

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

Organisation: Telecommunications Industry Ombudsman
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**Telecommunications
Industry
Ombudsman**

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Ombudsman**

12 October 2006

Victoria Pymm
Acting Principal Council Officer
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie St
Sydney 2000

Dear Ms Pymm

The Telecommunications Industry Ombudsman (TIO) has been invited by the Standing Committee on Law and Justice of the Parliament of New South Wales to respond to its Inquiry into Unfair Contract Terms in Consumer Contracts. The TIO's response is set out below.

Background

The TIO was established in 1993 to investigate and determine complaints from residential and small business customers about matters relating to service, billing and the manner of charging for telecommunications and Internet services. The TIO is a company limited by guarantee and is independent of government and telecommunications carriers and service providers. The mission statement of the TIO is to provide free, independent, just, informal and speedy resolution of complaints. In considering complaints the TIO has regard to the law, good industry practice and what is fair and reasonable in all the circumstances. Under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, all eligible telephone and Internet service providers, are required to be members of the TIO Scheme.

The Australian Communications and Media Authority (ACMA) is the industry regulator. However, the emphasis in the *Telecommunications Act 1997* is on a co-regulatory regime and this has resulted in the introduction of a series of codes of practice for telecommunications companies that have been developed by the Communication Alliance (in the remainder of this document, the organisation will be referred to by its former name, Australian Communications Industry Forum (ACIF)). ACIF brings together working committees of industry members, consumer groups and regulators to develop these codes. ACIF codes are generally voluntary until a provider becomes a signatory to the code. However, under Part 6 of the *Telecommunications Act 1997*, once an ACIF code is registered by ACMA, ACMA has powers to issue warnings to providers about breaches of the code and to direct industry participants to comply with the provisions of a code.

In January 2001 the Communications Law Centre (CLC) published a report entitled Unfair Practices and Telecommunications Consumers. The report was undertaken to examine the relevance to telecommunications and other industries in Australia of the European Union and UK legislation dealing with unfair contract terms in consumer contracts. The CLC's report was influential in the adoption by ACIF of the Consumer Contracts Guideline, which was published by ACIF in December

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2002. The Guideline was developed by ACIF to provide guidance on industry best practice for contract provisions and, in particular, to ensure that contractual terms were fair and intelligible. The Guideline did not have the status of an ACIF code and was not binding. However, there was an expectation that providers would comply with the Guideline. Under the Guideline, a contract term was considered to be unfair if it caused a significant and unreasonable imbalance in the parties' rights and obligations to the detriment of the consumer. The Guideline set out examples of the types of terms that could be considered to be unfair and provided guidance as to how contracts should be presented.

Following a further report by CLC regarding the effectiveness of the Guideline, ACMA requested ACIF to develop an industry code on consumer contracts. The ACIF Consumer Contracts Code was registered with ACMA in May 2005. The provisions of the Consumer Contracts Code are heavily influenced by Part 2B of the *Fair Trading Act 1999 (Vic)* and also the UK legislation on unfair contract terms. The general definition of an unfair term used in the Consumer Contracts Code is in all material respects identical to that used in s32W of the *Fair Trading Act 1999 (Vic)* and in the UK legislation.

Response to the specific terms of reference

(a) whether consumer contracts contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer, including the incidence of:

- i) terms which allow the supplier to unilaterally vary the price or characteristics of the goods or services without notice to the consumer;*
- ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement;*
- iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer; or*
- iv) terms which permit the supplier but not the consumer to terminate the contract.*

In the course of its investigations, the TIO has seen examples of these types of terms included in standard form contracts for telephone and Internet services. These types of contract terms were in widespread use during the early years of this decade. However, it appears that many service providers have amended their standard form contracts in response to part 2B of the *Fair Trading Act 1999 (Vic)* and/or the ACIF Consumer Contracts Code (see the response to point (d) below).

(b) whether the use of standard form contracts has increased the prevalence of the above terms in consumer contracts;

The TIO believes that telecommunications consumers are particularly vulnerable to unfair contract terms due to the operation of Part 23 of the *Telecommunications Act 1997* which allows providers to lodge a Standard Form of Agreement (SFOA) with ACMA and for the terms of the SFOA to apply to all relevant agreements with customers. Although providers are required to lodge their SFOAs with ACMA, and providers have obligations to provide summaries of the SFOA to customers and provide notice to customers regarding variations to the terms of the SFOA, ACMA does not have the power to scrutinise the particular terms of the SFOA. The TIO believes that SFOA contracts and 'take it or leave it' standard form contracts are a fact of life in the telecommunications industry. The TIO believes that such contracts are not objectionable per se but they do have the potential to allow a means by which unfair terms can be incorporated into an agreement without effective scrutiny by the consumer.

(c) the remedies available under common law and statute with respect to the above terms in consumer contracts;

The TIO believes that remedies available under common law and statute (apart from part 2B of the *Fair Trading Act 1999 (Vic)*) provide inadequate protection for consumers from unfair terms in consumer contracts as evidenced by the need for the ACIF Consumer Contracts Code.

(d) the effectiveness of specific purpose legislation such as the UK Unfair Terms in Consumer Contracts Regulations 1999 and the Victorian Fair Trading Act 1999 (Part 2B – Unfair Terms in Consumer Contracts)

The decision of Victorian Civil and Administrative Tribunal in *Director of Consumer Affairs v AAPT Ltd*¹ suggests that the provisions of the part 2B of the *Fair Trading Act 1999 (Vic)* have had an effect on contract terms included in consumer contracts for telecommunications services. In that case Stuart Morris J found that there were a number of terms contained in AAPT's standard mobile phone contracts in use prior to May 2005 that were unfair. However, he also acknowledged that AAPT had adopted new terms and conditions on 1 May 2005 which were intended to address the concerns raised by Consumer Affairs Victoria.²

It is evident to the TIO that the adoption of part 2B of the *Fair Trading Act 1999 (Vic)* and the ACIF Consumer Contracts Code has led a number of the larger telecommunications providers to amend their standard terms and conditions pre-emptively. However, in the TIO's experience, the use of the types of terms referred to in point (a) of the terms of reference by smaller sized companies, particularly Internet service providers, is still an issue. The TIO is at present conducting a number of systemic investigations into the use of unfair contract terms in standard form contracts by small Internet service providers.

Conclusion

As a national body, the TIO would welcome other States adopting similar provisions to Part 2B *Fair Trading Act 1999 (Vic)* so as to provide an equality of protection from unfair contract terms for all consumers within Australia.

Yours sincerely

JOHN PINNOCK
OMBUDSMAN

¹ [2006] VCAT 1493

² *ibid* at paragraph [8]