

3 July 2007

Consumer Policy Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616



Deirdre O'Donnell
Ombudsman

Dear Ms Irvine

Thank you for the opportunity to share the Telecommunications Industry Ombudsman's ('TIO's') views and experiences on Australia's Consumer Policy Framework with the Commission. This submission has been developed with assistance from members of the TIO Council, but the final views expressed are those of the Ombudsman.

In this submission the TIO has addressed matters that are specifically of interest to the TIO Scheme. In relation to other matters, generally no comment has been made. On some occasions, the TIO has indicated its reasons for not responding. For instance, this submission has not addressed issues related to economic policy because of the TIO's lack of expertise in relation to the underpinnings of economic policy setting. Moreover, the TIO Scheme has traditionally refrained from commenting on competition policy in the telecommunications sector. Clearly, however, effective competition policy that provides incentive for investment in customer service aids the development of industry responses to various impediments to the effective participation of consumers in the telecommunications market.

Market Trends and Developments

The telecommunications industry is one that is constantly changing. Apart from the open competition regime introduced in 1997, new technologies significantly influence change. These not only provide new ways of communicating, but have led to a host of new applications of benefit to consumers, particularly in the areas of mobiles and broadband Internet.

It is the TIO's view however, based on the number and variety of complaints that the Scheme has received over the last three years, that greater product complexity is one of the most significant barriers to consumers' effective participation in telecommunications markets. This is particularly true with the increasing use of service and product bundling, with consequent more complex Standard Forms of Agreement.

providing independent, just, informal and speedy resolution of complaints"

Telecommunications Industry Ombudsman Ltd ASN 46 057 634 787

Website: www.tio.com.au
Email: do@tio.com.au

Postal address:
PO Box 276
COLLINS ST WEST VIC 8007

Street address:
Level 3
595 Collins Street
MELBOURNE VIC 3000

Tel freecall*: 1800 062 058
Fax freecall*: 1800 630 614
Telephone: (03) 8600 8700
Fax: (03) 8600 8797

*calls from mobile phones may incur charges

There is an increasing tendency for telecommunications service providers to bundle not merely a variety of services, eg fixed line, mobile and broadband, but also to include equipment bundles such as a mobile handset, modem or even PABX. In some cases, these offerings will also involve separate finance contracts to cover the cost of the equipment part of the bundle. The TIO has particular concern about a new business model which focuses on the bundling of services and equipment, that is being used as a marketing tool directed at small businesses, in some cases without adequate disclosure of the true nature of the agreement. At present there is no clear avenue for redress for problems arising from such bundling.

When considering how consumers effectively participate in a market, it is important in the telecommunications sector to distinguish between standard pre-printed contracts and Standard Forms of Agreement ('SFOAs') under Part 23 of the *Telecommunications Act 1997*. The latter provide the legal underpinning for extremely detailed contractual provisions, in a form which can be both difficult to access and even more difficult to understand. The former, of course, is a method of guaranteeing a one size fits all approach by providers. In today's telecommunications industry, there is no doubt that consumers have very little opportunity to negotiate individual contracts. Regardless of whether standard contracts or SFOAs are used, the complexity of the product offerings adds an additional layer to the complexity faced by consumers.

Current Framework

It is the TIO's view that the current framework is fundamentally sound so far as the telecommunications industry is concerned. However, while acknowledging the benefits consumers have received as a result of greater choice of service and of provider, the TIO nevertheless considers that there are significant power imbalances in the telecommunications sector between providers and consumers, and that the current policy framework should be retained if this is to be addressed satisfactorily. Nevertheless, some fine-tuning may be needed to deal with emerging technologies and applications, such as the extent to which VoIP providers should be bound by the Customer Service Guarantee ('CSG').

As to a measure of effectiveness, greater clarity about how the Australian Communications and Media Authority ('ACMA') will enforce Communications Alliance Consumer Codes ('Consumer Codes') would send a powerful signal both to consumers and the industry.

As regards small business users, it is the TIO's belief that there is little justification in having different policy approaches between residential consumers and small businesses. At the same time the TIO notes the lack of a common understanding of the definition of 'small business' across the industry, and agrees that settling a definition would be of great assistance.

Nevertheless, from a consumer policy perspective, the TIO sees no benefit in separate approaches. For example, it is the TIO's experience that in many cases, operators of small businesses are no more adept at making rational choices in relation to telecommunications services and products than are residential consumers. So, as an example, the coverage of the newly established 'Do Not Call Register' to residential fixed line numbers and personal mobile numbers only and the exclusion of some small businesses (those that have an ACN)

from the ambit of the Victorian Fair Trading legislation is a concern. Small businesses are as much targeted by telemarketers seeking to transfer a customer's telecommunications services as are residential consumers and tend either to make the same mistakes or to be equally affected when there is unscrupulous conduct by telemarketing agents of service providers.

Consistent with this view, the TIO handles complaints by both small business and residential consumers. Further, the Communications Alliance Code regime generally makes no distinction between the two in relation to consumer rights and provider obligations.

For the reasons noted above, the TIO believes that, in broad terms, small business should be offered the same degree and type of protection as that offered for residential consumers.

Disadvantaged and Vulnerable Consumers

The TIO views the words 'vulnerable' and 'disadvantaged' as very broad terms with particular relevance to telecommunications services and products. While some protection is available through generic approaches to consumer protection policy, it is the TIO's view that a more targeted approach is warranted in the case of consumers with particular disadvantages or vulnerabilities. Some examples of successful policies targeting specific needs are detailed below.

Firstly, the *Telecommunications Act* itself establishes the National Relay Service which is conducted on an outsourced tender basis, and funded by the telecommunications industry. This service is provided to the hearing and speech impaired and allows people with this disability to communicate with each other and with people without the disability. The TIO regards this legislative provision as a fundamental protection for hearing impaired persons.

In addition, Telstra's Disability Equipment Program ('DEP'), which allows Telstra to fulfill its obligations as the Universal Service Provider, enables Telstra customers with a range of disabilities to rent equipment necessary for them to access a standard telephone service for the same price as they would otherwise pay for the rental of a standard telephone handset. This program plays an important role in ensuring that consumers with a disability have equitable access to telecommunications services offered by Telstra, regardless of the nature of their disability. Importantly, the range of communications equipment available under this plan has been reviewed from time to time, in consultation with disability groups, enabling the program to keep pace with new product offerings that may better address specific communications needs.

Thirdly, apart from consumers with specific physical or intellectual disabilities there are a number of regulatory requirements in the telecommunications industry to help consumers who, in the broader sense of the term, are vulnerable or disadvantaged. The first of these is a licence condition on Telstra which requires it, as the universal service provider, to offer consumers who have serious or life threatening medical conditions, priority in the provision of a standard telephone service or the repair of such a service. This requirement led to the subsequent development of the voluntary Priority Assistance Code by Communications Alliance (formerly the Australian Communications Industry Forum - ACIF).

It should be noted that both the second and third examples above are not available from all service providers in the telecommunications industry, and this can affect consumer choice.

A further protection is provided by the 'hardship' rules in the Communications Alliance Credit Management Code. Pre-dating the Industry Code, the TIO had developed, and continues to have regard to, a detailed Position Statement governing hardship complaints.

There is little evidence, however, of how effective the Credit Management Code and the TIO's Position Statement have been. While the TIO routinely applies these to complaints, we do not collect data on the number of times hardship issues might arise in relation to complaints handled at first instance by service providers. It should also be noted that whilst telecommunications providers are required to adhere to the Credit Reporting Code, they are not governed by any provisions of the Consumer Credit Code, even though the majority are in fact credit providers, on the basis that they bill after call charges, or other charges, have accumulated.

This is of particular concern to the TIO because the number of non-business default listings by the telecommunications industry has now overtaken the number of listings by the financial services industry' (for the benefit of whom the TIO understands the databases were originally conceived). The financial services industry, unlike the telecommunications industry, is subject to an obligation under the Consumer Credit Code to assess a consumer's capacity to pay for services which may expose them to sizeable debt burdens, thus reducing the eventual likelihood of an adverse credit default listing.

The Credit Management Code does include a rule regarding credit assessment. However, the rule is that providers must either conduct a credit assessment, or supply a service with limited expenditure, the result being that credit assessment is optional. Furthermore, where a credit assessment is conducted it is 'in order to determine whether to supply a service to that customer', not to determine a consumer's capacity to pay for services.

Generic and Industry-Specific Regulation

There are important generic protections for consumers that should apply across the board; in particular the Trade Practices Act (Cth) and the various Fair Trading Acts of the States, as well as legislative instruments such as the Consumer Credit Code and the Credit Reporting Code.

It is the TIO's view however, that there are a number of reasons why an industry-specific regulatory approach can be argued for in the telecommunications sector.

Open competition in telecommunications is still at a relatively early stage, compared to other sectors such as insurance, banking and finance. In addition, the network and exchange based nature of the telecommunications industry sets the scene for a variety of issues that are of no concern to banking and finance.

Already, there are a number of industry-specific regulatory approaches in telecommunications. The first of these is the Universal Service Obligation, which requires Telstra to provide any residential consumer in Australia a telephone service wherever that

person resides. This provision is supplemented by a regulatory instrument, the Customer Service Guarantee ('CSG'), which requires Telstra and other service providers to provision the standard telephone service, repair that service, and keep appointments for each of those requirements within mandatory times. The failure to do so requires the payment of damages as either a form of penalty to the company or a means of recompense to the consumer for damage suffered. The TIO believes these are important continuing protections.

The TIO notes the significant shift away from the standard telephone service as a primary means of communication and an increased take-up of mobile services as the primary or sole means of voice communication. For disadvantaged and vulnerable consumers, this raises important issues of affordability.

The second area of industry specific regulation that the TIO would like to comment on is the Communications Alliance Codes. These are categorised as either operational or consumer Codes. It is the TIO's view that it is appropriate to have industry-specific Codes in place which address network and technical issues that are specific to the telecommunications industry, and that result in benefits that flow through to consumers (examples being in codes around customer transfer processes that allow consumers to have their service provider of choice).

A question arises, however, whether there is a need for industry specific consumer Codes in all circumstances. Firstly, the existing Codes often mirror existing obligations under the *Trade Practices Act*, Fair Trading Acts, Privacy legislation, and so on. In some cases, they do expand upon these obligations.

Secondly, many of the issues that are covered by telecommunications consumer Codes could be equally relevant in other industries. Where different industries develop their own Codes of practice there is the danger that over-arching principles will be applied inconsistently between industries. The decision by the telecommunications industry to adopt a single Code reflects a desire to avoid such inconsistencies between Codes within the telecommunications industry, but does not resolve the broader issue.

The real problem, however, and the true test of the effectiveness of self-regulatory Codes, is of course the degree of industry compliance, or enforcement by the regulator. The issue of enforcement is discussed later in this submission.

A final and significant element of specific consumer protection is provided by the TIO's role to investigate and resolve consumer complaints. The TIO is unique in industry Ombudsman Schemes - which are often considered wholly self-regulatory - in that its existence, its membership and its broad functions are mandated by the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, while its detail, including its specific powers, are determined by the members of the Scheme. In addition, Section 114 of the *Telecommunications Act* allows industry to confer powers and functions on the Ombudsman, or industry Codes or under Standards determined by the industry regulator, the Australian Communications and Media Authority.

The TIO is regarded as a central element in the co-regulatory regime in the telecommunications industry, (cf. Explanatory Statement to the Telecommunications Bill 1996). As an alternative dispute resolution scheme it sits between industry and tribunals and / or courts, providing a mechanism for the fast and effective resolution of complaints

for telecommunications users, many of whom would otherwise never seek legal redress through the court system. It is, however, not a complete substitute for the court process in that it has no power to make new law.

Enforcement and redress issues

The TIO notes that views on what the terms 'compliance' and 'enforcement' encompasses will differ between the TIO, consumers and the industry. In discussing compliance and / or enforcement, the TIO is concerned with compliance and enforcement throughout the industry, not just with that of an individual participant.

It is the TIO's view that Communications Alliance, like its predecessor, ACIF, would greatly benefit telecommunications consumers by placing emphasis on a strong Code compliance regime. In the TIO's view, the lack of Code enforcement is the Achilles heel of the Code regime. Nevertheless, reference to the obligations imposed upon industry participants by the industry's Code regime will often allow the TIO to obtain satisfactory redress for consumers at an individual level.

Self and Non-regulatory Approaches,

As noted earlier, it is the TIO's view that industry specific regulation developed within the co-regulatory environment of the telecommunications industry has benefited consumers, and has the potential to assist those who could be better served, namely vulnerable and disadvantaged consumers.

A good example of such regulation is provided by the Communications Alliance Contracts Code, which has had a substantial effect on industry behaviour.

The TIO has a unique perspective here, as while it is an industry specific body, it references both generic regulation (eg Trade Practices Act & Fair Trading Acts) as well as industry specific regulation (eg CSG, Communications Alliance Codes) to resolve complaints. The TIO's experience is that it is beneficial to have this 'dual layer' of regulation. It is the TIO's view however, that in order to operate effectively, all aspects of the co-regulatory regime - the development of rules and regulations, compliance, consumer redress, and enforcement - must be utilised effectively where required.

Section 4 of the *Telecommunications Act 1997* ('Regulatory Policy') provides:

- "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 [of the Act]"

Leaving aside debates about the telecommunications-specific provisions of the *Trade Practices Act*, the balance of arguments about the telecommunications regulatory regime all hinge on the interpretation of the words 'greatest practicable use of industry self-regulation' and the qualifying words in the rest of the section.

In the TIO's experience, some providers fail to recognise that, taken as a whole, Sections 3 (Objects) and 4 (Regulatory Policy) of the Act establish a co-regulatory mechanism. As a result, and given the absence of a strong enforcement regime, many consumer groups see the co-regulatory safety net set far too low.

The TIO is an example of an effective part of the co-regulatory regime. The TIO has been able to evolve to keep pace with the changing industry so that it continues to meet its responsibility as a consumer protection mechanism. More often than not, the TIO is able to effect this change without the need for legislative amendment. One way the TIO achieves this is through Position Statements, which are developed and revised in house to take account of complaint trends or industry developments. The TIO also uses Position Statement to effect change in provider behaviour. An example is the industry's general acceptance of the TIO's position that fees charged for early termination of fixed term contracts should be a genuine pre-estimate of loss rather than a penalty. The TIO's Position Statements on over-commitment and financial hardship have also raised awareness of these issues within the industry.

The TIO is both accessible and effective in its handling of consumer complaints within the telecommunications industry. In 2005-06, the TIO investigated over 80,000 complaints, a number which has steadily increased each year. In the TIO's most recent complainant satisfaction survey, 89% of respondents rated the TIO's service as good or above, while 98% rated using the TIO's complaint handling process as easy or very easy. These figures show that despite the relatively high number of complaints it receives compared with many other Ombudsman Schemes, the TIO is seen as an effective means of redress for consumers of telecommunications services.

I hope that the above information is of assistance in the Commission's review. Please contact Silvia Superina on 03 8600 8723 if you would like to discuss any part of this submission.

Yours sincerely

Deirdre O'Donnell
OMBUDSMAN