'yes' OPTUS

Optus submission to the

Senate Economics Legislation Committee

Inquiry into the

Trade Practices Amendment (Australian Consumer Law) Bill 2009

31 July 2009

1. Executive Summary

1.1 Optus is a leading integrated national telecommunications provider, delivering cutting-edge communications, information technology and entertainment services throughout Australia. Our services are used by consumers, businesses, corporate entities and government agencies.

1.2 Optus welcomes the opportunity to provide input to the Senate Economics Legislation Committee's important inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (the Bill), further to earlier submissions we have provided to the Treasury in response to the consultation papers, *An Australian Consumer Law: Fair markets – Confident consumers* (March 2009) and *Australian Consumer Law – Consultation on draft unfair contract terms provisions* (May 2009). We note that Optus also provided a submission to the February 2008 paper, *Review of Australia's Consumer Policy Framework*, by the Productivity Commission (PC).

1.3 Optus is on the record voicing our in-principle support for a streamlined national approach to consumer policy in order to reduce the regulatory burden on business while maintaining an effective consumer protection regime. We believe that consumer policy regulation, as with all regulation, should be well targeted, based on solid evidence and actually address the specific problem for which it has been created to resolve or remove.

1.4 In this submission, Optus:

1. notes that greater clarity is required with respect to the way in which "consumer contracts" has been defined. We propose a new definition of the term "individual" which could provide the necessary clarity;

2. provides specific comments and drafting recommendations with respect to the following sections of the Bill – which we believe would support its effective and efficient operation:

(a) Section 1 – Definitions;

(b) Section 3 – Meaning of unfair;

(c) Section 4 – Examples of unfair terms;

(d) Section 5 – Terms that define main subject matter of standard form contracts etc are unaffected;

i) we are especially concerned that the current form of the Bill not be passed without appropriate "carve-outs" for conduct already sanctioned by a registered industry code;

(e) Section 6 – Prohibited terms of standard form contracts; and

(f) Application and transitional provisions

3. welcomes the exclusion of business transactions from the Bill. We have provided as an appendix to this submission an overview of the negative

impacts of including such transactions in the proposed unfair contract terms provisions, should this issue be subject to further consideration.

2. Definition of "consumer contracts"

2.1 The way in which "consumer contracts" has been defined by not providing a separate definition of the term "individual" could lead to some confusion and uncertainty regarding the application of the new provisions.

2.2 The intent of the Bill's Explanatory Memorandum (EM) appears to be to allow the Consumer Law provisions to apply to a sole trader, which, on the one hand, is consistent with the reference to "individual". On the other hand, to the extent that a sole trader is purchasing goods or services in their capacity as a sole trader, then they are almost certainly not acquiring goods "wholly or predominantly for personal, domestic or household use or consumption", meaning that the provisions would not apply.

2.3 Optus would suggest that by defining the word "individual" (in a similar way as it has been defined in the Commonwealth *Privacy Act*), it could be clearer that this means a natural person, or, alternatively, a sole trader which is entering a contract in their capacity as a natural person and not as a body corporate or any other business entity.

3. Specific comments and drafting recommendations

3.1 In this section, Optus provides specific comments and drafting recommendations with respect to the following sections of the Bill, which we believe are critical to its effective and efficient operation:

1. Section 1 – Definitions
2. Section 3 – Meaning of unfair, including:

(a) Treatment of detriment

(b) Legitimate interests

(c) The circumstances as a whole

3. Section 4 – Examples of unfair terms
4. Section 5 – Terms that define main subject matter of standard form contracts etc are unaffected, encompassing:

(a) Term required or permitted by law

(b) Upfront price

5. Section 6 – Prohibited terms of standard form contracts

6. Application and transitional provisions[1]

Section 1 – Definitions

3.2 We believe that the definition of "prohibited term" should be deleted. Please see the comments on section 6 below.

Section 3 – Meaning of unfair

Subsections 3(1) and 3(2)

3.3 Set out below are a number of comments on parts of subsections 3(1) and 3(2). Consolidated drafting for these subsections is also provided below.

Subsection 3(1) – treatment of detriment

3.4 The drafting is not clear in its intention that detriment be considered in determining whether a term is unfair in the manner contemplated by the PC. The PC recommendation as accepted by the Ministerial Council on Consumer Affairs (MCCA) and the Council of Australian Governments (COAG) was that there would need to be material detriment for a remedy to be available.

3.5 As subsection 3(1) is drafted, if paragraphs (a) and (b) are satisfied then the term is deemed to be unfair and void. It is not then entirely clear how subsection 3(2), in particular the issue of detriment, is to factor into the matters specified in subsection 3(1).

3.6 This could be addressed by moving subsection 3(2)(a) to subsection 3(1) as a new paragraph (c). Alternatively, set out below is drafting that consolidates subsections 3(1) and 3(2).

3.7 The detriment should be identified as needing to be "material" to reflect Recommendation 7 of the PC. Our understanding (see page 11 of the May 2009 explanatory paper issued with the draft provisions) is that the recommendation to include "material" is part of the MCCA agreed model that was accepted by COAG. Inclusion of material detriment as a clear requirement for assessing a term as unfair in subsection 3(1) would reduce the risk of a party incurring costs due to unfounded claims, as it would deter those who would not genuinely suffer detriment from making a claim under the unfair terms provisions.

Subsection 3(1)(b) – legitimate interests

3.8 We believe that subsection 3(1)(b) should be reworded as:

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[1] Paragraphs 3.2 to 3.37 draw extensively on the submission by the communications sector's peak industry body, Communications Alliance, *Submission to: Australian Consumer Law: Consultation on draft provisions on unfair contract terms* (May 2009), lodged with the Treasury and referred to in Optus' submission to the Treasury in response to the same consultation paper.

1. "(b) it is not reasonable in order to protect the legitimate interests of the party who would be advantaged by the term".

3.9 Requiring that a term be established as "necessary" to protect a legitimate interest is a very high test. Establishing that a term is necessary will require that the term pass a test of being essential, indispensable or compulsory. We do not agree that this is the right standard to apply.

3.10 The test for protection of a legitimate interest in the context of an unfair term should be whether the term is appropriate or proportionate to the legitimate interest to be protected. If the term is established as "reasonable" to protect a legitimate interest, then that should be sufficient to establish that the term is not unfair.

3.11 The language used in the proposed provision reflects sections 51AB(2)(b) and 51AC(3)(b) of the TPA. These sections allow the court to have regard to whether the conduct in question required the consumer or business consumer to comply with conditions "that were not reasonably necessary for the protection of the legitimate interests of" the corporation or supplier.

3.12 Allowing a court to have regard to such an element is quite different from deeming a term to be unfair simply because the burden of proof is not made out. Yet, as drafted, both the onus of proof and the impact on the party advantaged by the term would be significantly greater for unfair terms than for unconscionable conduct. This is a strange outcome given that engaging in unconscionable conduct should be viewed as a significantly more serious wrong than inclusion of an unfair term.

3.13 Please also see the further comments below on subsection 3(4).

Subsection 3(2)(c) – the circumstances as a whole

3.14 We believe that subsection 3(2)(c) should be deleted and replaced with:

1. "(c) the circumstances as a whole".

3.15 All the circumstances relevant to the entry into the contract must be matters considered in determining whether a term in a standard form contract is unfair. Limiting the criteria to "the contract as a whole" is narrower than the description of the MCCA model accepted by COAG which is described on page 4 of the May 2009 explanatory paper for the draft provisions as:

1. "it would require all the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected".[2]

3.16 Other matters that may be highly relevant to an assessment of whether a term is unfair but that would not be considered by a review of "the contract as a

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[2] Also see page 34 of *An Australian Consumer Law Fair markets – Confident consumers* issued by the Standing Committee of Officials of Consumer Affairs (17 February 2009).

whole" include the availability of competitive alternative products in the market at the time the contract was made and industry practice.

<u>Consolidation of proposed changes to subsections 3(1) and 3(2)</u>

3.17 As outlined above, if paragraphs (a) and (b) in subsection 3(1) are satisfied then the term is deemed to be unfair and void. With this drafting it is unclear how the other elements of the meaning of unfair in subsection 3(2) can be given a role. The PC report and subsequent papers reflect that the matters listed in subsection 3(2) were elements to be met in order for a term to be found to be unfair.

3.18 To address this, we propose that subsections 3(1) and 3(2) be consolidated more in line with the approach taken in Victoria as follows:

1. Delete subsections 3(1) and 3(2) and replace with:

(a) "(1) In determining whether a term of a standard form contract is unfair, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) if it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

(b) if it is not reasonable in order to protect the legitimate interests of the party who would be advantaged by the term;

(c) the extent to which it would cause, or there is a substantial likelihood that it would cause, material detriment (whether financial or otherwise) to a party if it were to be applied or relied on;

(d) the extent to which the term is transparent; and

(e) the circumstances as a whole."

<u>Recommended change – subsection 3(3)</u>

3.19 Subsection 3(3) should include as a deeming provision:

1. "A term is transparent:

(a) if:

(i) a provision of legislation; or

(ii) an instrument issued pursuant to legislation; or

(iii) an applicable industry code or other industry code developed under legislation,

prescribes criteria to be met in presenting that term to the other party to the contract; and

(b) the term complies with the criteria."

Rationale

3.20 This deals with potential inconsistency between existing legislative instruments and industry codes and the definition of "transparent" in the proposed unfair terms provisions. At the least, this is a transitional issue needing to be addressed until guidance on the new laws can be issued. It is not clear to us how the Government plans to deal with industry specific requirements and practices which have been sanctioned by legislation or by regulators, but which could be open to challenge under the proposed legislation.

3.21 For example, clause 5.2 of the telecommunications industry code C628:2007 *Telecommunications Consumer Protections Code* (TCP Code) deals with presentation of consumer contract terms. It sets out requirements on use of clear language, format and style and information accessibility that suppliers are required to follow for their consumer contracts. The unfair terms must reflect that, if a supplier complies with the applicable criteria of such a code, the supplier will not be in breach of the unfair terms provisions that deal with the same issue. Put another way, if the supplier complies with clause 5.2 of the code, the term should not be void for lack of transparency under the proposed provisions.

Recommended change – subsection 3(4)

3.22 Delete subsection 3(4) and replace with:

1. "(4) For the purposes of paragraph (1)(b), a term of a standard form contract is presumed not to be reasonable ~~reasonably necessary~~ in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise. Without limiting what a party may have as a legitimate interest, a party will have a legitimate interest if, at the time the contract was made, the party had a reasonable belief that the term was required to protect a legitimate interest even if that belief is later found to be incorrect."

Rationale

3.23 If the presumption is included then it should be rebuttable by the reasonable beliefs held by the party seeking to rely on the term at the time it entered the contract, even if those beliefs are subsequently found to be mistaken. For

example, a perceived security risk with use of a particular technology for a service may cause a telecommunications provider to include one-sided rights to suspend a service.

Section 4 – Examples of unfair terms

Recommended change – subsection 4(n)

3.24 Delete subsection 4(n).

Rationale

3.25 The list in section 4 is extensive and has been produced after much consultation and assessment. Additions to the list should be implemented through amending the legislation. Any amendments to the list in section 4 would also need to be accompanied by appropriate transitional provisions.

Section 5 – Terms that define main subject matter of standard form contracts etc are unaffected

Subsection 5(1)(c) – term required or permitted by law

Recommended change

3.26 Delete subsection 5(1)(c) and replace with:

1. "(c)is a term required, or permitted, by a law of the Commonwealth or a State or Territory or an applicable industry code or other industry code developed under legislation."

Rationale

3.27 The status of industry-specific regulations, such as the *Telecommunications Consumer Protection Code* (TCP Code) (which deals with unfair contract terms), could be open to challenge under the Bill as currently drafted. This is unreasonable because:

1. the TCP Code was developed and registered by the Australian Communications and Media Authority (ACMA) only after extensive and resource-intensive consultation between industry and a wide range of stakeholders including, importantly, as members of the working committee which developed the Code, consumer representatives;
2. further to (1) above, the balancing of respective interests between suppliers and consumers has already been undertaken and agreed; and
3. it means that a company such as Optus may be subject to two different and inconsistent tests with respect to unfair contract terms provisions.

3.28 Conduct that is sanctioned by an industry code, such as the TCP Code, should be similarly sanctioned by the unfair terms provisions of the Consumer Law. Amendment is required to reflect this.

3.29 We see the inclusion of the word "expressly" as likely to cause confusion. The test should be simply whether the term is permitted or not.

Subsection 5(2)(a) – Upfront price

Recommended change

3.30 At the end of subsection 5(2)(a) insert:

1. "or exercise of any right under the contract".

Rationale

3.31 We do not think that "grant" is sufficiently broad to include the exercise of a right under a contract that is agreed as part of the original deal. For example, the exercise of a right to take another service or to move to another mobile plan.

Section 6 – Prohibited terms of standard form contracts

Recommended change

3.32 Delete section 6

Rationale

3.33 Our reasons for requesting deletion of section 6 are the same as those for requesting deletion of subsection 4(n).

Application and transitional provisions

3.34 We believe that there should be a minimum 18 month period from the commencement of Part 2 of Schedule 2 to the TPA before Part 2 applies. The telecommunications industry needs sufficient time to review all types of contracts to which the provisions could apply. That is, review of all:

1. (a) consumer and business arrangements that may use a standard form contract; and

2. (b) arrangements where a party may propose standard form terms as a customer, supplier of goods or services or in another capacity (eg, as a franchisor).

3.35 This is a broader range of contractual arrangements than previously proposed by the PC or indicated by the government as intended to be covered by the unfair terms provisions.

3.36 The requirement in (2) assumes that the party advantaged by the unfair term:

1. (a) has the right to unilaterally vary or renew the contract at the time of the renewal, which may not be the case; or

2. (b) must refuse to make any variation or renewal unless the other party agrees to amend terms that would otherwise be unfair. This is both impractical and likely to lead to disputes.

3.37 For these reasons, we believe that the unfair terms provisions should not apply to any contract entered into before the legislation commencement date, even if varied or renewed after that date.

4. Business-to-business transactions

4.1 Optus welcomes the exclusion of business transactions from the Bill. We have provided as an appendix to this submission an overview of the negative impacts of including such transactions in the proposed unfair contract terms provisions, should this issue be subject to further consideration. We would be pleased to provide further detail on request.

Appendix 1 – Negative impacts of inclusion of business-to-business transactions in scope of unfair contract terms provisions

Please note: The comments below are with reference to the status of proposed provisions supplied for public comment as at 15 June 2009.

- The proposed scope expansion to include the full range of corporate and business standard form contracting does not appear to be based on resolving any existing problems or on any precedent for such laws anywhere else in the world. Furthermore, if such regulation is enacted, it will add additional costs and a layer of complexity to business practices, and potentially increase the cost of goods and services provided under such standard form contracts.
- The application of the unfair contract laws to business-to-business transactions would apply to a very broad range of contracts, extending well beyond the standard form contracts in areas where there have been concerns with respect to vulnerable consumer customers. This would significantly increase cost and complexity, without justification.
- There is a high risk that these regulations would facilitate exploitation by sophisticated and well resourced corporate entities seeking to resile from contractual obligations to avoid agreed terms and/or increase leverage when negotiating amended terms and conditions.
  - Such a likelihood would create uncertainty with respect to the status of agreed contractual terms in all standard form contracts entered into with business and, under particular scenarios outlined below, would essentially make such contracts unworkable in a business-to-business environment.
- There is uncertainty, and may be a disconnect, regarding how the draft unfair contracts terms provisions would operate alongside the standard form contracting provisions for the telecommunications industry enshrined in Part 23 of the *Telecommunications Act 1997* (Telco Act).
- The draft legislation, if implemented in its current form, would result in significant compliance costs during the lead up to its commencement. These costs would include costs associated with reviewing existing standard form contracts to ensure compliance. For example, Optus has identified over 210 documents which we would need to review in detail, of which approximately 90 related specifically to business-to-business transactions with corporate customers.
  - In addition to the "up front" review obligation, compliance costs would remain high on an ongoing basis given the need for continued compliance as these contracts may vary over time to include terms relating to new services, innovations, technology, service levels or business requirements.

- While the announcement by the Hon Chris Bowen MP with respect to the new laws not applying to contracts where the upfront amount payable exceeded $2 million is a step in the right direction, this dollar amount is far too high.
    - Moreover, such a threshold should also apply where the anticipated contract price over the term of the standard form contracts exceeds a certain dollar amount.
    - Also, recognition needs to be given to circumstances in which a corporate customer is not vulnerable by virtue of its size and experience, yet has entered a arrangement in which the contract price is relatively small.
- Were franchise agreements to be captured by the draft legislation, franchisors (such as Optus) would be subject to another regulatory regime in addition to the Franchising Code of Conduct (Code) and the existing provisions of the *Trade Practices Act 1974* (TPA). Moreover, there is potential inconsistency between the draft legislation and the Code.
    - Furthermore, a number of indicative "unfair terms" in the draft legislation are in common usage in franchise agreements and necessary for the effective and efficient administration of franchise networks. Such terms are not unfair.