

Not So Special: Telecommunications Contracts, Disability and Unfair Practices

The experiences of people with judgment-related disabilities when negotiating telecommunications contracts provide an insight into the spectrum of unfair practices in the industry and highlight issues for all consumers. Chris Atmore reports on preliminary findings of CLC research into the area.

Technology has jumped far ahead of regulation. As long as they get somebody on the dotted line then their attitude is "how dare they interfere?" (LEGAL SERVICE)¹

Introduction

Communication technologies play a fundamental role in our community. Consumers can enter into agreements for a range of telecommunications services quickly, easily, and often in informal selling environments, which can have significant long-term financial and legal consequences.

Research carried out by the CLC over the last few years has consistently found that telecommunications consumers in Australia are at risk of entering into contracts for services via unfair practices, or under terms that are potentially harsh or unfair.² Anecdotal evidence suggested that this risk was compounded when the consumer had a disability which impaired their ability to make reasonable judgments.³

The current project, funded by the Lance Reichstein Foundation, analyses the present legal position and examines the extent to which, in Victoria, telecommunications contractual disputes involve people with a judgment-related disability. The main focus of the project is on situations where the consumer could be said to have lacked legal capacity, or to have had their capacity impaired to the extent that the transaction was unconscionable. Based on consultation with a range of organisations,⁴ the research also identifies the circumstances which lead to contractual disputes, and therefore the key issues which must be addressed in practice. When completed, the report will make recommendations to government, advocates and service providers.

This article describes some preliminary findings, based on responses and data from advocates and the Telecommunications Industry Ombudsman (TIO).

Extent of the problem

The number of cases dealing specifically with disabilities and telecommunications contracts are few, but the ones we get seem to be doozies! (FINANCIAL COUNSELLOR)

Any figures probably only represent the tip of the iceberg, because it is likely that as for any complaint area, many issues would not get as far as an official complaint. For example, a youth advocate suggested that young people tend not to know that incapacity or unconscionability situations are legal issues, and so they may not seek legal redress until enforcement proceedings commence. This is even more likely to be the case when the consumer has a judgment-related disability and so, for example, may have difficulties with memory, comprehension or communication, or simply lack confidence and faith that justice is obtainable. These consumers may also experience unfairness in relation to telecommunications services as just one aspect of multiple disadvantages and discrimination.

There is also no one clear path to a central data collection body; with advocacy and support bodies varying in terms of their philosophy, client bases, available networks of resources, solutions and record-keeping. For example, a consumer, their advocate or

administrator may ask for support from a disability service with which they are already in contact. Alternatively, they might contact a consumer legal service or a financial counsellor for advice and assistance. These personnel or the original complainant might in turn contact the TIO, who however requires that the consumer first attempt to resolve the matter with the telecommunications provider. At any point along the way the issue may be resolved, or let drop for resource reasons, or because the consumer no longer wishes to pursue it. Telecommunications disputes involving consumers with a judgment-related disability are highly unlikely to proceed to litigation.

With those caveats, 'ballpark' annual figures for unfair practices in this area vary from 6–59 cases (telecommunications service providers) to 30 (advocacy organisation) to 90 (TIO). One service provider estimated that it lost \$15,000 in six months due to writing off debts for customers with a mental illness or intellectual disability.

Typical situations

Mobile telephones were responsible for more complaints than any other service. Problems for consumers can involve several factors. For example, consumers in circumstances where it appears there was contractual incapacity or unconscionability often have debt problems in a range of non-telecommunications areas as well.

The contract

My clients are not disabled to the extent of needing an administrator or guardian, but they are vulnerable to the sales pitch – providers need to be aware that sometimes they have very vulnerable people. (FINANCIAL COUNSELLOR)

Community workers and advocates repeatedly criticised the lack of clear explanations to their clients given by salespeople about the nature and terms of the contract, as well as the complexity of the contracts themselves.

Terms and conditions supposedly incorporated by reference are completely incomprehensible when you look at them. (LEGAL SERVICE)

It is also usually very difficult for the consumer or their advocate to obtain a copy of the contract itself, let alone of material which may contain terms which the contract incorporates by reference. Even if this content were easily available, the CLC's recent research on telecommunications contracts suggests that the combination of numerous unfair terms, lack of clarity of meaning and small print – across the board in the telecommunications industry – disadvantages even those consumers who do not have a disability which impairs their understanding.

Proving disability

Where the consumer claims they lacked the capacity to understand the contract when they entered it, they are usually required to prove this to the provider via a medical certificate, statutory declaration, or statement by an administrator or guardian. Generally where there is medical documentation, the contract can be voided or partially waived on the grounds of incapacity.

However, advocates identified difficulties with this process. For instance, it may not be easy to get the providers to accept that

the client has a disability, even if the client's doctor writes a letter. Providers have at best only a basic underlying policy in relation to consumers who lack understanding, and instead tend to deal with issues on a case-by-case basis. This seems to result most often in some form of payment plan and a waiving of only *some* of the amount. In contrast, if the consumer went to court, they might be found to be entitled to the whole contract being voided for incapacity, and so might not be liable for any of the debt.

Victor's advocate managed to get him out of a contract because he had a doctor's letter saying he had a psychiatric disability, as well as supporting documentation from his mother and evidence that he had no money if he was sued for the debt. However, a year later, Victor came back to the advocate with two more contracts – 'a phone in each pocket, because he really liked them.'⁵

In other situations, the consumer may not have understood aspects of the contract, but their lack of understanding was not sufficient to amount to incapacity, and instead might relate to an unconscionable situation.

Yussuf is a frail elderly man who has some psychiatric difficulties, and comes from a non-English speaking background. He was offered a plan which had special rates for overseas phone calls in blocks of half an hour. He made numerous calls for 3–5 minutes each time, thinking that he would only pay for that portion of the half-hour special rate, and couldn't understand why he was charged for half an hour each time. When he tried to sort out the dispute with the provider, Yussuf couldn't remember if he had signed anything or not. An interpreter at an advocacy service helped him, but he had problems understanding the plan, and there was nothing written available in his language (this wouldn't have helped some of Yussuf's community anyway as they cannot read).

Even if incapacity or unconscionability are not disputed issues, the stumbling block is often the fact that the consumer's lack of capacity, or the degree of lack of understanding going to a potential action for unconscionability, may not have been obvious to the salesperson. The resolution of the dispute then depends on negotiation between the provider and the advocate, and perhaps the TIO.

Nancy is a minor who has an intellectual disability, can't read, and takes medication affecting alertness and concentration. She asked for a pre-paid phone and came out of the shop with a 12-month plan. Nancy's advocate was able to argue that Nancy had reduced legal capacity and that she had told the provider she couldn't read. This was partly successful as the provider offered to waive all charges (eg debt collection and termination fees) except for the calls. Nancy was satisfied and paid by instalments.

Large bills and debts

Consumers who have an inadequate understanding of the contract may run up unaffordable bills due to entering a contract with terms inappropriate to their circumstances; such as a too high minimum monthly amount in a mobile plan. Add to that a lack of full comprehension of charges and calling times; a context analogous to being given unregulated credit on a credit card; perhaps compulsive calling behavior; and termination fees that might now be deemed unfair under the *Fair Trading Act 1999* (Vic); and it is easy to see how large debts (especially compared to income) can accumulate very quickly.

It seems to be an exception rather than the rule for the provider to notify a consumer when their bill has blown out in a way that seems noteworthy.

It is not unusual for clients to have accounts in excess of \$500 which they have no means of paying. (FINANCIAL COUNSELLOR)

Being unable to pay bills leads to debt collection fees, possible harassment by unscrupulous collection agencies, and default listings which can prevent loans in unrelated areas for many years.

Evelyn is on the Disability Support Pension. She has a default listing on her credit report and is not sure when it was listed, but it is about a telephone debt of \$800. Evelyn got the phone when she was having an episode of mental illness. She was in and out of hospital at the time and so wouldn't have been aware of the bills. Evelyn wants to get her life back together and perhaps hire a computer. She wants to know if she can get the default listing removed. There are no legal grounds, but she will try to appeal to the good will of the telecommunications provider and the debt collection agency.

A common concern for advocates is that as a result of being unable to pay debts, their client is disconnected from the telephone service. This can present a serious problem if the person has a mental illness or needs medical attention, as it is then almost impossible to contact them, or for them to seek help when they need it.

Administration and guardianship issues

Problems can also occur when a person represented by an administrator or guardian enters a telecommunications contract, or transfers to a new provider. Because they are a represented person, the law says that the contract is not valid; but in some situations if the company did not know there was an administrator or guardian involved, the person can still be liable for the cost.⁶

Sometimes the trustee's attempts to negotiate on behalf of the represented person are blocked by telecommunications personnel, who misinterpret privacy laws to mean that they can only discuss the problem with the represented person themselves. This is particularly a problem when the trustee has 'inherited' the telecommunications contract; that is, the person became represented after they had become a telecommunications customer and already had a large bill.

Raelene entered into a mobile contract in a shopping centre. The day after, she was involuntarily committed to a psychiatric hospital and an administrator appointed. The administrator was able to give evidence about Raelene's condition and tried to deal with the provider, but got no response over the phone and in writing. On Raelene's discharge, her advocate got authority. Raelene has now moved on and is transient. No one has had a response from the provider.

Other common areas of dispute

Other common areas of dispute concern unauthorised churn (transferring the customer to a new provider); misleading information, particularly offers of 'free' mobile phones; and disagreements over whether and when bars on services such as 190 calls were authorised, and when they came into effect.

Another problematic area concerns the making of landline calls by people other than the account holder. In some cases, the person with the judgment-related disability was the account holder and could be said to have been taken advantage of, and even coerced, by the caller. Mobile phone account holders with impaired capacity are sometimes persuaded to 'go guarantor' for others, who then run up large debts and refuse to pay them. In other situations, the account holder incurs a large bill via a member of their family who has a judgment-related disability.

Polly and Quentin, who both have obvious judgment-related disabilities, had nine accounts with a provider, totalling \$17,000. Their advocate still wants to know how they could continue to open new accounts when the existing accounts were in arrears. Polly and Quentin said that they were forced to open the accounts under duress. A 'friend' had told them she needed them to open accounts as she didn't have any ID and needed phones because she had a baby. The advocate was eventually notified that Polly and Quentin were not liable for any of the debts, and the credit reports were deleted.

Trying to resolve a complaint

It's a nightmare to get on to the right telecommunications person at the call centre. (DISABILITY ADVOCATE)

There's a lot of money in the industry to be made – it doesn't hurt them not to improve. (LEGAL SERVICE)

Advocates' and consumers' experience of contacting the providers is that the companies tend to be large, uncoordinated and often difficult to access through telephone menus and call centres. It is difficult to know what kind of personnel to ask for, and there is a tendency to be put on hold and get a different person each time. It also seems to be the rule rather than the exception that the computer system at a particular centre does not automatically link to the data at another centre.

The telecommunications provider was rude and intimidating, and was unwilling to negotiate – not like the utility companies. (INDIGENOUS ADVOCATE)

The process is hard enough for professional advocates, and often family members are trying to negotiate on behalf of the consumer, if it is not the consumer themselves trying to resolve the problem. Advocates also found it frustrating that the TIO demands negotiating with the provider first before they will investigate the complaint:

We underestimate how difficult it is for people dealing with a complaint – having to ring up and so on. The person on the other end will assert "this is how it is" – and how can the complainant know otherwise? (LEGAL SERVICE)

Negotiation with the providers was perceived as at least preferable to trying to resolve the matter with debt collection agencies. The agencies were seen as particularly difficult to deal with and as drawing out complaint resolution processes, because the whole process of negotiation had to start again.

Despite the telecommunications providers being signatories to various Australian Communications Industry Forum (ACIF) codes, some of the examples in this project are clear code breaches.⁷ While the research indicates that some providers are making much more effort than others, many consumer organisations regard the self-regulatory model for the telecommunications industry as ineffective and inappropriate.

Conclusion

The industry is so rich, it should really support people in need. Especially as society encourages people to be independent. (DISABILITY ADVOCATE)

The number of consumers identified in this project who have experienced unfairness in relation to telecommunications contracts may be comparatively small, but the issue is important. Contractual unfairness impacts severely on these consumers' lives, and often on the lives of their family and friends. How a telecommunications service provider treats its customers with judgment-related disabilities, and whether and what kind of redress exists, is a litmus test for Australian consumers in general.

There is also not always a solid dividing line between the experiences of consumers who have a judgment-related disability, and those who do not. Just as enforcement of the *Fair Trading Act 1999* (Vic) and the *Trade Practices Act 1974* (Cth) in relation to what is unconscionable interprets 'special disability' fairly broadly, those telecommunications contractual practices which can be seen as unfair also implicate some consumers who do not have an 'obvious' judgment-related disability. As just one example, telemarketing a new mobile plan to someone who does not lack legal capacity but who is driving at the time, could

perhaps be deemed to be taking advantage of impaired decision-making capacity.

Finally, many of the problems which have emerged also throw into stark relief the issues for all consumers: the need for clarity of contractual terms, the provision of essential information and better complaint resolution; and blatantly unfair terms and practices.

The consumers focused on in this project are therefore 'not so special'. As one disability advocate put it:

Everybody has some special needs, but some are more resourced than others. (DISABILITY ADVOCATE)

Instead, the experiences of some of the more vulnerable members of Victorian communities should be used as a benchmark when working to improve the track record of telecommunications providers. This approach is more in line with the view of many disability rights advocates, who argue that any solutions require a reshaping of the bigger picture, rather than merely a tinkering or 'add on' approach for a minority, sidelined as somehow 'special' in an inferior sense.

Chris Atmore

Policy Researcher

Notes

¹ Quotes are from interviews conducted as part of the project in 2003.

² See eg *Unfair Practices and Telecommunications Consumers, 2001; Report on Fair Terms in Telecommunications Consumer Contracts 2003* – refer www.comslaw.org.au/publications.

³ Guidance for the meaning of 'judgment-related disability' has been taken from the *Guardianship and Administration Act 1986* (Vic) which establishes the Office of the Public Advocate. In the legislation 'disability' is defined as intellectual impairment, mental disorder, brain injury, physical disability or dementia. A disability which might affect a person's judgment could therefore be intellectual disability, mental illness, brain injury, dementia, or illness- or injury-related confusion.

⁴ For example, disability services and advocates, specialist community legal centres, telecommunications service providers, financial counsellors, TIO.

⁵ Examples in boxes are taken from interviews with, or material supplied by, sources referred to in note 4.

⁶ Essentially, a represented person cannot legally enter into a contract without an order of the Victorian Civil and Administrative Tribunal or the written consent of the administrator. A person represented by a guardian or administrator lacks legal capacity under s. 52(1) of the *Guardianship and Administration Act 1986* (Vic). If a provider signs a contract with a represented person, under s. 52(2) of the Act any such transaction is void, and anything given over by the represented person is recoverable. However, this does not render invalid any transaction where the person received an adequate good or service, and the provider proves that they acted in good faith, and did not know (or weren't expected to know) that the person was a represented person (s. 52(3)).

⁷ For example, the Credit Management Code (ACIF C541: 2003) forbids calling someone a 'guarantor' in a telecommunications contract. The TIO records breaches by signatories and non-signatories of the codes for which it is responsible, and found 4,167 for 2002–2003.