



23 December 2016

Mr Aidan Storer
ACL Review Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600
ACLReview@treasury.gov.au

cc: Aidan.Storer@treasury.gov.au; Julia.Muse@treasury.gov.au

Dear Mr Storer

Australian Consumer Law Review Interim Report (October 2016)

The Telecommunications Industry Ombudsman Ltd (TIO) welcomes the opportunity to comment on the proposed policy options canvassed by the *Interim Report*.

Our submission focuses on:

1. access to remedies
2. consumer guarantees (acceptable quality)
3. unauthorised customer transfers.

Our comments are informed by the telecommunications industry complaints we handle from individuals and small businesses.

If you have any queries regarding our submission, please feel free to contact me, or our Senior Policy Advisor, Ai-Lin Lee on (03) 8680 8403. Please note our offices are closed for the festive season from 23 December 2016, returning on 3 January 2017.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Judi Jones'.

Judi Jones

Ombudsman

Telecommunications Industry Ombudsman

TIO Submission to the Australian Consumer Law Review Interim Report

1. Access to remedies

Our view:

- (a) The background commentary on the Australian dispute resolution landscape should include reference to the TIO.
- (b) The TIO has a 'follow on' provision which may assist when designing an ACL 'follow on' provision.

(a) TIO in the Australian dispute resolution landscape:

The background commentary on the Australian dispute resolution landscape should include reference to the TIO.

The commentary on 'Access to Remedies' in the *Interim Report* canvassed feedback from submissions to the Issues Paper on whether an equivalent UK Retail Ombudsman scheme might be established in Australia¹.

While noting that Australia's dispute resolution context may differ from the UK, the *Interim Report* provides limited, if any commentary on how our dispute resolution landscape may differ².

The TIO's mandate is set out in Part 6, *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) (TCPSS Act)* and supported by certain provisions in the *Telecommunications Act 1997 (Cth) (Act)*.

Together, the Act and the TCPSS Act (including relevant standards and codes) provide for additional regulatory protections for customers of telecommunications services, in addition to those protections afforded by the Australian Consumer Law (**ACL**).

When enacting the TCPSS Act, the Australian Government envisaged that an independent Ombudsman's scheme would be accessible to individual and small business consumers of telecommunications services as part of the broader telecommunications customer protection framework³.

¹ *Australian Consumer Law Interim Report* (October 2016) (**Interim Report**), 162-169

² *Ibid*, 165

³ *Explanatory Memorandum to the Telecommunications Bill 1996 (Volume 1)*, 141 - 143

Under our Company Constitution⁴ and Terms of Reference⁵, the TIO has jurisdiction to handle telecommunications complaints involving alleged non-compliance with some provisions of the ACL and other telecommunications specific laws and standards.

While responsibility for administering the ACL is shared between State and Territory fair trading agencies and the ACCC, the ACMA has responsibility for administering telecommunications specific laws and standards.

(b) The TIO's 'follow on' provision:

The TIO has a 'follow on' provision which may assist when designing an ACL 'follow on' provision.

Under s119 of the TCPSS Act, to assist in proceedings for damages⁶, consumers can obtain an evidentiary certificate from the TIO for contraventions of telecommunications industry performance standards set out in the Customer Service Guarantee⁷. In practice, as matters tend to be resolved without recourse to court, the TIO has not issued an evidentiary certificate to date.

2. Consumer guarantees (acceptable quality)

Our view:

- (a) The ACL guarantee for acceptable quality should clarify what constitutes a 'major failure' and introduce a consumer right to reject for ongoing contracts like those in the telecommunications industry.
- (b) We recommend this reform because of the inconsistent responses of telecommunications service providers to complaints involving the consumer guarantee for acceptable quality.

(a) Clarifying the ACL guarantee for acceptable quality:

The ACL guarantee for acceptable quality should clarify what constitutes a 'major failure' and introduce a consumer right to reject for ongoing contracts like those in the telecommunications industry.

This could be achieved by:

- *clarifying a product safety issue constitutes a major failure*

⁴ TIO Constitution (https://www.tio.com.au/data/assets/pdf_file/0017/167111/TIO-Company-Constitution-2014-WM.pdf)

⁵ TIO Terms of Reference (1 December 2014) (**TIO TOR**) ([https://www.tio.com.au/data/assets/pdf_file/0004/163579/CORRSDMS-11233597-v6-TIO - Plain English Terms of Reference FINAL.pdf](https://www.tio.com.au/data/assets/pdf_file/0004/163579/CORRSDMS-11233597-v6-TIO-Plain-English-Terms-of-Reference-FINAL.pdf))

⁶ Ibid, clause 6.1

⁷ Telecommunications (Customer Service Guarantee) Standard 2011

- *introducing a dead on arrival protection as part of major failure* – this could apply when a mobile handset exhibits a latent defect that renders the handset unusable (but does not involve a product safety issue) within a specified timeframe from the start of the customer contract
- *introducing a right to reject* – where for example after one failed replacement or repair, the mobile handset still exhibits a latent defect that renders the handset unusable (but does not involve a product safety issue). In these cases, the customer should be able to exercise a right to return the mobile handset and terminate the bundled service contract having paid pro rata; or to select another type of handset under modified contractual terms.

This approach could also potentially apply across other types of complaints in the telecommunications industry, for example involving bundled modems and internet service contracts.

(b) Inconsistent responses:

We recommend this reform because of the inconsistent responses of telecommunications service providers to complaints involving the consumer guarantee for acceptable quality.

In the financial year ended 2016, we handled 112,518 new complaints, of which 36.6% (or 41, 269) involved a complaint about a mobile phone⁸.

Compared with previous years, this represents a decrease in mobile phone complaints received by the TIO⁹, notwithstanding the growing number of Australians switching off their landline connection in favour of a mobile phone¹⁰. This trend in reduced mobile phone complaints appears consistent with consumer responses to the Australian Consumer Survey 2016¹¹.

Of the mobile phone complaints we handle, we typically see customers who have purchased a mobile phone handset bundled with a 24 month phone contract for connection services. These customers present with a dispute involving a faulty handset.

In these cases, to meet the ACL guarantee of acceptable quality¹², the telecommunications retail service provider will typically offer a refurbished

⁸ TIO, *Telecommunications Industry Ombudsman 2016 Annual Report* (November 2016), 14 (See: <http://www.tio.com.au/publications/annual-reports>)

⁹ Ibid, 15

¹⁰ ACCC, *Competition in the Australian Telecommunications Sector Report* (February 2016), 14-15 (See:

<https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202014%E2%80%9315%20and%202012%20web%20FA.pdf>)

¹¹ *Interim Report*, above n1, 61

¹² Australian Consumer Law, s54 (Schedule 3 to the *Competition and Consumer Act 2010* (Cth))

or repaired mobile phone to replace a defective handset, for example if the mobile phone screen goes black and no calls can be made, whether at the start of the customer's 24 month contract.

While a customer may be offered a new handset if they immediately report it was 'dead on arrival' or even within a month of arrival, industry interpretation of 'major failure' is inconsistent and such that a customer will rarely ever be able to choose which remedy they want (repair, refurbished phone or new replacement).

We also see complaints involving a 'cycle of repair' where the refurbished phone continues to be returned for repair, but a defect remains, and the customer is not provided with an interim or new handset. During this time, the customer may be required to pay connection service fees and charges in accordance with their contract, even though they have no functioning mobile phone.

We observe that complainants in these situations tend to feel they have:

- no option other than to accept a refurbished or repaired phone, even though they expect to receive a new replacement phone when the defect presents within the first few months of their contract
- been unfairly locked into a contract that requires them to make payment for little or no benefit.

We also see complaints where the mobile handset becomes defective closer to the end of the 24 month contract. In these cases, we consider the offer of a refurbished handset reasonable.

3. Unauthorised customer transfers

Our view:

- (a) The unsolicited consumer agreement provisions of the ACL should be modified to: extend the cooling-off period to a reasonable time after the customer receives their first bill so they may exercise their cooling-off right; allow cancellation of the new contract without the customer incurring a termination fee and only having to pay pro rata for the services they used.
- (b) We recommend this reform because the TIO handles a number of complaints about unauthorised customer transfers. In these cases, the TIO finds the current cooling-off protections ineffective and customers having to pay termination fees.

(a) Modifying the ACL unsolicited consumer agreement provisions:

The unsolicited consumer agreement provisions of the ACL should be modified to: extend the cooling-off period to a reasonable time after the

customer receives their first bill so they may exercise their cooling-off right; allow cancellation of the new contract without the customer incurring a termination fee and only having to pay pro rata for the services they used.

The TIO recognises that the protections under Part 3.2 (Subdivision D, Division 2) of the ACL for unsolicited consumer agreements are intended to provide an economy-wide response to telemarketing and door-to-door sales, and provide protections to customers who may be more susceptible to pressure selling.

The TIO supports principles-based regulation where ever possible, so the ACL can continue to remain flexible and effective across industry sectors. However, we are of the view that a modified approach may be warranted for ongoing contracts, like those in the telecommunications industry.

The TIO encourages modifications to the unsolicited consumer agreement provisions of the ACL along the lines proposed by Option 3 in the *Interim Report*¹³, so the cooling-off period is extended to a reasonable time after the customer receives their first bill so they may exercise their cooling-off right; and the new contract can be cancelled without the customer incurring a termination fee and only having to pay pro rata for the services they have used.

(b) TIO unauthorised customer transfer complaints:

We recommend this reform because the TIO handles a number of complaints about unauthorised customer transfers. In these cases, the TIO finds the current cooling-off protections ineffective and customers having to pay termination fees.

The number of unauthorised customer transfer complaints brought to the TIO has remained relatively stable, averaging approximately 2,040 complaints per financial year (see Graph 1 below).

¹³ *Interim Report*, above n1, 146 - 150

Graph 1: TIO unauthorised customer transfer complaints



Note:

- The number of complaints exclude complaints against the TIO’s top 3 providers (Telstra, Optus and Vodafone) and have been compared against the total number of TIO complaints, also excluding complaints against the TIO’s top 3 providers. TIO enquiries that may have progressed to a complaint under TIO complaints handling procedures have also been excluded.
- The number of complaints differ to our previous submission because we have revised how we identify these complaints for more comprehensive reporting.

In 2016 (until 2 December 2016), the TIO received 1,658 unauthorised customer transfer complaints, of which 69 progressed to conciliation, 3 progressed to investigation and the remainder were referred back to the telecommunications service provider for resolution.

The TIO has identified that these types of complaints tend to be concentrated against smaller market players (perhaps as a cluster of associated companies), who often do not have a shop front presence and tend to outsource their telemarketing.

In unauthorised transfer cases that come to our attention, we find that cooling-off protections are often ineffective.

This may be due to a range of factors including:

- when the customer is first engaged in discussion by the telemarketer, they may not have the context of a telecommunications contract in mind
- customers are often vulnerable or disadvantaged (e.g. they are elderly, English is not their first language or they may have a mental

health issue) so they may not understand the nature of the telephone conversation¹⁴

- the telecommunications retail service provider or its telemarketers may employ tactics to persuade a customer to transfer, that may be confusing, constitute misleading and deceptive conduct, such as creating an impression they represent Telstra or are affiliated with Telstra¹⁵; or may even constitute unconscionable conduct¹⁶
- 'welcome' packs, including the new customer contract may not be compliant with the unsolicited consumer agreement requirements (e.g. there may be no conspicuous, prominent front page information about the consumer's right to terminate), or the welcome pack may not be sent at all¹⁷
- when the customer receives their 'welcome pack', including their new contract as part of the transfer, the information may have little or no impact:
 - (i) If the customer has been misled or misunderstood the nature of the telemarketing call, they may believe the information has been sent to them in error and not engage with it
 - (ii) Even if the customer understands the information is for them, they may not read the contract nor understand its terms to be aware of their cooling-off rights. This is consistent with the findings of consumer research, recently commissioned by ACCAN that found that consumers do not read, nor necessarily understand their telecommunications contract¹⁸
- in some cases, customers may seek to exercise their cooling-off right, but may be unable to do so because they cannot contact the company they have been transferred to
- customers may find themselves having to pay a termination fee of up to \$1,000 to cancel the new contract; or the customer may refuse to pay fees because they did not consent to the transfer and the company they have transferred to disconnects them so they cannot retain their phone number¹⁹. Associated hardship and/or debt collection issues may be involved.

¹⁴ TIO submission to the *Review of ACL Issues Paper* (16 June 2016), 27

¹⁵ e.g. *ACCC v Zen Telecom Pty Ltd* [2014] FCA 1049 (30 September 2014)

¹⁶ e.g. *ACCC v Harrison* [2016] FCA 1543

¹⁷ Australian Consumer Law, s79 (Schedule 3 to the *Competition and Consumer Act 2010* (Cth))

¹⁸ Harrison, P, et al, *Confident, but Confounded: Consumer Comprehension of Telecommunications Agreements* (September 2016) (See:

https://accan.org.au/files/Reports/Confident%20Confounded_accessible%20WEB_03.11.16.pdf)

¹⁹ *Local Number Portability Industry Code* (C540:2013 Incorporating Variation No.1/2016)