
INDIGENOUS PEOPLE, TELECOMMUNICATIONS AND CONSUMER PROTECTION

by Heron Loban

INTRODUCTION

Indigenous people in their dealings with telecommunications companies ('telcos') face a broad range of issues. The role of consumer protection law in safeguarding Indigenous people has been raised at different intervals in the past.¹ In the last five years, the Federal Court has heard a number of cases involving breaches of Australia's consumer protection laws in respect of Indigenous consumers. Communications technologies have had a positive impact on Indigenous communities. They have opened up possibilities in areas such as education,² health³ and banking⁴. However, at the same time they have facilitated access into remote Indigenous communities by unscrupulous businesses using high pressure sales tactics such as telemarketing.

The recent cases of the *Australian Competition and Consumer Commission v EDirect Pty Ltd*⁵ ('EDirect (No.1)'), the *Australian Competition and Consumer Commission v EDirect Pty Ltd*⁶ ('EDirect (No. 2)') and the *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd*⁷ ('Excite Mobile') raise two issues in particular in respect of Indigenous consumers and mobile phones. The first issue is coverage, essentially due to remoteness. The second issue is knowledge and use of complaints mechanisms. Both pose important and challenging questions for the Australian Competition and Consumer Commission ('ACCC') as the regulator, and Indigenous communities themselves in successfully harnessing the core benefits of mobile technology whilst managing the potential for financial harm and its flow-on effects.⁸

This paper will probe at these two issues as raised by the Federal Court. It will also consider the recent action of the ACCC as the regulator to ensure the adequate protection of Indigenous consumers. Finally, it will look at whether these strategies are enough to protect Indigenous consumers in the short and long term.

THE CASES

These three cases all involved questions of misleading and deceptive conduct pursuant to section 52 of the *Trade*

Practices Act 1974 (Cth).⁹ Two of the cases further raised matters with respect to unconscionable conduct pursuant to section 51AB of the *Trade Practices Act 1974* (Cth).¹⁰

The first of these cases, *EDirect (No. 1)* decided in 2008, involved the telemarketing of mobile phones and plans from a call centre overseas. Indigenous people were sold mobile phones and plans intended to be used through the Optus network. However, for those Indigenous people living in remote areas, the Optus network did not extend to their community. A fact that was misrepresented to them by the telco. His Honour Reeves J commented in his judgment directly on this point stating that:

... [t]he most egregious aspect of EDirect's conduct was in its selling its mobile phones and service plans to people living in remote areas of Australia, including remote Aboriginal communities, when the slightest enquiry on its behalf would have disclosed that those mobile phones could not connect to the Optus GSM network because that network did not provide coverage to those remote areas of Australia.¹¹

Isolation from information, financial services and complaints mechanisms was a second issue raised in *EDirect (No. 1)*. His Honour Reeves J found that:

[t]he likelihood of detection of these sorts of breaches is slight, particularly in remote areas of Australia, and for that reason the full force of the law should be brought to bear in circumstances where, as is in this case, the authorities have managed to detect such breaches.¹²

The case was decided against EDirect and they were found to have engaged in misleading and deceptive conduct.

Despite the harsh words of His Honour Reeves J in *EDirect (No. 1)* EDirect were again before the Federal Court in a decision handed down in 2012 in *EDirect (No. 2)* – the second case. Indigenous people living in remote communities were again telemarketed mobile phones and plans from a call centre overseas for use through the Optus network. The network still did not extend to the relevant remote communities and Indigenous consumers were again left with mobile phones and plans that did

not work in their area, despite representations made to them by EDirect that coverage did exist. By the time of this decision EDirect was in liquidation. EDirect in this case was again found to have engaged in misleading and deceptive conduct. His Honour Reeves J considered whether breaches of unconscionable conduct had occurred but for a range of reasons found that the matters in respect of unconscionable conduct did not have to be determined.

In the third and most recent case, *Excite Mobile*, handed down in early 2013, allegations were made that Excite Mobile engaged in conduct similar to that of EDirect with respect to Indigenous consumers. Claims were made by the regulator that the telco engaged in misleading and deceptive conduct and unconscionable conduct. The telco represented to Indigenous people living in remote places that the mobile phone and plan they were buying from Excite Mobile could be used in their community when in fact there was no coverage in that area. However, the conduct of Excite Mobile went beyond that of EDirect. Excite Mobile created a fictitious debt collector and fictional complaint handling body to create a system wholly overseen by them.

In *Excite Mobile* important evidence was provided by an Indigenous organisation, the Indigenous Consumer Assistance Network. It was key to the ACCC's success in prosecuting Excite Mobile.¹³ The Central Australian Aboriginal Legal Aid Service also played an important role.¹⁴ Indigenous consumers affected by the operations of Excite Mobile came from across north Queensland, the Northern Territory and Western Australia. Indigenous people in remote communities were particularly affected. Excite Mobile were found to have engaged in both misleading and deceptive conduct and unconscionable conduct.

Evident from the judgments of the Federal Court is the prominence of coverage and complaints as key issues. Coverage was discussed at length in all three cases, namely the lack of coverage. Complaints arose in a number of different ways in the cases. In *EDirect (No. 1)* it was raised directly by His Honour Reeves J in respect of Indigenous people with his reference to the 'likelihood of detection' suggesting the important correlation between remoteness and the probability of complaint. In *Excite Mobile* the telco created a fictional independent complaints body where consumers took their complaints about Excite Mobile when in fact there is a Telecommunications Industry Ombudsman.¹⁵

The involvement of the Indigenous Consumer Assistance Network and Central Australian Aboriginal Legal Aid

Service further demonstrates that access to complaints information, advocacy services and awareness of consumer protection laws are essential to ensuring the proper enforcement and enjoyment of Indigenous people's consumer rights. These services have been found to be desperately lacking in remote Indigenous communities.¹⁶

POSITIVE STEPS

A number of positive steps have been taken by the regulator to improve Indigenous consumer protection. On 3 March 2013 the ACCC outlined its key priorities for 2013. The priorities included telecommunications and consumer protection issues impacting on Indigenous communities.¹⁷ The recent cases are evidence of the need to address Indigenous consumer issues with telecommunications matters especially.

In addition to this announcement was the creation of the Tiwi Islands 'ACCC – Your Rights Mob Tiwi Islands' Facebook page launched on 26 February 2013 and the production of five short films.¹⁸ Each film is presented by a Tiwi Islander in both English and language. Tiwi Island humour is also used as a way to deliver the important legal messages. One of the films mirrors the facts of the 2012 *EDirect* case. In the film, one woman is telemarketed and buys a mobile phone and plan. The woman is asked for the details of another person such as a family member or a friend who might also be interested in a new mobile phone and plan. The woman provides these details. Her friend is then contacted by the same telemarketer trying to sell the same mobile phone and plan. In Tiwi Island style humour one woman acts like Tina Turner.

IS THIS ENOUGH?

The law itself is not sufficient as a tool to adequately protect Indigenous consumers. This is apparent from the telco cases. Better access to and knowledge of legal rights, and product information such as coverage and reception are needed. Both require a proactive approach. In this regard, the recent activities of the ACCC are to be commended. However, there is an underlying and fundamental need to empower Indigenous communities and their members. The unique position of Indigenous people living in remote areas requires innovation.

One option to address product knowledge could be an independent consumer advice service to help individual Indigenous consumers assess their circumstances, find the product and service that will best suit them and give value for money. Such an approach might go some way to redressing key issues, such as coverage, raised in the cases. The cases also reflect a real demand for increased

consumer advocacy services in and to remote Indigenous communities that must be met. There is a great need to build knowledge about consumer rights, telco complaints processes and complaints bodies amongst Indigenous people, particularly in remote areas. Funding and services must be directed to this gap.

CONCLUSION

Based on these three cases alone it is clear Indigenous consumers are at a significant disadvantage in the mobile phone market due to coverage issues—which will not be resolved in the short term—and the availability of complaints mechanisms which is affected by people’s knowledge of their legal rights and an understanding of how to enforce them. This situation will not change overnight. It will be an ongoing process.

Given the scale and frequency of cases, clever and concerted efforts are required by both the regulator and by Indigenous communities. The high place on the regulator’s agenda and the partnership between the ACCC and the Tiwi Islanders are steps in the right direction.

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Commission’ (1991) 1(5) *Aboriginal Law Bulletin* 31.

- 11 [2008] FCA 65 para 26.
- 12 Ibid para 32.
- 13 Consumer Federation of Australia, *Telco ruling a brilliant result for ICAN* (29 April 2013) <<http://consumersfederation.org.au/telco-ruling-a-brilliant-result-for-indigenous-consumer-network/>>.
- 14 Australia Competition and Consumer Commission, ‘Court finds Excite Mobile acted unconscionably’ (Media Release, 89/13, 22 April 2013).
- 15 The Telecommunications Industry Ombudsman is an independent industry-funded complaints body that receives and seeks to resolve telecommunications complaints by consumers.
- 16 Fiona Allison, Chris Cunneen, Melanie Schwartz and Larissa Behrendt, *Indigenous Legal Needs Project: Northern Territory Report* (2012), James Cook University, Cairns.
- 17 Rod Sims, ‘Championing the rights of consumers’ (Speech delivered at the Consumer Congress Conference, 15 March 2013).
- 18 Australian Competition and Consumer Commission, ‘ACCC launches the ‘ACCC – Your rights mob Tiwi Island’ Facebook page’ (Media Release, 37/13, 26 February).

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- 1 See Sunila Srivastava, ‘Stirrings: Indigenous Consumers in the Northern Territory’ (1998) 4(11) *Indigenous Law Bulletin* 17.
- 2 See examples in Australian Government, 2011-2012 Regional Telecommunications Review, *Regional Communications: Empowering Digital Communities* (2012) 94-9.
- 3 Ibid 99-103.
- 4 See the work of the Indigenous Financial Services Network of Reconciliation Australia at <<http://www.reconciliation.org.au/home/projects/ifsn>>.
- 5 [2008] FCA 65.
- 6 [2012] FCA 976.
- 7 [2013] FCA 350.
- 8 Heron Loban, ‘Indigenous Consumers, Financial Stress and Emotional Wellbeing’ (2011) 35(6) *Aboriginal and Islander Health Worker Journal* 14-16.
- 9 In 2010 a new national consumer protection regime was introduced with the support of the States to provide a uniform framework for the protection of consumers in Australia. This *Australian Consumer Law* is contained in the *Competition and Consumer Act 2010* (Cth).
- 10 The value of the unconscionable conduct provisions for the benefit of Indigenous consumers was identified many years ago and has been at the centre of litigation undertaken by both the Australian Competition and Consumer Commission and its predecessor the Trade Practices Commission. For earlier case studies see Bill Dee, ‘Sharp Practices, Aboriginal Consumers and the Trade Practices