

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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The Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Ms Roberston

Inquiry into Unfair Terms in Consumer Contracts

Optus welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice and its Inquiry into Unfair Terms in Consumer Contracts.

Optus is Australia's second largest telecommunications carrier, offering residential, corporate and Government customers in New South Wales an extensive range of fixed, mobile, internet and satellite telecommunications services. Optus also offers content services including subscription television.

Optus operates on a national basis, holds several telecommunications carrier licenses, operates as a carriage service provider, and is subject to an industry specific Commonwealth regulatory regime, Commonwealth laws relating to business and commerce, as well as State law in the jurisdictions in which it operates.

I wish to draw your attention to matters relevant to the terms of reference, including:

- The Commonwealth industry-specific telecommunications legislative regime and the provisions it makes for standard form contracting;
- The consumer protections provided by Industry Codes under the co-regulatory arrangements in the Commonwealth regime, and in particular the Code relating to fairness in the terms of consumer contracts in the telecommunications industry.
- Comment on principles of regulation, including targeting of regulation to areas of need, avoiding regulatory overlap and minimising the aggregate burden of regulation.

The telecommunications regulatory regime – standard form contracting

The *Telecommunications Act 1997* (“the Act”), makes specific provision for carriage service providers to use a type of standard form contracting. Part 23 of the Act introduces and implicitly sanctions standard form contracting using what is called a Standard Form of Agreement (“SFOA”).

The terms and conditions on which telecommunications-related goods and services are supplied are either as agreed between the supplier and customer or as set out in the relevant SFOA made by a carriage service provider. Regulations made under Part 23 of the Act clarify that the scope of use of SFOAs may cover a broad range of telecommunications goods and services.

The Commonwealth Parliament has recognised that the use of standard form contracts can lead to reduced transaction costs and improved information flows leading to efficiency gains for both customers and suppliers. It also recognised that such contracts in the telecommunications industry will need to be unilaterally varied from time to time to reflect technical developments, new services, service feature innovation and competitive pressure on prices. Consumers now demand, and have grown to expect, ready access to new features and service elements without the need to enter into new contractual arrangements.

These standard form contracts, and any variation made to them, must be lodged with the industry regulator, the Australian Communications and Media Authority (ACMA). The Act also requires contracts to be made readily available to customers on request. A subordinate instrument made by ACMA also requires summaries of SFOAs to be developed and provided to customers when they acquire a service and also at regular intervals. If an adverse variation is made to a SFOA, the same instrument requires providers to give customers reasonable notification so that informed decisions can be made about service usage or whether to continue with the contract.

The broader back-drop to these industry-specific arrangements is provided by the *Trade Practices Act 1974*, which provides statutory protections for a range of contractual circumstances. Amongst other things, suppliers are required to keep their representations current, and to avoid misleading customers.

The combined affect of these arrangements is to provide a regulated environment for standard form contracting in the telecommunications industry that controls key aspects of the contracts, including the scope of goods and services covered by such contracts and information to customers about the contracts and any variations to them. It provides an efficient form of contracting for telecommunications providers offering services to the mass market and it also provides substantial benefits in reduced transactions costs to both consumers and suppliers compared with alternatives.

The telecommunications regulatory regime – industry codes

The Commonwealth regulatory regime for telecommunications places importance on a co-regulatory approach to a range of matters, including consumer protection issues not addressed in legislation. This co-regulatory approach is embodied in Part 6 of the Act which provides for industry bodies to develop codes and for the regulator to register them. The telecommunications industry has worked cooperatively to develop Industry Codes within the Australian Communications Industry Forum¹ (ACIF) to support this co-regulatory approach.

The co-regulatory component is provided when Industry Codes are registered by the industry regulator, ACMA. This means that the Codes are enforceable by ACMA, via its powers of direction and ultimately in the Federal Court. ACIF has a number of registered consumer codes, including:

- ACIF C521:2004 Customer Information on Prices, Terms and Conditions
- ACIF C542:2003 Billing
- ACIF C546:2001 Customer Transfer
- ACIF C541:2006 Credit Management

¹ The organisation ACIF has recently become known as the Communications Alliance, but the work of developing industry codes is still carried on within the Communications Alliance by a division known as ACIF and industry codes are still branded as ACIF codes.

- ACIF C547:2004 Complaint Handling
- ACIF C522:2003 Calling Number Display

and of direct relevance to the terms of reference of the inquiry, the

- ACIF C620:2005 Consumer Contracts Industry Code

These Codes can be accessed at http://www.commsalliance.com.au/ACIF_documents/codes. Taken together, this suite of Industry Codes forms a comprehensive set of consumer protections for the telecommunications industry. The ACIF C521:2004 Customer Information on Prices, Terms and Conditions Industry Code provides rules about disclosing important contract terms to customers and requires a focus on clarity and ease of comprehension in drafting contracts.

The ACIF C620:2005 Consumer Contracts Industry Code deals specifically with issues of fairness in contract terms in the telecommunications industry. The Code is registered by ACMA.

The Code uses a similar fairness test to the UK Unfair Terms in Consumer Contracts Regulations 1999, but modifications have been made to recognise the specific situations and circumstances of the telecommunications industry. The result is a successful blending of the generic fairness test with an overlay that helps interpret the rule and also provides additional guidance based on the reality of the demand and supply arrangements in the industry.

The adoption of these Codes by industry and associated compliance checking, including by ACMA, has seen all major players in the telecommunications industry review, and where necessary, adjust their contracting arrangements to be in accord with standards of fairness imposed by the Industry Code. Similar compliance checking has been undertaken for Part 2B of the Victorian fair Trading Act.

Optus' SFOA contracts can be viewed at www.optus.com.au/standardagreements

Conclusion

Optus is not aware of any substantial current evidence to suggest that there is widespread use of unfair contract terms in the telecommunications industry. On the contrary, it is possible to demonstrate that the co-regulatory approach, which has led to the development of a binding industry code on fairness in consumer contracts, in conjunction with existing federal and state law, has reduced the incidence and impact of any unfair contract terms and practices.

Because telecommunications companies typically operate on a national basis, and even if they do not, are subject to the federal co-regulatory industry code regime, in Optus' view there is little to recommend an additional overlay of NSW legislation dealing with unfair contract terms that would be applicable to the telecommunications industry. It is not clear how such legislation could demonstrably improve outcomes for consumers of telecommunications services in NSW.

If such legislation was developed along similar lines to the UK Unfair Terms in Consumer Contracts Regulations 1999 and made applicable to the telecommunications industry, the most likely effect would be to replicate in large part the arrangements already in place and hence to add costs and further compliance burden to telecommunications companies which

would erode the efficiency of the standard form contracting regime provided for in the *Telecommunications Act 1997*.

The Commonwealth Parliament in its statement of regulatory policy in the *Telecommunications Act 1997* set out its intentions for the regulation of the telecommunications industry:

“The Parliament intends that telecommunications be regulated in a manner that:

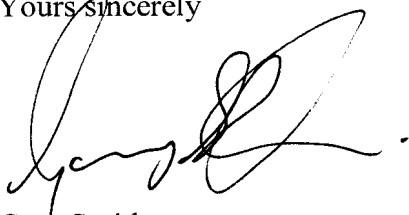
- (a) promotes the greatest practicable use of industry self-regulation; and
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;

but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.”

Optus submits that the Committee should also have regard to this regulatory policy when considering its terms of reference.

Principles of good regulation suggest that new or additional regulation should be justified by demonstrable market failure or legislative failure that requires remedy and that the benefits to be derived outweigh the costs of implementation. In Optus' view, NSW consumers of telecommunications services are not subject to any substantial occurrence of unfair contract terms and there are adequate protection mechanisms in place. We therefore believe it is open for the Committee to find that there is no case to be made that new NSW legislation should target unfairness in telecommunications contracts. Further, if additional legislation were proposed, it would be very difficult to justify on cost-benefit grounds. It is more likely that because of the existing protections and practices, the benefits would be low compared to the additional compliance burden imposed.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Smith', with a stylized flourish at the end.

Gary Smith
General Manager
Regulatory Compliance & Self-regulation