



7 July 2021

Submitted via email to: Marie.Dalins@aer.gov.au

Marie Dalins
Director, Market Entry and Exit
Australian Energy Regulator

Dear Marie,

Telstra Energy – application for electricity and gas retailer authorisation

Accompanying this letter, please find attached a joint submission prepared by Consumer Action Law Centre, Financial Counselling Australia, Financial Counselling Victoria and the Victorian Aboriginal Legal Service on applications for gas and electricity retailer authorisations by Telstra Energy (Retail) Pty Ltd (**Telstra Energy Retail**).

We note that this submission was originally prepared for Victoria's Essential Services Commission in response to Telstra Energy Retail's application for electricity and gas retail licences in that state. Despite the differences in the legislative and regulatory framework governing Victoria and other states and territories in Australia's energy market, we are sharing this submission with the Australian Energy Regulator (**AER**) as we believe the issues raised apply nationally. We therefore encourage the AER to consider the contents of this submission when considering Telstra Energy Retail's applications for authorisation in jurisdictions outside of Victoria under the National Energy Retail Law (**Retail Law**).

We thank you again for the opportunity to comment on Telstra Energy Retail's applications for gas and electricity retailer authorisation. Please contact Luke Lovell at **Consumer Action Law Centre** on (03) 9670 5088 or at luke@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody | Chief Executive Officer



1 July 2021

Submitted via Engage Victoria

Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne, VIC 3000

Dear Commissioners,

Telstra Energy – application for electricity and gas retail licence

This submission is jointly from the Consumer Action Law Centre (**Consumer Action**), Financial Counselling Australia (**FCA**), Financial Counselling Victoria (**FCVic**) and the Victorian Aboriginal Legal Service (**VALS**).

Together we welcome the opportunity to comment on the application by Telstra Energy (a subsidiary of Telstra Corporation) for licences to sell electricity and gas in Victoria.

Overall, while we do not oppose Telstra Energy being granted a licence, the continued existence of serious systemic issues in the telecommunications industry raises very real concerns about whether these poor practices will be carried over into way the business operates in the energy sector. These issues include mis-selling of products and services, a lack of effective dispute resolution processes, inadequate hardship support and inadequate processes to identify and take extra care with people who are vulnerable.

The systemic issues in the telecommunications industry arise partly because of the underlying inadequate regulatory framework and a resulting lack of enforcement action, but importantly, they also reflect a broader cultural problem with the industry. This is an industry that talks about being “customer focused” but like the banks a few years ago, the reality is that the focus is on cost-cutting and/or sales at any cost. If the poor culture at the heart of the malaise in the telecommunications industry is allowed to seep into the way a telco energy offshoot operates, we will see the same systemic issues arise. This will be a poor outcome for the community.

Our submission does not comment on the technical capacity or financial viability of Telstra Energy. Instead, it is focused on whether Telstra Energy, and other telecommunications businesses seeking to enter energy retail, are ‘fit and proper’ to hold a licence. Granting of electricity and gas retail licences should be conditional on telecommunications businesses making clear commitments as to how they will meet their obligations with respect to selling practices, complaints handling and support for customers in hardship or other vulnerable circumstances. Particular attention should be paid to what steps Telstra Energy will take to ensure fair and equitable treatment of

First Nations customers, to avoid repeating the unconscionable treatment of First Nations people which occurred in its retail telecommunications operations.¹

While we are responding to this application as Telstra is the largest telecommunications provider to move into energy retailing, we recommend the Essential Services Commission (**ESC**) consider our recommendations when assessing all applications from telecommunications providers in the future. We also urge the ESC to closely monitor the conduct of energy retailers as they branch into the telecommunications space, and vice versa. This will be particularly important as there is increased crossover between the two sectors in coming years.

Our comments on these issues, as well as several recommendations, are included below.

About us

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians, and our advocacy supports a just marketplace for all Australians.

Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors in Australia. Financial counsellors provide advice and support to people experiencing financial hardship. As the peak body, FCA provides resources and support for financial counsellors, works to increase access to financial counselling, raise the profile of financial counselling and advocates for a fairer marketplace.

Financial Counselling Victoria

Financial Counselling Victoria (FCVic) is the peak, professional body for financial counsellors in Victoria, and a member organisation of Financial Counselling Australia. FCVic advocates on behalf of financial counsellors and their clients on systemic issues that cause and exacerbate poverty and hardship. Financial counselling is a regulated profession providing free, confidential and independent advice and advocacy for people in, or at risk of, financial hardship.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community-controlled Co-operative Society in 1973. VALS plays an important role in providing referrals, advice/information, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being Criminal Law, Family Law and Civil Law.

¹ See: <https://www.accc.gov.au/media-release/telstra-to-pay-50m-penalty-for-unconscionable-sales-to-indigenous-consumers#:~:text=The%20Federal%20Court%20today%20ordered,proceedings%20brought%20by%20the%20ACCC>

Our response to Telstra Energy's licence application

Cultural issues in telecommunications sector and ability to comply with regulatory obligations for energy retail

Telecommunications companies operate in a regulatory context where consumer obligations are almost entirely governed under a code designed and drafted by the industry, which lacks adequate consumer protections. This code, the Telecommunications Consumer Protection Code (**TCP Code**) is not directly enforceable by the Australian Communications and Media Authority (**ACMA**). Instead, the ACMA is required to enter a two-step process of investigating suspected breaches, then making a direction to comply with a Code, and then only being able to apply enforcement if further breaches are found to have occurred. Weakly drafted obligations combined with a lack of power to enforce those obligations have led to a telecommunications culture of mis-selling (including upselling unaffordable products to consumers experiencing vulnerability), of inappropriate and unhelpful financial hardship options and poor dispute resolution practices.

Many of these systemic issues in the telecommunications sector were set out in Consumer Action's November 2020 report *'The Trouble With Telcos: Stories from 2020'*² and the joint report from Consumer Action and VALS *'Consumer Issues in Victorian Aboriginal Communities during 2020.'*³

Systemic issues and other risks with selling practices

As noted above, the Federal Court recently imposed a \$50 million penalty against Telstra for unconscionable conduct in mis-selling to Aboriginal and/or Torres Strait Islander people in northern and central Australia. In relation to the industry sales practices generally, the recent Telecommunications Industry Ombudsman (**TIO**) systemic investigation report *"Helping telco consumers sign up to the right phone and internet products"* highlights appalling sales conduct from the telco industry during 2020.⁴ The key findings include:

- "advertising and point-of-sale information does not always cover key terms" (including two telcos charging for accessories offered as 'free')
- "Online information about telco products and services can be difficult to find and understand" (including not providing relevant terms and conditions on the telco's app where services could be purchased)
- "Providers do not always responsibly promote or sell telco products and services" (including advertising trials as 'risk-free' even when there was a cost if they were ended)
- "Consumers sometimes unknowingly sign up for products or services they do not need" (including telcos selling products to customers who did not understand or need them).

Furthermore, it seems apparent that any telecommunications provider entering the retail energy market will seek to take advantage of product bundling and cross-selling to their existing customer base and vice versa. Suppliers commonly present bundling as a way for consumer to save money—for example, by packaging several products or services into one 'deal', they can obtain a discount. However, this creates new risks for consumers. For example, it can become difficult for consumers to compare products and services across suppliers, reducing the ability to compare relative values. It also makes complex products and services even more complex. This is particularly concerning given the TIO's finding of potentially misleading advertising in its recent report.

² Consumer Action Law Centre, *The Trouble with Telcos: stories from 2020* (November 2020), https://consumeraction.org.au/wp-content/uploads/2020/11/201120-Covid-Telco-Report_V7.pdf

³ Consumer Action Law Centre and Victorian Aboriginal Legal Service, *Consumer issues in Victorian Aboriginal communities during 2020: Integrated Practice Project Report* (June 2021), available at: https://consumeraction.org.au/wp-content/uploads/2021/06/VALS-IP-Report_FINAL_UPDATED2_WEB.pdf

⁴ TIO, *"Helping telco consumers sign up to the right phone and internet products"* (17 May 2021), available at: <https://www.tio.com.au/reports-updates/investigation-finds-poor-sales-practices-hidden-costs-and-unclear-information>

Product bundling can have particular effects on people with lower incomes or who are disadvantaged. Bundling increases the potential for these consumers to be excluded from accessing discounts that are offered as part of a bundle. For example, low-income consumers are less likely to get discounts for essential services such as electricity or gas, if this is bundled with high-speed internet which may not be affordable. Bundling services may have the effect of locking out potential competitors and making it harder for people experiencing problems to switch away from the supplier, because it is harder to terminate or change a bundled product. While product and service bundling can be a legitimate innovation by suppliers, allowing them to competitively price goods and services, we consider that the ESC should examine how any consumer risks can be addressed.

Financial hardship

A brief review of the hardship requirements of the TCP Code at Ch 7 exposes the gaps in financial hardship obligations between the telco industry and energy retail. For example, telcos will be moving from a framework where there is no requirement for hardship options to be affordable. Furthermore, telcos can choose to restrict service (i.e. effectively cutting people off from their essential telco services) as their 'hardship' offer to a customer. Unlike the focus on outcomes for customers as part of the tailored assistance entitlements contained in the Payment Difficulty Framework (**PDF**), telco customers do not have a clear voice in hardship arrangements. Furthermore, the ACMA has limited recourse when it comes to enforcing these meagre provisions, compared to the ESC. The TCP Code confirms that *'hardship options included in a ... financial hardship policy do not represent a range of options from which a customer experiencing financial hardship can choose. Rather they represent options a [telco] has available to offer an individual customer, depending on what is most appropriate in the circumstances'*.⁵ Telcos entering the energy space in Victoria should be monitored to ensure they understand and comply with the Payment Difficulty Framework as it is vastly different to the requirements of telecommunications businesses.

Restriction of service and disconnections

Unlike the energy sector, Telstra and the entire telecommunications industry can restrict, suspend and disconnect a person's service with few checks and balances. As mentioned above, restriction of service (i.e. limiting a person's calls to emergency services and the telco themselves) is listed as an option for telcos to choose when a person is in financial hardship. Telcos must give their customer at least five working days' notice prior to a restriction, suspension, or disconnection—unless they assess the account as an unacceptably high credit risk. There is no clear requirement for this notice to be in writing and no other requirements to assist the customer with their debts other than informing the customer of their financial hardship policy, which varies from provider to provider.⁶

Financial counsellors have received a number of calls from people who cannot afford their telco bills, who say they have been told by Telstra and other telcos that they will be disconnected if they can't pay an unaffordable amount immediately. For example, a client who lost work during the COVID-19 emergency recently called the National Debt Helpline and told the financial counsellor that their telecommunications provider demanded a lump sum payment of more than \$600 to keep their service connected. The client also said they were told if they did not make this payment their internet service would be disconnected the following week, despite having six children who needed internet access for their schooling.

Further to our concerns about bundling services above, weak consumer protections may also lead to consumers becoming vulnerable to 'double disconnection' where they lose access to all the services provided in a bundle if

⁵ Communications Alliance, Telecommunications Consumer Protection (TCP) Code C628:2019 (1 August 2019), 7.2.2 "Guidance" on p 56, available at: <https://www.commsalliance.com.au/Documents/all/codes/c628>.

⁶ Communications Alliance, Telecommunications Consumer Protection (TCP) Code C628:2019 (1 August 2019), 6.7.1 – 6.7.5 available at: <https://www.commsalliance.com.au/Documents/all/codes/c628>.

they are unable to meet payments for one or more of the services provided, particularly if one consolidated bill is used. Where essential services such as energy and telecommunications are bundled together, this could expose consumers to significant risk. While there are protections against double disconnection of gas and electricity services under clause 117 of the Energy Retail Code, consideration should be given to whether this is sufficient in the case of energy bills being bundled with telecommunication services.

RECOMMENDATION 1. Ensure Telstra Energy trains frontline staff on the requirements around selling, provision of information, and customer entitlements under the Payment Difficulty Framework, including the process for disconnection, has strict compliance protocols and undertakes its own internal audits of compliance.

RECOMMENDATION 2. Require Telstra and all telcos entering the energy sector in Victoria to provide regular data on their compliance with the Payment Difficulty Framework and data on any disconnections.

RECOMMENDATION 3. Investigate the broader consumer issues that arise with the bundling of energy and telecommunications services, and ensure consumer protections (including the Energy Retail Code) address risks of consumer detriment.

Ensuring fair and equitable treatment of First Nations people

When assessing Telstra Energy's licence application, we suggest that the ESC pay particular attention to previous treatment of First Nations people by Telstra Corporation, and steps Telstra Energy will take to ensure that issues in its telecommunications operations are not repeated in energy retail.

As mentioned above, Telstra Corporation was fined \$50 million in May 2021 for its treatment of First Nations customers in rural and remote parts of Western Australia, South Australia, and Northern Territory, through selling of mobile plans that people did not understand and/or could not afford. Exposure of First Nations people to problematic sales practices and poor hardship responses is likely to have been exacerbated in 2020 due to the increased usage of phone and internet services for remote schooling and working and to keep in touch with family and friends during the pandemic.

We are aware of recent reports of mis-selling by Telstra, which has resulted in Consumer Action raising concerns directly with Telstra and making complaints to the ACMA, including on behalf of a First Nations person. Continued instances of mis-selling by Telstra point to the likelihood of ongoing consumer harm to First Nations people throughout Victoria and in other parts of Australia.

It is also the case that not all Victorians are benefitting equally from PDF protections. As the ESC notes in the consultation paper for its consumer vulnerability strategy, First Nations people already experience high levels of energy related financial hardship, including disproportionately high levels of disconnection.⁷ Consumer Action and VALS' recent report *Consumer issues in Victorian Aboriginal communities during 2020* also found high levels of energy hardship among First Nations people. Utilities debt (electricity, water and telecommunications) was mentioned in 40% of calls to financial counsellors from Victorian Aboriginal community members last year where financial difficulty type was flagged. Of those utilities-related calls, over 60% related to electricity.⁸ Given these pre-existing barriers to fair and equitable access to energy, we consider that Telstra (and other telecommunications providers entering into energy retailing) should have a number of conditions imposed on their

⁷ Essential Services Commission, *Getting to fair: Breaking down barriers to essential services* (6 May 2021), available at: <https://www.esc.vic.gov.au/sites/default/files/documents/Getting%20to%20fair%20-%20Draft%20decision%20paper%2020210507%20.pdf>

⁸ Consumer Action Law Centre and Victorian Aboriginal Legal Service, *Consumer issues in Victorian Aboriginal communities during 2020: Integrated Practice Project Report* (June 2021), available at: https://consumeraction.org.au/wp-content/uploads/2021/06/VALS-IP-Report_FINAL_UPDATED2_WEB.pdf

licence to ensure that existing barriers to access for First Nations people are not further exacerbated through the importation of issues from the telecommunications sector.

In terms of actions, we suggest these could include:

- As a first step, the development of a new Reconciliation Action Plan. This plan would include an action on compulsory cultural safety training for all staff, including directors and board members.
- Employment of culturally safe customer service staff in each store, who would help people read through contracts prior to signing and assist with billing enquiries and requests for hardship assistance.
- Ensuring that First Nations staff are part of the customer service team for energy, or that the existing Aboriginal-staffed call centre is expanded and given training to be able to assist with energy enquiries.
- Engaging external consultants to provide advice on strategies to employ and retain First Nations staff and improve internal cultural safety.

RECOMMENDATION 4. As part of the licensing process require Telstra Energy to outline commitments it will enact to ensure First Nations customers are not impacted by energy hardship and wrongful disconnection.

We thank you again for the opportunity to comment on Telstra Energy's licence application. Please contact Luke Lovell at **Consumer Action Law Centre** on (03) 9670 5088 or at luke@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

Gerard Brody

Chief Executive Officer

Consumer Action Law Centre

Fiona Guthrie

Chief Executive Officer

Financial Counselling Australia

Sandy Ross

Executive Officer

Financial Counselling Victoria

George Selvanera

Acting Chief Executive Officer

Victorian Aboriginal Legal Service