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Intellectual Property and Technology

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Review of Australia's Consumer Policy Framework
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Dear Commissioners,

Comments in response to the Draft Report issued in connection with the Review of Australia's Consumer Policy Framework (PCDR)

We make this submission in our capacity as a law firm with practice area interests in telecommunications and IT law. These submissions represent our views only and they should not be taken as representing the views of any specific clients.

Introductory Comments

At the present time, we note the recommendation to move towards national regulation of consumer protection matters via the same 'applied law' mechanism used to implement the Competition Code and to be supplemented by provisions for voluntary referral of powers by the States (PCDR, Vol. 2, Section 4.2, pp57-72).

In general, it is our opinion that such an approach should be recognised as useful, not only by consumers, but also by industry as potentially relieving it of certain compliance costs arising from dealing with multiple regulation sources. However, we are very concerned that an overly-rapid transition to a generic law model could cause industry difficulties, even damage, especially if what is sought to be regulated represents a complex interlocking of technical issues (e.g. interfacing hardware and software, maintaining service levels) with the not-insignificant scaffold of an existing, substantial industry-specific policy framework developed by the Commonwealth over a number of years.

Thus, whilst we would accept the general proposition that, on grounds of economic cost, there should not be industry-specific regulation without a strong reason for it, it must also be recognised that 'one size does *not* fit all'.

In light of the all foregoing, our principal concerns are as follows.

The CoAG Review Process (PCDR, Vol. 2, Section 5.3, pp83-85)

We note that, at present, it is proposed that CoAG's role as the driver of the review (and reform) of industry-specific regulation is confined to:

- Identification and repeal of unnecessary [industry] specific consumer regulation.
- Identification of other [industry] specific consumer which is divergent as between jurisdictions, etc. with a view to cost reduction by suitable means, including transfer to Commonwealth responsibility.

We would submit that the first limb of should be extended by consideration of a mechanism for identification and referral to appropriate review of industry-specific regulation with a view to reform and retention (whether temporarily or permanently), especially in simplified form, recognising that there are varying degrees of necessity, both by subject matter *and* over time.

In the case of telecommunications, for example, as the Commission has itself pointed out, there are currently some six sets of regulatory requirements to meet in relation to (what is not precisely identified but we assume is) a standard PSTN consumer contract: whilst modification or repeal of some or all might be desirable in the longer term, unravelling the current linkages to underlying services, technologies and business models will be a non-trivial task and so much higher visibility needs to be given to all relevant possibilities for progressive regulatory simplification and/or transitioning out.

Assistance for Disadvantaged Consumers of Utilities Services (PCDR, Vol. 2, Section 5.5, pp95-97)

We are very concerned by the way that, for the purposes of this Section, telecommunications have been directly categorised together with energy and water as utilities in the nature of essential services or facilities: by the Commission's very own admission in Appendix F to this present Draft Report, whilst 'basic telephone services' (presumably, some subset of PSTN-deliverable services but here not defined) are commonly regarded as utility services,

"some newer telecommunications services – mobile telephony and Internet services – are less clearly so."

Given that a key rationale for intervention to provide the sorts of assistance which are proposed below is access to an essential facility or service, the question of categorisation is more than merely academic: if the telecommunications service or facility in question is not an essential utility, then the main policy justification for imposing extensive consumer protection goes.

We note proposals by the Commission to provide assistance as above by reference to the following examples:

- mechanisms to deal with product complexity, such as 'simpler' payment plans, including pre-paid mobile services and pre-payment electricity meters;

- simplification of standard form contracts, and the adoption of principles designed to remove 'unfair' terms from these contracts; and
- development by suppliers of hardship policies for disadvantaged consumers.

Whilst accepting that these proposals are, at this stage, set out broadly, the implications of such policies applying generically across all telecommunications services or facilities are, in our opinion, unacceptable: for example, whilst a hardship policy might be appropriate in relation to a prescribed subset of 'basic telephone services' (subject to those being properly defined), would it *truly* be appropriate for a broadband video on demand service? The existing telecommunications policy framework already recognises, to some extent, these kinds of service and facility distinctions and so, to that extent, is to be credited; it correspondingly already delivers various kinds of assistance that are appropriate in the circumstances.

In short, before any further thought is given to consumer assistance as described, it will be necessary to assess further what constitutes an essential telecommunications facility or service in that context.

Unfair contracts legislation (PCDR, Vol. 2, Section 7.5, pp116-127)

Whilst there can be no general objection to unfair contract or contracts terms controls *per se*, it is our opinion that some recognition has to be given to the point that there are certain unavoidable sources of complexity in contracts that are often externally dictated. In the case of many telecommunications technologies, facilities and services, for example, the highly sophisticated technical nature of the actual subject matter of the agreement is such that it is impossible to describe it by reference solely to 'plain English'.

Therefore, any system of review for unfair contracts or contracts terms should guard against what the Commission itself has noted as possible opportunistic consumer behaviour (see p118) which could, in the scenario envisaged, take the unavoidable complexity described above as a basis for what would otherwise be a baseless action by a consumer against a provider.

Alternative Dispute Resolution (PCDR, Vol. 2, Section 9.4, pp154-162)

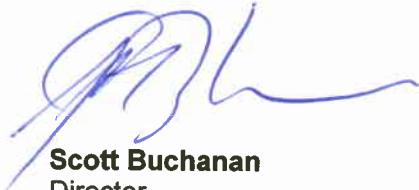
We note with interest the proposal to broaden the remit of the Telecommunications Industry Ombudsman (TIO) by transfer of responsibility away from other bodies such as Office of Fair Trading and the Telephone Information Services Standards Council.

Whilst this proposal is not necessarily objectionable *per se*, we would be very concerned about such moves being made unless appropriate guarantees could be put in place as to a proportionate increase in resources (both human and financial) expended on consumer complaints handling without, at the same time, generating an undue increase in the costs to commercial stakeholders. Therefore, we submit that it would be necessary to undertake a full review of industry costs associated with running any proposed expanded TIO system prior to any changes being made.

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We thank the Commission for this opportunity to make comments and await all further developments with considerable interest.

Yours sincerely



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