TELSTRA GROUP LIMITED

Submission to Treasury:

‘Protecting consumers from unfair trading practices’ – Consultation Regulation Impact Statement

29 November 2023

Executive Summary

- Telstra's view is that the sector-specific consumer protection regime applicable to telecommunications already addresses unfair trading practices in a manner which meets community expectations.
- The telco examples which Treasury cites from foreign jurisdictions would all be in breach of the Australian Consumer Law and the Telecommunications Consumer Protections Code.
- If Treasury considers there is a 'gap' in our law because our courts have interpreted the existing unconscionability prohibition to not sufficiently cover unfair conduct, Telstra's preference is for Option 2.
- The proposed solution should be carefully scaled to address the harmful conduct and not act in an overbroad or duplicative manner with existing industry-specific consumer protection which works well.
- If there is a new specific addition of "unfair" conduct to an offence provision in the Australian Consumer Law, Telstra suggests this should specifically require the unfair conduct to cause (or be likely to cause) significant consumer harm.
- Telstra is concerned that Options 3 and 4 may involve an intricate definition of unfair conduct, with sprawling lists of impugned conduct, and this approach runs a high risk of regulatory overreach.
- Additionally, legislative measures designed to address particular concerns in the digital environment may be unduly complex to implement in the traditional physical context, such as in-person sales and service interactions by our employees with customers in retail stores, voice calls and live messaging chats.

1. Introduction

We welcome the opportunity to provide our views to Treasury on its Consultation Regulation Impact Statement (**CRIS**) regarding options for protecting consumers from unfair trading practices.

Telstra is a member of the Business Council of Australia and the Technology Council of Australia, and we support the submissions made by those peak industry bodies. This submission supplements their input with information specifically relevant to Telstra's experience as Australia's largest supplier of retail telco services.

2. The TCP Code addresses unfair trading practices in telco services

The CRIS raises the question of whether existing prohibitions in the Australian Consumer Law (**ACL**) are sufficient to address unfair commercial practices which are harmful to consumers. If Treasury reaches the conclusion that there is a 'gap' in our law, Telstra's view is that the proposed solution should be carefully scaled to address the harmful conduct and not act in an overbroad or duplicative manner. Any changes to the ACL will operate across the entire economy, however in the telecommunications sector there are existing protections against unfair trading practices which supplement the ACL and work well already.

Suppliers of telecommunications services to Australian consumers and small businesses must comply with the Telecommunications Consumer Protections (**TCP**) Code,[1] an industry-specific code which is enforced by the Australian Communications and Media Authority (**ACMA**).[2] The TCP Code sets out rules including how suppliers are permitted to communicate and deal with customers, what they can say in advertising and sales information, how bills and disputes are managed, the ways in which customers are entitled to pay for services, as well as credit assessment and required support to enable a customer to move to a competing supplier. These consumer protection obligations address many of the examples of unfair trading practices which the CRIS raises. For example, in respect of disclosure the TCP Code requires suppliers to include any important conditions, limitations, qualifications or restrictions when advertising any offer, to allow consumers to make informed choices and not be misled.[3] Suppliers must publish a Critical Information Summary (**CIS**) which provides consumers with the key information about the service being offered, such as the maximum amount which the consumer may have to pay including when they terminate their services early.[4] The standardised content of the CIS enables consumers to readily compare offers from competing telcos.

Additional to the TCP Code, the ACMA has been directed by the Minister for Communications to make a new industry standard by February 2024 to provide additional protections to telco consumers and small businesses facing financial hardship.[5] This illustrates that protection for consumers of telecommunications services evolves dynamically to address community expectations, and the TCP Code itself is subject to a mandatory review every five years to ensure its ongoing relevance.[6] There are additional consumer protection measures which address specific areas of consumer concern, for example the International Mobile Roaming Determination which requires mobile service providers to proactively send ongoing information to consumers about the cost of using their roaming service and thereby prevent unexpected charges.[7]

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[1] Communications Alliance, C628:2019, https://www.commsalliance.com.au/Documents/all/codes/c628.

[2] See Part 6 of the *Telecommunications Act 1997 (Cth)*.

[3] TCP Code cl 4.1.1.

[4] TCP Code cl 4.2. For a summary of the mandatory content in a CIS see the ACMA webpage https://www.acma.gov.au/critical-information-summaries. For examples of Telstra's CISs for its services, see https://www.telstra.com.au/help/critical-information-summaries

[5] As directed by s 5(2) of the *Telecommunications (Financial Hardship Industry Standard) Direction 2023*; and see the ACMA consultation paper at https://www.acma.gov.au/consultations/2023-10/proposed-telecommunications-financial-hardship-industry-standard.

[6] TCP Code cl 1.7. The next review of the TCP Code will take place in 2024, for which work is already underway.

[7] *Telecommunications Service Provider (International Mobile Roaming) Determination 2019*.

3. The offshore telco cases cited in the CRIS would all be in breach of Australian law and the TCP Code

Treasury has cited several cases involving foreign telcos in the CRIS, to illustrate how a general prohibition against unfair trading practices operates in those offshore jurisdictions.[8] However, all the conduct described in the examples would already be contrary to the ACL and/or the TCP Code.

Descriptions such as "dark patterns" and "junk fees" are already covered by plain language definitions in our law:

- use of "dark patterns" would likely be misleading and deceptive conduct under section 18 of the ACL and would also likely be associated with false and misleading representations about goods or services under section 29 of the ACL; and
- "junk fees" are likely to involve misleading conduct and the seller would be wrongly accepting payment in breach of section 36 of the ACL, additional to which the relevant contract term would almost certainly be considered unfair under section 24 of the ACL, so that the supplier could not rely upon it and would also have committed an offence under the new sections 23(2A)/(2C) of the ACL.

Such conduct would also breach several obligations which the TCP Code places on telco services suppliers regarding representations we make to our customers.

The CRIS cites a US FTC prosecution of a telco services supplier, Vonage, as an example of "dark patterns" and "junk fees", but tricky sales tactics and charging fees to customers that have no commercial basis, without any supply of services, are contrary to the ACL. Please see the **Attachment** to this submission for a more detailed analysis of why the conduct in each of these telco examples would already be addressed by the ACL and our industry-specific regulation in Australia.

The CRIS suggests there are limits to the extent to which a failure to disclose information (an omission) would be regarded as misleading, deceptive or false under our courts' interpretation of existing Australian law.[9] However, Telstra's view is that the non-disclosures in the Vonage case would almost certainly be regarded by an Australian court as information which should have been made known upfront and prominently by the supplier to purchasers. The requirement that a contract term be "transparent" is a key determinant under our existing law of whether it would be considered unfair (section 24(2)(a) of the ACL).

Similarly, the CRIS calls out the direct debit payment arrangements in the Vonage case. Telstra recognises that direct debit is not suitable for everyone and therefore we offer a range of payment options to our customers. However, direct debit is a convenient method for many customers to pay for broadband and mobile services. These regular payments are similar in value, expected and predictable from month to month and are fully disclosed in compliance with our obligations in the ACL and the TCP Code. Direct debit is not of itself an inherently unfair means of payment: to the contrary, it is a highly efficient and lower cost payment mechanism for expected and predictable regular payments. Direct debit payment does not attract credit card surcharges or run the risk of late payment. The unlawful conduct in the Vonage case was not the use of direct debit payment but rather that customers were misled and deceived about the charges they would pay, which were unpredictable and unexpected.

In the newly released 7th report in its Digital Platform Services Inquiry the Australian Competition and Consumer Commission (**ACCC**) acknowledges that the ACL enables it to carry out compliance or enforcement action where "dark patterns" or other unfair practices raise potential concerns, such as under the misleading or

[8] Appendix A of the CRIS: the cases of Vonage (US), Wind Tre & Vodafone Italia (EU), and Mobile Air (Singapore).

[9] CRIS p19.

deceptive conduct, or unfair contract terms provisions.[10] The ACCC argues that there remains a 'gap' in respect of deliberate behavioural strategies such as unnecessary friction points and manipulative design. Telstra's view is that if such practices are causing significant consumer harm then they are confined to the digital platforms context in which the ACCC has identified them, because regulation for retail telecommunications services has long had measures enabling consumers to switch services to competitors with minimum impediment.[11]

4. Community expectations regarding unconscionable conduct

Telstra's view is that our industry-specific telecommunications consumer protection regime reflects community expectations that telcos must not engage in unfair and tricky behaviour likely to harm consumers. Telcos are held to these obligations by the ACMA as enforcement authority for the TCP Code and by the availability of recourse for consumers to the Telecommunications Industry Ombudsman (**TIO**), an experienced and well-resourced dispute resolution body embedded in statute.[12]

Telstra recognises that other industry sectors have different arrangements for consumer protection with greater reliance on the unconscionable conduct prohibition in the ACL to prevent conduct that is harmful to consumers. The CRIS cites recent cases in other sectors where the Federal Court did not agree with the ACCC that supplier conduct was unconscionable under section 21 of the ACL (though the ACCC did nonetheless succeed with other ACL claims). The 'gap' in these instances appears to be between unfair or even deplorable conduct by a supplier which caused real harm to consumers, but in the court's view did not deviate from accepted commercial behaviour to a degree that the conduct was considered to be unconscionable.[13] If Treasury takes the view that these court decisions do not reflect contemporary community expectations of supplier conduct, it would be appropriate to amend the ACL as proposed in Option 2 of the CRIS, to make the unfairness factors in section 22 of the ACL a mandatory consideration for determination of whether there is a breach of section 21. This would be a targeted and scaled change in our law to reset the bar for unacceptable supplier conduct that causes significant consumer harm.

5. Simpler rules enable higher levels of compliance

Telstra is concerned that a new general prohibition drafted in the manner proposed by the CRIS in Options 3 or 4 would be highly dependent on how unfair conduct is defined, which may include a sprawling list of behaviours that overlap existing provisions of our telco sector-specific arrangements. Unlike the scripted and controlled environment of online sales, it is not feasible for suppliers to precisely control every human interaction that takes place in stores and on phone calls and live messaging chats between our employees and customers. A supplier's key compliance tools in these contexts are training, managerial supervision and real-time learning by employees when interacting with consumers.

Treasury should take into account that the potential harmful conduct it has identified appears to be mostly prevalent in the digital/online sales environment, but a general prohibition on unfair trading practices would also equally apply in the traditional physical environment, that is, bricks and mortar stores, as well as in voice calls and live messaging chats with a supplier's employees. Some consumers cannot easily make use of online channels and require access to physical stores and a readily accessible voice call answer point. Other consumers could make their purchases online but, when making a purchase that may involve a term agreement or an expensive device, prefer human interaction and the ability to ask a range of questions in-store or over the phone. Digital-only retail supply is usually offered at a discount to reflect the lower cost of that channel, for

[10] ACCC, "Interim Report 7: Report on expanding ecosystems of digital platform service providers", *Digital Platform Services Inquiry* (September 2023), p168.

[11] See e.g. the ACMA webpage summary, "Rules for porting a phone number", https://www.acma.gov.au/port-customers-phone-number.

[12] Pt 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)*.

[13] *ACCC v Mazda Australia Pty Ltd* [2023] FCAFC 45 [555].

example the Belong brand offered by Telstra. Artificial intelligence and online 'chatbots' are rapidly improving the digital experience of customers but physical stores and the availability of voice calls and live messaging interactions with employees will always have an important role.

The minimum standard for fair trading practices set by a general prohibition would need to be realistically capable of being implemented by retailer employees consistently across numerous in-person customer interactions, every working day. Telstra doubts that intricate "blacklists" of impugned conduct set up as part of a widely framed prohibition would best enable retailer employees to consistently share the right information with customers and act fairly. The most effective consumer protection rules are simple, so that they can be easily understood and effectively communicated in training and by managerial supervision.

Conduct can be beneficial to consumers by intentionally communicating only key relevant information to enable informed purchasing decisions rather than the entire terms and conditions of an offer: for example, the standardised and brief (maximum two A4 pages) form of the CIS which is backed up by ready access to the full terms and conditions, as required by the TCP Code. Additional to the CIS which calls out the key terms of Telstra's service offer in which the customer is interested, our store staff should be able to communicate key information which they judge to be relevant to a particular customer's circumstances, having had the benefit of an interactive discussion as well as objective aids such as a credit check. In the context of in-person sales and service interaction, non-disclosure of irrelevant information is very unlikely to cause harm to consumers, so long as customers can easily access the full terms and conditions and can readily contact the supplier (for example, if their circumstances change).[14]

An overly intricate and broadly applicable definition of unfairness also risks distorting commercially efficient and legitimate decisions by suppliers. Suppliers should be entitled to design and change their services to generate a profit and deliver reasonable returns on capital spent. Telstra is concerned that an overly broad unfairness construct may delay commercially rational product changes and technology upgrades such as the closure of our 3G mobile network and refarming the spectrum for 4G and 5G services. Similar technology transitions are taking place in the energy sector, and which might be considered "unfair" to groups of consumers on a wide construction of a general prohibition.

For all these reasons, Telstra's view is that any definition of unfairness should focus on the likelihood of significant harm to consumers as the basis, rather than the consumer merely making a different choice due to the seller's conduct (and listing all the possible ways that might come about). Our view is that the existing list of factors in section 22 of the ACL does appropriately focus on supplier conduct that is likely to be predicate to consumer harm, and hence an amendment to require mandatory reference to that list would be sufficient to bring about an adjustment that meets contemporary community expectations. However, if Treasury reaches a view that the express addition of a reference to "unfair" conduct is required (additional to the "unfair tactics" aspect of subsection (d)) we suggest the preferred location for this new provision would be as a new factor added to the lists in the existing sections 22(1) and (2) of the ACL. We think this new unfair conduct factor must have a requirement that it is likely to cause significant consumer harm, in the same way that subsection (i) references impact on the "interests of the customer" and "risks to the customer" by the supplier's non-disclosure.

The above is a different proposal to that contained in the second limb of Option 2 in the CRIS which suggests the addition be made to section 21 (i.e. "unconscionable or unfair"). Telstra's view is that the latter is not significantly different to Option 3 with its attendant risks of being applied in an overbroad and unpredictable manner. We think any reform should be scaled and targeted to the identified 'gap', which is evolved community

[14] Not all customers for telecommunications services have email addresses, and some customers may be uncomfortable sharing their email address with a retail service supplier. In these circumstances Telstra provides customers with a printed CIS for in-store sales and mails a hardcopy CIS to the customer's nominated postal address in the case of sales made by voice call. The CIS also explains how the customer can access the full terms and conditions for the service being supplied.

expectations around unacceptable supplier behaviour and what should now be considered "unconscionable". The test would not be only for heinous conduct, as appears to be the current standard applied for section 21 of the ACL by the courts, but for conduct which causes (or is likely to cause) significant harm to a customer and in all good conscience should not have happened.

6. Design for effective compliance

Should Treasury elect to recommend one of the change options in the CRIS, it should design the proposed amendment to the ACL so that it is capable of being effectively implemented by Australian suppliers:

- *ACCC guidelines are preferable to intricate and detailed lists of prohibited conduct in legislation*

  Telstra considers that best practice is for offences to be described in simple terms (as is the case with section 21 of the ACL at present) which can be augmented by lists of factors to assist a court (the current section 22), followed by a well-considered and comprehensive guideline setting out the regulator's interpretation. ACCC guidelines are more responsive to market changes and new developments than lists of prohibited conduct in legislation.

- *Determine thresholds for application which assist suppliers to identify consumers protected by the law*

  The CRIS takes the view that the threshold will be the definition of "consumer" for most ACL purposes (an individual person, or small business which employs fewer than 100 persons or has a turnover for the last income year of less than $10 million) and which applies to the unfair contract terms ("**UCT**") offence amendments which came into effect this month. Telstra's experience is that it is difficult and costly to ascertain – and keep up to date with – the employee numbers and yearly income of its customers or counterparties, especially when those customers or counterparties are small (often unlisted) businesses with limited publicly available data. By comparison, it is straightforward to determine a customer or a counterparty spend with a business under the consumer guarantees threshold in the ACL, because the relevant information is known to the supplier itself.[15] The TCP Code adopts a similar but more flexible design approach, i.e. what does the impacted customer spend with the supplier annually (rather than the cost of the specific good or service).[16] Telstra suggests that as part of the current process Treasury seek input from stakeholders on their experience with implementing compliance measures for the UCT reforms and whether the associated compliance cost (initial and ongoing) justifies the consumer benefit compared to a threshold that can readily be ascertained by suppliers.

  Further, Telstra notes that large and sophisticated holding companies would be able to get the benefit of any unfair trading practices protection by having smaller subsidiaries contract for goods or services. This is an undesirable outcome that diverts compliance resources from the consumers and small businesses which the ACL is intended to protect. The threshold should be based on the total number of employees and turnover of any group of related entities (similar to section 4A of the *Competition and Consumer Act 2010 (Cth)*).

- *Penalties should be commensurate with the seriousness of the offence*

  If Option 2 is adopted then section 21 of the ACL would cover a wide range of unacceptable conduct with different degrees of egregiousness and harm to consumers. At its worst, this could be heinous conduct intentionally taking advantage of the vulnerabilities of particular consumers and would likely also be a breach of common law unconscionability (section 20 of the ACL). On the other hand, lackadaisical or thoughtless conduct without any malicious intent could also be caught if it is unfair and causes (or is likely to cause) significant consumer harm. The approach to penalties should reflect that wide range of potential conduct, for

[15] Part 3.2 of the ACL.

[16] TCP Code, cl 2.1, definition of "consumer".

example by way of an ACCC enforcement policy set out in its guidelines whereby it will encourage rapid settlement and remediation in the case of conduct which was not malicious or intentional but is nonetheless unfair.

Additionally, Telstra supports a transition period to enable compliance planning and training, as was done in the case of the UCT offences, the revisions to warranties against defects, and indeed the original statutory unconscionable conduct provision for which civil pecuniary penalties were only introduced in 2010.

Attachment: international telco industry examples cited by Treasury are fully addressed by existing Australian consumer protection law

1. Vonage (US)

The conduct which the Federal Trade Commission pursued, in substance involved:

- the imposition of high early termination fees that were not clearly and prominently disclosed to customers taking up Vonage's phone/internet services. In Australia, this conduct would amount to misleading conduct (in breach of section 18 of the ACL) and the making of a false or misleading representation with respect to the price of services (in breach of section 29(1)(i) of the ACL), as well as comprise an unfair contract term (in breach of the new sections 23(2A)/(2C) of the ACL) on the basis that the fees were unlikely to be reflective of the Vonage's loss flowing from the early termination and were insufficiently transparent. It would also breach the TCP Code, including section 4.2.2(a)(iv) (on the basis that the TCP Code requires early termination charges to be disclosed in a CIS); and
- Vonage continuing to charge customers for their service after they called and directly spoke to an agent to request cancellation. In Australia, this conduct would amount to misleading conduct (in breach of section 18 of the ACL) and the making of a false or misleading representation with respect to customer's agreement to acquire services (in breach of section 29 of the ACL), as well as breach of section 36 of the ACL (wrongly accepting payment for services) where Vonage knew the customer's account had been cancelled.

2. Wind Tre & Vodafone Italia (EU)

The conduct involved phones being sold with SIM cards that included pre-loaded and pre-activated internet and voicemail services without prominently informing customers of these add-ons (and their associated charges). In Australia, this conduct would amount to misleading conduct (in breach of section 18 of the ACL) and the making of false or misleading representations with respect to price of services (in breach of section 29 of the ACL), as well as a breach of section 34 of the ACL (conduct that is liable to mislead the public as to the nature or characteristics of services). It would also breach the TCP Code, including section 4.1 (as the TCP Code requires suppliers to include any important conditions of an offer in their advertising, to allow consumers to make informed choices and to avoid them being misled). Finally, Australian suppliers must consider for all mass consumer market products that it is very likely a proportion of sales will be made to vulnerable customers: in this case the conduct would likely be considered unconscionable in breach of section 21 of the ACL, in respect of those vulnerable customers.

3. Mobile Air (Singapore)

The conduct involved Mobile Air stores selling low-priced mobile devices to attract customers and, post-sale, altering the associated invoices to scam customers into making additional payments. In Australia, this conduct would amount to unconscionable conduct (in breach of section 21 of the ACL) and breach of section 36 of the ACL (wrongly accepting payment for goods/services where there is no intention to supply) as well as misleading conduct (in breach of section 18 of the ACL) and the making of false or misleading representations with respect to price of services (in breach of section 29 of the ACL). It would also breach the TCP Code, including section 5.5.1 (as the TCP Code requires suppliers to ensure billing accuracy).