAN members suggests that many phone and internet providers inadequately manage customers experiencing vulnerability. This is attributable to two causes.

Firstly, existing consumer protections allow a great deal of flexibility of providers’ behalf in terms of the assistance measures they offer their customers. The TCP Code allows providers to choose which supports are offered in relation to financial hardship, and the needs and best interests of the vulnerable customer need not be taken into account.³⁷ More detailed practices for managing vulnerability are contained in non-enforceable guidelines, like IGN 017: Authorised Representatives and Advocates, or IGN 013: Sales Practices and Credit and Debt Management.

Secondly, there is evidence of routine non-compliance with obligations and guidelines surrounding dealing with vulnerability. ACCAN regularly receives case studies and direct feedback from consumers who have not been treated in accordance with financial hardship, credit management, or other customer support obligations under the TCP Code. It is unclear what impact guidelines have in practice.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Communications Alliance 2019, *C628:2019 Telecommunications Consumer Protections Code*, part 7.2.2, p. 55, https://www.commsalliance.com.au/__data/assets/pdf_file/0011/64784/TCP-C628_2019.pdf

Case study: The impact of poor selling practices on vulnerable consumers³⁸

Lynn (name changed) is an Elder at an Aboriginal community in the Northern Territory. She lives on the disability support pension and is homeless due to a housing shortage in her community. Lynn speaks limited English, her first language being Alyawarr. She sought out a mobile phone at the Alice Springs Telstra store and was signed up to a smartphone, tablet and platinum subscription due to feeling pressured by the in-store sales representative. The terms and conditions of the contract were not explained to her. Within a year, Lynn's Telstra bill had reached \$9,000. Her mobile phone was disconnected and Telstra demanded that the full contract was payable. Lynn saw a financial counsellor who took on her case and successfully sought a debt waiver.

The ACMA's report into customer financial hardship in the telco industry reveals concerning trends regarding ways in which providers manage customers experiencing payment difficulty:

- 45% of telco customers in financial hardship in the 2018-2019 FY did not successfully meet their financial hardship arrangements.
- 23.5% of financial hardship customers had their services disconnected due to non-payment.
- As of June 2019, 74% of financial hardship customers were on payment plans.
- As of June 2019, 45% of payment plans involved monthly pay installments of \$150 or greater. This amount is unaffordable for many people experiencing payment difficulty.³⁹

As with customer service, there is a clear need for greater regulatory oversight and auditing of providers' approaches to vulnerability, and higher penalties for non-compliance with existing rules to disincentivise non-compliance. The appropriateness of obligations surrounding financial hardship must also be reviewed. ACCAN supports an approach similar to the Victorian Essential Services Commission's payment difficulty framework.⁴⁰

Recommendation 2: Telecommunications consumer protections surrounding managing vulnerability should be reviewed by the ACMA in consideration of best practice approaches in other essential services.

³⁸ Case study taken from MoneyMob Talkabout 2020, *Telecommunications Debt in Rural and Remote Indigenous Central Australian Communities*, (unpublished)

³⁹ Australian Communications and Media Authority 2020, *Customer financial hardship in the telco industry: State of play report 2018–19*, <https://www.acma.gov.au/sites/default/files/2020-03/Customer%20financial%20hardship%20in%20the%20telco%20industry%20State%20of%20play%20report%202018-19.pdf>

⁴⁰ Essential Services Commission 2017, *Payment Difficulty Framework*, <https://www.esc.vic.gov.au/sites/default/files/documents/payment-difficulty-framework-final-decision-20171009.pdf>

1.3. Changes to the contents and enforcement of telecommunications consumer protections rules are needed

Section 2 of this submission sets out ACCAN’s response to the Department’s consultation paper. We have made additional points in this section below to address matters not directly covered by the Paper.

Market stewardship and direct regulation

Consumer protections rules need to reflect the essentiality of telecommunications.

In complex markets, regulators and governments need to act as market stewards. Market stewardship involves policymakers and regulators steering or shaping markets to ensure those markets deliver good outcomes for consumers. The CPRC writes:

Market stewards cannot continue to rely on compliance with disclosure requirements as the default consumer protection to address information asymmetries and ensure firms provide fair products and services. Nor can market stewards necessarily rely on a critical mass of active consumers to ensure good outcomes for the whole consumer base.⁴¹

Instead, using direct policy and regulatory intervention, market stewards create marketplaces that are fair, accessible and reflect real-world decision-making. Consumers are assisted to make the most appropriate choices about services, and those who have difficulty engaging with the market are supported.⁴²

It is essential that the Department and the ACMA work together to adopt a market stewardship approach to telecommunications in order address the serious and complex problems described in the Paper. As expressed by the Department’s own conceptual framework for regulating harms in the consumer sector:

Black letter law is appropriate where there is a compelling policy reason for regulation, usually related to protection of the public or industry from harm, and where a legal foundation is required for enforcement measures in the case of non-compliance. It is also appropriate when industry has little interest in controlling risks (or cannot control it easily) or where industry consensus is uncertain without regulatory intervention.⁴³

It is ACCAN’s view that a need for such intervention has been established due to the essentiality of phone and internet services, and the industry’s failings to support choice and fairness, as evidenced in the preceding sections. Consumer issues concerning choice, competition, fairness and access to

⁴¹ Consumer Policy Research Centre, *The experiences of older consumers: towards markets that work for people*, https://cprc.org.au/wp-content/uploads/Markets-for-People-Report_2July2020_compressed-1.pdf

⁴² Ibid.

⁴³ Department of Communications 2014, *Regulating harms in the Australian communications sector: Observations on current arrangements*, <https://www.communications.gov.au/file/824/download?token=drQ4TZSr>

services should be addressed through ‘objectives based’ administered law – that is, through a suite of directly regulated service provider determinations and standards.

What happens in energy?

Consumer protections in the energy sector are largely regulated via the National Energy Customer Framework (NECF). This framework has been adopted in Australian Capital Territory, Tasmania, South Australia, New South Wales and Queensland, and is closely aligned with Victorian arrangements.

The NECF was developed with the view that energy is an essential service, and is comprised of a suite of directly regulated instruments that cover issues like:

- Minimum terms and conditions for retail contracts,
- Billing arrangements,
- Rules about disconnections and financial hardship, and
- The provision of consumer information.

A similar approach should be adopted in the telecommunications sector due to the essentiality of phone and internet services, and the severity of past and current telecommunications consumer detriment. ACCAN supports the establishment of a Telecommunications Consumer Protections Framework that incorporates the core components of the TCP Code, and the issues captured within existing service provider determinations and standards.

Retail licensing scheme

A key theme emerging from ACCAN’s consultation with members and industry experts is that the low visibility of industry providers creates difficulties when enforcing consumer protections rules and educating providers about their obligations.

While a licence scheme exists for carriers of telecommunications services, there is no licensing requirement for anyone seeking to become a retail phone and internet service provider. This means that there is no comprehensive register or consolidated list of retail service providers (**RSPs**) in the telecommunications sector. This creates significant administrative challenges with potential consequences for consumers, for example, information about the number of RSPs is incomplete. Communications Compliance’s published list of RSPs that have lodged attestation certificates does not comprehensively cover all RSPs in the market.⁴⁴ This creates difficulties for the ACMA in ensuring all phone and internet service providers are aware of and are following their regulatory obligations. There is also no way for the TIO to ensure all eligible phone and internet service providers are members of the TIO external dispute resolution (EDR) scheme. At the same time, the TIO has no power to handle complaints about non-TIO members. Additionally, there are no barriers to enter the phone and internet market as an RSP. A potential RSP is not required to demonstrate it is able to provide communications services before selling services directly to consumers. This means there are limited means to curtail illegal phoenixing activity and ‘fly-by-night’ providers in their early stages.⁴⁵

⁴⁴ Communications Compliance 2019, *CSP Compliance*, <https://commcom.com.au/compliance/#compliance>

⁴⁵ Telecommunications Industry Ombudsman 2018, *Submission to the 2018 Treasury Consultation on Reforms to Combat Illegal Phoenix Activity*, <https://www.tio.com.au/sites/default/files/2019-05/20181002-TIO-Submission-Reforms-to-combat-illegal-phoenix-activity.pdf>

A retail licensing scheme is a viable solution to these problems. Under a retail licensing scheme implemented by the ACMA, reasonable licensing conditions could be applied which would require providers to demonstrate their ability to provide services. While a licence to operate within the telecommunications market should be a requirement, the cost of a licence should not be a barrier to market entry. A licensing scheme should not be a revenue raising activity, but rather a strengthening of the ACMA's regulatory regime and the effectiveness of rules enforcement.

It is ACCAN's view that the costs associated with developing and running a retail licensing scheme would be largely offset by the time and resourcing saved seeking out non-compliant providers. Additionally, the costs to consumers would be greatly reduced, as all retail service providers would be required to demonstrate their ability to supply services.

Recommendation 3: The ACMA should develop and administer a telecommunications retail licensing scheme, binding upon all RSPs in the residential and small business market.

Information service

Another key theme that emerged from our consultations was the need for an unbiased and independent information and plan comparison tool for phone and internet products and services, similar to energymadeeasy.gov.au. This would assist in reducing persistent information asymmetries experienced by communications consumers.

Choice and competition in the mobile market have delivered good and affordable options for consumers in metropolitan and some regional areas. However, ACCAN is aware that many consumers do not shop around due to a lack of awareness about the options available to them. As the Paper notes, telecommunications providers are some of the least trusted companies in Australia, and regular feedback to ACCAN indicates that many consumers do not trust the information given to them by providers. The prevalence of poor selling practices and misinformation in the sector are legitimate reasons for these concerns.^{46 47}

The CPRC writes:

Where the marketplace itself is inadequate, consumers face excessive search, comparison and switching costs ... The development of online comparison tools and switching services has somewhat addressed these costs. However, while online digital comparison tools and platforms have the potential to partly address these deficiencies, the profit motive and incentives of commercial intermediaries may not align with consumers' incentives, skewing the marketplace and potentially

⁴⁶ Bainbridge, A 2019, *Telstra facing investigation over selling 'unaffordable contracts' to vulnerable Australians*, ABC News, <https://www.abc.net.au/news/2019-06-25/telstra-hits-vulnerable-australians-with-extra-data-charges/11173362>

⁴⁷ Australian Competition and Consumer Commission 2019, *Optus to pay \$6.4 million for misleading NBN disconnection claims*, media release, <https://www.accc.gov.au/media-release/optus-to-pay-64-million-for-misleading-nbn-disconnection-claims>

misleading consumers. Independent or government run digital comparison tools can address misaligned incentives.⁴⁸

ACCAN members express overwhelming support for a trusted independent plan comparison tool that would address consumer knowledge gaps and provide accurate and customisable information about the availability and price of various phone and internet services.

The *Energy Made Easy* price comparison tool relies on data provided by energy companies about every plan they offer. Energy companies must develop a Basic Plan Information Document (**BPID**) and the Detailed Plan Information Document (**DPID**), which accompany each energy plan on the market.⁴⁹ This is submitted to the Australian Energy Regulator for inclusion in the searchable data base.

These arrangements could be mirrored in telecommunications. Small changes to CIS requirements could bring greater consistency and feed into a telecommunications-specific plan comparison tool.

Recommendation 4: A trusted and independent party should be resourced to develop and maintain an online plan comparison tool about telecommunications services to support consumer choice.

⁴⁸ Consumer Policy Research Centre, *The experiences of older consumers: towards markets that work for people*, https://cprc.org.au/wp-content/uploads/Markets-for-People-Report_2July2020_compressed-1.pdf

⁴⁹ Cella, L 2018, *New look for Energy Made Easy*, Energy Magazine, <https://www.energymagazine.com.au/new-look-for-energy-made-easy/>

2. What should be in consumer protections rules?

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

2.1. General comments

ACCAN supports Proposal 1 and its underlying principles that rules are needed to drive customer-focussed behaviour where market/commercial incentives are weak, and that consumers should be treated fairly and in good faith by providers.

The Department has previously stated that objectives-based regulation via black letter law is appropriate for issues to do with competition (choice) and equitable access to services (fairness). It has stated this approach is necessary where there is a compelling policy reason for regulation, such as protections from harm, and where legal enforcement measures for non-compliance are required. The Department's view is that where industry has shown little interest in managing risks, objectives-based regulation is needed.⁵⁰

ACCAN strongly supports this view and agrees with the Paper's observations that these criteria have been met. There has been limited incentive for providers to differentiate themselves on the basis of non-price competition. Generally, providers do not compete on the issues that matter the most to many consumers: customer service, fairness, accessibility. Therefore, ACCAN considers the co-regulation model which favours competition should be reformed in favour of direct regulation.

ACCAN agrees with the Department's definition of the types of matters that should be covered in direct regulation as outlined in its *Regulating Harms in the Australian Communications Sector* policy paper. Applying this reasoning to the telecommunications sector means that any matter directly related to a consumer getting or staying connected, or managing their connection, should be included in a consumer protections rules framework.

⁵⁰ Department of Communications 2014, *Regulating harms in the Australian communications sector: Observations on current arrangements*, <https://www.communications.gov.au/file/824/download?token=drQ4TZSr>

2.2. Responses to questions

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

The starting point for deciding which matters should be covered by consumer protections rules must be the recognition that telecommunications are essential services, and that loss of access to services creates significant consumer harm. We have set out a case for the essentiality of telecommunications under Section 1.1. Consequently, any matter related to a consumer's ability to get or stay connected, or manage their connection, must be included in a rules framework. This principle naturally incorporates issues of choice and fairness.

The core components of the TCP Code and the issues captured by the suite of service provider determinations and standards should be the starting point for matters to be included in a consumer protections framework.

However, while the TCP Code captures the types of issues that should be included in consumer protections, ACCAN reiterates that much of the consumer detriment in telecommunications stems from the contents of the rules, as well as the way rules are developed and enforced. This will be further explained in comments below.

The Telecommunications Act 1997

The list of consumer protections issues described in the Tel Act is useful for considering the types of matters to be covered in a consumer protections framework.⁵¹ However, this list is incomplete and needs updating. The list makes limited reference to financial hardship and customer service. It is somewhat dated in its reference to the standard telephone service.

ACCAN submits that any issue related to consumers getting and staying connected, and managing their connection, should be included in a directly enforceable consumer protections framework.

What should be in consumer protections rules?

Aside from the structure and design of consumer protections rules, some aspects of the contents of the rules must be designed to minimise consumer harm. As set out in Section 1.2, existing consumer protections rules do not adequately address the full scope of potential consumer harm.

⁵¹ *Telecommunications Act 1997* (Cth) s 113, <https://www.legislation.gov.au/Details/C2020C00268>

When designing a new consumer protections framework, it is ACCAN’s view that additional obligations should be considered in the areas of:

- **Customer service:** existing rules do not adequately address deficiencies in current customer service obligations, or establish a benchmark for acceptable customer service arrangements.
- **Financial hardship and credit management:** existing rules place too much onus on consumers to self-manage financial hardship and credit management. There are gaps in providers’ obligations in relation to offering proactive supports and responding to consumers’ needs.
- **Dealing with vulnerability:** providers are not required to proactively assist customers in suspected vulnerable circumstances. Systems, policies and procedures are shaped around what works better for providers, rather than what works best for people. Existing obligations do not support consumers to authorise representatives to act on their behalf.⁵²
- **Accessibility:** providers are not required to provide information in a variety of accessible formats, or design products, services, and internal policies that work for people with disability.
- **Responsible selling:** current affordability checks are not robust, and providers are not required to provide sales information in the best interests of customers. Providers with shopfronts often use a KPI based system where sales targets are designed to incentivise and maximise unnecessary upselling, rather than offering quality and appropriate customer service.⁵³

<i>Types of rules and matters to be included in a directly enforceable Telecommunications Consumer Protections Framework</i>	
Matters in the TCP Code	Advertising, sales and customer contracts Customer service and staff training, including general rules about communicating with customers Billing Credit and debt management Financial hardship Changing suppliers Managing vulnerability and customers with support needs Accessibility
Existing determinations and standards	The Telecommunications (Mobile Number Pre-Porting Additional Identity Verification) Industry Standard 2020 Telecommunications Service Provider (Mobile Premium Services) Determinations No.1 and No.2 of 2010 Telecommunications (NBN Continuity of Service) Industry Standard 2018 Telecommunications (NBN Consumer Information) Industry Standard 2018 Telecommunications (Consumer Complaints Handling) Industry Standard 2018 Telecommunications Service Provider (NBN Service Migration) Determination 2018

⁵² ACCAN 2019, *Draft Industry Guidance Note - Authorised Representatives and Advocates*, <http://accan.org.au/our-work/submissions/1622-draft-industry-guidance-note-authorised-representatives-and-advocates>

⁵³ Lonergan 2020, *Spotlight on Telco Commissions and Targets: Exploring Telecommunications Providers’ Sales Incentive Practices*, prepared for ACCAN, <http://accan.org.au/our-work/research/1584-spotlight-on-telco-commissions-and-targets>

	Telecommunication Service Provider (International Mobile Roaming) Determination 2019
Industry guidelines and guidance notes of relevance to consumer protections	G660:2018 Assisting Customers Experiencing Domestic and Family Violence IGN013 Sales Practices and Credit and Debt Management IGN017 Authorised Representatives and Advocates G630:2020 Accessibility of Payphones
Other Codes that may be applicable	C513:2015 Customer and Network Fault Management Code C525:2017 Life Threatening and Unwelcome Communications Code C540:2013 Local Number Portability Code C570:2009 Mobile Number Portability Code

Recommendation 5: A directly regulated Telecommunications Consumer Protections Framework must be established. Matters related to consumer choice, competition, fairness, and managing access to services should be regulated through a suite of directly enforceable service provider determinations and standards.

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?

Design of consumer protections rules

The telecommunications market has become increasingly complex since the introduction of the first TCP Code in 2011. The NBN roll-out, technological convergence, the growing role of RSPs as tech and content venders, and increasing reliance on data and smartphones have shaped telecommunications usage into something quite unrecognisable from that of a decade ago.

Existing consumer protections rules should be redesigned to an overarching Telecommunications Consumer Protections Framework, similar to the National Energy Customer Framework. This framework should incorporate the suite of consumer-related industry standards and determinations, as well as the core components of the TCP Code. A breakdown of relevant instruments is contained in the table above.

Accessibility and consumer information

This review offers the opportunity to expand upon some of these existing consumer information obligations. For instance, the legacy consumer safeguard relating to standard terms and conditions could be extended to ensure the provision of accessible, consumer-friendly information at all stages of the consumer lifecycle – from marketing, to purchase and use of telecommunications products and services. This could be achieved by explicitly listing in regulation the different types of accessible formats in which such information must be offered to consumers, such as braille, large print, plain English, and Auslan resources, or mandating a minimum standard for accessible formats.

Addressing supply chains issues

In order to address the increasingly complex supply chain, consumer protection rules also need to be designed to effectively assign responsibility between wholesalers and retailers. There has been significant progress regarding NBN wholesale standards in creating accountability between retailers and NBN, with the ACMA announcing that it will develop guidance on appropriate pass through of rebates to consumers.⁵⁴ ACCAN considers similar arrangements need to be in place regarding consumer protection rules. For example, whilst NBN must provide retailers with information regarding network maintenance, there are no obligations for retailers to provide this information to consumers.

Regarding accountability when it comes to financial hardship, there needs to be clear obligations for both wholesalers and retailers. The rules need to reflect the complex supply chain and ensure RSPs are not penalised by the wholesaler for offering the financial hardship arrangements they are required to offer. For example, NBN provisioned \$50 million as part of its COVID-19 relief package to support small businesses in financial hardship.

In the energy sector, a mechanism was introduced to allow retailers to defer the payment of network charges to distribution network service providers as a response to COVID-19.⁵⁵ Whilst these are measures taken during a global pandemic, ACCAN considers that permanent mechanisms need to be put in place in the telecommunications sector which appropriately allocate the financial risk for retailers in providing financial hardship measures to consumers. In doing so, retailers will be supported to meet financial hardship obligations, which will ultimately benefit the demand and the supply side as bad debt is not accumulated.

To what extent should third parties such as communication ‘app’ providers be captured by any new rules, and why?

Currently third party services paid for by RSPs are subject to the Mobile Premium Services (MPS) Code 2019, which is binding on RSPs and content providers.⁵⁶ Also relevant are the two Telecommunications Service Provider (MPS) Determinations covering information requirements and conditions under which contracting with content providers and billing is prohibited. Both apply to RSPs.

The scope of the Code is limited to mobile premium services, direct carrier billed services, and to some extent to proprietary network services (content services only available to customers of the retailer). During the last Code revision which commenced in 2016 and was finalised in 2019, ACCAN identified concerns about the effectiveness of the Code in addressing the consumer harm due to opportunistic conduct of content providers. This has historically resulted in large numbers of consumers inadvertently incurring premium rate charging, particularly for ‘subscription’ services involving ongoing charging at regular intervals. Currently the three mobile networks have curtailed these

⁵⁴ ACMA 2020, *ACMA proposes new rules for broadband service failures*, <https://www.acma.gov.au/articles/2020-08/acma-proposes-new-rules-broadband-service-failures>

⁵⁵ Australian Energy Market Commission 2020, *Deferral of network charges*, AEMC, <https://www.aemc.gov.au/rule-changes/deferral-network-charges#:~:text=On%206%20May%202020%2C%20the,19%20pandemic%20for%20six%20months>

⁵⁶ Communications Alliance 2019, *C637:2019 Mobile Premium Services Code*, https://www.commsalliance.com.au/__data/assets/pdf_file/0007/45844/C637_2019.pdf

services due to the intervention of the ACCC.⁵⁷, however there are still concerns about proprietary network services, illustrated by the case study below.

However, history has shown that this business model is persistent and profitable, and ACCAN remains concerned that similar third party billed services are likely to emerge in the future, using different platforms and applications. Existing rules will not be adequate to deal with this due to definitional and other limitations.

One of the underlying problems in dealing with third party services such as MPS and Direct Carrier Billing (DCB) is the complex supply chain involving RSPs, content service providers and intermediaries who can be based overseas. RSPs have sought to risk manage by distancing themselves from direct responsibility for issues that arise, on the basis that they are merely billing conduits and not responsible for any complaints. However, ACCAN's approach has been that RSPs are practical intermediaries, and as such, they need to take on more responsibility for how these services operate and how problems can be prevented in the first place. This is particularly the case when RSPs derive income from the services. Clearly this is the approach taken by the ACCC in its actions against Telstra and Optus, and the current TCP Code now requires RSPs to handle complaints about third party charges billed to its customers.

Case study: Third party charges scam

Between March and May 2020, a number of Telstra customers began reporting a \$5 charge on their monthly bill titled 'AirG MiniMe 500c'. Affected customers did not authorise this charge or recall signing up for the AirG service, which was an online chat function available through a Telstra media portal. It was later confirmed by Telstra to ACCAN that the AirG MiniMe charges were billed in error.

Several consumers reported difficulty getting the charge refunded, as Telstra and the third party billed service provider, AirG, referred customers to each other to try and resolve the billing issue.⁵⁸ The number of Telstra customers that were affected by this issue is unclear. ACCAN understands that Telstra no longer provides AirG services.

Overall, ACCAN supports back-to-back obligations in complex third-party supply chains that promote positive consumer outcomes and reduce harms, and that may assist RSPs manage the relationship with downstream content providers. However, the history of MPS and DCB indicates that the most effective approach to achieve positive consumer outcomes is via regulatory intervention to due to the conflict of interests involved between RSPs and third-party app providers.

⁵⁷ Australian Competition and Consumer Commission 2019, *Optus penalised \$10 million for misleading customers over digital purchases*, ACCC, media release, <https://www.accc.gov.au/media-release/optus-penalised-10-million-for-misleading-customers-over-digital-purchases>

⁵⁸ Various Telstra customers 2020, *Unsolicited subscription to AirG, and charges to account*, blog post, <https://crowdsupport.telstra.com.au/t5/billing-payments/unsolicited-subscription-to-airg-and-charges-to-account/td-p/861377>

3. How should the rules be made?

Proposal 2: The telecommunications consumer protection rulemaking process should be reformed to improve its effectiveness.

3.1. General comments

ACCAN strongly supports Proposal 2, and the underlying principle that consumer protections rule-making should be faster, more efficient, more balanced and representative of consumer interests. The code development process should produce clearer and more targeted rules.

Co-regulation is the dominant system by which telecommunications consumer protections are determined. It is intended to allow for flexibility and industry cost-effectiveness when developing rules. However, as the Paper notes, co-regulation works best when industry is willing to be transparent and is motivated to improve their performance without the need for further intervention. This optimum scenario is difficult to achieve in relation to consumer protections that may be costly for industry to implement, but that will benefit customers. The ACMA and the Minister have often been required to intervene to protect the interests of consumers with numerous directions to develop codes and standards under the current system, for example, with the ACMA Complaints Handling Standard.

From an end-user perspective, industry codes can set a low bar for compliance, containing ambiguous rules which allow for subjective application. A prime example of this is the common drafting approach within numerous TCP Code clauses that specify industry should ‘take reasonable steps to’ or ‘have regard to’ various processes or activities. ACCAN’s experience sitting on code Working Committees has shown that providers have ample opportunity to shape code development to suit their commercial interests. Regrettably, in some instances, the code development process resembles a style akin to ‘negotiation by attrition’, where working committees work for month after month to come to agreement. Areas where there is an impasse are left until last and if consumer and industry representatives are not aligned, there is limited appetite to adopt ACCAN’s proposals regardless of the public interest. This often results in little or no shifts from industry positions, with small changes and concessions at best that frequently do not deliver effective consumer protections.

Due to the failures of co-regulation in this regard, consumer protection rules should be directly enforceable and developed directly by the ACMA through a process of public consultation. This method of rules development would reflect the essentiality of telecommunications and the severity of consumer detriment related to issues that are quite often poorly managed by industry codes.

That said, ACCAN considers there are matters suitable to be dealt with via co-regulation: for example industry wide technical areas, and issues of process and procedure that expand upon core obligations to customers and but do not directly impact providers’ retail relationships with their customers. In these circumstances, there are changes that can be made to the Code development process to make it more efficient and more equitable.

Recommendation 6: Matters to do with consumer protections must be dealt with by directly enforceable regulatory instruments developed by the ACMA.

Recommendation 7: Changes to the Code development process should be made to support the efficiency and the effectiveness of the code-making.

3.2. Responses to questions

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

Direct regulation

Direct regulation should govern the entirety of consumer protections rules – this includes any matter that impacts a consumer getting or staying connected, and managing their service. The reasoning behind this approach is set out in Sections 1.3 and 2.2.

It is important that the ACMA has the powers to act swiftly to identify and act upon emerging issues causing consumer detriment. Historically, it is ACCAN’s view that this has not been that case, though more recently this has improved.

Industry codes

Industry codes may sit alongside a revised consumer protections framework, but should not be the core instruments responsible for dealing with consumer protections matters. Codes are well-placed to deal with industry-wide technical matters, and issues of process and procedure that do not directly impact providers’ retail relationships with their customers. For example, ACCAN supports C564:2018 Mobile Phone Base Station Deployment Code. This code sets out procedures for involving communities in the planning, installing and operation of mobile phone base stations. This is a technical issue of interest to consumers, but does not directly relate to retail or contractual relationships, or consumers’ ability to get or keep connected. Thus, in ACCAN’s view, it is suitable to be covered by an industry code.

Guidelines

As with industry codes, guidelines and guidance notes can provide useful detail to support providers to meet their regulatory obligations. However, given the lack of enforceability of these instruments, guidelines and guidance notes are not appropriate for core consumer protection obligations.

Recommendation 8: Industry codes and guidelines should be reserved for inter-operator and technical matters, and secondary issues not directly related to providers’ retail and contractual relationship with customers.

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

ACCAN maintains that consumer protections rules should be dealt with via direct regulation, rather than co- or self-regulatory mechanisms. However, for issues that are dealt with via Codes, we have several proposals to improve the code development process.

ACCAN's experience sitting on Working Committees

ACCAN's predecessor, Consumers Telecommunications Network (**CTN**), was a member of Australian Communications Industry Forum (**ACIF**) and of its Board, before ACIF became Communications Alliance and changed its constitution to become an industry peak body. Currently, ACCAN generally represents consumers on Communications Alliance's consumer-related industry code development committees (**Working Committees**). Our experience sitting on these committees varies greatly depending on the subject matter, but frequently, ACCAN has difficulties ensuring the interests of consumers are adequately taken into consideration during the code development process. This is because:

- While there is an obligation for the industry to consult with consumers in the development of consumer facing codes, there is no requirement to consider or reflect the interests of in consumers in finalised documents submitted for registration.
- The Telecommunications Act 1997 (**The Tel Act**) requires the ACMA to make sure 'public interest considerations' are addressed in a way that does not 'impose undue financial and administrative burdens' on the telecommunications industry when exercising its code development powers.⁵⁹ This is not balanced with consideration of the costs to consumers of inadequate consumer protection,
- Consumer representation is in most cases restricted to a single representative, rather than allowing multiple consumer representatives that would deliver a variety of consumer perspectives in the code-making process. In the past there was an agreement for equal representation of industry and consumer representatives on committees, but this agreement is no longer upheld.
- Code processes are slow and often confusing.
- Code development often occurs 'behind-the-scenes' and outside of Working Committee meetings, meaning that ACCAN experiences major information gaps.
- The Working Committee Terms of Reference are developed by industry, not in agreement with consumers, which often leads to significant restrictions on scope. This can undermine the effectiveness of the protections the code can offer even before the drafting is commenced.

There is an inherent conflict of interest in circumstances whereby industry members develop consumer protection rules that may negatively impact their own commercial interests. This issue is exacerbated by the requirement for the ACMA to consider the impost to industry when registering codes, which at times has not been demonstrated in detail. ACCAN's view is that the costs to the consumer, and by extension to the economy, must also be taken into account in these considerations on an equal footing. Arguably, a large proportion of consumer detriment in the telecommunications sector can be attributed to this conflict of interest.

Improvements to code development

It is ACCAN's view that the core provisions surrounding the ACMA's ability to request and register codes are generally adequate. There is ample room within the Tel Act for the ACMA to request a code is developed about an issue, and for the ACMA to not register a Code if it deems the code unsatisfactory. The 120-days minimum notice period for code registration is reasonable, as is the 30-day minimum notice period for addressing code deficiencies. However, there is no maximum time specified for code registration or amendments, allowing for significant delays.

⁵⁹ *Telecommunications Act 1997* (Cth) s 6.3.112.2 and s 6.3.112.3.c, <https://www.legislation.gov.au/Details/C2020C00268>

Rather, it is the practical reality of internal code development processes and the rules about code enforcement that cause the majority of consumer harm, and underly the need for reform. To this end, ACCAN recommends the following changes are made to improve the efficiency and equity of code development:

- **Apply a reasonable maximum time period in which a code may be developed or amended.** This would restrict excessive delays in code development.
- **Adjust the requirement under the Tel Act⁶⁰ that the ACMA must consider the financial impost to and business interests of industry when exercising its code powers.** This requirement gives insufficient regard to the impost of consumer harm on the community. Instead, the ACMA should give greater consideration to the financial and non-financial cost of consumer detriment when exercising code powers. This would ensure codes better take into consideration the interests of consumers, and Codes can be assessed in terms of public interest, rather than cost to industry.
- **Introduce a requirement that consumer interests must be adequately adopted as much possible.** Code Working Committees follow a consensus-based approach which often results in a war of attrition, where the areas of disagreement are deferred and concessions are minimised to protect industry interests. As discussed earlier, while consumers must be consulted in the code development process, but there is no requirement for a Working Committee to adopt their positions. This must be rectified to ensure adequate consumer consultation and representation.
- **Mandate equal consumer and industry representation for code development on issues of interest to consumers.** It is inherent to industry code-making that the balance of power is unevenly weighed in the industry's favour. Consequently, it is essential that consumer representation is supported in code development on issues of interest to consumers. An equal balance of industry and consumer representation on Working Committees could assist in addressing these inherent biases.
- **Increase funding for consumer representation.** Under the Tel Act, Communications Alliance may apply for reimbursement of refundable costs incurred in developing the code or varying the Code.⁶¹ Historically, under Communications Alliance's predecessor ACIF, the balance of consumer and industry representation was better achieved. However, ACCAN is generally the only consumer organisation represented on Communications Alliance Working Committees. Given the time commitment involved in code development, and the fact that many consumer organisations are very poorly resourced, equal representation would be better supported if this funding was also available via ACCAN's code reimbursement arrangement to administer and fund consumer organisations that are represented on committees. It should not be up to industry to select and approve these organisations and decide if they are funded or not.
- **Appoint an independent reviewer to define the Terms of Reference for code development.** ACCAN is aware that industry members can strategically shape the Terms of Reference of code reviews for industry purposes. It is essential that the development of Terms of Reference for code reviews is undertaken by an independent reviewer, agreed to by both the industry peak body and the consumer peak body. Terms of Reference could be developed by the independent reviewer in consultation with a balanced Working Committee.
- **Appoint an independent chair of Working Committees dealing with all codes related to issues of interest to consumers.** It is important that the chair of any Working Committee dealing with codes on issues of interest to consumers is independent to ensure matters are

⁶⁰ Ibid.

⁶¹ *Telecommunications Act 1997* (Cth) s 6.6A.136A.1, <https://www.legislation.gov.au/Details/C2020C00268>

dealt with fairly and transparently. Their appointment must be agreed to by both the industry peak body and the consumer peak body. This is not the case at present.

- **Ensure that the wording of codes is explicit, clear and directly enforceable.**

The ACMA must ensure these conditions are met to satisfy the test of whether consumer consultation has been adequate when considering a code for registration.

ACCAN considers that increased consumer involvement in the code development process would be a valuable asset to industry and regulators. In the past, ACCAN has recommended additional consumer representatives to be present on Communications Alliance Working Committees, and this has not been approved by Communications Alliance. Stronger consumer voices in this process will allow a broader range of expertise to shape codes, and will pre-empt consumer issues before they arise – saving significant time and resources for both industry and regulators.

Recommendation 9: Changes to the code development process should be made through ACMA requirements for code registration and the ACMA Code reimbursement scheme. This would support better efficiency and effectiveness of industry codes and guidelines of interest to consumers.

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

Given the essentiality of telecommunications services, the constraints on the ACMA’s ability to make standards are unacceptable. The staged approach results in delays and periods of protracted consumer harm, frustration and sometimes media attention as a consequence of ongoing industry practices. The flawed TCP Code is a good example of this. Loose obligations surrounding responsible selling have seen concerning levels of consumer detriment arising from poor selling practices, and unsuitable provisions surrounding financial hardship arrangements have seen just under half of consumers in these arrangements fail to successfully complete them.^{62 63}

Division 5 of the Tel Act outlines the circumstances in which the ACMA can make a standard:

- Instances where a request for an industry Code is not complied with (that is, the request is ignored, or a Code is developed but not registered by the Authority), for the purpose of providing ‘appropriate community safeguards’,⁶⁴
- Instances where a Code has failed to provide appropriate community safeguards, or has failed to adequately regulate, after a 180-day period has elapsed and the ACMA has requested deficiencies to be addressed,⁶⁵ and

⁶² Bainbridge, A 2019, *Telstra facing investigation over selling 'unaffordable contracts' to vulnerable Australians*, ABC News, <https://www.abc.net.au/news/2019-06-25/telstra-hits-vulnerable-australians-with-extra-data-charges/11173362>

⁶³ Australian Communications and Media Authority 2020, *Customer financial hardship in the telco industry: State of play report 2018–19*, <https://www.acma.gov.au/sites/default/files/2020-03/Customer%20financial%20hardship%20in%20the%20telco%20industry%20State%20of%20play%20report%202018-19.pdf>

⁶⁴ *Telecommunications Act 1997* (Cth) s 6.5.123, <https://www.legislation.gov.au/Details/C2020C00268>

⁶⁵ *Telecommunications Act 1997* (Cth) s 6.5.125, <https://www.legislation.gov.au/Details/C2020C00268>

- If directed by the Minister.⁶⁶

This means the ACMA is required under the Tel Act to allow the industry to first address an issue via a Code unless directed by the Minister. If a code has explicitly failed, the ACMA must again allow the industry to address code deficiencies before being able to make a standard. This is extended process is not in line with community expectations. It has led in some cases to thousands of consumers bearing the cost of poor regulation.

The pace of change in the industry is fast with new services and technology rolled out rapidly. On the other hand, the code development process is slow, involving a Working Committee and sometimes many months of negotiation. Ultimately, the co-regulatory system is no longer fit for purpose in regulating consumer protections. As expressed in the Paper, these constraints create unnecessary time delays, and are extremely detrimental when considering the severity of consumer detriment that can occur due through poorly managed consumer protections rules.

The ACMA should not need to wait for an issue to be dealt with via industry code prior to developing industry standards. The test of defining market failure is too high, while the costs of that failure are carried by consumers. The ACMA must be able to immediately develop standards, not just where the Minister directs it, but also for matters where there is evidence that immediate regulatory intervention is needed.

Recommendation 10: Constraints to the ACMA's ability to make industry standards should be adjusted to allow for more timely and direct regulatory responses.

⁶⁶ *Telecommunications Act 1997* (Cth) s 6.5.125AA, <https://www.legislation.gov.au/Details/C2020C00268>

4. How should the rules be enforced?

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.

4.1. General comments

ACCAN supports Proposal 3 and the underlying principle that the ACMA should have appropriate power, and actively enforce consumer protection rules with a risk-based approach.

The current code-based self-regulatory system fails to meet this principle. Under the existing consumer protections regime, a provider must contravene an industry code and a subsequent direction to comply from ACMA before running the risk of a penalty for non-compliance.⁶⁷ As the Paper explicitly states, consumer protections are not effective if penalties for non-compliance are not an incentive to follow the rules, and if the rules are not actively enforced.

ACCAN agrees with the Department's previous statements that any sanctions must reflect the real potential impact of breaches on the community and industry.⁶⁸ The enforcement system of a revised consumer protections framework must be proportionate to the risk of consumer harm, and the potential severity of that harm. When considered in light of the essentiality of communications and the importance of connectivity to work, community, and personal safety, this harm can be extremely significant.

4.2. Responses to questions

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

Broader use of industry standards

ACCAN supports the proposal for ACMA to play a strengthened role in regulating the telecommunications industry. ACMA's current role in the multi-step regulatory process is insufficient to counterbalance the power asymmetry between consumers and industry.

As expressed throughout our submission, consumer protections rules must be contained in a directly enforceable consumer protections framework, made up of industry standards and service provider determinations. There is still an important role for codes in industry wide inter-operator and technical

⁶⁷ Department of Infrastructure, Transport, Regional Development and Communications 2020, *Consumer Safeguards Review Part C / Choice and Fairness Consultation Paper*, DITRDC, <https://www.communications.gov.au/file/50433/download?token=5EalbwxC>, p. 4

⁶⁸ Department of Communications 2014, *Regulating harms in the Australian communications sector: Observations on current arrangements*, <https://www.communications.gov.au/file/824/download?token=drQ4TZSr>

matters, and issues of process and procedure that do not directly impact providers' retail and contractual relationships with their customers.

Remove staged enforcement of Codes

One of the weaknesses in current consumer protections arrangements is the staged enforcement approach required of the ACMA. Enforcement of telecommunications consumer protections involves first issuing a direction to comply with a registered code before taking more direct enforcement action if the initial direction is not effective. This delays the regulator's ability to take prompt action to compel compliance, delays the imposition of penalties where appropriate, and in turn mitigates against the effectiveness of the regime in deterring harm and increasing compliance and best practice.

Removal of this step would mean enforcement would not be staged and the ACMA would be able to hand down immediate penalties for non-compliance. This would potentially remove the need for further government intervention on secondary issues already covered by codes, because providers may be compelled to comply under threat of immediate sanctions.

Delaying ACMA's power to issue an infringement notice or seek a pecuniary penalty order from the Federal Court until a provider has breached a formal warning or direction to comply⁶⁹ stacks the current regulatory system in favour of industry. This two-step regulatory process provides industry with two un-penalised opportunities to fail consumers – first, with the initial Code breach and, second, by failing to act on a formal notice to comply. Meanwhile, a consumer has still received no remedy or compensation, and all consumers continue to be affected by the issue until enforceable action is eventually taken.

ACCAN considers that while consumer protections rules should be contained in industry standards, best practice for secondary matters would be to introduce a code compliance regime that allowed ACMA to take direct and immediate action for non-compliance using penalties such as infringement notices and fines. Direct regulation by ACMA - where penalties could be imposed without having to first issue a direction to comply, and then wait for a provider to breach that direction - would provide clearer rules and expectations of industry, impose unambiguous sanctions, require compulsory industry compliance with codes and deliver better consumer outcomes.

Transparent reporting practices

The introduction of more transparent public reporting practices by the telecommunications industry would encourage behavioural change by individual service providers, and would alert the ACMA of potential systemic non-compliance. Public reporting practices drive change by facing providers with the threat of reputational damage and a decline in sales if they do not adequately protect the interests of consumers.

⁶⁹ *Telecommunications Act 1997 (Cth)* s 121 and s122, <https://www.legislation.gov.au/Details/C2020C00268>

More granular public reporting practices in a variety of areas would force industry to be more accountable and create a self-motivating feedback loop for industry. Areas that would benefit from greater public reporting include:

- Financial hardship, including the number of disconnections and the number of customers that re-enter financial hardship arrangements once successfully completing one set of arrangements, and the number of customers in credit management,
- Public identification of individual providers in ACMA reporting of complaints received and resolved by RSPs,
- Customer service metrics, such as number of first contact resolutions, average wait times by method of contact, and time taken to get an enquiry resolved, and
- Individual providers' complaints levels in ACMA complaints data.

Retail licensing scheme

Section 1.3 of our submission outlines a case for a retail licensing scheme. As discussed there, a retail licensing scheme would give the ACMA greater visibility over industry members, and support it in its enforcement activity.

Recommendation 11: The enforcement process should be adjusted by the removal of the notification to comply requirement and allow ACMA to act on identified breaches as a first step, to support timely and direct enforcement.

Recommendation 12: RSPs' reporting requirements should be expanded to include public reporting on financial hardship, disconnections, credit management, customer service and complaints data where individual RSPs are named.

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

Under the *Telecommunications Act 1997*, when a provider contravenes a direction to comply with a code, the pecuniary penalties available to ACMA are limited to:

- \$250,000 for each breach through the Federal Court; or
- Up to \$13,3206 for each contravention under an infringement notice.⁷⁰

These penalties are low compared to penalties available in other essential industries such as energy and financial services, and should be brought in line with best practice.

Energy

The government has proposed that the COAG Energy Council introduce penalties of up to \$10 million for breaches of the *National Electricity Law* and related laws.⁷¹

⁷⁰ *Telecommunications Act 1997* (Cth), s121. 31 and 31B, <https://www.legislation.gov.au/Details/C2020C00268>

⁷¹ Department of Industry, Science, Energy and Resources, *Energy market legislation*, <https://www.energy.gov.au/government-priorities/energy-markets/energy-market-legislation>

Financial services industry

The maximum civil penalties for individuals and companies have significantly increased under the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.

The maximum civil penalty for individuals is the greater of 5,000 penalty units (currently \$1.11 million) or three times the benefit obtained and detriment avoided. The maximum civil penalty for companies is the greater of:

- 50,000 penalty units (currently \$11.1 million)
- three times the benefit obtained and detriment avoided, or
- 10% of annual turnover, capped at 2.5 million penalty units (currently \$555 million).⁷²

Australian Consumer Law

For corporations, certain breaches of the Australian Consumer Law (ACL) can warrant maximum penalties of:

- \$10,000,000
- three times the benefit obtained, or
- 10% of annual turnover, if the benefit can't be determined.

Infringement notices for other breaches of the ACL usually warrant penalties of \$13,320 per infringement.⁷³

Telecommunications penalties should be in line with the penalties available to consumers under these comparative essential services. The comparatively much lower cap on civil penalty and infringement notice maximums available for breaches in the telecommunications industry fail to incentivise compliance with the Codes. The telecommunications industry needs higher pecuniary penalties to act as a real disincentive for non-compliance by industry.

Recommendation 13: Penalties for infringements of consumer protections rules must be in line with comparable industries to reflect the essentiality of telecommunications, and provide a genuine disincentive for consumer harm through non-compliance.

⁷² Australian Securities and Investment Commission, *Fines and penalties*, ASIC, <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/>

⁷³ Australian Competition and Consumer Commission, *Fines and penalties*, ACCC, <https://www.accc.gov.au/business/business-rights-protections/fines-penalties>

5. What should happen to old rules?

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

5.1. General comments

The communications environment has changed dramatically since the introduction of some of these legacy consumer safeguards. It is appropriate to test the efficacy and relevance of these legacy rules, however given the essentiality of communications services, the needs of consumers must be kept at the forefront of any such tests and subsequent decisions. ACCAN recognises that there are some situations where it is appropriate for obligations to be reconsidered. For example, some issues become less relevant to consumers over time and developments in technology may mean that the obligations are no longer necessary or appropriate.

Consumer safeguards play a vital role in supporting a market that is fair and sustainable. Any regulatory changes in relation to these legacy obligations must result in a more efficient and competitive market that promotes consumer choice and fairness, including greater affordability and availability of services. ACCAN has consulted broadly with our members to consider which of these legacy obligations continue to be relevant to consumers. Many of our members pointed to the need for more information from providers about how broadly these legacy consumer safeguards are being used by consumers. In some cases these services may still be used or relied upon by particular cohorts of people across Australia. Based on this consultation and ACCAN’s broader expertise in the communications sector, we outline below which obligations we believe should be kept, and which obligations may be altered or revoked to suit the changing communications environment, pending further analysis of usage data and consultation with consumers.

5.2. Responses to questions

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

Free access to emergency call services

ACCAN agrees that free access to emergency call services is a legacy obligation of continued importance. All members of the public must be ensured free access to emergency call services through all telephony services. Public safety is critical, and it is essential that this vital consumer safeguard continues to be regulated appropriately.

Provision of calling line identification

ACCAN agrees that calling line identification (**CLI**) is a consumer safeguard of continued importance. This is particularly the case for people experiencing domestic or family violence, or those receiving other types of threatening or harassing calls who rely on calling number display (**CND**) on their fixed voice handsets. More specifically, older consumers experiencing elder abuse or other forms of domestic or family violence may be more likely to use a fixed line service and may benefit from being

able to identify the telephone numbers of calling parties. ACCAN has commented elsewhere about the importance of CND to consumers, particularly those experiencing or at risk of violence, and those seeking advice or assistance from support services.⁷⁴

In addition to being used as the basis for CND for consumers, CLI continues to be used for technological purposes, such as billing and the routing of telephone calls. Accurate CLI is vital to the effective operation of networks, including the emergency call service. Emergency Service Organisations rely on accurate CLI in responding to emergency calls, particularly if the call drops out, as CLI enables them to call back the emergency caller in these instances.

It is ACCAN's view that it is appropriate for this consumer safeguard to remain in the Tel Act, and for the practicalities of managing CLI to be outlined in another instrument. ACCAN previously opposed the deregistration of the CND Code⁷⁵ (C522:2007), and our position remains that the contents of the current Industry Guideline⁷⁶ and Guidance Note⁷⁷ should instead be provided in a Code.

Number portability

ACCAN agrees that number portability obligations need to be retained to ensure greater competition and consumer choice. Allowing consumers to port their phone numbers when they change providers is essential to ensuring choice and competition in the communications sector.

Standard terms and conditions

ACCAN appreciates the consumer safeguard relating to standard forms of agreement for supplying telecommunications products and services to consumers continues to be important for consumers. Transparency is essential, and consumers must have access to useful, consumer-friendly and accessible information.

While this safeguard does have ongoing importance, it may be better addressed through ministerial or regulator-developed rules rather than in primary legislation. This is one of many areas that is touched upon in the TCP Code which could be included in regulation around contract formation and information requirements.

Access to untimed local calls

ACCAN agrees that this legacy consumer safeguard is of diminishing importance, particularly as fixed line voice services have reduced, and consumers have transitioned to more recent plans with different inclusions such as unlimited calls. Despite this, access to untimed local calls remains important as older plans are still in use with this feature. ACCAN members in rural and remote parts of Australia are

⁷⁴ ACCAN 2019, *Calling Number Display Guideline*, <http://accan.org.au/our-work/submissions/1602-calling-number-display>

⁷⁵ ACCAN 2015, *Calling Number Display Code review*, <https://accan.org.au/our-work/submissions/1056-calling-number-display-code-review>

⁷⁶ Communications Alliance 2016, *G522:2016 Calling Number Display Guideline*, <https://www.commsalliance.com.au/Documents/all/guidelines/g522>

⁷⁷ Communications Alliance 2016, *Industry Guidance Note 009: CLI Management*, <https://www.commsalliance.com.au/Documents/all/Industry-Guidance-Notes/ign009>

especially keen to ensure this consumer safeguard continues to be mandated, as many of them still benefit from untimed local calls.

It is therefore ACCAN's view that consumers must still be able to pay a flat rate to make calls in their local call zone. While we acknowledge that many fixed and mobile phone plans offer unlimited local and national calls as part of the included plan value,⁷⁸ some lower price fixed phone plans still charge separately for making calls. This relates to the broader affordability issue of fixed line phone plans. Until affordability concerns are addressed in relation to fixed line connections, there will remain a need for consumers to have access to untimed local calls.

It is also clear from ACCAN's consultation that many customers were unaware they could move to better fixed line plans with cheaper options and they called for a service to help with comparing plans. This highlights the importance of an independent and trusted online price comparison service to support consumer choice.

Price control arrangements for Telstra

ACCAN previously welcomed a reassessment of Telstra's price control arrangements,⁷⁹ in acknowledgment that these policy settings were developed when there was less competition in the market and consequently are less relevant today.

Part 9 of the TCPSS Act currently details price control arrangements for carriage services, content services and facilities supplied by Telstra. It stipulates that the Minister may determine in writing that specified carrier charges are subject to price control arrangements, such as price-cap arrangements. ACCAN has concerns at the removal of this reserve ministerial power for the following reasons:

- Telstra is still the only option for fixed voice services in many areas, and for those with life-threatening medical conditions requiring priority assistance;
- Residential users of fixed voice services tend to be older and on low incomes, as noted in the consultation paper;⁸⁰
- Telstra has advised that its fixed voice services are loss making or at best not profitable, so it is in Telstra's interest to increase prices. This negatively impacts lower income fixed line voice customers;
- This impact would not be fully offset by Telstra's low-income measures as these are available for pensioners, but not other low-income users of the service. In addition, while the discounts offered are important, they apply to a relatively high cost base of \$55 per month.

The deterrence impact of the reserve ministerial power in Part 9 of the TCPSS Act remains relevant as a break on Telstra's pricing, and should be retained.

⁷⁸ Department of Infrastructure, Transport, Regional Development and Communications 2020, Consumer Safeguards Review Part C / Choice and Fairness Consultation Paper, DITRDC, <https://www.communications.gov.au/file/50433/download?token=5EalbwxC>, p. 26

⁷⁹ ACCAN 2013, *Deregulation: Initiatives in the Communications Sector*, <https://www.communications.gov.au/sites/default/files/submissions/ACCAN.PDF>, p. 5

⁸⁰ As per p26 of the consultation paper.

Operator services for reporting faults and service difficulties

In ACCAN's view, operator services continue to be an important consumer safeguard. These operator services allow consumers to contact their fixed line phone provider (through customer service channels or online) to report faults and service difficulties. Consumers must have clear information about who to contact when experiencing an outage and must be assured quick and painless interactions with those collating this information. Many rural and remote consumers with little or no mobile coverage cannot access provider apps used for reporting faults and managing their accounts; this increases their reliance on operator services. While we agree with the Department that providers are likely to continue to offer consumers a way to report faults and service difficulties, we nevertheless recommend that this remain an obligation. Much like the safeguard relating to standard terms and conditions, ACCAN believes that this consumer safeguard could be covered by a new customer service and information requirements regulation.

Itemised billing

It is ACCAN's position that itemised billing must continue to be regulated in primary legislation as an important consumer safeguard. This safeguard is essential for greater transparency, fairness and consumer choice. In consulting with our members, many felt that itemised billing continued to be important due to the information asymmetry between consumers and telecommunications providers, the complexity of plans and in some instances call charges, and the lack of trust consumers can have toward telecommunications providers. Some called for the obligation to be expanded further, to include itemised billing for all calls, including those made to mobile or satellite services.

Some of our members reported that itemised billing continues to be particularly important for people on low incomes, people with disability, and older people. In addition, some of ACCAN's member organisations took this opportunity to reiterate previous feedback that all telecommunications bills need to be provided to consumers in accessible (digital and non-digital) formats, such as braille, at no extra cost to the consumer. As such, there is scope to expand upon this existing legacy obligation to cover all types of calls, all forms of telecommunications billing, and to impose obligations regarding the accessibility of this vital information.

Directory assistance services

ACCAN appreciates the Department's acknowledgement that the revision of legacy obligations needs to take into consideration the needs of particular consumers, such as consumers with disability or consumers on low income.⁸¹ Directory assistance is one such obligation that is particularly important for people with disability, and as such, must remain an obligation within primary legislation.

While we acknowledge that for some consumers, directory assistance may be of declining relevance due to the prevalence of internet search engines, virtual assistants and online directories, for some consumers directory assistance remains crucial to their ongoing connectivity.⁸² This is particularly the case for consumers in rural and remote areas with more limited connectivity, older consumers,

⁸¹ As per p31 of the consultation paper.

⁸² One of ACCAN's members sent a brief email survey to their members relating to directory assistance. This polling exercise of more than 60 people who are blind or have vision impairment found that about 50% of respondents use directory assistance regularly. 10% of respondents stated that they do not use directory assistance but would not like to see it withdrawn.

consumers with disability and even more so for older people who are blind or have vision impairment. Although people of all ages who are blind or have vision impairment use directory assistance, we have been informed by our membership that any change to directory assistance would have a huge impact on older people with disability in particular. Given Australia's aging population, and the greater prevalence of vision loss and related conditions as people age,⁸³ it is important to acknowledge the ongoing relevance of directory assistance for this group.

People who have acquired vision impairment as they've aged may be particularly reliant on directory services. ACCAN's members explained that some recently blind older people can find it hard to navigate new systems, processes, and assistive technologies. This can be even more difficult when trying to learn to use new technologies having never previously engaged with these technologies, or any internet connected devices in general. For this group, using a mobile phone or computer to access or dial phone numbers may be less familiar than using a landline telephone. It is therefore important that directory assistance services continue to be available on fixed line services.⁸⁴

Consultation with ACCAN's members has shown that some people use directory assistance while working and prefer to use it over other methods, such as searching online or using a virtual assistant. Indeed, it was explained to ACCAN that virtual assistants like Siri are not always useful and do not always return results to inquiries for telephone numbers. Calling directory assistance was presented as an easy way of attaining phone numbers, particularly for people who were not technologically savvy, people who were time poor and would rather call than search online, and people who did not have an internet connected device (or were not confident navigating websites). In addition, not all people who are blind or have vision impairment will have assistive technologies on their computer or internet connected device, which may make accessing the white pages website more difficult (or may make navigating this site itself more time consuming).

Finally, discussions with members have highlighted that many people who are blind or have vision impairment are frustrated by the additional cost of accessing directory assistance services. While some providers offer free directory assistance to people with disability or other requirements,⁸⁵ not all do. Based on ACCAN's consultation in relation to this review, there is a general feeling that all providers should be required to offer directory assistance free of charge to all people with disability and older people. This would benefit those who are not connected to the internet, or who are not confident online. It was also suggested that a mandatory, independent directory assistance service (offered free of charge to consumers with disability and older consumers) should be established for use from both fixed line and mobile numbers. Our members suggested that this free and independent directory assistance service could be funded by all telecommunications providers, to ensure consumers of all providers have access to a comprehensive and efficient directory assistance service.

Given the ongoing relevance of directory assistance for consumers, ACCAN believes this service must continue to be mandated within Schedule 2 of the Act. As discussed below, moving this important service to another form of regulation may result in the existing service disappearing from the market,

⁸³ Vision Initiative states, for example, that around 80% of vision loss in Australia is caused by conditions that become more common as people age. More information available: <https://www.visioninitiative.org.au/common-eye-conditions/eye-health-in-australia>

⁸⁴ Schedule 2 of the Act currently states that: 'A carriage service provider who supplies a standard telephone service must make directory assistance services available to each end-user of the service'.

⁸⁵ As per p39 of the consultation paper.

which given the abovementioned suggestions for expansion and greater access to the service, would be in direct conflict with consumer needs.

Recommendation 14: Legacy obligations of enduring relevance should remain enforceable rules.

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

ACCAN is not convinced that some of the abovementioned legacy safeguards would continue to be provided by the market if they were not mandated. For instance, it is unlikely that providers would continue to offer directory assistance services if the requirement to do so were removed. Consumers with disability already report their disappointment at the lack of information available on providers' websites about directory assistance, and feel that this represents an apparent lack of willingness to advertise or market this offering to consumers. In addition to the costs associated with this service, this leads us to believe that this service must continue to be mandated as there does not appear to be much commercial incentive for providers to continue offering this essential service.

The same can be said for many of the other legacy consumer safeguards discussed above, including number portability, standard terms and conditions, access to untimed local calls, and itemised billing, and price control arrangements. ACCAN would like to think that providers would continue offering free access to emergency call services and calling line identification, given that these obligations relate to issues of public safety.

As outlined in the Paper, providers may continue to offer operator services for reporting faults and service difficulties, given they already do this through customer service and online channels. Likewise, providers would likely continue to offer pre-selectable services as this currently has business applications, however this would likely be phased out when all business services make the switch to NBN.

Which obligations/services have, in practice, been replaced in the market by other services?

Pre-selection

ACCAN has previously noted that there appears to be a lack of consumer demand for pre-selection services.⁸⁶ This decrease in demand for pre-selectable services may be due to a range of changes, for instance, the decline in demand for fixed-line phone services;⁸⁷ the fact that fixed-line phone services delivered via the NBN are not eligible for pre-selectable services;⁸⁸ the availability of over-the-top

⁸⁶ ACCAN 2013, *Deregulation: Initiatives in the Communications Sector*, <https://www.communications.gov.au/sites/default/files/submissions/ACCAN.PDF>, p. 5; ACCAN 2020, *Review of Telecommunications (Provision of Pre-Selection) Determination 2015*, <http://accan.org.au/our-work/submissions/1704-pre-selection-determination>

⁸⁷ Australian Communications and Media Authority 2020, *Communications Report 2018–19*, ACMA, <https://www.acma.gov.au/sites/default/files/2020-02/Communications%20report%202018-19.pdf>, p. 4

⁸⁸ Department of Infrastructure, Transport, Regional Development and Communications 2020, *Consumer Safeguards Review: Part C / Choice and Fairness Consultation Paper*, <https://www.communications.gov.au/have-your-say/consumer-safeguards-review-consultation-part-c-choice-and-fairness>; Australian Communications and Media Authority 2015,

messaging and calling apps as alternative international calling options; and the availability of fixed and mobile plans offering unlimited local, national and mobile calls.⁸⁹

However, ACCAN does not have access to detailed data on the number of consumers and small businesses actively using pre-selectable services, or those outside of NBN's fixed line footprint who may wish to retain these services into the future.⁹⁰ ACCAN's position therefore remains that an investigation into the potential impact on consumers must be performed before any changes are made to the existing pre-selection obligations.⁹¹ Furthermore, to limit disruption and confusion for consumers yet to transition across to the NBN, any changes must not occur until all consumers in the fixed NBN footprint are fully transitioned to the NBN.⁹²

If, after the investigation and consultation with consumers and small businesses using pre-selection services, this obligation was removed, appropriate transitional measures must be implemented for affected consumers. This must involve these consumers being provided with adequate information and support to be transitioned away from pre-selectable services. Options offered as alternatives to pre-selected services must not impose additional costs on consumers and small businesses, must appropriately meet consumer needs and must provide an equivalent service offering.⁹³

Which obligations, if no longer mandated, should be subject to transitional or grandfathering arrangements? What form should such arrangements take and how long should they remain in place?

ACCAN and many of our members believe that it is too early to be discussing potential grandfathering arrangements for legacy consumer safeguards. Such transitional arrangements should not be considered until greater data is provided about the take up of these legacy safeguards across Australia, particularly in relation to the specific usage of different cohorts of society (such as people living in regional, rural or remote areas, people on low incomes, older people, and people with disability). As outlined above in relation to pre-selection, it is ACCAN's position that grandfathering arrangements must not be put in place until all consumers in the fixed NBN footprint are fully transitioned to the NBN. In addition, grandfathering should not be considered until there is a proven (equivalent or improved) alternative to the legacy safeguards that are being used by consumers.

Any transitional arrangements for legacy services must be developed in close consultation with consumers who rely upon the safeguard that is to be revoked or altered. Consultation with consumers who experience the value and benefits of these legacy consumer safeguards would likely lead to a smoother transition process, and would also help to ensure that any replacement of or alteration to existing arrangements would provide all consumers with an appropriate and fair replacement. As outlined above in relation to pre-selection, as a baseline, alternative options must not impose extra costs on affected consumers, consumers must be adequately supported to transition, and easy to

Telecommunications (Provision of Pre-selection) Determination 2015, s 5.2,
<https://www.legislation.gov.au/Details/F2015C00750>

⁸⁹ Ibid.

⁹⁰ ACCAN 2020 op cit.

⁹¹ ACCAN 2020 op cit.

⁹² ACCAN 2020 op cit.

⁹³ ACCAN 2020 op cit.

understand information about the alternative and transition process must be provided to consumers in a range of accessible formats.

Is it appropriate for Telstra to continue to provide low income measures in relation to fixed line phone services for the duration of its contract as the USO provider?

Affordability of communications must continue to be addressed as the communications sector changes, to ensure that consumers on limited incomes are not left behind. As such, given Telstra is still contracted as the USO provider until 2032, existing obligations for them to offer low income measures in relation to fixed line phone services must continue.

ACCAN's view is that Part C of the Consumer Safeguards Review is not an appropriate forum to address the suitability of affordability measures in the telecommunications sector because this is a market-wide issue, not just relevant to Telstra's legacy obligations. We note that affordability measures will be considered by the Department in further detail as part of their work on digital inclusion and productivity.⁹⁴ We look forward to engaging with this work in the future to ensure greater affordability of communications products and services for all consumers.

Telstra's ongoing affordability obligations

Telstra's low-income measures remain relevant to a core base of customers who use continue to use copper landline services. They are also relevant to customers in the regions, many of whom remain dependent on Telstra copper voice services due to competition failures. For as long as Telstra is subject to the USO, requirements for low income measures for fixed line voice services must continue.

However, a separate and more detailed look at affordability provisions and their impact on choice in the telecommunications sector must take place to address the best ways in which all people, not just those with Telstra fixed-line voice services, can benefit from affordable services.

Ideally, all major retailers would be required to offer an affordable and data-inclusive mobile service tailored to the needs of people on limited incomes. While competition has delivered a good array of mobile services, these products are limited by coverage, and many people are unaware of the variety of mobile offers available. This is another reason ACCAN has recommended that an independent price comparison service is needed.

While consumers in metropolitan and some major regional areas benefit from a competitive mobile market, more work must be done on updating Telstra's obligations to addressing rural and remote consumers' need for an affordable basic mobile service with reasonable data inclusions. As discussed in earlier sections, consumers in rural and remote areas are generally limited to using Telstra's mobile network, meaning they face extremely limited choice in mobile provider. Telstra has recently attempted to address this by offering of a \$30 per month concessional basic mobile service with 2GB of data is not adequate because of both price and small data inclusions.⁹⁵

⁹⁴ As per p27 of the consultation paper.

⁹⁵ Telstra 2020, *Concession offers: \$30/month Value Mobile Offer*, <https://www.telstra.com.au/mobile-phones/telstra-30-month-concession-value-mobile-offer>

Recommendation 15: Telstra's obligation to provide low income measures should continue.

Recommendation 16: A comprehensive review of telecommunications affordability provisions is needed to assess the effectiveness of existing measures, and address new ways to deliver affordable services to people on limited incomes.

Recommendation 17: Telstra should be required to offer a basic mobile service retailing at less than \$30 per month, with generous data inclusions, in recognition of its monopoly status in regional Australia.

6. General questions

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

ACCAN has significant concerns about factors that impact choice and fairness other than consumer protections: affordability and digital inclusion.

Challenges in telecommunications affordability

Affordability is a barrier for people on limited incomes accessing essential communications services.⁹⁶ For these consumers, the cost of communications services can represent a significant proportion of their total income. Households in the lowest 10% and 20% of earners on average pay just under 10% and 6% of their disposable income on communication services respectively.⁹⁷ This is well in excess of average household expenditure on communications, which accounts for approximately 3.5% of disposable income. These statistics reflect the exceptionally regressive and inequitable nature of communications expenditure and the significant affordability challenge faced by consumers on low incomes.

While the Paper posits that affordability in telecommunications has been improving generally over the past 5 years, home broadband is still unaffordable to many Australians, with approximately 1 million households on limited incomes going without.⁹⁸ This is a significant public interest concern considering the essentiality of communications, and the extent to which internet connectivity is vital for work, study, accessing services, and social and economic participation.

ACCAN argues that the best way to address broadband affordability is for NBN Co to offer a 50 Mbps service for a \$20 per month wholesale rate, available to households receiving financial support from government. A concessional wholesale service would allow RSPs to offer competitive rates to low income consumers, while still allowing consumers to exercise choice between providers.⁹⁹

Digital inclusion

Our consultations with consumer organisations for this submission, in addition to ACCAN's recent partnership with NBN Co in running No Australian Left Offline roundtables, has revealed a dire need for coordinated and national responses to digital inclusion. Key areas to be addressed include guaranteed access to devices for school-aged children, and digital skills building for a variety of groups, including:

- Young people,
- People from culturally and linguistically diverse communities,

⁹⁶ Thomas, J et al. 2019, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2019*, RMIT University and Swinburne University of Technology, Melbourne, for Telstra, p. 6

⁹⁷ BCAR (Bureau of Communications and Arts Research) 2017, *Trends and drivers in the affordability of communications services for Australian Households*, trans. BCAR, Working Paper, Canberra, p. 27

⁹⁸ Australian Communications and Consumer Action Network 2019, *No Australian Left Offline: affordable broadband for all Australians*, <http://accan.org.au/files/Affordability/No%20Australian%20Left%20Offline-1.pdf>

⁹⁹ Ibid.

- Older people,
- People with disability,
- First Nations peoples, and
- Recently arrived migrants.

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

ACCAN has no further issues to identify.

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

Section 1 of this submission provides an overview of issues we urge the Government to take into account when considering a revised consumer protections framework.