

Review of Australia's Consumer Policy Framework

Response to Draft Report

February 2008

Consumers' Telecommunications Network

Thank you for the opportunity to provide comments on the Draft Report.

About CTN

The Consumers' Telecommunications Network (CTN) is a national peak body of consumer and community organisations, and of individuals representing community interests, who participate in developing national telecommunications policy. We advocate policies for better access, quality of service and affordability of telecommunications facilities for all residential consumers. CTN's members are national and state organisations representing consumers from non-English speaking backgrounds, deaf consumers, Indigenous people, low income consumers, people with disabilities, young people, pensioners and superannuants, rural and remote consumers, women and consumers in general.

Introduction

CTN congratulates the Commission on the work it has undertaken to date, recommending improvements to the consumer policy framework. We are supportive of many of the recommendations in the draft report, and in many cases our comments seek only minor improvements to the draft recommendations.

The most significant issue that is overlooked in the draft report is recognition of the necessity of including consumers in the creation, maintenance and review of the policy frameworks that affect them and are designed for their benefit. The report could be interpreted to as implying that industry should have more power in consumer policy issues, rather than embracing a collaborative approach involving all stakeholders, including consumers. The Commission itself recognised that industry agrees there's a role for consumers in the creation of policy, and we'd like the Commission to incorporate this principle into the final recommendations.

We also have concerns that the Commission's recommendations are guided by an underlying notion that all regulation an unnecessary burden foisted on business without good reason. Particularly in telecommunications, the prescriptive self-regulatory regime would not be so onerous if industry compliance had not made it absolutely necessary. Where is the recognition that industry itself is largely responsible for ethical behaviour in line with community expectation (and the existing Trade Practices Act)?

It is the view of many consumer groups that regulation is, in itself, not an inherently bad thing. Consumers and industries benefit when industry providers have clear guidance on their conduct. Detailed regulation often develops where the broad consumer protections of the Trade Practices Act are not sufficient, and where market practices can result in consumer detriment. Regulation has a legitimate role and is not simply an unnecessary cost to business (which gets

passed to consumers eventually anyway). Active enforcement agencies are vital as a means of ensuring regulation is taken seriously by industry and prevents the proliferation of superfluous regulation. In many ways, the enforcement of existing regulation is the key to getting the right balance.

We would like to point out that with regard to comments on page 156 of the Consumer Policy Framework draft report that CTN's suggestion was not simply "a single entity for resolving telecommunications complaints". Our recommendation was for a broad review of telecommunications complaint handling, which would necessarily need to consider the current operations and scope of the TISSC and TIO schemes, as well as the various other agencies that have oversight of telecommunications issues (ACMA, ACCC, state consumer protection departments).

We have commented on relevant draft recommendations as appropriate.

Draft Recommendation 3.1

We congratulate the Commission for recognising the need to identify the overarching objectives for consumer policy. Confident, informed consumers should be the priority, but not just where a competitive marketplace exists. In telecommunications, many areas are not competitive due to a lack of interest in providing services, rather than a lack of consumer demand.

There is a key omission from the objectives, namely that consumers must be represented in consumer policy development. Just as it would be unacceptable to develop policy that effected business without consulting those affected, policies which impact on consumers must incorporate the views of consumers. The Commission noted the recent Regulation Taskforce's report that recommended a whole-of-government policy on consultation requirements should be established. We think that further to this, there should be a specific recommendation that consumer participation in the development of consumer policy be mandatory.

As the commission itself noted in the Draft Report (p220), full stakeholder consultation is also supported by business. We also note that many consumer groups are resourced specifically for the purpose of contributing to policy development. It is appropriate that the recommendation made by the Commission reflect the collaborative, co-operative principle that best-practice consumer policy already embodies.

Recommendation: That a new principle requiring consumer participation in the development of all aspects of consumer policy be mandatory

The policy of “proportionate, risk-based enforcement” advocated by the Commission is highly problematic. The reality is that enforcement is simply not a priority for many regulatory agencies, who are not only risk adverse but unwilling to use their enforcement powers despite the demonstrated need for enforcement. The wording of the current recommendation will exacerbate their unresponsiveness, and systemic issues that could be resolved with regulatory oversight will continue to fester.

Telecommunications regulatory authorities are inactive and unresponsive to the ongoing problems being experienced by consumers. Complaints to the TIO reached a staggering 102,463 last year, which constitutes a 16.9 per cent increase on the 87,593 received in the previous year (TIO Annual Report). Consumers who need assistance resolving a complaint continue to rise unabated. The range of self-regulatory code breaches identified by the Ombudsman follows a very distinctive pattern and has done so for many years. There is very, very clearly a role for the regulator to respond to these recurrent complaints by directing compliance with the codes of practice where systemic breaches are identified and stop consumer detriment. The lack of compliant behaviour with the self-regulatory regime is the Achilles heel in telecommunications regulation.

The Telephone Information Service Standards Council (to which CTN nominates 3 public members) is a good example of how effective, pro-active regulation can minimise consumer detriment and ensure good practices across the industry, which preserve consumer trust and satisfaction in those services. The majority of TISSC work involves compliance monitoring of 190 services to ensure they comply with the Code of Practice. The Council consists of equal community and industry representatives, and the Code is updated regularly by the Council. This ensures the industry is self-regulated in line with community expectations and industry offerings. The Arbitrator has power to enforce compliance where a service is discovered that breaches the Code (including the withdrawal of the service until the service is rectifies the identified breach).

Recommendation: That the final dot point highlight the critical role of active and responsive enforcement as a central element of effective regulation as both a preventative measure and as part of the framework of self regulation

Draft Recommendation 4.1

We agree that nationally consistent consumer law across jurisdictions is a logical suggestion, but the purpose must be specifically to benefit consumers who are under-protected as a result of the differing protections across jurisdictions. It is important that the Commission specify that a ‘lowest common denominator’ approach is unacceptable in developing a single consumer law – that is, winding back consumer protections so that some is lost, rather than raising those with lower levels of protection.

It is notable that there are several significant instances where State laws have been developed to meet gaps in the regulatory framework where there has been a pressing need. The best example is the development of Victorian unfair contracts legislation, where the imbalance between suppliers and consumers was addressed in a piece of responsive and effective legislation that is now proposed as the base for a national law.

We are concerned that the provision of information is often seen as an adequate replacement for ensuring proper industry behaviour. There are some practices that simply should be banned, rather than allowing behaviour because you have told the consumer about it. We hope the national generic law will deal with this issue.

Recommendation: That any new national generic law not result in any winding back of consumer protections in any jurisdiction but revise up to meet highest existing levels of protection.

Draft Recommendation 4.4

It is worth giving further consideration to enforcement of this new national law, for a number of reasons. The draft report acknowledged that some consumers have found the ACCC too big to actually cope with individual complaints, and often unwilling to act on complaints where the detriment could not be estimated, despite the practice being a breach of the TPA. There is a widely held view that the ACCC concerns itself with high profile, high-level enforcement activities, at the expense of low-level individual complaints. Many consumers find that enforcement by local regulators is more effective because they are easier to contact and complain to. Encouraging enforcement through local regulators may be far preferable.

It would be inappropriate to give all powers to the ACCC and simply resource the ACCC to fulfil roles that have been previously done by local regulators. The ACCC has never functioned as a local regulator, and providing greater resources would not change this fact. For the ACCC to function effectively, it would require significant cultural change toward complaints, and in particular whether a complaint is worth investigating (the ACCC has in the past dismissed complaints

that are significant to affected consumers, if not necessarily numerous). The proposal opens the possibility of placing too much emphasis on one agency for enforcement, which may result in a focus on and enforcement approach that is heavily reliant on formal legal proceedings, rather than the range of options available to regulators.

We have a general concern that a generic law may not have the flexibility needed for the regulator to act beyond enforcement activities. The Trade Practices Act has limited consumer protection protections, largely around misleading and deceptive conduct, unconscionable behaviour etc. If there is to be one national regulator, the range of powers should be beyond simply dealing with the behaviour currently in the TPA, to a broader brief. There is a need for regulators to not only enforce regulation and legislation, but to set standards which specifies what practices are appropriate.

Recommendation: Reconsider the ACCC enforcement recommendations – specifically retaining the roles of the state based OFT that have both the mandate and experience in handling individual complaints

With regard to consumer education responsibilities, we note that state-based agencies have had greater success in the past in terms of running high profile consumer awareness campaigns. The Scamwatch collaboration has been a very welcome exception to that generalisation. The ACCC's role in promotion of telecommunications issues has been relatively minor, due to the shared responsibility of other agencies.

Changing reporting arrangements of the ACCC and the creation of mechanisms to ensure issues can be raised through a formal mechanism will be useful additions to the ACCC, but there's also a need to ensure the ACCC is dedicated to addressing consumer issues with equal importance to its role as a competition regulator. This will require close monitoring and review after this role commences. We also strongly support the suggested formal mechanism for sharing priorities and concerns, but again the process will need to be formal and transparent, and inclusive of consumer concerns.

Draft Recommendation 5.1

It is unclear to CTN as to whether the Commission considers self-regulation has an ongoing role in telecommunications, given the highly prescriptive approach to regulation that has evolved in response to industry practices. CTN is of the view that the self-regulatory model is presently the most workable, and would be far

more so with effective enforcement particularly by ACMA. We ask the Commission to clarify the role it sees for self-regulation in the final report.

Recommendation: That the Commission clarify the role it sees for self-regulation in the final report.

Precisely what constitutes “unnecessary” regulation will be dependent on the perspective. Industry may find a regulatory safeguard unnecessary – for example a mandatory cooling off period - but for consumers may be a highly effective and useful mechanism. The Commission needs to recognise that “unnecessary” is highly contentious and is a highly loaded term. If regulation is indeed genuinely “unnecessary”, there should be consensus on this point. Any repeal of regulation needs to consider multiple viewpoints of affected parties and can’t simply rely on previous work.

Recommendation: That repeal of regulation occur only with the agreement of all affected parties

Draft Recommendation 5.4

CTN has long supported the price control regime that applies in telecommunications. That said, we recognise that there are a number of problems on the current regime, namely that it only applies to Telstra and thus limits the supplier choice for low-income consumers, and it applies only to local call pricing and line rental. In the last review of the regime undertaken by the ACCC, we argued the need to expand the regime to ensure it was in line with the telecommunications needs of low-income consumers.

Subsequent research has consistently shown that low-income consumers are more than ever using mobile phones as their primary service, which suggests a big disconnect between the usage and where assistance is being rendered. However it is worth recognising that many older people (particularly those on low fixed incomes and pensioners) still overwhelmingly prefer a landline service to a mobile service, so a simple substitution within the price cap regime would not be appropriate.

Contestable markets do exist in telecommunications, but there isn’t much competition to be seen in the form of programs for low-income consumers. Competition has the greatest advantage for consumers who are heavy users of services, and consumers with lower levels of expenditure are less attractive. Our concern with removing the price cap regime altogether is the possibility that the

replacement low-income measures may not be suitable, which would have disastrous impacts for some consumers.

The principle of having targeted, transparent community service obligations and supplier provided hardship programs that are monitored for effectiveness is excellent. How this would function in practice is another thing entirely. We would expect that clear regulatory arrangements would need to be in place, and the appropriateness of having licence conditions to make these low-income measures successful.

Price controls aim to ensure all consumers have access to reasonably priced basic telephone services, and the policy question is whether this regime is successfully achieving this aim. We would like the Commission to clarify that there is no suggestion that price controls could be dismantled without the simultaneous creation of appropriate measures to ensure basic telecommunications services remain affordable. We would expect a range of specific recommendations to accompany the winding back of this consumer protection such as:

- low-income measures program (based on Telstra's Low Income Measures Assessment Committee)
- compulsory hardship programs (not just payment plans)
- license conditions to ensure reporting on effectiveness of targeted programs
- formal process for reviewing effectiveness of low income measures which includes consumer groups as part of that review

It is critical that low-income measures actually reflect the needs and usage patterns of low-income consumers, and the overwhelming usage of mobile phones.

Recommendation: That a mandatory, detailed low-income measures program be provided by the Commission if the recommendation about removal of price cap regimes remains

Draft Recommendation 6.1

We are pleased to note that since the draft report was issued, that a Ministry for Competition Policy and Consumer Affairs has been created, as suggested in the draft report. There remains an ongoing role for consumer policy development outside this portfolio though, as exemplified by telecommunications in which policy is developed under a number of regulatory bodies. Consumer protection should go hand in hand with other industry specific regulation since there would

be many issues that are specific to that industry and could be overlooked if there is one body charged with consumer protection.

Draft Recommendation 7.1

CTN endorses this recommendation.

Draft Recommendation 9.1

There is much to be gained by sharing information between agencies. We have concerns about consumers being aware of this exchange of information, given that government agencies are not bound by the jurisdiction of the Privacy Act and consumers can have no control over their personal information once it has been provided.

A web based tool that can advise on the correct ADR for a consumer to approach in the instance of a dispute already exists, but there remains an ongoing demand for this information to be available in other forms. We concur that an overhaul to ensure usability is needed. Much of the information needs updating. The consumer education aspects in particular need an overhaul. For example, ACMA Tool Kits to provide independent guidance to consumers are no longer available.

We reiterate our comments in our initial submission that service providers must be more responsible for promoting their external dispute resolution scheme to their customers. There is a widespread view that the TIO is deliberately not promoted by the industry, to avoid complaints being made. The way to address this problem was to make it mandatory that contact details for the TIO be listed on every bill, with an equivalent notification for those who use services but do not receive bills (such as SMS for pre-paid mobile and emails for internet users).

This pro-active approach will provide a much-needed incentive for the industry to resolve complaints internally, before being referred to an ADR.

Recommendation: That it be mandatory that contact details for the TIO be listed on every communications bill, with an equivalent notification for those who use services but do not receive bills (such as SMS for pre-paid mobile and emails for internet users).

Draft Recommendation 9.2

CTN agrees that the need for consumers to have access to ADR schemes is paramount. However, we consider that the Commission's recommendation to extend the TIO's functions to cover all premium services would not achieve this purpose. We would support the TIO having jurisdiction over handset and PayTV complaints, but regarding premium content services we hold a different view.

As the Commission may be aware, TISSC deals exclusively with complaints about 19 information services. TISSC's role is not simply as a reactive dispute resolution agency; it has a key role monitoring the industry and enforcing the TISSC Code of Practice. This pro-active function is invaluable, and minimises the instances of consumer detriment by monitoring the industry on an ongoing basis to ensure users of information services have adequate consumer protection.

This is reflected in the much higher proportion of TISSC initiated industry complaints, as opposed to public initiated complaints. We are also aware that the TIO and TISSC informally liaise on issues of potential jurisdictional overlap, thereby minimising the likelihood of consumer complaints not being resolved. As we discussed in our initial submission to the Commission, there is an ongoing need to ensure that all consumer complaints are directed to the correct avenues.

Given the effective functioning of TISSC, the probable costs of any amalgamation of the two agencies (virtual or otherwise), and the distinctly different functions to that of the TIO, our suggestion is that the Commission retract the recommendation that the TIO's functions over all telecommunications premium content services.

Recommendation: that the Commission retract the recommendation that the TIO's functions over all telecommunications premium content services.

Draft Recommendation 9.5

We fully support this recommendation.

Draft Recommendation 9.6

This is an excellent recommendation that we strongly support. It should be recognised that the roles of services that offer individual advocacy also have an important role in identifying systemic issues and advocating for changes for the benefit of all consumers. The need to ensure funding also allows for community legal and financial counseling services to also undertake high level advocacy, to ensure problems they are dealing with can be addressed at the source.

Recommendation: Ensure increased levels of funding for community legal and financial counseling services support work of advocates to ensure they can also participate in high-level policy development.

Draft Recommendation 10.3

We are very pleased to see a recommendation that addresses many of the issues we identified in enforcement undertaken by regulators. This is a critical way of addressing the gaps in accountability of the industry and regulators which we discussed in detail in our initial submission to the Commission.

However, we think the Commission needs to clarify that it's not only enforcement problems that should be reported on, but the agency's entire enforcement strategy and priorities for the year ahead that need to be more transparent. This will allow better tracking of progress on improvements on systemic issues.

We reiterate our calls for specific requirements that require regulators to publish reports identifying analysing key consumers issues and how the industry is making progress to resolve these issues. We'd like to see requirements on regulators to analyse the industry against the established benchmarks and much clearer indications via reporting arrangements on the areas where improvements are expected.

Recommendation: That annual reports from regulators be required to identify key consumer issues and report on those issues on a progressive basis

Draft Recommendation 11.1

We agree in part with this recommendation but have a number of suggested improvements. As a minor suggestion, we think the *purpose* of the information should be to facilitate good consumer decision-making. The recommendation should also be more general so it can be applied to all regulation, such as telecommunications self-regulatory codes, as is no doubt intended but not covered by the current wording.

We are concerned though with the second part of the recommendation referring to complex information. There is a need for the Commission to offer greater detail on what it considers complex. The overwhelming quantity of "basic" information is indeed problematic, but at times there is so much information or it is marketing, as opposed to information, that it does more harm than good.

Recommendation: Generalise this recommendation so it is applicable to all regulation developed, and provide greater detail on what constitutes basic and complex information.

We also think there is a need to look at information requirements – that, is factual information about a good or service, as opposed to marketing information – which we discussed in detail in our initial submission. Marketing information often serves to undermine the meaning of common use words and misleads consumers about what the key elements of the contract are. An excellent example is the use of the term “capped”, which often applies only to certain aspects of a service and does not function as an absolute maximum, despite the common use of such a term suggests. We reiterate our previous calls for better regulation and enforcement of marketing practices, and offer clear guidance on how information should be provided.

Recommendation: Consider how best to provide factual information as opposed to marketing information, such as stricter requirements on characterising the offer, minimum font size, and basic comparability between products and more consideration as to when and the format in which information should be provided – such as at point of sale or on a website

There’s an ongoing need for better guidance for industry on preventing disadvantage to vulnerable consumers, which is well beyond the scope of the Commission. Obtaining informed consent, and ensuring consumers fully understand what they are agreeing to, is highly contentious and complex. It is high time that consistent and broadly agreed principles on how to ensure informed consent is dealt with as a key way to address ongoing issues for disadvantaged and vulnerable consumers.

Recommendation: That the Commission recommend the development of guidelines obtaining Informed Consent as a means of preventing detriment to disadvantaged and vulnerable consumers.

Draft Recommendation 11.2

Again, CTN supports the general intent of this recommendation. As we discussed at length in our original submission, there is a lack of co-ordination of resources and messages about consumer rights and issues in telecommunications (and beyond). However, there’s a need to not only coordinate messages and information, but also a big-picture framework of educational aims and evaluation of how successful these outcomes are. To this end, we suggest that consumer education should be part of an ongoing, coordinated, inter-agency framework with clear outcomes that can be measured.

Recommendation: Formal consumer education strategies be developed by coordinated within a framework that identifies outcomes and measurables

Draft Recommendation 11.3

Our initial submission advocated for a boost in consumer funding, and we are pleased the Commission has come to the same conclusion. We suggest that the Commission recognises that currently consumer advocacy is under-funded, and that much perceived value currently provided is in fact derived from staff of community organisations working as volunteers, or employees simply working over time with no compensation. CTN alone in 2006-2007 wrote off 585 hours (nearly 16 weeks) of unpaid work by employees – which does not include the efforts of volunteers or CTN Board members who do not receive remuneration for their work. We recommend the word “modest” be removed from the recommendation and instead the appropriate levels of funding be decided on a needs basis.

Recommendation: remove modest from the draft recommendation

We also point out that allocating funding for networking and policy functions, as opposed presumably to administrative costs, as largely irrelevant. There are very few advocacy organisations that can exist on funding from ad hoc, on-off project work without ongoing funding to support their day-to-day administration. Large organisations may well be able to support their advocacy work through extensive commercial activities, but this is not the case for smaller community organisations. We suggest that the recommendation not specify networking and policy functions, but a more generic recommendation to increase funding for consumer groups.

Recommendation: a more generic recommendation to increase funding for consumer groups

Should you wish to discuss this response in more detail please contact myself or Sarah Wilson at the Consumers' Telecommunications Network on 02 9572 6007 or at ctn@ctn.org.au.

Yours sincerely,



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Chief Executive Officer

This submission was prepared by Sarah Wilson, CTN Policy Advisor, and Teresa Corbin, CTN Chief Executive Officer. It was approved out of session by the CTN Board

