



# ACCC submission to Part C of the Consumer Safeguards Review

September 2020

## Executive summary

The telecommunications consumer safeguards framework is not working. Over the past decade, there have been a number of attempts to strengthen or buttress the framework, including:

- the Reconnecting the Customer inquiry,
- reviews of the Telecommunications Consumer Protections Code,
- the establishment of an industry led compliance body,
- a review and restructure of the telecommunications industry ombudsman (TIO) scheme,
- the introduction of industry standards and service provider rules to buttress the Code, and
- the Consumer Safeguards Review, of which this consultation forms the final part.

While these processes have introduced some important improvements, complaint numbers to the TIO still remain higher than other industry ombudsman schemes and industry participants, both large and small, are still regularly the subject of investigation and enforcement for breaches of the Australian Consumer Law (ACL).

The nature of these complaints and enforcement actions have shown that breaches of the framework can result in a range of negative outcomes for consumers, which can sometimes be significant and/or widespread. Examples of consumer detriment include taking advantage of vulnerable consumers, making decisions based on misleading information, unfair contract terms, financial hardship, unsatisfactory customer service, long wait times, and poor complaints handling.

Telecommunications services are essential services. They support a vast range of work, business, education, health and entertainment needs. As the demand for these services and the structure of the sector continues to evolve, it is critical that the consumer safeguards framework reflects the essential nature of these services and promotes a competitive and well-functioning market.

The current health pandemic has highlighted the essential nature of telecommunications services. While industry has done well to maintain connectivity (particularly on the NBN) during this time, some other telecommunications matters including certain protections under the Telecommunications Consumer Protections (TCP) Code have not been managed as well.

The current safeguards framework was originally designed for a very different environment to today. The changing nature of telecommunications services combined with the near completion of the NBN and the rollout of new competing wireless technologies necessitates a rethink of the current framework.

Co-regulation under the industry led TCP Code, combined with the framework's two-step enforcement process and disproportionately low-level financial penalties provide very few incentives for industry compliance. Further, aspects of the current framework do not reflect the everyday importance of telecommunications services or the potential harm to consumers of non-compliance.

In principle, we support the Review's suggested improvements to strengthen direct regulation and increase the ACMA's enforcement powers. Such changes should be supported by a robust and active compliance and enforcement program, and sufficient resourcing to support any changes.

However, the Review provides a timely and critical opportunity to rethink the framework and implement a scheme that reflects the essential role of telecommunications, fits the increasingly diverse range of market participants and incentivises compliance. We propose a new regulatory framework to impose minimum conditions of entry and participation when providing essential telecommunications services. We consider that these objectives can be achieved by underpinning the Review's suggested improvements to the framework with a scheme that has the following key elements:

- Minimum standards to market entry for all telecommunications providers
- The inclusion of a 'suitability' criteria, and
- Dynamic and responsive to changing circumstances.

We believe that a scheme that meets these criteria will ensure the sector is well placed to meet the challenges in the future, and reflects the essential nature of the services being provided. This scheme would:

- be consistent with the regulation of other parts of the sector
- be already embedded within the ACMA's operational work
- give the ACMA a valuable additional tool for the protection of consumers, and
- provide greater visibility across industry.

Importantly, the scheme should require potential and existing telecommunications retail market participants to show their capacity to comply with basic consumer safeguards, and to make this a requirement of their operation in the market. This obligation would require market participants to do no more than demonstrate that they are capable of meeting and maintaining consumer safeguards that they are required under law to meet/apply today. Further, while establishing some conditions on entry, it would not unreasonably raise barriers to entry to providers who intend to engage competitively and operate within the bounds of the framework.

Finally, despite the near completion of the NBN and the need to rethink the framework, we consider that the removal of certain legacy obligations is not appropriate at this time. To the extent access to essential communications services is maintained as a policy through legacy fixed-line services (such as the Universal Service Obligation), a minimum standard of consumer protections is required to ensure accessible and affordable telecommunication services for all people in Australia.

## Our role and outline of our submission

The Australian Competition and Consumer Commission (ACCC) welcomes Part C of the Consumer Safeguards Review (the Review) and appreciates the opportunity to provide a submission to the final part of this Review.

The ACCC is the economy-wide competition and consumer regulator responsible for enforcing the *Competition and Consumer Act 2010* (CCA). We protect Australian consumers by fostering competitive, efficient, fair and informed Australian markets, including telecommunications markets.

This includes our work in investigating and enforcing breaches of the Australian Consumer Law (ACL), which establishes legal protections for consumers in their dealings with

businesses across the entire economy,<sup>1</sup> for example, ensuring that consumers are not misled when purchasing goods and services and businesses have reasonable grounds for making representations about future matters. Businesses are responsible for ensuring compliance with the ACL when they provide information to consumers.

The ACCC's submission to this part of the Review outlines why we consider further adjustments to the consumer safeguards framework, while valuable and necessary, will not on their own, deliver the changes necessary to adequately protect the interests of consumers. We set out the reasons why we consider a fundamental rethink of the framework is necessary, including consideration of a new scheme that requires participants who operate within the downstream retail markets for essential telecommunications services to comply with the existing safeguards as a condition of their operation. We also outline our views on the ongoing importance of the legacy regulatory obligations.

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<sup>1</sup> We note there are some carve outs to the ACL. For example, financial services, contracts of insurance and goods sold before 2011 are not covered by consumer guarantees. Different laws apply to these matters.

## A rethink of the telecommunications consumer safeguards framework is necessary

The current review of consumer safeguards is taking place at a critical time for the telecommunications industry. The build of the national broadband network (NBN) and the associated restructure of the industry, is approaching completion. New wireless technologies are being rolled out which will compete with fixed line services and consumer demand for reliable, high speed services that can support work, business, education, health and entertainment needs continue to grow.

Parts A and B of the review have implemented some important changes that bolster or replace legacy regulations in the existing framework, including strengthening the TIO and recognising the need for service standard benchmarks.

However, from our perspective, the matters being considered in Part C are fundamental to an effective, competitive and well-functioning market that will operate in the best interests of consumers, businesses and industry participants.

Consumers must be able to easily access information about the services on offer and, critically, must have confidence that they can rely on the representations being made in order to choose the products and services that meet their needs. Providers must be able to compete fairly on a level playing field by being able to accurately represent the services they offer, and rely on other industry participants to do the same.

These are the outcomes that the existing framework is designed to deliver but which are not being achieved. Consumers continue to report poor outcomes with telecommunications. For example, in August 2020, the Consumer Policy Research Centre reported that for the fourth consecutive month, telecommunications providers have been identified by consumers as delivering the worst customer service of all essential service providers.<sup>2</sup> In August 2020, 5.7 million Australians reported having a recent negative experience with their telecommunications provider, compared with 4.1 million in July 2020. Further, 43 per cent of consumers with a disability also reported having negative experiences with telecommunications providers.<sup>3</sup> As noted in the Consultation Paper to this part of the Review, the telecommunications sector has a much higher proportion of complaints per customer than in the energy sector.<sup>4</sup> Telecommunications is also often in the top ten industries complained about to the ACCC.

Too often in this sector, the incentives of industry participants to mislead or deceive consumers, or make misrepresentations about the quality or coverage of networks, in order to gain market share and maximise profit have been higher than the incentives to comply with the industry's own benchmarks and rules. There have been multiple reviews of the regulatory framework over the past decade, and yet, the overall adherence to the industry's self-regulatory framework still remains too low.

This can be seen in the high numbers of complaints still made to the TIO and the large number of enforcement matters that the ACCC, as the economy-wide consumer regulator, has taken against telecommunications providers. For example, over the past four years, the ACCC has taken several cases to litigation, accepted ten court-enforceable undertakings under section 87B of the CCA, and issued six infringement notices to participants in the

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<sup>2</sup> Consumer Policy Research Centre, *Consumers and COVID-19 August Results Snapshot*, [https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19\\_AUGUST-RESULTS-SNAPSHOT\\_21Sept2020.pdf](https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19_AUGUST-RESULTS-SNAPSHOT_21Sept2020.pdf)

<sup>3</sup> Consumer Policy Research Centre, *Consumers and COVID-19 August Results Snapshot*, [https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19\\_AUGUST-RESULTS-SNAPSHOT\\_21Sept2020.pdf](https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19_AUGUST-RESULTS-SNAPSHOT_21Sept2020.pdf)

<sup>4</sup> Department of Infrastructure, Transport, Regional Development and Communications. *Consumer Safeguards Review Part C Choice and Fairness: Consultation paper*, pp.8-9.

sector. Further, a few providers made changes to their behaviour following the ACCC raising concerns with those particular providers. There are also a number of ongoing investigations. In addition to action undertaken by the ACCC, the ACMA's website also outlines a range of telecommunications consumer protection compliance and enforcement actions taken by the ACMA over the last few years.<sup>5</sup>

A list of our recent telecommunications enforcement action is provided at **Attachment A**.

The telecommunications sector has remained a priority area in some form in the ACCC's annual compliance and enforcement priorities in most years over the past decade despite several reviews of the industry's TCP Code and additional safeguards being introduced. If the market was working effectively, we would expect that the industry rules and standards would operate to minimise the occurrence of such matters and industry providers would have strong and robust internal compliance systems in place to mitigate the risk of breaching both the industry's own rules and the ACL.

### What is working well, less well and where are the gaps?

The current consumer safeguards framework should offer consumers a comprehensive range of protections. While many components are working well, we consider that there remains a gap between the rules in place and the corresponding behaviours that we would expect to see across a mature, compliant sector:

- We consider that the TIO provides an external dispute resolution scheme of high quality and standard. The ACCC and State and Territory ACL regulators often refer individual consumer complaints to the TIO with good outcomes. The TIO also identifies systemic issues, which can alert industry members to matters of broader concern. The TIO also refers systemic issues to regulators where there is a risk to consumers as a result of systemic conduct or particular products or services. Nevertheless there are significant numbers of complaints made to the service each year;
- The TCP Code is in itself, a high quality industry code of conduct. It offers a range of consumer protections that cover the key points along the life-cycle of the consumer-provider engagement. The TCP Code offers significant supplementary protections above that of other industries, and more specific protections than the general concepts set out in the ACL.

In some respects, the TCP Code and ACL do overlap. The TCP Code deals with telecommunications trade practices, while the ACL deals with general consumer protections which, among other things, include prohibitions on false, misleading and unconscionable advertising and sales practices. As such, a breach under the TCP Code may also constitute a breach under the ACL. The ACCC has been seen by some as a "backup regulator" when the TCP Code is not enforced.<sup>6</sup> However, as outlined in the Consultation Paper, direct enforcement of TCP Code breaches has been constrained by the current legislated two-step enforcement process. Some of our enforcement and compliance action outlined in Attachment A has been taken for alleged false and misleading advertising that would likely have been in breach of the TCP Code's advertising and sales standards and rules.

As the Consultation Paper acknowledges, the enforcement powers available to the ACMA are limited and cumbersome. They do not reflect the standards that we would expect to set the right incentives among industry members. Similarly, the ACMA's powers to accept codes or seek improvements to the operation and coverage of the Code are rigid and indirect and

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<sup>5</sup> ACMA, *Investigations into telco providers*, <https://www.acma.gov.au/investigations-telco-providers> and *Action on telco consumer protections*, <https://www.acma.gov.au/action-telco-consumer-protections>.

<sup>6</sup> Grant A and Raiche H, 2011, 'Consumer protection and universal service' in A Grant and D Howarth (eds), *Australian Telecommunications Regulation*, 4<sup>th</sup> edn, CCH Australia, Sydney, p. 361.

do not enable the ACMA to ensure the Code remains a flexible, adaptable set of rules to safeguard consumers.

However, we think the most notable gap is the lack of a consistent compliance culture across the industry. As noted above, the TCP Code covers each of the key stages of the customer–provider relationship and compliance with those provisions should mitigate the risk of a provider breaching provisions of the ACL. However, the number of ACL enforcement outcomes against both large and small telecommunications providers, including for conduct that would also breach the industry’s own rules, would indicate that a consistent and widespread compliance culture is lacking across the sector.

We are not persuaded that imposing more rules, or indeed stronger enforcement powers would on their own, necessarily create stronger incentives for compliance. Further, while the number of complaints to the TIO have fallen as stronger rules around complaints handling have been introduced, the numbers remain high in comparison to other industry dispute resolution bodies. This reinforces the need for a rethink of the framework.

## Lack of consistent compliance across the industry is concerning

Our response to Part A of the review noted that:

- our recent history of enforcement action demonstrates that generally the telecommunications industry has quite low standards of customer service and an inconsistent culture of poor compliance. The ACCC has undertaken enforcement action against a range of retail carriage service providers (CSPs), both large and small, and
- the ACCC considers that a policy response must be directed at the underlying problem facing the industry. That is, the industry must have the right incentives to develop a more robust culture of compliance that focuses on the consumer.

For the past ten years, the ACCC has taken enforcement action against service providers (including large service providers with significant market share) within the telecommunications sector for misleading and deceptive conduct. In addition, there has been a significant amount of litigation between competitors seeking to injunct each other’s advertising. This suggests that many industry participants know when conduct is wrong, but despite this, these same participants also end up being subject to ACCC action for similar conduct.

- For example, Telstra recently commenced proceedings against Optus alleging that its use of the phrase "covering more of Australia than ever before" was misleading as Telstra claims it conveys the impression that Optus’ mobile network covers more of Australia than the other mobile networks.<sup>7</sup> Telstra also took actions against Optus in 2014 and in 2018 regarding misleading and deceptive representations made about its mobile network.<sup>8</sup> In 2018, Optus successfully took action against Telstra for its advertisements regarding unlimited mobile data plans, which the Court found were

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<sup>7</sup> Sydney Morning Herald, *Telstra sues Optus in long simmering dispute over mobile networks*, 28 July 2020: <https://www.smh.com.au/business/companies/telstra-sues-optus-in-long-simmering-dispute-over-mobile-networks-20200728-p55q6d.html>.

<sup>8</sup> IT News, *Telstra wins legal battle over Optus Ads*, 18 February 2014: <https://www.itnews.com.au/news/telstra-wins-legal-battle-over-optus-ads-372659>. Australian Financial Review, *Telstra takes Optus to court over best mobile network claims*, 11 May 2018: <https://www.afr.com/companies/telecommunications/telstra-takes-optus-to-court-over-best-mobile-network-claims-20180511-h0zy64>.

misleading and deceptive.<sup>9</sup> In 2010, Optus unsuccessfully took action against Vodafone regarding its infinite mobile plan advertisements.<sup>10</sup>

The ACCC has continued its focus on poor conduct within the telecommunications industry as part of its enforcement work.

A summary of the actions that the ACCC has taken against service providers over the past few years is included in **Attachment A**. This summary shows action against multiple providers for patterns of non-compliant conduct such as:

- Misleading and deceptive representations about the performance of, or inclusions within their products and services. For example, between 2017-2018 the ACCC accepted court enforceable undertakings from each of Telstra, Optus, TPG, iiNet, Internode, Dodo, iPrimus and Commander providing for remedies to be offered to consumers after these providers promoted their plans with maximum broadband speeds when in fact many of their customers' internet services were not capable of receiving the maximum advertised speeds. These providers undertook to contact thousands of affected consumers to offer them a range of options, such as moving to a lower speed plan of their choice, or exiting their contract and receiving a refund.
- Falsely representing that consumers would be disconnected if they did not switch to the NBN. In 2020 we accepted a court enforceable undertaking from NBN Co, and in 2019, BVivid paid \$25 200 in infringement notice penalties, for such conduct. Further, in 2019, the Federal Court ordered Optus to pay \$6.4 million in penalties for making misleading claims about home internet disconnections to consumers. Similarly, in 2018, the Court ordered Optus to pay penalties of \$1.5 million for making misleading representations to customers about their transition from Optus' HFC network to the NBN.
- Providers taking advantage of vulnerable consumers and causing severe consumer detriment. Our action against SoleNet and Sure Telecom in 2016/2017 is a good example of this. Telstra has recently informed the market that the ACCC is undertaking an investigation into Telstra's sales, complaint handling and debt collection practices, to determine whether Telstra has engaged in misleading or deceptive conduct, unconscionable conduct, or made false or misleading representations.
- Poor telemarketing and sales practices, whereby misrepresentations or deceptive conduct causes consumers to transfer from their current service to another. We recently instituted proceedings against Superfone Pty Ltd alleging it had engaged in such conduct. Previously, we successfully took enforcement action against Zen Telecom in 2014, with the court ordering Zen Telecom to pay pecuniary penalties of \$225 000 for such behaviour. In 2013, Utel Networks also provided the ACCC with a court enforceable undertaking to improve its practices, and paid \$19 800 in infringement notice penalties regarding its conduct by its telemarketers making misrepresentations and not complying with the requirements for unsolicited consumer agreements.
- The use of unfair contract terms in standard form consumer contracts, such as those declared to be unfair in the action we took in 2013 against Bytecard, and the terms Exetel removed from its residential broadband standard form of agreement following the ACCC raising concerns they were unfair contract terms.

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<sup>9</sup> IT News, *Telstra loses court case over 'unlimited' mobile ads*, 23 May 2018: <https://www.itnews.com.au/news/telstra-loses-court-case-over-unlimited-mobile-ads-491555>.

<sup>10</sup> Zdnet, *Vodafone infinite case costs Optus*, 2 May 2011: <https://www.zdnet.com/article/vodafone-infinite-case-costs-optus/>.



We have also taken action against each of the mobile network operators (MNOs) regarding their third party billing services. These actions against the MNOs are important in highlighting the gap between the standards in place and the conduct of industry members. In these cases, it appears that commercial incentives were clearly given more weight than compliance with the safeguards to ensure consumers were aware of, and provided clear, informed consent to acquire such services. For example, in our action against Telstra in 2018, there were approximately 72 000 consumers impacted by Telstra's third party billing issue. While Telstra paid \$10 million in court ordered penalties and refunded approximately \$9.3 million to consumers, Telstra earned about \$61.7 million in net revenue from commissions on premium billing services charged to more than 2.7 million mobile numbers.<sup>11</sup>

ACCC enforcement action is not limited to larger providers. We have also taken action against a number of smaller providers for conduct that was misleading, deceptive and/or unconscionable.

Some of these smaller providers act outside the industry's self-regulatory regime and can slip under the regulatory radar, which reflects the low barriers to entry that are currently in place. Their conduct can sometimes be deliberate, unconscionable and targeted to harm consumers. They can disappear and re-emerge under a new name but with the same directors or operators (phoenixing).

For example, in 2016 we took action in the Federal Court against SoleNet and SureTelecom. The Court found that these providers had engaged in unconscionable conduct in the supply of telecommunications services by the following conduct:

- between 2013 and 2015, restructuring these companies in part to avoid regulatory sanctions and unpaid debts to regulators,
- transferring customers from one SoleNet/Sure Telecom Company to another without their knowledge or informed consent, and
- demanding payment from these customers for early termination or cancellation fees, when there was no legitimate contractual basis for the SoleNet/Sure Telecom Company to demand the fee payment.

The Court also found that in the cases of four customers, the SoleNet/Sure Telecom Companies engaged in undue harassment in connection with the supply of services and payment for services by persistently pursuing them for debts they did not owe.

In delivering the judgment, the Court noted that “the contravening conduct was serious, deliberate and extended over a period of about two to three years” and “was not ad hoc, but systemic and planned.”<sup>12</sup> The Court ordered that SoleNet and Sure Telecom and sole director Mr James Harrison pay penalties of \$250 000 and be restrained from carrying on a business or supplying services in connection with telecommunications for a period of two years.

Another example is our action in 2013 against Excite Mobile.<sup>13</sup> In that case, the Federal Court found that Excite Mobile engaged in false, misleading and unconscionable conduct in its provision of mobile phone services to customers across Australia. This included

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<sup>11</sup> ACCC, *Telstra misled customers over premium billing charges*, 26 March 2018, <https://www.accc.gov.au/media-release/telstra-misled-customers-over-premium-billing-charges>.

<sup>12</sup> Austlii, *Australian Competition and Consumer Commission v Harrison (No 2)* [2017] FCA 182 (2 March 2017) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2017/182.html>.

<sup>13</sup> Austlii, *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2013/350.html?context=1;query=Excite%20Mobile%20ACCC;mask\\_path=au/cases/cth/FC A](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2013/350.html?context=1;query=Excite%20Mobile%20ACCC;mask_path=au/cases/cth/FC A).

consumers living in indigenous communities on the Cape York Peninsula, remote areas in Queensland and Western Australia, and throughout the Northern Territory. The Court also found Excite Mobile acted unconscionably and used undue coercion when attempting to obtain payment for mobile phone services. Excite Mobile's directors, were both found to have been directly knowingly concerned in Excite Mobile's contraventions and were disqualified from managing a corporation.

Taking action against these companies can be time consuming and resource intensive. Further, there is no guarantee that the significant penalties that the Courts have imposed on these companies for behaviour that was particularly egregious, will be a deterrent to other smaller providers within the sector.

## We propose a new regulatory framework to impose minimum conditions of entry and participation when providing essential telecommunications services

The telecommunications sector is very diverse, with more than 1200 retail service providers. The majority of the service providers are telecommunications resellers that provide services to end-users using third-party owned infrastructure. This involves purchasing a service from network wholesalers and on-selling this service to consumers or businesses. The reseller industry is fragmented and is comprised largely of small to medium entities, reflecting the relatively small capital investment required to enter this market. At the other end of the market are larger providers, with significant market share, that directly sell services to end-users.

Given the large number of participants in the market and persistent poor conduct across the industry more generally, we consider that the review provides an opportunity to consider a new scheme that can sit within the existing framework. Such a scheme will set the sector up to ensure that participants, who intend to provide retail telecommunications services, can demonstrate their capacity to meet and comply with basic consumer safeguards, and compliance with those safeguards is a condition of their ongoing participation. This would better reflect a mature, well-functioning market and the essential nature of the services being provided. We consider that such a scheme would achieve those objectives and, in turn, promote greater consumer confidence in the sector and in the overall telecommunications consumer safeguards framework.

The current licensing regime for telecommunications providers only applies to carriers who own network units that deliver carriage services.<sup>14</sup> However, carriage service providers (CSPs), who use licensed networks to provide telecommunications services, are not required to hold a licence or be registered in any way.

While the current regulatory regime provides for service provider rules and gives the Minister various powers (such as the ability to impose conditions on licences and to make determinations for class licensing), we consider that these are not flexible or responsive enough to address current issues in this sector. We consider that a positive upfront requirement, which applies to all CSPs, will provide a more direct, responsive and efficient tool to address the objectives in this Review.

A scheme that provides minimum standards for market entry could be provided for in a licensing, registration or authorisation type framework. However, regardless of the model selected, for the framework to effectively address the ongoing issues in the sector, it must have the following key elements:

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<sup>14</sup> Carrier network facilities may include transmission infrastructure, cabling, wireless networks and satellite facilities.

- **Minimum standards to market entry for all telecommunications providers**

Minimum standards to entry ensure all participants have the capacity to supply telecommunications services to end-users. For example, in energy, retailers must first meet certain criteria before being 'authorised' to supply gas or electricity. These criteria include organisational and technical capacity, financial capacity and suitability. We consider it is also essential that industry participants commit to meeting any financial orders or compensation directed to be paid by external dispute resolution bodies as part of their operation within the sector.

- **Minimum standards must include a 'suitability' criteria**

A suitability criterion is critical to ensure that telecommunications as an essential service is only provided by 'suitable' entities. Further, it could address some of the issues which have been identified in this submission regarding 'rogue' providers.

While there are many smaller providers that contribute positively to competition within the market, as outlined above, we have identified through our investigation and enforcement work, a small number of providers that operate outside of the regulatory purview and have engaged in conduct that deliberately harms consumers. These sorts of actions undermine the sector more generally.

These types of matters can be difficult to remedy, and can often be resource intensive for the TIO, ACMA and/or the ACCC to investigate and enforce. If entry to this market was subject to a set of minimum standards which reflect the essential nature of telecommunications services, we expect that some of the smaller providers who intend to breach the rules to maximise profit, may weigh up the risk of non-compliance, and choose to leave (or not enter) the sector.

- **Dynamic and responsive to changing circumstances**

The scheme should allow for ability to review and modify the conditions of entry to, or operation within, the market. This should allow flexibility for the ACMA, as the industry regulator, to respond quickly to emerging issues and breaches. For instance, the recent health pandemic required some essential industry sectors to implement measures to safeguard consumers for the duration of any health orders. Without this, the framework may not achieve the stronger safeguards that are needed.

We believe that a scheme that meets these criteria will ensure the sector is well placed to meet the challenges in the future, and reflects the essential nature of the services being provided. Specifically, such a scheme will:

- **Provide additional enforcement tools**

In addition to having more direct enforcement powers as proposed in the review, a scheme as proposed above will give the ACMA a range of tools that can be targeted, responsive and effective. For instance, it could provide the ACMA with a broader range of tools including imposing licence-type conditions, banning powers, or, ultimately, revocation of the right to operate in the market in serious or particularly egregious matters. Being able to remove a rogue provider from the sector, that is creating an operating risk, will be more effective in preventing consumer harm and can send a strong deterrent message to other providers than the imposition of penalties.

- **Be consistent with the current framework**

Any framework that includes the imposition of conditions should not impose a significant regulatory burden on the regulator. The existing regulatory framework of other parts of the sector includes licensing and is already embedded within the ACMA's operational work. We consider that a similar design, which includes

registration and the ability to impose conditions of participation in the sector could give the ACMA more levers to set industry benchmarks and more flexibility to respond to breaches depending on the severity and extent of the conduct.

- **Complement existing obligations**

This type of framework could also complement obligations in, or action taken under, other aspects of the consumer safeguards framework. For instance, a market participant could be required to provide evidence of its membership of the TIO as a condition of entry to the sector or a licence-type condition requiring a stronger compliance system could be imposed by the regulator where a participant is found to have breached the ACL on multiple occasions.

The Federal Court has previously been critical of providers who lacked internal compliance systems. This includes our actions against Optus regarding its 'THINK BIGGER' and 'SUPERSONIC' broadband internet advertising. Such action can be targeted to the circumstances of the market participant, and as such, allow a more proportionate response to a breach, and operate to safeguard consumers against particular misconduct.

- **Provide greater visibility across the industry**

In the absence of a requirement for CSPs to be registered or licensed, there is no single consolidated list of all market participants. Without such visibility, the regulator is unable to track industry compliance or monitor market structure.

It is important that the costs in establishing a new framework also be weighed against the lower regulatory and compliance costs that would likely follow after it is established. Taking enforcement action through a Court process can be time consuming, resource intensive and costly, both for the regulator and the provider and any increase in direct regulation by the ACMA would need additional resources to meet increased compliance and enforcement costs. Given this, a scheme of the type we are proposing would make available to the ACMA a broader range of remedies as an alternative to Court proceedings which could mean more emphasis on compliance and less on enforcement leading to lower costs over the longer-term.

## Telecommunications consumer protection rules need to be directly enforceable

The current legislated two-step enforcement framework means that a provider could potentially engage in behaviour that breaches the Code (and profit from such breaches), cause significant detriment to a large number of consumers and only face consequences if the provider fails to comply after it has been given an ACMA warning or direction to comply with the Code. The Consultation Paper importantly notes this means that no immediate sanction can be applied, even if significant consumer detriment occurred. However, this also means the ACMA lacks the power to impose sanctions to rectify any harm that occurred as a result of the initial breach. This, combined with low-level penalties, provides for a framework that provides insufficient incentives for industry compliance.

The ACMA has undertaken a number of investigations and actions in response to breaches of the safeguards framework in recent years.<sup>15</sup> However, the current legislated two-step enforcement process and low-level penalties are no longer fit for purpose for the sector. Therefore, we welcome and strongly support the proposal to give stronger and more direct enforcement powers to the ACMA. Further, changes to the consumer protection framework

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<sup>15</sup> ACMA, *Investigations into telco providers*, <https://www.acma.gov.au/investigations-telco-providers> and *Action on telco consumer protections*, <https://www.acma.gov.au/action-telco-consumer-protections>.

and increasing the regulatory powers of the ACMA, will only be effective if it is adequately resourced.

Litigated outcomes can be a strong deterrent for the industry as a whole, as well as penalising the particular misconduct litigated. However, it can take some time to obtain litigated outcomes. Remedies such as formal warnings and infringement notices can generally be taken more quickly, but may have less of an impact on the industry sector as a whole, even when they resolve individual instances of misconduct.

Implementing appropriate remedies that incentivise compliance and that reflect the critical nature of these safeguards should be a central consideration of a new consumer safeguards framework to ensure good outcomes for consumers.

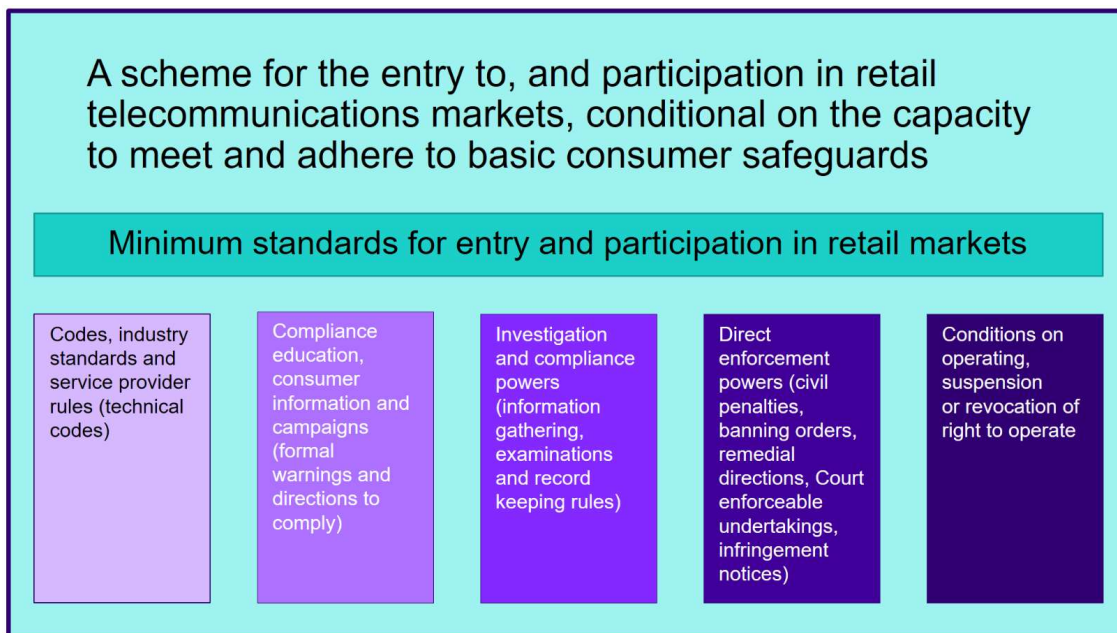
Further, large penalties may not always be a sufficient incentive and some providers may be willing to risk significant fines and engage in harmful behaviour if there is an opportunity to earn significant profits. The third party billing example discussed above illustrates this point. Perhaps other incentives for compliance with safeguards that protect consumers from particularly harmful conduct could be considered, including making certain safeguards carrier licence conditions and service provider rules.

### A multifaceted approach will deliver for consumers and industry

Based on the observations outlined above, the ACCC considers that a multi-faceted telecommunications consumer safeguards framework, with direct enforcement powers complemented by a regulatory scheme that imposes minimum conditions for entry to, and operation within the sector, will provide the best outcomes for consumers and industry.

The sector needs protections which adequately protect consumers, introduce strong incentives, are responsive to a poor culture of compliance, and also reflect the essential role of telecommunications in the daily lives of Australians.

We suggest that the key tenets of a strengthened safeguards framework could operate as follows:



- **Minimum standards for market entry and participation in retail markets**

We propose a requirement that all providers meet a set of minimum standards, including a suitability test, before being allowed to operate as a retail service provider. It should be dynamic and allow for the ACMA to review and impose conditions on the ongoing participation in the sector, and, importantly, to remove operators from the sector for conduct that is particularly egregious.

Further, the requirement to meet minimum standards such as a suitability test may protect competition and consumers by discouraging entry of providers who intentionally engage in harmful and disruptive behaviours such as phoenixing, unauthorised transfers and/or unconscionable conduct. It will also help identify any directors who have previously been banned or subject to disqualification in other industries. Our cases against a range of smaller providers, including our action in the Federal Court against SoleNet and Sure Telecom is a good example of where higher standards to entry might have discouraged such behaviour and prevented harm to consumers.

While the scheme would be key to the framework, the existing safeguards would operate as the baseline. As such, industry members would not be subject to new obligations, but the incentives to embed those safeguards within the internal compliance systems would be higher. The failure to do so would represent an operating risk, rather than pecuniary risk.

- **Codes and industry standards**

We consider that industry codes and standards should continue to play an important role in setting the consumer safeguard rules in the framework. Technical industry codes have worked effectively and ensure that there is a coordinated response to technical matters, while industry standards and service provider rules are effective in setting baseline rules.

Our preference is for the key consumer safeguards set out in the TCP Code to be incorporated into an Industry Standard. However, the code making process itself could be strengthened, for example by requiring equal representation from industry and consumer groups and giving the ACMA more power to require a code to include additional community safeguards and more flexibility when registering a code.

We also consider that key consumer safeguards should continue to be set through industry standards and service provider rules.

- **Compliance education, consumer education and campaigns**

We expect that the ACMA, ACCC and TIO would continue their respective work on compliance education and consumer and industry engagement. For example, the ACCC's industry guidance on broadband speed claims responded to concerns about how industry was advertising its broadband products and is intended to ensure consumers are given accurate information to help inform their decisions and providers operate on a level playing field.<sup>16</sup>

Formal warnings and directions to comply would continue to provide less interventionist responses to breaches, where it was expected that compliance would follow from such action.

- **Investigation and compliance powers**

The ACMA should have the full suite of investigation and compliance powers to be able to investigate matters that may involve a breach or to check compliance with the consumer

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<sup>16</sup> ACCC, *Broadband speed claims – Industry Guidance*, 2019 <https://www.accc.gov.au/publications/broadband-speed-claims-industry-guidance>.

safeguards framework. This includes not only the existing information gathering powers, but also examination powers and record keeping rules.

- **Direct enforcement powers**

As discussed above, we strongly support the ACMA having more direct enforcement powers. This will allow the ACMA to more easily and expeditiously take action against a market participant for breaching the consumer safeguard rules.

- **Conditions on operating, suspension or revocation of right to operate**

To remove a provider's ability to operate in the industry is the strongest action a regulator can take against a regulated entity. It would only be warranted in cases where the provider's conduct was particularly egregious and designed to intentionally harm the market or consumers, and in cases of repeated serious misconduct.

However, the regulatory framework we propose also has the benefit of providing the regulator with other options, such as the imposition of conditions on the operator through the relevant regulatory mechanism (whether that be a licence, registration or authorisation type framework). The risk of such action may be a valuable tool in addressing some of the serious harmful behaviours observed across different players in the industry.

## Legacy regulatory obligations

The ACCC agrees that free access to emergency services, number portability, line number identification and standard terms and conditions should remain “enduring” protections in place via direct regulation. Many of these safeguards deal with public interest matters (such as ensuring public safety, competition and consumer protection and choice) where there may not be strong commercial incentives, so continued direct regulation remains appropriate.

At this time, the ACCC does not support the removal of other consumer protections through untimed local calls, directory assistance services, operator services, itemised billing and low income measures in relation to fixed voice services. The ACCC considers that, to the extent access to essential communications services is maintained as a policy through legacy fixed-line services (such as the Universal Service Obligation), a minimum standard of consumer protections is required to ensure accessible and affordable telecommunication services for all people in Australia.

This is particularly the case given that retail competition on Telstra’s copper network will continue to reduce over time, despite a significant number of end-users being connected to this network. There are already only a few providers offering PSTN fixed voice services and the pricing is not particularly affordable.<sup>17</sup> These basic voice services also do not have access to innovations like over-the-top messaging and calling services available on IP networks.

While the ACCC acknowledges that legacy fixed-line voice services are becoming less relevant for the majority of Australians, there are particular groups which will be disproportionately affected by the removal of fixed-line voice service safeguards. These include older Australians, those living in regional and remote areas, and people on low incomes.

The ACCC considers older consumers who continue to use voice services are particularly vulnerable, given that most are on fixed incomes and many rely on fixed-line services as a secure means of telecommunications. Eighty-three per cent of Australians over the age of 75 continue to use fixed phone-lines while 76 per cent of Australians between the ages of 66-74 use fixed phone services, as well as 66 per cent of those between the ages of 55-64.<sup>18</sup> The significant proportions of consumers using the services within these age groups means that the proposal will adversely affect older Australian consumers in particular.<sup>19</sup>

For regional and remote areas, there may be no, or poor, mobile phone voice coverage. Thus, residents and businesses are more reliant on fixed-line voice services. People living in these areas often need to keep a fixed-line voice service due to lack of mobile service coverage, and in some cases unreliable or sub-standard internet solutions. Connectivity remains an essential service, which has been highlighted in the current pandemic.

### Pre-selection

We note the Department’s indication that the importance of pre-selection for providing consumers with choice of service provider has declined significantly given developments in competition, technology and the introduction of the NBN. However, to the extent pre-selection is still being utilised by carriers on non-NBN fixed-line networks during the

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<sup>17</sup> As noted by the Department, standalone fixed line phone plans featuring unlimited national calls to landlines and mobiles cost around \$50–\$60 per month.

<sup>18</sup> Australian Communications and Media Authority (ACMA), *Communications Report 2018-2019*, February 2020, p.73.

<sup>19</sup> This is concerning given that the relative old age (65+) poverty rate is almost twice as high among those aged 65+ than the population as a whole (over 23.7% vs over 12.4%). Source: TIO, *Quarter 3 Report 2019-20*, May 2020.



remainder of the NBN migration period, there may be some value in keeping the pre-selection requirement in terms of continuity and alignment of regulatory arrangements for the period of the ACCC's 2018 fixed line services declaration until 30 June 2024.<sup>20</sup> The ACCC expressed this view to the ACMA in relation to its recent review of pre-selection arrangements.

### **Telstra price controls**

The ACCC supports the removal of the Minister's reserve Telstra price controls in Part 9. As noted by the Department, the Minister revoked the retail price control arrangements in 2015 as growth in a competitive retail market had made them redundant.<sup>21</sup> To the extent that equity/affordability issues may arise in the future, alternative reserve powers exist that could address the supply of carriage services to consumers (for example, the Minister may make a carrier licence condition declaration or service provider determination). The ACCC acknowledges it also has the power to set prices at the wholesale level, however this is unlikely to alleviate affordability issues for vulnerable consumers of retail services to the extent that alternative providers choose not to offer basic voice services.

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<sup>20</sup> The ACCC's declared [fixed originating access service](#) (FOAS) is an access service provided on a call that is made with pre-selection, and is used to allow the connection of fixed voice calls between consumers on different networks. To the extent that the pre-selection requirement is removed, a carrier may decide not to provide pre-selection, which could have an impact on utilisation of the FOAS. Removal of pre-selection removes the ability of consumers to make calls using their preferred service provider through a pre-selection override code.

<sup>21</sup> The ACCC notes, however, that the Minister retains retail price control powers and can reintroduce retail price controls at any time.

## ACCC enforcement actions

### Larger providers (since 2017)

- The ACCC has confirmed it is investigating Telstra's alleged misleading sales practices associated with the supply of mobile phones, plans and ancillary goods and services to some vulnerable Indigenous Australian people across a number of states. This investigation is ongoing. Telstra has recently informed the market that it is cooperating with the ACCC.
- In June 2020, the ACCC commenced litigation against Dodo Pty Ltd and Primus Telecommunications Pty Ltd (part of the Vocus Group) alleging they made false or misleading claims about the NBN broadband speeds their customers could achieve during busy evening hours. The ACCC claims that Dodo and iPrimus used a fundamentally flawed testing methodology, developed by Vocus, which was not a reasonable basis for their advertising claims about certain typical evening speeds. These proceedings are ongoing at the date of this submission.
- In June 2020, the ACCC accepted a court enforceable undertaking from NBN Co in relation to representations NBN Co made to TransACT Network consumers that their telephone and internet services would be disconnected if they did not move over to the NBN. The ACCC considered that those representations were false as the TransACT Network will continue to operate alongside the NBN. As part of the undertaking, NBN Co agreed to reimburse the early termination costs paid by customers who moved across prior to 10 July 2019, and then chose to return to the TransACT Network and to improve transparency over networks that will continue to compete with the NBN.
- In January 2020, the ACCC commenced proceedings against Superfone Pty Ltd for alleged false or misleading representations made to consumers to get them to switch from their existing provider through unsolicited phone calls. The ACCC claims that, between June 2017 and December 2018, telemarketers acting on behalf of Superfone cold-called consumers making them think its offers and services were endorsed by or affiliated with their existing provider, and offering them discounted plans on their existing network if they signed up to a new contract via Superfone. The ACCC also alleges Superfone breached the unsolicited consumer agreement provisions, being laws designed to protect consumers from issues arising from unsolicited telemarketing sales. Litigation is currently ongoing for this matter.
- In December 2019, the Federal Court ordered Optus to pay a \$6.4 million penalty for misleading consumers regarding the need to switch to NBN or risk disconnection. Optus admitted that it had no basis for claiming the consumers were at risk of disconnection, since Optus understood that the consumers were already acquiring NBN services from another provider. This follows a similar case in 2018, where the Federal Court ordered Optus to pay penalties of \$1.5 million for making misleading representations to customers about their transition from Optus' HFC network to the NBN.
- In October 2019, the ACCC issued NBN Co with a formal warning in relation to failure to comply with the non-discrimination obligations in section 152AXD of the CCA when building fibre infrastructure and other related activities to supply wholesale business grade NBN services. The ACCC also accepted a court enforceable undertaking given by NBN Co pursuant to section 87B of the CCA to address non-discrimination and transparency concerns.
- In September 2019, BVivid Pty Ltd paid penalties totalling \$25 200 after it was issued with two infringement notices by the ACCC in relation to misleading cold calls made to consumers who were led to believe that their internet services would be disconnected or

their telephone number would be lost if they did not move to the NBN immediately. BVivid also admitted that it likely breached the unsolicited consumer agreement protections in the ACL when it supplied services within the 10 business day cooling-off period and failed to give consumers an official form they could use to terminate the contract. In addition to paying the infringement notice penalties, BVivid provided a court enforceable undertaking in which it committed to contact all affected consumers and offer to release them from their contracts without charge and refund any termination fees already paid, as well as review its internal practices and compliance procedures.

- In July 2019, Vodafone Hutchison Australia provided a court enforceable undertaking to the ACCC under of the section 93AA *Australia Securities and Investments Commission Act 2001* (ASIC Act) following the ACCC investigating Vodafone's third-party billing or direct carrier billing services under a delegation from ASIC. In the undertaking, Vodafone admitted likely breaches of the ASIC Act and agreed to issue refunds to customers where appropriate.
- In July 2019, the ACCC accepted a court enforceable undertaking from Dodo Services Pty Ltd regarding claims that certain retail broadband plans supplied over the NBN were 'perfect for streaming' when that was not the case. Dodo admitted the 'perfect for streaming' statements were likely to contravene the ACL and agreed to refund up to \$360 000 across 16 000 affected customers.
- In February 2019, the Federal Court ordered Optus to pay a \$10 million penalty for misleading consumers who unknowingly purchased games, ringtones and other digital content through its third party billing service. Optus admitted that it did not properly inform customers that the third party billing service was a default setting on their accounts, and that they would be billed directly by Optus for any content bought through the service, even unintentionally. The ACCC took this action under a delegation of power from ASIC.
- In March 2019, the Federal Court ordered Australian Private Networks Pty Ltd (trading as Activ8me) to pay penalties of \$250 000 for making false or misleading representations and not displaying a single price when advertising its internet services. The Court also ordered Activ8me offer to refund setup fees and allow affected customers to exit or switch plans without charge.
- In September 2018, we announced that Telstra had refunded \$9.3 million to 72 000 customers it misled in relation to its 'Premium Direct Billing' (PDB) third-party billing service, according to a report it provided to the ACCC. Telstra had agreed to provide such refunds after the ACCC had commenced court proceedings against Telstra for misleading consumers when it charged them for digital content, such as games and ringtones, which they unknowingly purchased. Telstra did not adequately inform customers it had set the PDB service as a default on their mobile accounts. If customers accessed content through this service, even unintentionally, they were billed directly by Telstra. In handing down judgment in April 2018, the Federal Court ordered that Telstra pay penalties of \$10 million.
- In September 2018, in response to concerns raised by the ACCC, Aussie Broadband removed statements across its advertising which described its broadband services as "congestion-free". We were concerned that the statements might lead consumers to believe that its services would not ever experience congestion, when this was not the case.
- In July 2018, NBN service provider MyRepublic Pty Ltd paid penalties totalling \$25 200 after the ACCC issued two infringement notices for alleged false or misleading representations about its NBN service performance.

- In March 2018, Dodo Services Pty Ltd, Primus Telecommunications Pty Limited, and M2 Commander Pty Ltd gave undertakings to offer remedies to customers who could not receive the internet speeds they bought because their NBN connection was incapable of delivering it.
- In March 2018, iiNet Limited and Internode Pty Ltd provided the ACCC with court-enforceable undertakings to compensate more than 11 000 customers who could not reach the internet speeds they were promised in their NBN contracts.
- In March 2018, Australian Private Networks Pty Ltd, trading as Activ8me, paid a penalty of \$12 600 after the ACCC issued an Infringement Notice for alleged false and misleading representations. It was alleged that Activ8me represented that its internet services were endorsed or approved by the ACCC as being superior to those offered by other providers, when this was not the case.
- In December 2017, Optus and TPG provided court-enforceable undertakings to the ACCC detailing the compensation it proposed to provide to more than 16 000 consumers who were misled about maximum speeds they could achieve on certain NBN plans.
- In November 2017, Telstra provided a court-enforceable undertaking to the ACCC to offer remedies to around 42 000 customers for promoting and offering some of its NBN speed plans as being capable of delivering specified maximum speeds, when those maximum speeds could not be achieved in real-world conditions.
- In June 2017, Sprint Telco Pty Ltd paid a penalty of \$10 800 following the issue of an infringement notice by the ACCC in relation to a false or misleading representation to a consumer.

## Smaller providers

- In December 2016, the Federal Court found that SoleNet and Sure Telecom had engaged in unconscionable conduct and undue harassment in connection with the supply of telecommunications services. Further in March 2017, the Court ordered in relation to this conduct that SoleNet, Sure Telecom and sole Director Mr James Harrison pay penalties totalling \$250 000 and be restrained from carrying on a business or supplying services in connection with telecommunications for a period of two years.
- In 2016, Voiteck Pty Ltd (Voiteck) paid a penalty of \$10 200 following the issue of an infringement notice by the ACCC. The notice related to representations about Voiteck's internet and telephone services that the ACCC has reasonable grounds to believe were false or misleading. The ACCC considered that Voiteck represented to certain South Australian consumers resident in a retirement village that they did not have a choice of internet and telephone services provider, and were required to use Voiteck for these services, when this was not the case.
- In early 2016, Vaya took measures to address concerns raised by the ACCC following consumer complaints about emails they received with contract variations. The ACCC formed the view that certain emails were likely to be misleading about fees to be paid by Vaya consumers and in failing to inform consumers of their termination rights and Vaya's obligations under the TCP Code. Following ACCC investigative action, Vaya refunded all customers who were incorrectly charged, informed relevant consumers of their right to terminate their contracts without penalty, and committed to improving the transparency of its customer communications and advertising.
- In response to concerns raised by the ACCC, in 2016, Exetel agreed to compensate consumers affected by changes made to its fixed term residential broadband plans, and agreed to remove a clause from its residential broadband standard form agreement that the ACCC considered was likely to be an unfair contract term. In 2015, Exetel had written to more than 2000 residential broadband customers on 12-month fixed term plans, informing them that they were required to either change their broadband plan or terminate their Exetel service without penalty. The company relied on a clause in its standard residential broadband agreement which provided that Exetel could vary any part of that agreement for any reason, which the ACCC considered likely to be an unfair contract term under the ACL. The ACCC also considered Exetel's advertising of these fixed term plans was likely to be misleading and deceptive because it represented that consumers would receive the service for the 12-month fixed term, when this was not necessarily the case.
- In September 2014, the Federal Court ordered Zen Telecom to pay pecuniary penalties of \$225 000 for contraventions of the ACL in relation to its unsolicited telemarketing practices. Zen Telecom was found to have engaged in misleading and deceptive conduct during telemarketing calls by representing that it was acting on behalf of, or was in some way associated with, Telstra, when it was not. The Court also found that Zen Telecom had breached the unsolicited consumer agreement provisions of the ACL.
- In April 2014, Cardcall Pty Ltd paid two Infringement Notices totalling \$20 400 in relation to its 'Hot' prepaid phonecard services. The company's advertised prices did not reflect various terms and conditions that applied, such as flagfall fees, service fees and other surcharges. These terms were not prominently displayed and made it highly unlikely that consumers would pay the advertised price per minute through ordinary use of the phonecard. The ACCC had reasonable grounds to believe Cardcall made false or misleading representations in contravention of the ACL by this conduct.
- In April 2014, the Federal Court ordered by consent that Startel pay penalties of \$320 000 for misleading consumers about their rights under the ACL, and failing to comply with the requirements of the unsolicited consumer agreements provisions, when

cold calling consumers to sell mobile phone plans. Ultimately, it was identified that more than 2500 customers Australia-wide were affected by the conduct, including consumers in a number of remote Indigenous communities in the NT. The Court also made a community service order requiring Startel to publish an online education page to inform consumers about their rights when they receive a telemarketing call.

- In November 2013, the Federal Court ordered that Excite Mobile pay penalties of \$455 000 for engaging in false or misleading conduct, unconscionable conduct and undue coercion. Excite Mobile was found to have engaged in this conduct when selling mobile phone services, in enforcing payment arrangements, the handling of consumer complaints, and taking debt collection steps. Excite Mobile's two directors were found to be knowingly concerned in the conduct and were disqualified from managing a corporation for three and two and a half years respectively, and ordered to pay penalties of \$55 000 and \$45 000 respectively.
- In July 2013, the Federal Court declared by consent that some terms in Bytecard's standard form consumer contract were unfair contract terms, and therefore void under section 23 of the ACL. The unfair terms enabled ByteCard to unilaterally vary the price under the contract, unilaterally terminate the contract at any time with or without cause or reason, and required the consumer to indemnify ByteCard in any circumstance, even where the contract has not been breached and the liability, loss or damage may have been caused by ByteCard's breach of the contract.
- In June 2013, Utel Networks paid three infringement notices totalling \$19 800 and provided a court enforceable undertaking to the ACCC. Following complaints referred to the ACCC by the TIO, the ACCC had reason to believe that Utel Network's telemarketers misrepresented that it was associated with the customer's existing telecommunications provider, and that the customer's service would not change upon being transferred to Utel. Utel Networks also failed to provide consumers with an agreement that clearly informed them of their cooling off rights.