Australian Communications Consumer Action Network (ACCAN)

Informed Consent Research Report

Contents

1. Executive summary

Objectives

This research project is designed to inform the development of a consumer perspective on 'informed consent' in the communications industry. It includes a focus on the information that should be provided to a consumer, the method of conveying such information and the point at which a consumer is regarded as having become informed.

The project also addresses the issue of obtaining informed consent from specific consumer categories, including:

- people with relevant disabilities (intellectual disabilities, cognitive impairment, hearing impairment, visual impairment and communication impairment);
- Indigenous consumers;
- young people; and
- culturally and linguistically diverse consumers.

Key findings

This research project made a number of key findings that could contribute to an improved approach to informed consent in the communications sector:

- Organisations participating in the project (including regulators, complaints schemes, community advocacy organisations and casework organisations) reported receiving a total of more than 40,000 communications sector *consent* complaints each year.
- Organisations participating in the project reported significant concerns regarding consent and vulnerable consumer groups, including the limited capacity of some consumers to consent to communications contracts.
- There is no central/consistent guidance available to industry on consent requirements, nor is there best practice guidance on obtaining consent from consumers.
- The few consent requirements that exist in laws and codes are inconsistent and do not include coverage of key issues such as capacity.
- Current industry practice in obtaining consent is extremely diverse and often ineffective.

Key recommendations

This research project makes several important recommendations:

- Industry and consumers would benefit from a move towards setting out consistent requirements for consent in laws and codes.
- Consumers would benefit from a requirement to record consent.
- Industry and consumers would benefit from the development and distribution of best practice guidance on obtaining consent from consumers in specific consumer categories.
- Further research is required on consent issues and barriers to accessing redress mechanisms for some specific consumer categories.
- Further research is required in order to evaluate the effectiveness of potential methods to obtain *informed* consent.
- It is important to recognise the limits of relying on consent and to continue to develop other consumer protection tools where appropriate.

Methodology

The research project included a detailed review of literature and of policy/best practice guidance in Australia and internationally, backed by the collection of case studies and a brief survey of regulators and front-line consumer caseworkers.

Participants

- **Australian Communications Consumer Action Network (ACCAN)**
  The project was commissioned by ACCAN – the new peak body for consumers and consumer organisations on issues including telecommunications and the Internet.[1]
- **Galexia**
  The project research and writing tasks were undertaken by Galexia, an independent consultancy specialising in law and technology.[2]
- **Advisory Committee**
  The research project was guided by input from an Advisory Committee consisting of experts in consumer protection and communications regulatory issues. Members included:
  - Sue Salthouse, ACCAN Board (Chair)
  - Helen Anderson, Department of Broadband, Communications and the Digital Economy (DBCDE)
  - Loretta Kreet, Legal Aid Queensland
  - Jackie Thorpe, Australian Competition and Consumer Commission (ACCC)
  - Paul Harrison, Deakin University
  - Gerard Goggin, UNSW, ACCAN Board.

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[1] <http://www.accan.org.au>.

[2] <http://www.galexia.com>.

Acknowledgment

This project was funded by the Commonwealth government through the Department of Broadband, Communications and the Digital Economy (DBCDE) as part of its support for the establishment of ACCAN.

2. Review of consent requirements and definitions

The collection of informed consent from consumers is a key requirement in the communications sector. It is essential for contract formation, subscription services and the use of customer information. However, there is no single location for a definition of consent – and consent requirements are scattered throughout a mix of common law, generic consumer laws, specific telecommunication laws and industry codes of conduct.

This ad hoc approach has resulted in some key limitations on the effectiveness of consent requirements in the communications sector:

- Organisations only face detailed requirements for the information they must provide to consumers when they are seeking consent to churn (transfer) a consumer from one provider to another – they face no detailed information requirements for other sales.
- Consent requirements for the use of personal information (in privacy law) are stronger than consent requirements for paid services.
- Common law requirements provide limited avenues for redress for consumers without access to legal advice.
- Organisations are only required to *record* consent for one service in one jurisdiction (telemarketing in Victoria) and for customer transfers.

The following section summarises some of the key consent requirements in current laws and codes.

2.1. Telecommunications Consumer Protections (TCP) Code

Section 8 of the *Telecommunications Consumer Protections Code*[3] includes a detailed section on consent requirements before a consumer can be transferred from one supplier to another.

> 8.1.3 Before a Transfer: A Gaining Supplier must:
>
> (e) take all reasonable steps to ensure that the consent obtained is informed consent. Informed consent will occur when, before seeking agreement to the Transfer, the Gaining Supplier informs the Authorised Customer or their Authorised Representative of the following and the Authorised Customer or their Authorised Representative clearly conveys agreement to the Transfer:
>
>> (i) that the Authorised Customer is entering into a new contract by agreeing to the Transfer;
>>
>> (ii) which Telecommunications Service is being transferred;
>>
>> (iii) the terms and conditions of the Transfer;
>>
>> (iv) the identity of the Gaining Supplier;

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[3] Communications Alliance, *Telecommunications Consumer Protections Code*, industry code C628:2007, Sydney, September 2007, <http://www.commsalliance.com.au/__data/page/21676/C628_2007.pdf>.

> (v) whether equipment they have for their existing service will be compatible with the Gaining Supplier's service;
>
> (vi) the relevant terms and conditions relating to any Telecommunications Goods purchased from the Gaining Supplier for use with the Telecommunications Service being Transferred; and
>
> (vii) that there may be consequences arising from their existing Telecommunications Services contract, which the Customer must check.

Section 8.1.5 also requires the organisation to:

> (d) keep a record of the Authorised Customer or Authorised Representative's consent to the Transfer

This Code is complemented by industry guidelines that provide examples of how to record consent for customer transfers.[4]

2.2. Telecommunications Act 1997 (Cth)

The *Telecommunications Act* 1997[5] only contains a brief mention of consent in relation to unsolicited commercial electronic messages (spam) (section 111B) and other privacy-related matters (section 289). The term 'consent' is not defined in the *Telecommunications Act* 1997; however, section 111B(2) states that the definitions used in the *Spam Act* 2003 apply where a term appears in both Acts – this includes the term 'consent' (see details below).

2.3. Spam Act 2003 (Cth)

Schedule 2 of the *Spam Act 2003*[6] concerns consent. Section 2 sets out the following definition:

> For the purposes of this Act, consent means:
>
> (a) express consent; or
>
> (b) consent that can reasonably be inferred from:
>
> (i) the conduct; and
>
> (ii) the business and other relationships;
>
> of the individual or organisation concerned.

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[4] Communications Alliance, *Telecommunications Consumer Protections Guideline*, industry guideline G631:2007, Sydney, September 2007, <http://www.commsalliance.com.au/__data/page/21678/G631_2007.pdf>.

[5] *Telecommunications Act* 1997 (Cth), <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401743>.

[6] *Spam Act* 2003 (Cth), <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401898>.

2.4. *Privacy Act 1988 (Cth)*

The *Privacy Act* 1988[7] defines consent in section 6 as meaning ‘express consent or implied consent’. This very brief definition is fortunately supplemented by interpretation guidelines issued by the Office of the Privacy Commissioner.[8] These guidelines contain several key additional recommendations:

> **Informed consent**
> If an agency wants to use [relevant consent exceptions to privacy principles] they must be able to show that the person the information is about:
>
> > – is accurately informed of what they are consenting to, or
> >
> > – can reasonably be assumed to understand what they are consenting to, at the time they consent.
>
> This may require the agency to take special measures, for example, when seeking consent from a person who has difficulty with English.
>
> **Free consent**
> If an agency wants to use [relevant consent exceptions to privacy principles] then the person the information is about must freely consent to the use or disclosure.
>
> A ‘consent’ from a person who has or reasonably believes they have no real choice but to consent, is not adequate. If, for example, the person the information is about knows or believes that serious adverse consequences will follow if they refuse to consent, any consent they give is not freely given. An agency should not suggest that it is obtaining consent if the person the information is about has no practical alternative but to consent.

2.5. *Fair Trading Act 1999 (Vic)*

Section 67D of the *Fair Trading Act* 1999 (Vic)[9] also provides a useful checklist for obtaining consent in the telemarketing context:

> (4) For the purposes of this section, *explicit informed consent* in relation to a telephone marketing agreement means the consent to make the agreement–
>
> > (a) must be given by the purchaser directly to the supplier or a person acting on behalf of the supplier–
> >
> > > (i) in writing signed by the purchaser; or
> > >
> > > (ii) orally; and
> >
> > (b) if given orally, must be recorded in accordance with subsection (5); and

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[7] *Privacy Act* 1988 (Cth), <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401860>.

[8] Office of the Privacy Commissioner, *Plain English Guidelines to Information Privacy Principles 8–11: Advice to Agencies About Using and Disclosing Personal Information*, OPC, Sydney, November 1996, <http://www.privacy.gov.au/publications/ipp8_11.pdf>.

[9] *Fair Trading Act* 1999 (Vic), <http://www.dms.dpc.vic.gov.au>.

> (c) must be given only after the supplier or a person acting on behalf of the supplier has, clearly, fully and adequately disclosed all matters relevant to the consent of the purchaser, including each specific purpose or use of the consent.

This is one of the few examples of an additional requirement to record consent in the telecommunications sector if it is provided orally (although similar requirements are common in the financial services sector).

3. Current consent arrangements

Industry practice regarding the collection of consent is very diverse and inconsistent. The following table summarises the consent process in a selection of common communications products:

Product / Service	Process for obtaining consent	Timing of consent	Information provided
Optus – Consumer Terms	Written signature on application form	Prior to payment/provision of service	34 pages of detailed terms and conditions
Optus – Consumer Terms – Summary of Cable Internet Service	Written signature on application form	Prior to payment/provision of service	4 pages of detailed terms and conditions
Premium Services: BigPond Sport on Your Mobile	Subscribe online (enter mobile number) then follow link in SMS.	None	None
Premium Services: B4U – Mobile Horoscopes	Online subscription (enter mobile number and tick box next to service)	Concurrent with payment/provision of service	Short paragraph of terms online
Premium Service: Planet Three	Menu selection on handset	Prior to payment/provision of service	1 page of brief terms and conditions online
Premium Service: Sky News Now	Enter SMS code	Concurrent with payment/provision of service	2 pages of terms and conditions with unsubscribe instructions
Premium Service: SMSFun	Immediate subscription via web page	Concurrent with payment/provision of service	2 pages of terms and conditions with unsubscribe instructions
Premium Service: *So You Think You Can Dance* 'Season Pass'	Enter SMS code	Concurrent with payment/provision of service	1 page of brief terms and conditions online
Premium Services: *Sydney Morning Herald*	Enter SMS code and send to premium number	Concurrent with one-off charge	1 page of frequently asked questions
Premium Services: Telstra Ringtone Subscription	Enter SMS code	Concurrent with payment/provision of service	One paragraph online with costs – link to how to unsubscribe
Premium Services: V8 Supercars Alerts	Enter SMS code	Concurrent with payment/provision of service	Short paragraph of instructions
Telstra – General Terms for Consumer Customers	Written signature on application form	Prior to payment/provision of service	31 pages of detailed terms and conditions with links to additional information (e.g. privacy policy)
Telstra BigPond – Customer Terms for Particular Premium Services	Consumer entering SMS code is treated as consent Can subscribe to some services by calling the call centre	Concurrent with payment/provision of service	57 pages of general terms and conditions in a general notice Some additional notice by SMS depending on service selected
Three – Customers Terms for Services (Standard Form of Agreement)	Written signature on application form	Prior to payment/provision of service	4 pages of general terms and conditions
Virgin Broadband – General Terms	Written signature on application form	Prior to payment/provision of service	27 pages of detailed terms and conditions
Virgin Mobile – Mobile (Pre-Paid and Postpaid) Services Description	Written signature on application form	Prior to payment/provision of service	26 pages of detailed terms and conditions
Vodafone – Terms and Conditions – Mobile Plans	Written signature on application form	Prior to payment/provision of service	17 pages of detailed terms and conditions

The key issues in relation to current industry practice in obtaining consent include the following:

- There is a trend away from obtaining written signatures on application forms towards oral consent (to a call centre) or electronic consent via a website or SMS activation.
- There are very few circumstances where electronic consent is recorded effectively (for example, there is no simple mechanism available to save or print out a confirmation of the consent).
- The full terms and conditions of the agreement are often not provided to the consumer.
- There is an enormous diversity in the amount of information provided, ranging from no information to 57 pages.
- Where terms and conditions are summarised into one paragraph (common for SMS-activated services), key information may be missing.
- There are some circumstances where a consumer is taken to have consented before they could reasonably have done so (note that this issue appears to be limited to mobile premium services (MPS) and may therefore be addressed by the new approach to MPS regulation and the use of double opt-in).
- Most processes for obtaining consent rely on English language proficiency.
- There are virtually no processes in place to assist consumers with special requirements during the consent process.
- There are virtually no processes in place to identify capacity issues when obtaining consent (such as the age of the applicant).

4. Generic consumer issues

Consumer organisations, regulators and external dispute-resolution (EDR) schemes all report a significant rise in complaints and inquiries regarding consent issues in the communications sector.

The scope of this current research project was limited by time and resource constraints. A short survey was designed to capture key consent complaints data in the sector. Seventeen organisations participated, including the Telecommunications Industry Ombudsman (TIO),[10] the Australian Competition and Consumer Commission (ACCC)[11] and the Department of Broadband, Communications and the Digital Economy (DBCDE)[12] – all of which receive a high volume of communications sector complaints. In addition, a diverse range of community advocacy organisations, legal services and casework agencies responded to the survey.

Participating organisations reported a total of 40,400 complaints (in the 2007/08 year) where consent was an issue in the communications sector. The vast majority of these were eventually dealt with by the TIO (38,200).

Data collection was limited by the inability of many organisations to easily distinguish *consent* complaints, so this figure may under-represent the true volume of consent complaints. Some major organisations (including the Office of the Privacy Commissioner and Choice) were unable to participate in this survey due to data categorisation issues, although they may be able to provide data for future research if a longer timeframe is provided for responses.

Although there were limitations in the data collection for this research project, the number of consent complaints (40,400) is still very significant. It easily dwarfs the number of consent complaints in any other sector (e.g. health or financial services).[13]

These consent complaints can be broken down into four common categories:

- Capacity;
- Absence of consent;
- Lack of informed consent; and
- Flawed consent process.

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[10] <http://www.tio.com.au>.

[11] <http://www.accc.gov.au>.

[12] <http://www.dbcde.gov.au>.

[13] Note that, in the health context, 2.1 per cent of complaints relate to consent; Health Care Complaints Commission, *Annual Report* 2007/08, HCCC, Sydney, 2008, p. 24, <http://www.hccc.nsw.gov.au/html/AR07_08.htm>.

4.1. Capacity

In the Project Survey, caseworker organisations and regulators reported a low to moderate volume of complaints regarding capacity.

The common law includes a capacity test for contract formation that requires each party to have the capacity to provide their consent. In the communications sector, capacity issues arise in a number of ways:

- The organisation attempts to gain consent from the wrong party:
  – a child rather than the parent;
  – a spouse/flatmate/employee rather than the account holder; or
  – an individual (with an intellectual disability) rather than their guardian.
- The organisation seeks consent from a party who clearly does not have the capacity to provide it (e.g. a child).
- Organisations obtain consent from a party who does not have the capacity to provide it, but there is some doubt as to whether the organisation knew, or should have known, about the lack of capacity (typically in cases where the person has an intellectual disability but no guardian is present).

The 2008 annual report of the Telecommunications Information Ombudsman (TIO) notes that 55.7 per cent of potential *Customer Transfer Code* issues relate to claims from end users that their service was transferred without their consent.[14]

The TIO notes that, in complaints of this nature, consumers commonly claim the person who arranged the transfer was not the authorised account holder. For example, the supplier proceeded to transfer the service after obtaining the consent of the consumer's spouse or child or employee.

Increasingly, the capacity of individuals will be difficult to determine in the communications sector, as consent can be provided by electronic means.

Where capacity is not present, the contract may be void. Also, a lack of capacity can lead to a claim of unconscionable conduct if the organisation is thought to be exploiting a vulnerability of the consumer of which they were (or should have been) aware.

In Australia, however, very few capacity cases are raised in formal legal action. This is because organisations have the discretion to 'make good' any problems when they discover that a person did not have the capacity to enter into a contract (whether or not they knew or should have known about the capacity issue earlier). Consumer caseworkers reported that many organisations are prepared to void contracts or waive/reduce bills once they become aware of a capacity issue, without requiring legal action.

The TIO also takes an informal approach to capacity issues, stating that they may compensate consumers based on fairness and the position of the parties, rather than relying on a strict test of whether the organisation knew or should have known that capacity was an issue.[15]

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[14] Telecommunications Industry Ombudsman, *2008 Annual Report*, Melbourne, 2008, <http://www.tio.com.au/publications/annual_reports/ar2008/PDFs/AnnualReport2008.pdf>.

[15] Telecommunications Information Ombudsman, *Disadvantaged and Vulnerable Consumers*, Melbourne, August 2008, <http://www.tio.com.au/POLICIES/Contracts/DisadvantagedVulnerable.htm>.

This discretionary approach has had both positive and negative impacts. On the positive side, many consumers have received quick and easy redress without the need for a detailed legal debate on capacity. On the negative side, complaints have been resolved at the individual level without necessarily leading to any systemic changes in approach by the organisation.

4.2. Absence of consent

Caseworkers continue to report cases where the consumer denies all knowledge of a service that appears on their bill. In the Project Survey, caseworker organisations and regulators reported a low to moderate volume of complaints regarding the absence of consent.

The TIO includes this category of consent complaints in a broader category (including general sales tactics) so it is difficult to get an exact breakdown from their database, but that broader category accounts for over 19,000 complaints each year.

Complaints regarding the absence of consent are dominated by issues arising from MPS. This issue may therefore be addressed by the new approach to MPS regulation and the use of double opt-in.

Case study 1

[from Ministerial correspondence]

Like many parents, a father allowed his teenage children to have a pre-paid mobile phone for security reasons. The father recently purchased $30 credit for his son's pre-paid mobile phone and, despite his son making no phone calls or SMS messages, the credit was gone in 24 hours. The father contacted his phone company and was told that his son's mobile had received and was charged for six premium SMS messages in that period (many of them promotional material), which had absorbed the credit.

The phone company also informed him that if he wanted to stop access to premium rate services from his children's mobiles it would take 10 working days and that he would have to re-credit the mobile phone before a 'STOP' message could be sent to the content provider. On further complaint, his phone company agreed to credit the mobile with $5 so that the 'STOP' message could be sent. The father is concerned that these premium rate services are using up his son's credit, which will compromise his son's ability to contact him in an emergency.

The phone company has told him that it is not responsible for the charges; it simply provides the phone service and network and he is responsible for any interactions with third parties such as content providers.

The volume of complaints regarding the complete absence of consent is extremely high when compared with other sectors. It is difficult to imagine how other sectors (such as health and financial services) could continue to operate in the face of similar concerns regarding the absence of consent.

However, in the communications sector this issue is not entirely surprising given the enormous diversity in industry processes for obtaining consent and the lack of strong requirements to confirm consent before billing. Indeed, there is a clear link between the ease of billing individuals in the communications sector and complaints regarding the absence of consent. The following factors have all contributed to this issue:

- Content providers do not require an individual account/relationship with the consumer.
- Both content providers and service providers can simply add new items to an existing bill rather than issuing a new or separate bill.
- Collecting payments is automated through direct debits or through prepaid services.

- Billing relies on a system of trust between content providers and service providers.
- To date there have been only minor repercussions for mistaken or exploitative billing practices (e.g. repayment to one consumer rather than systemic change).
- There is a history of service providers informally settling consumer complaints without repercussions for content providers.

All of this has contributed to the prevalence of charges on communications bills where the consumer denies any knowledge of the service or of consenting to the charge.

Case study 2

[from Ministerial correspondence]

A retired doctor complained about an unexpected $7 charge that appeared on his mobile phone bill. The doctor queried the unexpected charge with his provider. He was told he, or someone else who had access to his phone, had subscribed to a mobile premium service.

The doctor explained that he used his mobile phone sparingly, switching it on only to make a call when away from his home. He used a landline phone at home. He vehemently denied subscribing to any mobile premium service. He also explained that his phone could not have been in the possession of anyone other than himself. The doctor vowed to pursue a refund on principle.

4.3. Lack of informed consent

In the Project Survey, caseworker organisations and regulators reported a moderate to high volume of complaints regarding the lack of informed consent. This covered situations where key information was not provided or where the information that was provided was misleading.

Laws and codes in the communications sector provide some guidance on the information that should be provided to consumers. Although there is limited detail for most products and services, more precise requirements apply to customer transfers.

These laws and codes are backed by *Trade Practices Act* 1974 (Cth) restrictions on the provision of misleading information, which have proved useful in major investigations.

Case study 3

[from the ACCC]

The ACCC instituted proceedings against EDirect and VIPTel for breaching section 52 of the *Trade Practices Act* 1974 in cases where they made misleading and deceptive representations to consumers to induce them to enter contracts for phone services. From February 2006 to March 2007, EDirect and VIPTel made representations to possible customers through telemarketing phone calls and over the Internet regarding the coverage of their network, their fixed monthly payments, the included services, the future savings, their local call pricings and the ability to terminate a contract at any time (without charges). It was found the statements made were often contrary to the true position and could be seen to mislead or deceive.

For example, through the VIPTel website it was represented that network coverage and mobile telecommunications services were available ‘Australia-wide’ in circumstances where coverage was only available in areas immediately surrounding main towns. The court further found that the conduct of

EDirect in dealing with complaints relating to this issue was ‘egregious’. When one customer living in an unserved remote area reported the network problem for the third time he was told that the problem might simply be with his house and that he should try down the street.

The ACCC and EDirect settled the matter and brought the orders before the court to effect the settlement. The court briefly discussed the ability to detect future possible breaches of section 52 by telemarketers, particularly in remote areas of Australia. Within the discussion (paragraphs 32–34), the judge noted that only in Victoria was there legislation regulating this aspect of telemarketing, requiring informed consent to be given and a voice recording to be made. It was found that the orders given by the ACCC were enforceable by the court, requiring that EDirect not make any representations to consumers which were not accurate, or based on reasonable grounds. [16]

Although complaints related to informed consent represented the highest volume of consent complaints in the Project Survey, mechanisms for addressing this specific issue are difficult to identify.

Prohibiting the use of misleading information obviously does have strong support, but this is a ‘negative’ requirement and it does not help to provide guidance on what information should be provided. As noted above, industry practice ranges from providing no information to the consumer through to 57 pages of detailed information. There is no agreement regarding the ideal amount of information that should be provided to a consumer.

To date, the approach has been to prescribe detailed information that must be provided in circumstances that result in a high volume of complaints (customer transfers and MPS). For most other issues, organisations can determine how much information they provide.

Reliance on negative requirements (*Trade Practices Act* 1974 prohibitions) and ad hoc reactive requirements for specific products may not be sufficient to address the high volume of consumer complaints regarding a lack of informed consent. Mechanisms for improving informed consent are worthy of further study and policy development. In the meantime, some of the other specific recommendations in this report (such as establishing a consistent definition of consent) may have a ‘knock on’ effect on processes for obtaining informed consent in the communications sector.

4.4. *Flawed consent process*

In the Project Survey, caseworker organisations and regulators reported a moderate to high volume of complaints regarding flawed consent processes. This typically covers situations where consent was obtained at the wrong stage in the process (e.g. after a consumer had already transferred their service or been subscribed to a new service) or where consent was intended to only cover one service but had been applied more broadly. This category also covers situations where organisations have deliberately confused/disguised the consent process with other information (such as competition entries).

Flawed consent processes are prevalent in the MPS sector and have led to consumer advocacy organisations demanding that double opt-in processes be adopted.

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[16] *Australian Competition and Consumer Commission v. EDirect Pty Ltd* (2008) FCA 65, <http://www.austlii.edu.au/au/cases/cth/FCA/2008/65.html>. See also Australian Competition and Consumer Commission, ‘ACCC Alleges VIPtel Mobile telemarketing calls are misleading’, press release, ACCC, 26 July 2007, <http://www.accc.gov.au/content/index.phtml/itemId/793554/fromItemId/621277>.

Case study 4

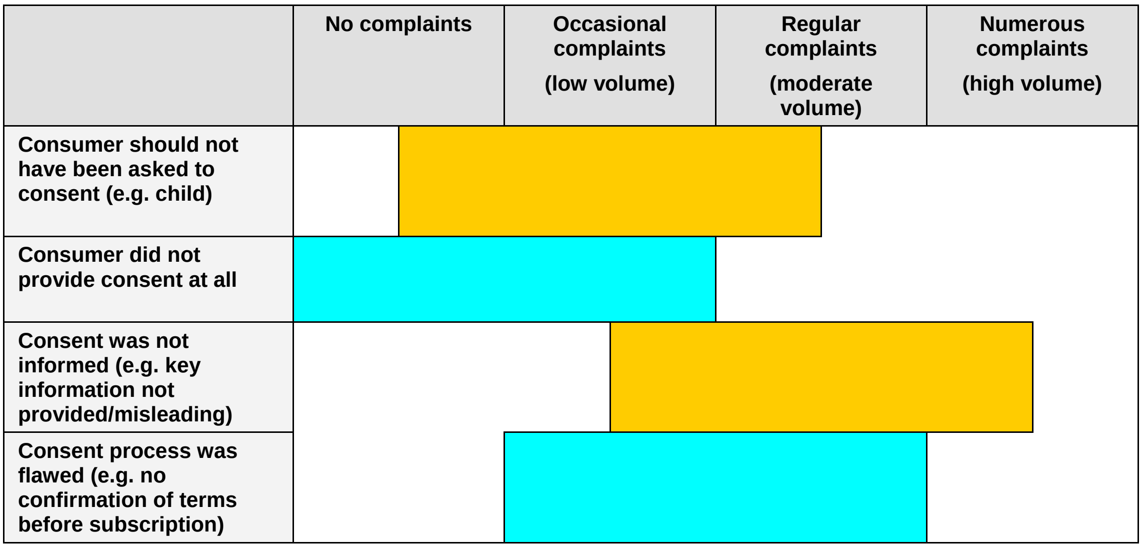
[from CTN]

Complaint: Ms S received a scratch card in the mail. The card consisted of two panels. The card said that if she could unscramble a word from the first panel she would win a prize. She scratched the first panel and unscrambled the word ‘cat’. The card said that if she won she could scratch the second panel to reveal her prize. The second panel instructed her to call a 190 number. She called this number and was put on to a recorded message for four minutes. She later found out that she was charged $2.97 per minute for this call. She was finally asked to key in her unscrambled word, so she keyed in ‘cat’. She was given a PIN and instructed to SMS her PIN to a particular number. It was later found out that by messaging this number she was signing up to an MPS subscription service. She was sent messages on an ongoing basis, and was charged for each of the messages sent to her at a premium rate. These messages gave her instructions on how to claim her free gift valued at $50. After investigation by authorities, this gift was found to be $50 worth of Mobile Premium Content.

4.5. Summary table

The scope of this current research project was limited by time and resource constraints. A short survey was distributed to organisations which receive consumer complaints. Responses were received from key organizations, including the Telecommunications Industry Ombudsman (TIO), the Australian Competition and Consumer Commission (ACCC) and the Department of Broadband, Communications and the Digital Economy (DBCDE). In addition, a diverse range of community advocacy organisations, legal services and casework agencies responded to the survey.

Not all organisations could break down their complaints data into sub-categories. For those that were able to, the following table summarises the prevalence of complaints in the four most common categories:



	No complaints	Occasional complaints (low volume)	Regular complaints (moderate volume)	Numerous complaints (high volume)
Consumer should not have been asked to consent (e.g. child)	🟨	🟨	🟨	
Consumer did not provide consent at all	🟦	🟦		
Consent was not informed (e.g. key information not provided/misleading)		🟨	🟨	🟨
Consent process was flawed (e.g. no confirmation of terms before subscription)		🟦	🟦	

5. Issues in specific consumer categories

The section discusses issues regarding obtaining informed consent from specific consumer categories, including:

- people with relevant disabilities (intellectual disabilities, hearing impairment, visual impairment and communication impairment);
- Indigenous consumers;
- young people; and
- culturally and linguistically diverse consumers.

It is important to note that this list of specific consumer categories is not exhaustive. It was selected on the basis of time and resource constraints. Some evidence emerged during research for this project that other key vulnerable consumer groups had been targeted heavily by exploitative sales in the communications sector, including older consumers.

In the communications sector, there is little guidance available to industry on obtaining consent from specific consumer categories. This is in contrast to some other sectors where detailed guidance is available. Not surprisingly, the two areas with the greatest coverage are health and human research, where documents covering topics such as *Informed Consent and Special Populations* are common.[17]

The communications sector could benefit from a greater recognition of the specific needs of some consumer categories and improved guidance on obtaining consent from consumers in those categories.

In the absence of specific guidance on obtaining consent from vulnerable consumers, caseworkers and regulators have tended to rely on a common law test of capacity. In Australia, the common law allows a contract to be declared void if one of the parties did not have the capacity to understand the agreement.[18] However, the exact definition and assessment of capacity is complex and differs in some jurisdictions/sectors. It may not be effective to rely on the common law test for general complaints, as the costs of legal and medical expertise are prohibitive.

In addition, if an organisation were aware or should have been aware of a specific vulnerability of a consumer and subsequently exploited this vulnerability, they may face a claim of unconscionable conduct. In practice, this type of claim has proved expensive to pursue, with mixed results (refer to the *Radio Rentals* case in Case study 5 below).

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[17] See, for example, Xavier University, *Informed Consent Process with Consent (Adults) and Assent (Children): Form Templates*, Cincinnati, OH, n.d. <http://www.xavier.edu/IRB/docs/InformedConsent&Template.doc>.

[18] *Gibbons v. Wright* (1954) [1954] HCA 17; (1954) 91 CLR 423, <http://www.austlii.edu.au/au/cases/cth/HCA/1954/17.html>.

Fortunately, the Telecommunications Industry Ombudsman (TIO) applies a less formal test regarding capacity. The TIO's 2008 *Disadvantaged and Vulnerable Consumers* position statement[19] notes the TIO's approach to capacity issues and capacity complaints. The TIO's questions pertaining to an investigation may include the following:

- Did the consumer have a disadvantage or vulnerability which significantly affected their capacity – for example, to make a voluntary and informed decision about purchasing or using a telecommunications service, or about the financial implications of this purchase or use?
- Did the provider know, or ought it reasonably to have known, about this disadvantage or vulnerability?
- What was the nature of the provider's interaction with the consumer?

The position statement outlines the relevant materials the TIO might collect in order to answer these questions and further outlines how each question might directly affect the decision in question. Considerations taken into account by the TIO include the resources available to parties during the negotiating stage of any transaction, the impact of the alleged events on each party and the relative cost to each party of possible resolutions.

In reaching fair and reasonable outcomes, the TIO decides either that the consumer's disadvantage is not an issue in the complaint, or that the consumer's condition affected their capacity in the circumstances. Where the provider was, or ought reasonably to have been, aware of the condition of the vulnerable or disadvantaged party, the TIO may decide that it would be fair and reasonable for the provider to remedy the situation relating to the complaint. In situations where the provider was not aware, and could not have been expected to be aware, of the consumer's conditions, the TIO may still find it fair and reasonable for the provider to remedy the situation, based on the impact on each of the parties.

An alternative to relying on a general test of capacity and common law remedies is to develop best practice guidance for obtaining consent from specific consumer categories. The following sections describe relevant consent issues in some key consumer categories.

5.1. Intellectual disabilities

Most legal guidance defines an intellectual disability as being either inherent or resulting from injury, and the term is used broadly to capture a range of mental illness and cognitive impairment. In the Project Survey, caseworker organisations and regulators reported a low to moderate proportion of consent complaints regarding people with an intellectual disability.

There is surprisingly little information available on the capacity of people with intellectual disabilities to enter into contracts. Most studies and guidance have a focus on these individuals' capacity to consent to medical treatment or to participate in medical research. There is also a recognised gap in Australian law detailing informed consent in the case of the mentally ill.[20]

As a result of the focus on medical settings, the limited guidance that is available assumes that an organisation already knows it is dealing with a person with an intellectual disability or that the organisation has the ability to make a proper assessment.

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[19] Telecommunications Information Ombudsman, *Disadvantaged and Vulnerable Consumers*, Melbourne, August 2008, <http://www.tio.com.au/POLICIES/Contracts/DisadvantagedVulnerable.htm>.

[20] Human Rights and Equal Opportunities Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness*, HREOC, Sydney, 2004, <http://www.humanrights.gov.au/disability_rights/inquiries/mental/Volume 1.txt>.

In the communications sector, it is unlikely that organisations will know in advance that a consumer has an intellectual disability, especially where consent is obtained by electronic means. Even if a transaction is occurring face to face, the ability for individuals to recognise incapacity may be quite limited. Even trained medical staff performed poorly in recognising incapacity in a blind test in a nursing home setting.[21]

The leading Australian case (*Radio Rentals*) places a heavy focus on the appearance of the consumer – an approach that may increasingly be ineffective for consumer protection.

Case study 5

[from ACCC]

The ACCC pursued a claim of unconscionable conduct against Radio Rentals.[22] A consumer (Mr G) had a total of 15 rental, two loan and 19 service agreements with Radio Rentals and three rental agreements with Walker Stores. These all related to electrical goods. The payments he made under those agreements totalled $20,700.43.

Mr G's medical history showed a failure to complete school, a history of incarceration in institutions for behavioural offences, an IQ ranging from 50 to 80, and a confirmed diagnosis of schizophrenia. He had been on the disability pension since the age of 17.

The ACCC argued that Radio Rentals knew or ought to have known 'from Mr G's presentation and verbal skills' that he was a person with an intellectual disability: he could not read the agreements; he could not understand all the terms and conditions of the agreements; he was unable to understand all the rights he had under the agreements; and he was unable to make a worthwhile judgment about whether entering into the agreements was in his best interests.

However, Mr G presented well in court (neatly dressed, basic language skills, good memory) so the court found that there was no overwhelming evidence that staff should have been aware of his disability. In fact, Mr G – like most witnesses – was well prepared and rehearsed for the hearing and this appeared to affect the court's view. Consumer organisations find this case disappointing as it places the onus on people with an intellectual disability to protect themselves, despite obvious exploitation and a lack of consideration of the financial hardship caused by the company's actions.

It may be important to consider alternatives for dealing with capacity issues where consumers have an intellectual disability. These could include the following:

- Where the organisation is aware of the intellectual disability, consent could be gained through the provision of additional information complemented by testing to ensure that consent is informed. In some circumstances, consent may need to be obtained from a guardian.

- Where the organisation is not aware of the intellectual disability and a complaint arises, the TIO's fairness test should continue to be applied, looking at all of the circumstances of the parties and the transaction (rather than relying on a strict legal test of capacity).

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[21] C.D. Barton Jr, H.S. Mallik, W.B. Orr and J.S. Janofsky, 'Clinicians' Judgement of Capacity of Nursing Home Patients to Give Informed Consent', *Psychiatric Services* 47, 1996, pp. 956–60, <http://www.psychservices.psychiatryonline.org/cgi/content/abstract/47/9/956>.

[22] *Australian Competition & Consumer Commission v. Radio Rentals Limited (with Corrigendum dated 24 August 2005)* (2005) FCA 1133, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2005/1133.html>.

Finally, consumer caseworkers also raised concerns about the need to ensure organisations take care in not dismissing consumers with a disability because the consent issue is too hard. There is some useful guidance from the New Zealand health sector:

> Where a person is considered incompetent, that person still keeps the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence. It is important that people with an intellectual disability are not denied treatment or services because of a perceived difficulty in gaining consent. [23]

5.2. Hearing impairment

In the Project Survey, caseworker organisations and regulators reported a low proportion of consent complaints regarding people with a hearing impairment. However, many representatives asserted that people with a hearing impairment were under-represented in complaints data as a result of the limitations in data collection, their reluctance to make official complaints and other barriers they faced in accessing complaints services.

Very limited information or data is available on consent issues related to people with a hearing impairment, and this area may be suitable for further research. Key issues that were identified include the following:

- As hearing loss can occur gradually, this issue may require a slightly different approach from that taken to other consumer categories, where impairments are more certain.
- Caseworkers and advocates reported that people with hearing impairment were often reluctant to acknowledge to sales staff the difficulties they may have in hearing.
- Caseworkers and advocates reported that people with hearing impairment were often reluctant to make complaints or follow up inquiries that revealed their difficulties, especially if they had not revealed their hearing impairment originally.

Although people with a hearing impairment face challenges in terms of receiving and understanding oral information regarding communications products and services, there are obvious tools available for ensuring that they are still given an opportunity to provide informed consent:

- Various services are available to improve accessibility.
- People with a hearing impairment benefit from consent processes that include written information.
- People with a hearing impairment benefit from consent processes that include a short cooling-off period while they consider written information.

Overall, the consent issues facing people with a hearing impairment should not be difficult to overcome; however, the lack of relevant best practice guidance on this issue is a concern.

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[23] IHC Advocacy, *Informed Consent*, Wellington, New Zealand, September 2003, <http://www.eqs.co.nz/pictures/Informed consent.pdf>.

5.3. Visual impairment

In the Project Survey, caseworker organisations and regulators reported a very low proportion of consent complaints regarding people with a visual impairment. However, many representatives asserted that people with a visual impairment were under-represented in complaints data as a result of the limitations in data collection, their reluctance to make official complaints and other barriers they faced in accessing complaints services.

Very limited information has been available on consent issues related to people with a visual impairment in the communications sector, as most studies focus on general access issues rather than consent. This area may be suitable for further research. Key issues that were identified include:

- Visual impairment creates specific difficulties in relation to lengthy and complex contracts and terms and conditions, which can be difficult to convert into a suitable format.
- People with a visual impairment often rely on a third party to read, summarise or explain documentation, including contracts. This raises concerns where the third party is also involved in the sale of the product.
- Caseworkers and advocates reported that people with visual impairment faced considerable access barriers when making complaints.

Managing consent for people with a visual impairment requires further consideration.

5.4. Communication impairment

A communications impairment covers the situation where a person is unable to express their consent easily. In the Project Survey, caseworker organisations and regulators reported no examples of consent complaints regarding people with a communication impairment.

Although this is an important issue, it is likely that it only arises in a small minority of cases. As the situation is not included in most data categories, no data are available on the prevalence of this concern. This area may be suitable for further research.

5.5. Indigenous consumers

In the Project Survey, caseworker organisations and regulators reported a low to moderate proportion of consent complaints regarding Indigenous consumers (most organisations do collect data on Indigenous consumers, so this figure should be fairly accurate).

However, Indigenous consumers have been the targets of some of the most notorious instances of exploitative sales in the communications sector and, despite the low to moderate proportion of complaints, it is likely that instances of exploitation are high. Indigenous consumer may be under-represented in official complaints data as a result of barriers they face in accessing complaints services.

Some of the main consent issues with indigenous consumers are:

- Indigenous communities are often the *specific* target of scams and high-pressure sales – a sales team will even fly into remote communities to promote a particular product.

- Indigenous communities often have their own language barriers, and proficiency in English should not be assumed.

- Consent in Indigenous communities is a slightly different concept to that in non-Indigenous communities and may require the broader consent of the family (and even the community in some circumstances).

- Indigenous community peer pressure is a known vulnerability exploited by some sales teams.

There are emerging concepts of free and informed consent in Indigenous communities around the world, to help free them from exploitation. Although these may not be relevant to the communications sector, this trend is indicative of the special measures being developed to protect Indigenous communities from exploitation.

The concept of 'free, prior and informed consent' in relation to Indigenous peoples generally refers to their capacity for self-determination, particularly in relation to their lands, resources, culture and beliefs. It is unlikely that the principles discussed will cross over with concepts of consent in relation to contract making, or relate to relevant complaints made due to a lack of information at the time of giving consent. However, the term 'free, prior and informed consent' is used quite often for instances where research into an Indigenous community will take place.[24]

In one recent research paper, which contrasts Western notions of informed consent with those of Indigenous Australians, the authors note that significantly Western civilisation places importance on the notions of individual autonomy, while Indigenous cultures generally look to honouring the family and community.[25]

An example of this in practice is that, for traditional Indigenous people, 'informed consent' for medical procedures must come from the 'right' person within the network of kinship and community relationships, not necessarily just the patient. The authors also note the requirement to ensure that Aboriginal patients are fully informed in their own language about potential harms or benefits of the procedures offered.[26] Again, these health consent issues may not be entirely relevant to the communications sector.

In other sectors where Indigenous communities have been exploited (notably financial services), the regulator has taken direct action rather than relying on improving consent. This has included complete prohibitions on some products being sold in Indigenous communities or restrictions on some specific companies' activities.

For example, the Australian Securities and Investments Commission (ASIC) has taken numerous actions to protect Indigenous communities from insurance and credit sales teams. In one case, it imposed licence conditions on one insurance broker, capping its sales to six per day in any one Aboriginal community.

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[24] Desert Knowledge CRC, *What is Free Prior Informed Consent?*, briefing paper 7, 2007, <http://www.desertknowledgecrc.com.au/socialscience/downloads/DKCRC-SS-BP7-Free-Prior-Informed-Consent.pdf>.

[25] P. McGrath and E. Philips, 'Western Notions of Informed Consent and Indigenous Cultures: Australian Findings at the Interface', *Bioethical Inquiry* 5, 2007, pp. 21–31, <http://www.springerlink.com/content/p6108ng20rm21452/fulltext.pdf>.

[26] Creative Spirits, *Hospitals, Doctors, Health & Aboriginal People*, n.d., <http://www.creativespirits.info/aboriginalculture/health/aboriginal-hospitals-doctors-health.html>.

5.6. Young people

In the Project Survey, caseworker organisations and regulators reported a moderate to high proportion of consent complaints regarding young consumers. This issue is a significant concern for the telecommunications sector because of the prevalence of young people with mobile phones (often provided/funded by parents).

Current practice in the communications sector in relation to young people and consent is sometimes poor. Instead of informing young people about the risks of products, the communications industry often appears to be attempting to scare young people into paying their bill.

Consider this provision from SMSFun:

> Special note to members under 16 years of age or where others pay their mobile account/bill While legally you may not be required to pay your mobile bill, your parent or guardian definitely is. SMSFun logs every request for content, membership, pictures, server and database query with ip, geo-ip and proxy detection features. Should any charges be disputed by the bill payer, SMSFun reserves the right to persue [sic] the user via legal and civil avenues for moneys owed, damages, legal costs and ongoing hardship to SMSFun from any false or misrepresented claims arrising [sic] from any disputed matter. SMSFun may call to verify mobile ownership to any members under 16 years of age.[27]

There is no set age limit for obtaining consent in contract law or privacy law, so the test of capacity relies on the circumstances of each case. Most Australian legal guidance on young people and consent is from the health sector, and the leading case says that you must assess the maturity of the individual in each case.[28]

There are inconsistencies in the law: there are some instances where there is a specific age limit (e.g. 18 for tattoos); human research generally requires parental consent if under 18, with some exceptions;[29] and privacy law has a general test of maturity, although there is a recommendation for requiring parental consent for a default age of 15.

The Australian Law Reform Commission (ALRC) has made a series of important recommendations in its publication *Decision Making by and for Individuals Under the Age of 18.*[30] The current law is relatively thin on this issue: the *Guidelines to the National Privacy Principles* (non-binding) require each individual's case to be assessed individually; where a child is capable of making their own decisions, they should be allowed to do so.[31]

As part of the ALRC's investigation, research was conducted on the capacity of young people to make decisions. It showed a clear correlation between the development of cognitive skills and age, with a

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[27] SMS Fun, *Register Here*, <http://www.smsfun.com.au/smsalerts.php>.

[28] *Department of Health and Community Services v. JWB and SMB (Marion's Case)* (1992) HCA 15; (1992) 175 CLR 218, <http://www.austlii.edu.au/au/cases/cth/high_ct/175clr218.html>; Human Rights and Equal Opportunity Commission, *Outline of Submission of the Human Rights and Equal Opportunity Commission*, HREOC, 19 May 2003, <http://www.hreoc.gov.au/legal/submissions_court/intervention/P_v_P_legalaid.html>; NSW Law Reform Commission, *Report on Young People and Consent to Health Care*, report 199, NSWLRC, October 2008, <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r119.pdf/$file/r119.pdf>.

[29] J. Bessant, *The Fixed Age Rule: Young People, Consent and Research Ethics*, Youth Studies Australia, 2006, <http://www.accessmylibrary.com/coms2/summary_0286-29055150_ITM>.

[30] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, report 108, ALRC, August 2008, <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>.

[31] Office of the Privacy Commissioner, *Guidelines to the National Privacy Principles*, OPC, Sydney, September 2001, <http://www.privacy.gov.au/publications/nppgl_01.html>.

gradual increase in skills as age increases. Multiple researchers have positioned the age where minors become able to logically reason and make sound judgments at around 15 to 17 years of age, and in some studies this was even shown to be 14 years. The various results regarding capacity and ages revealed that it isn't possible to identify an age above which all young people are competent in decision-making and below which all children aren't.

Following an examination of all the relevant evidence, the ALRC determined that a clarification of the *Privacy Act*'s attitude to children's decision-making was needed. They proposed an age of presumption working alongside a method of individual assessment, where practicable. The suggested approach is individual assessment; however, where this is not possible, individuals over the age of 15 are to be considered capable of decision-making.

The ALRC made the following relevant recommendations:

- **Recommendation 68–1**
  The *Privacy Act* should be amended to provide that where it is reasonable and practicable to make an assessment about the capacity of an individual under the age of 18 to give consent, etc. under the Act, an assessment about the individual's capacity should be undertaken. Where an assessment of capacity is not reasonable or practicable, then an individual:

  (a) aged 15 or over is presumed to be capable of giving consent etc.; and

  (b) under the age of 15 is presumed to be incapable of giving consent etc.

- **Recommendation 68–2**
  The *Privacy Act* should be amended to provide that where an individual under the age of 18 is assessed or presumed to not have capacity under the Act, any consent etc. must be provided by a person with parental responsibility for the individual.

If these proposals become law, they will present a significant change to the general approach by industry to obtaining consent from young people.

The ability of commercial organisations to assess a young person's level of maturity may be limited. In the health sector, there has been considerable additional guidance on this issue. For example, one health professional organisation (the Osteopaths Registration Board of Victoria)[32] has even broken down the question into a series of factors that must be considered by their members:

- age;
- general maturity of speech and bearing;
- level of independence from parental care;
- level of schooling; and
- ability to understand the gravity and complexity of the treatment proposed.

It may not be realistic to expect this same attention to detail in the communications sector.

Overall, the communications industry would benefit from some guidance on obtaining consent from young people, and may also benefit from the development of a default age to simplify the legal position. It is interesting to note that consent to tattooing must be from a parent if a person is under 18 years old

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[32] Osteopaths Registration Board of Victoria, *Consent for Treatment and Confidentiality in Young People*, 2005, <http://www.osteoboard.vic.gov.au/docs/treatconsent.pdf>.

and intimate piercing is completely prohibited for those aged under 16 years (not even with parental consent).[33] This may be a reflection of the community's recognition of the limits of consent.

5.7. *Culturally and linguistically diverse consumers*

In the Project Survey, caseworker organisations and regulators reported a low to moderate proportion of consent complaints regarding culturally and linguistically diverse consumers. However, many representatives asserted that culturally and linguistically diverse consumers were under-represented in complaints data due to a combination of their reluctance to make official complaints and the language barriers they faced in accessing complaints services.

There is some evidence of deliberate exploitation of consumers' lack of English proficiency (with a crossover into unconscionable conduct in some matters). Key regulators reported concerns regarding the number of complaints received from people who did not speak English, but who had been subscribed to phone plans or premium services based on documentation that was only available in English.

However, there are also some obvious concerns regarding the expense of potential solutions to this issue. This is a globally recognised problem, but very few solutions have been proposed other than expensive interpreters, hiring of bilingual staff and the translation of documents into multiple languages.[34]

Some other sectors/jurisdictions do require a very comprehensive and detailed approach to ensuring consent has been obtained properly from culturally and linguistically diverse consumers. For example, Queensland Health[35] includes the following requirements for medical consent:

> COMMUNICATION AND CULTURAL ISSUES:
>
> The patient/parent/guardian/substitute decision-maker who does not speak English, or is profoundly hearing impaired must be offered a qualified interpreter during the informed consent process.
>
> The qualified interpreter shall:
>
> – countersign the consent form to indicate that he/she has given a verbal translation of the procedure/ operation relating to consent in the language that the patient understands.
>
> – specify the language.
>
> In the event that the only interpreter available is a telephone interpreter service, the interpreter's name and contact details must be documented on the consent form by the treating Medical Practitioner (or delegate) in the 'Interpreter's statement' section.
>
> The patient who has specific cultural needs will also be asked if they require a Cultural Support Worker and same provided as indicated.

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[33] Health Care Complaints Commission, *When Can Young Persons Consent to Their Medical Treatment and Care?*, HCCC, Sydney, 2009, <http://nwsdgp.org.au/assets/documents/mwm_04-09_HCCC_article_-_when_can_young_people_consent_to_their_medical_treatment_and_care.pdf>.

[34] B.G. Wilson, *Linguistic Diversity: A Global Threat to Informed Consent*, Eradimaging, 1 November 2006, <http://www.eradimaging.com/site/article.cfm?ID=3>.

[35] Queensland Health, *Informed Consent for Invasive Procedures*, policy 14025, Queensland Health, Brisbane, 2007, <http://www.health.qld.gov.au/informedconsent/ConsentForms/14025.pdf>.

Another approach is to focus on making consent documents easy to read and understand – for example, the Flesch-Kincaid method measuring the readability of a document, and in particular the readability of an informed consent form. The research looks into the best way to develop informed consent forms for those for whom English is a second language.[36]

Case study 6

[from CTN]

Complaint: Ms A, an expectant mother with English as a second language, starts receiving SMS messages on a daily basis with trivial relationship advice, similar to spam. Leading a busy lifestyle in the lead-up to the birth of her first child, she does not follow up on the origin of the messages. The messages drop down from daily to every second or third day over the period of a month. Ms A then receives her monthly phone bill from Optus and discovers she has been charged $130 for the unsolicited text messages.

Action: Ms A called Optus to complain and was advised to contact the company sending the SMS and ask for them to unsubscribe her. She called the company and informed them she was never aware that she had signed up for their service and wished to be removed immediately and to have the charges refunded. When the company refused to disclose how she had been signed up and to give a refund, she went back to Optus. Optus agreed to reimburse Ms A $40 of the bill, leaving her with an incurred charge of $90. Ms A is still unaware of how she became subscribed to this service. ‘It is very strange,’ she said. ‘I do not do anything on the net except check my emails. I don’t even do online shopping. I do not give my number out to many people, so I don’t know how this happened.’

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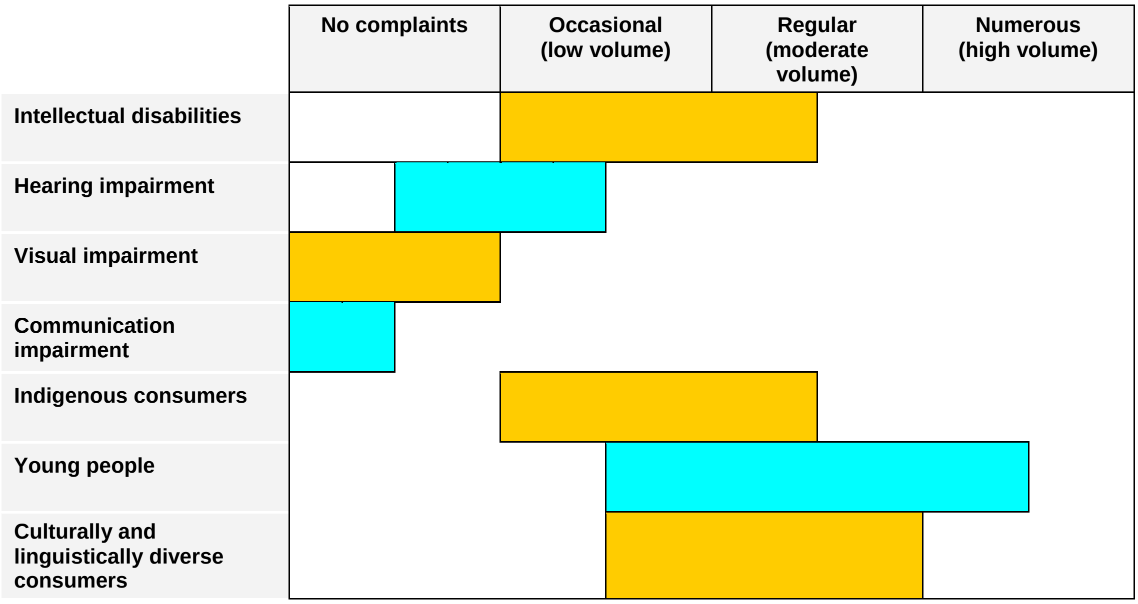
[36] J. Ancker, *Developing the Informed Consent Form: A Review of the Readability of Literature and an Experiment*, American Medical Writers Association, 2004, <http://www.amwa.org/default/publications/vol 19 no 3/vol 19 no 3developing.pdf>.

5.8. Summary table

The scope of this current research project was limited by time and resource constraints. A short survey was distributed to organisations which receive consumer complaints. Responses were received from key organisations, including the Telecommunications Industry Ombudsman (TIO), the Australian Competition and Consumer Commission (ACCC) and the Department of Broadband, Communications and the Digital Economy. In addition, a diverse range of community advocacy organisations, legal services and casework agencies responded to the survey.

Not all organisations could break down their complaints data into consumer sub-categories. For those that were able to do so, the following table summarises the prevalence of complaints received from the different target groups:



Overall, caseworkers reported a shared concern that capacity issues were not the subject of concerted effort by industry – despite continuous complaints, there has been no systemic response. This is possibly because it is easier to deal sympathetically and quickly with a few complaints rather than address larger issues such as infrastructure, staff training and awareness, and product suitability.

There is also a strong concern that consumers in these specific categories are under-represented in complaints statistics, due to limits on data collection and a reluctance to complain because of the stigma associated with being a victim. Many of these consumers also face significant barriers to accessing complaints services.

Many organisations in the Project Survey were unable to provide data on specific consumer categories (or were unable to report within the tight project deadline). There may be a need for further research to consider these categories in more detail – this will require sufficient time and resources for analysis of data from key organisations.

6. Recommendations

The findings in this research project lead to several important recommendations.

6.1. Potential for a more consistent approach to consent

The communications sector would benefit from the development of a consistent approach to obtaining consent across all communications laws and codes. This could be achieved by:

- inclusion of a definition of consent in the *Telecommunications Act* and other relevant legislation;
- inclusion of the same definition of consent in codes and standards and in the code development guides;
- consistent guidance from TIO, TISSC and other relevant EDR schemes; and
- development of a best practice guide to consent, built around the consistent definition published by the Australian Communications and Media Authority (ACMA).

The key to achieving consistency will be to establish consensus amongst stakeholders concerning a basic definition/test of consent that is relevant for the communications sector.

A basic test might contain the following requirements:

- *Consent must be voluntary.* The individual must have a genuine opportunity to provide or withhold consent – that is, they must be able to say ‘yes’ or ‘no’ without pressure or disadvantage.[37]
- *Consent must be informed.* The individual must know what it is they are agreeing to. The individual needs to be aware of the implications of providing or withholding consent, having received the information in a way meaningful to them and appropriate in the circumstances. This may require additional confirmation of consent (e.g. double opt-in) for some products and services.[38]
- *The individual must have the capacity to provide consent.* The individual must be capable of understanding the issues relating to the decision, forming a view based on reasoned judgment and communicating their decision. Organisations must consider best practice guidance on obtaining consent from specific consumer categories (e.g. young people and consumers with an intellectual disability).
- *Consent must be recorded.* A clear record of the consent must be made and retained by the organisation. Where consent is obtained orally, the conversation should be recorded or confirmed by subsequent written consent.

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[37] Other similar guidance from the New Zealand Health Council Working Party on Informed Consent (1989) states: ‘The consent must be voluntary. There should not be any pressure on the person to give their consent. No undue influence or duress should be present.’

[38] Other similar guidance from the New Zealand Health Council Working Party on Informed Consent (1989) states: ‘Informed consent implies that enough relevant information is provided to enable a reasoned decision to be made, and that information was understood. Without understanding what is involved no one can make a reasoned decision.’

This approach would capture current requirements in laws and codes (for both consumer issues and privacy issues) and provide a consistent base for contract formation, complaints management, and so on across the entire consumer relationship, rather than the current ad hoc and inconsistent approach.

However, it is important to note that, even if consent requirements are standardised ‘on paper’, there may still be issues with compliance. For example, consent issues with MPS have been a significant concern despite detailed requirements in the MPS scheme. This was the result of a poor approach to monitoring and enforcement, rather than merely a weakness in the rules. Major changes to the compliance culture in industry and the enforcement culture by regulators may be required before significant benefits appear for consumers.

6.2. Recording consent

Consumers would benefit from a consistent requirement to record consent.

In the communications sector, it is not technically difficult to record consent (as call centres already record many calls). The difficulty is establishing an appropriate dialogue or script. The Communications Alliance already provides some examples in its guidance on customer transfers.[39]

Some innovative measures may be required in order to adequately record consent in electronic contract formation, including communications via newer channels such as SMS and VOIP.

Overall, a consistent requirement to record consent should act as a preventative measure, as well as having obvious benefits in relation to disputes.

6.3. Best practice guidance on obtaining consent

Industry and consumers would benefit from the development and distribution of best practice guidance on obtaining consent from consumers in specific consumer categories.

This report has collected a range of available resources on obtaining consent from specific consumer categories (see Appendix 1). However, there is a notable gap in the relevant information that is available regarding consent and specific consumer categories in the communications sector. Most information sources regarding capacity have a focus on the health sector. Most information sources on communications and accessibility issues do not deal with consent.

6.4. Additional research

Further research is required on consent issues and barriers to accessing redress mechanisms for some specific consumer categories. In particular, information on consent issues for people with cognitive impairment, communications impairment, hearing impairment and visual impairment is not readily available. Also, data collected by casework organisations and regulators does not always include data on vulnerable consumers (or data are not available in sufficient detail).

Further research is also required in order to evaluate the effectiveness of potential methods to obtain *informed* consent. This research project found that a lack of informed consent is the largest category of

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[39] Communications Alliance, *Telecommunications Consumer Protections Guideline*, industry guideline G631:2007, Sydney, September 2007, <http://www.commsalliance.com.au/__data/page/21678/G631_2007.pdf>.

consent complaints in the communications sector. This research project also found enormous diversity in industry practice regarding the type and amount of information provided to consumers. Further studies could examine ways to improve industry practices to obtain informed consent.

One research option that is worth considering is to develop a methodology for evaluating the effectiveness of consent. A method that has been considered elsewhere is testing or spot-checking the consumer's understanding (post consent). In one study, a call centre called back (medical) study participants with standard questions about what they had just agreed to.[40]

6.5. The limits of consent

It is important to recognise the limits of relying on consent and to continue to develop other consumer protection tools where appropriate.

Where a product or sales technique is seriously flawed and consumers are suffering, consent may not be sufficient.

There are also limits to relying on consent in the face of a hardened sales team, the members of which are reliant on sales commissions as their major source of income and willing to use aggressive tactics and misinformation. It is notable that in the *One.Tel* case brought by the ACCC, [41] sales staff were able to *customise* the false statements to suit the needs of the consumer. For example, if the customer liked Telstra the staff would (falsely) imply that One.Tel was part of Telstra. If they disliked Telstra, the staff would claim a (false) price advantage of One.Tel over Telstra. It is important to recognise the limitations and vulnerabilities of consumers in the face of such careful manipulation and misrepresentation.[42]

In other sectors, regulators have relied on enforceable undertaking, licence conditions, banning products and even prescribing product characteristics in order to protect consumers.

Notable examples include:

- the establishment of the National Do Not Call Register;
- prescribed interest rate caps in consumer credit law;
- licence conditions on some financial service providers not to sell products to pensioners, Centrelink recipients or persons over 60 years of age (due to prior poor behaviour); and
- enforceable undertakings not to sell to more than six members of an Aboriginal community in any 24-hour period (due to prior poor behaviour).

These actions recognise the limits of relying on disclosure and consent provisions in the face of flawed products and overly aggressive and exploitative sales techniques. Similar powers should be available in the communications sector and the limits of consent should be recognised by the regulators.

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[40] *Study Into Informed Consent For Clinical Trials*, Medical News Today, 14 January 2008, <http://www.medicalnewstoday.com/articles/93839.php>.

[41] Australian Competition and Consumer Commission, 'Undertaking to the Australian Competition and Consumer Commission Given under s87B of the *Trade Practices Act* 1974' by One.Tel Limited, ACCC, Sydney, 9 January 2001, <http://www.accc.gov.au/content/item.phtml?itemId=331523&nodeId=a55f639fdc73a6a4f70731c93afaed36&fn=d01_1080.pdf>.

[42] See also Australian Competition and Consumer Commission, *Court Agrees That Door-to-Door Sellers Illegally 'Slammed' Telephone Customers*, ACCC, Sydney, 24 March 2002, <http://www.accc.gov.au/content/index.phtml/itemId/88010/fromItemId/378014>.

Alternative consumer protection tools that may need to be considered include:

- Do Not Contact registers;
- spending caps;
- cooling-off periods;
- prohibition on door-to-door sales;
- prohibition on unsolicited telemarketing;
- prohibition on selling in remote Indigenous communities;
- prescribed product characteristics;
- caps on commissions/remuneration; and
- prohibition of unfair contract terms.

Some of these tools are already in use in other sectors. Obviously, each of these tools has its own positive and negative elements and may only be suitable in limited circumstances. However, it is important to remember that consent is just one consumer protection tool and consumers face many challenges in relying on consent alone.

7. Appendix: Resources on obtaining informed consent

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Rural Law Online, *Capacity*, <http://www.rurallaw.org.au/handbook/xml/ch06s18s09.php>.