Communications Law Centre

Submission to the Senate Environment, Communications, IT and the Arts References Committee

Inquiry into the Performance of the Australian Telecommunications Regulatory Regime

April 2005

The Communications Law Centre

The Communications Law Centre is an independent, non-profit public interest research, teaching and public education centre, specialising in media, communications and online law and policy. The Centre was established in Sydney in 1988 and in Melbourne in 1990. It is a research centre of the University of New South Wales and is affiliated with Victoria University. The CLC aims to be an innovative, professional and influential source of research, ideas and actions in the public interest on media and communications issues. The Chair of the Communications Law Centre Ltd is Hon Deirdre O'Connor. The Chair of the Centre's Management Committee at UNSW is Professor Philip Bell.

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INTRODUCTION

The Communications Law Centre welcomes the opportunity to contribute to this Inquiry.

In seeking to comment only on matters on which the Communications Law Centre has research and policy expertise, this submission will be limited to the following terms of reference:

Term or reference (d)	whether consumer protection safeguards in the current regime provide effective and comprehensive protection for users of services
Term of reference (e)	whether regulators of the Australian telecommunications sector are currently provided with the powers and resources required in order to perform their role in the regulatory regime
Term of reference (f)	the impact that the potential privatisation of Telstra would have on the effectiveness of the current regulatory regime.
Term of reference (j)	whether it is possible to achieve the objectives of the current regulatory regime in a way that does not require the scale and scope of regulation currently present in the sector.

Term of reference (k) whether there are any other changes that could be made to the current regulatory regime in order to better promote competition, encourage investment or protect consumers.

These questions are answered in substance throughout this submission. A summary of our responses to the terms of reference appears at the end of the submission.

We acknowledge that an important factor for this inquiry and its assessment of the telecommunications regulatory scheme is the further privatisation of Telstra. In relation to consumer protection, we have identified four categories of regulation that could be included in this review:

1. Requirements placed on a privatised Telstra to maintain capital expenditure and ensure that infrastructure is maintained;
2. The operation of the Universal Service Obligation (USO) and the Digital Data Service Obligation (DDSO) as set out in Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the 'Consumer Protection Act');
3. The framework for self-regulation, including regulatory policy and the operation of Part 6 of the *Telecommunications Act 1997*;
4. Other specific aspects of telecommunications legislation and other regulation such as the SFOA regime set out in Part 23 of the *Telecommunications Act*, licence conditions and service provider rules imposed on suppliers, and those parts of the *Consumer Protection Act* dealing with matters other than the USO and DDSO.

While the Centre would like to address these issues in full, there is limited scope within the timeframe of the Inquiry. As a result, we have excluded consideration of the first and second points on the understanding that other consumer and public interest groups are likely to comment on these matters.

In relation to the remaining issues, while we have not been able to conduct a review of all remaining aspects of consumer protection regulation, we have adopted a general approach to this review which is based on the belief that there are few benefits in introducing a wide range of additional legislative consumer protection measures.

Our preferred approach would be as follows:

- remedy some specific problems with existing consumer protection mechanisms such as the SFOA regime;
- refine the more general aspects of telecommunications legislation that establish the framework for self-regulation in order to make that system more effective.

PART ONE REVIEW OF CONSUMER PROTECTION MECHANISMS

The table below offers one way of categorising telecommunications consumer protection regulation in Australia.

As the table indicates – and as the Centre has commented on previous occasions – there is already a wide range of regulatory initiatives. Our preference would be to review the effectiveness of these forms of regulation and the competition regulation scheme rather than propose a suite of new consumer protection legislative mechanisms.

This table should not be taken as an exhaustive list of consumer protection mechanisms. A list of further regulatory provisions with important application to consumers follows. The measures in that secondary list are distinguished from the 'first order' consumer protection mechanisms since they do not directly create consumer rights or create obligations on suppliers arising from a direct relationship with consumers.

Consumer Protection Mechanism	Source
Registered Consumer Codes ▪ Billing ▪ Calling Number Display ▪ Complaint Handling ▪ Consumer Contracts (pending registration) ▪ Credit management ▪ Customer Information on Prices, Terms and Conditions ▪ Customer Transfer	Telecommunications Act 1997, Part 6
Operator services, directory assistance, itemised billing	Telecommunications Act 1997, Schedule 2
USO, including DDSO and STS	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 2 Telecommunications (Consumer Protection and Service Standards) (Special Digital Data Service) Regulations 1999
National Relay Service	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 3
Untimed Local Calls	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 4
Customer Service Guarantee	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 5 Telecommunications (Customer Service Guarantee) Standard Telecommunications (Performance Standards) Determination
Telecommunications Industry Ombudsman	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 6
Protected pre-payments on standard telephone services	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 7
Emergency services	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 8
Telstra Price Controls	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 9
Telephone sex services	Telecommunications (Consumer Protection and Service Standards) Act 1999, Part 9A
Disability services	Disability Services Guideline, ACIF, unregistered ACA Standard: Requirements for Customer Equipment for the use with the STS – Features for Special Needs of Persons with Disabilities Telecommunications Act 1997, Part 20 Telecommunications (Equipment for the Disabled) Regulations 1998
Spam	Spam Act 2003 Australian E-Marketing Code of Practice 2005
Content	Broadcasting Services Act 1992, Schedule 5 Internet Content Code Internet Industry Association Classification (Publications, Films and Computer Games) Act 1995 Criminal Code Act 1995, Part 10.6

Online gambling	Interactive Gambling Act 2001 Gambling Code Internet Industry Association
Advertising/selling practices	Trade Practice Act Part V, Part IVA (+ state and territory Fair Trading Acts)
Low-income Measures	Telstra Licence condition
Priority services (households with people with life-threatening injuries)	Telstra Licence condition
Premium rate services	Telecommunications Service Provider (Premium Services) Determination 2004 or replacement Telecommunications Information and Service Standards Council Codes of Practice (unregistered)
Tele-marketing	State Fair Trading Acts/legislation dealing with door-to-door sales ADMA Code of Practice
ACA Consumer Consultative Forum, ACA Advisory Committees	Australian Communications Authority Act 1997, s 52, s 51, and replacement provisions in the Australian Communications and Media Authority Act 2005.
Standard Agreements	Telecommunications Act 1997, Part 23 Telecommunications (Standard Form of Agreement Information) Determination

Other regulatory mechanisms relevant to consumer protection

- ACIF codes such as Number Portability, Unwelcome and Threatening Phone Calls, SMS, Network Performance
- Privacy/protection of communications: Telecommunications Act 1997, Part 13; Privacy Act 1988
- Pre-selection/calling line identification: Telecommunications Act 1997, Parts 17 and 18
- Technical standards – customer equipment, cabling etc: Telecommunications Act 1997, Part 20
- Interception of private communications: Telecommunications (Interception) Act 1979; Telecommunications Act 1997, Part 15
- Network Reliability Framework – Telstra Licence condition.

As stated above, the table and list are not offered as an exhaustive statement of consumer protection in Australia; instead they are designed to provide an indication of the range of existing consumer protection mechanisms. These are the mechanisms that consumers in a privatised environment will turn to. In our view, these measures deserve assessment along with the structural and competition aspects of telecommunications regulation.

While this submission only considers in detail the self-regulation framework and the SFOA regime in Part 23 of the Telecommunications Act, a full assessment of the adequacy of consumer protection measures would have regard to all these issues. Such a review would consider emerging issues and matters that have already been identified for action, such as:

- Content regulation on mobiles, including the limitation on the powers of the two regulators to act on this matter (as outlined in the ACMA Inquiry) and with particular regard to the regulation of third party suppliers not covered by existing telecommunications regulation (including self-regulatory measures)
- Selling practices
- Access to broadband
- The level of regulation of VOIP services
- Credit management, including protection for consumers in relation to unexpected high bills

- Implementation of disability equipment programs
- The operation of price caps, including the introduction of caps on fixed-to-mobile services
- Privacy and access to the IPND
- Provision of pay phones
- Provision of fixed-line, mobile and internet services to remote indigenous communities.

PART TWO SELF-REGULATION FRAMEWORK

The Centre recognises the earlier work of the Environment, Communications, Information Technology and the Arts References Committee on the Inquiry into the provisions of the ACMA Bill and related bills.

Instead of re-stating earlier proposals we confirm that we support Recommendation 13 from the Report of that Inquiry which was endorsed in principle by all members of the Committee:

> **Recommendation 13**
> The Committee recommends that section 4 of the *Telecommunications Act* be amended to remove the preference for self-regulation and to more closely reflect the regulatory policy statement under the Broadcasting Services Act. The revised section should make it clear that Parliament intends telecommunications to be regulated in a manner that:
>
> - promotes the use of industry self-regulation where this will not impede the long term interests of end users; and
> - enables the objects mentioned in section 3 to be met in a way that does not impose unnecessary financial and administrative burdens on participants in the Australian telecommunications industry.

For the purposes of this review, the most significant part of this proposal relates to the additional qualifying statement relating to the use of self-regulation: 'where this will not impede the long term interests of end users'. In our view, this approach is fair and reasonable to all participants in that it employs a concept already used within the sector (the 'LTIE' test) in order to provide some protection to consumers in cases where self-regulatory solutions are not effective. In addition, the second bullet point in Recommendation 13 contributes an appropriate commercial consideration, applying a provision used in the *Broadcasting Services Act*.

In addition to this change to regulatory policy, we see the need for changes to Part 6 of the *Telecommunications Act*. Improvements are needed to the following aspects of code development and enforcement:

- Development criteria – ie, specified conditions for developing good codes of practice such as time frames, with additional emphasis placed on consumer participation;
- Registration and assessment criteria – the implementation of effective criteria for assessing a code at the time that it is first submitted for registration and at the time at which it is reviewed;
- Systems for ensuring compliance and enforcement.[1]

[1] This outline of improvements to code development and enforcement and the substance of comments on self-regulation which follow were developed for a presentation by Derek Wilding to the Telstra Consumer Consultative Council (TCCC) on 7 April 2005. The Communications Law Centre gratefully acknowledges the assistance provided by a grant from the TCCC to research and develop these ideas.

These matters were flagged in the *Consumer Driven Communications* Report (ACA 2004, *Consumer Driven Communications: Strategies for Better Representation*, https://www.aca.gov.au/consumer_info/CDC_committee/). However, there is considerable work needed in carefully charting the operation of self-regulation in Australia and the ways in which self-regulation in telecommunications can be improved. In our view, it is reasonable for Parliament to expect industry, consumers and regulators to conduct the work of self-regulation, provided that funding issues are addressed. However, Parliament has a responsibility in ensuring that the framework within which that work can be done is itself sound in design and effective in operation.

Importantly, we think that the self-regulatory scheme for telecommunications should feature consumer involvement in both the 'front end' and 'back end' of self-regulation. This means involving consumers on an equal footing in all code development work and then ensuring that they are involved in registration and review processes. Embracing consumers in theoretical or rhetorical terms only, but locking consumers out of the decision-making (for example, in the way that codes are developed in some forums other than ACIF), has the potential to produce poor outcomes for both industry and consumers. This is because those consumers will insist loudly on more active and inflexible intervention by the regulator. Genuine and credible involvement of consumers in front end regulation promotes co-operative work with industry and regulators and discourages rigid regulatory intervention while safeguarding against supplier default or regulatory capture.[2]

The lengthy and well-documented process to address unfair terms in consumer contracts demonstrates the need for improvements to the monitoring of consumer issues and intervention by the regulator in cases of failure of self-regulation. This experience highlights problems in the legislation, as documented in the section on the SFOA regime below, and emphasises the need for regulator vigilance and consumer participation at both the front end (code development) and back end (compliance, enforcement and review) of self-regulation. Failing to make improvements to the scheme will have the result that the benefits of self-regulation will be forgone – too many people will still be too intent on fighting self-regulation itself.[3]

This is not to say that some good results have not already been achieved through self-regulation and neither is it to blame consumers who are sceptical about the benefits of self-regulation. Such an approach by some consumers is to be expected while the system itself exhibits these design faults, effectively locking consumers out at some stages.

Part of the responsibility for this situation must lie with the regulator. In the past the ACA has not been clear enough about the following:

- the need for genuine consumer participation in code development;

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[2] The concept of 'front end' and 'back end' participation and the observation that consumers who are locked out of these stages are likely to call for rigid command and control regulation is taken from Ayres and Braithwaite's explanation of 'tripartism' as a method of self-regulation. Although Ayres and Braithwaite outlined their ideas in 1992 using the figure of 'public interest groups' rather than 'consumer groups', experience in telecommunications regulation since 1997 fits their theory. See I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, New York, Oxford University Press 1992, Chapter 13, especially pages 75, 77-78.

[3] The likelihood of consumer opposition to self-regulation is also flagged in theoretical terms by Ayres and Braithwaite, above.

- the need to demonstrate that the provisions of codes meet some benchmarks;
- the need for monitoring compliance with codes or implementation of a system whereby industry reporting is genuine and accurate.

Over the part two years the ACA has expanded its consumer protection work and succeeded in correcting some of these problems while retaining a commitment to self-regulation. The CDC Report was an important step in this but a substantial amount of work is required. Staff of the Communications Law Centre are participants in an application for a large-scale research project based at UNSW that would conduct such work and in the meantime we are reluctant to make definitive statements on how that framework should be amended. However, it is possible to recommend a set of preliminary amendments to the *Telecommunications Act* that address documented problems within the current scheme and enable a more effective self-regulatory system to evolve under ACMA.

Some of these proposals are set out in the CDC Report. A more extensive package of amendments designed to provide the necessary fine-tuning to self-regulation is set out below.

Section 4 – Regulatory policy

Replace section 4 with wording proposed in ECITA ACMA Report:
Parliament intends telecommunications to be regulated in a manner that:

- promotes the use of industry self-regulation where this will not impede the long term interests of end users; and
- enables the objects mentioned in section 3 to be met in a way that does not impose unnecessary financial and administrative burdens on participants in the Australian telecommunications industry.

Section 112– Statement of regulatory policy

Retain 112(2) requirement for the ACA to exercise its powers in a manner that enables public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants.

Retain 112(3) list of criteria for judging public interest considerations and undue financial and administrative burdens (including item (c) 'the legitimate business interests of participants in sections of the telecommunications industry') but add a further criterion: "(e) the extent to which there is existing consumer detriment in an aspect of the provision of telecommunications goods and services or a reasonable likelihood of future consumer detriment".

Section 117 – Registration of industry codes

'Quality' test for registration

Section 117(1)(d) sets out the test for ACA registration: "the code provides appropriate community safeguards". A more effective system would set out quality benchmarks that codes are required to meet. Since more work is required to develop these criteria and it is appropriate for the ACA/ACMA to develop them, section 117(1)(d) could require the ACA to develop a set of assessment criteria for registration and to require that the ACA is satisfied that the code meets those criteria.

Requirement for ('front end') consumer participation and public comment

117(1)(f) and (i) set out the tests for public comment/consumer participation:

- an industry association must invite members of the public to comment on a draft of the code and give consideration to any submissions;
- at least one consumer group must be consulted in the development of a code.

In order to improve consumer participation at this stage, section 117(1)((f) should be replaced with a requirement that the ACA is satisfied that consumer consultation has been adequate, as follows:

> (f) the ACA is satisfied that in the development of a code and in the development of any revisions to the code:
>
> (i) there has been adequate consumer consultation;
>
> (ii) at least one body or association that represents the interests of consumers has participated in the development and drafting of the code; and
>
> (iii) in the development and drafting of the code there was an equal number of participants from that section of the industry and from bodies or associations representing the interests of consumers.

(Similar amendments could be made in relation to sections 132 and 135 concerning public consultation and consumer participation in industry standards).

New Section 120A – Monitoring of compliance with industry standards

As noted above, a prerequisite for effective self-regulation is the knowledge that in cases of system failure, the regulator will intervene to correct non-compliant conduct. This is not to say that such intervention should occur on a regular basis; indeed, a truly effective system of self-regulation will not require actual intervention – the existence of the residual power itself will be sufficient. Nevertheless, in order for the regulator to retain credibility among both suppliers and consumers, a system of effective monitoring is required.

We propose a new section 120A that formalises the need for monitoring of compliance of codes or practice as follows:

- by suppliers/industry associations reporting to the ACA on an annual basis, and
- where the ACA/ACMA is of the view that supplier monitoring is not providing accurate or adequate data, monitoring by the ACA/ACMA.

New Section 125A – ACA may determine industry standards where industry codes will not adequately address an identified aspect of consumer detriment

Development of an industry standard is governed by section 123 (where a request for a code is not complied with), section 124 (where there is no industry association), and section 125 (where there is code failure).

As recommended in the CDC Report, a new Section 125A should be introduced to cover situations where there is evidence to suggest that self-regulatory mechanisms will not adequately respond to an identified need in relation to consumer protection. In deciding whether to exercise this power, the ACA is to have reference to the views of, and consult with, any bodies or associations that represent a section of the industry and any bodies or associations that represent consumers.

PART 3 CONSUMER PROTECTION AND THE SFOA (STANDARD FORM OF AGREEMENT) REGIME

The subject of unfair contract terms in telecommunications consumer contracts has been a priority issue for the Centre over the past five years. This work complements preliminary research on selling practices and current work on unconscionable conduct and telecommunications contracts.

Work on unfair terms includes the following reports:

- *Unfair Practices and Telecommunications Consumers* (January 2001) - research project funded by the Commonwealth through DCITA's Telecommunications Consumer Representation and Research Program and the Telecommunications Industry Ombudsman;
- *Report on Fair Terms in Telecommunications Consumer Contracts* (May 2003);
- *Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline* (commissioned and published by the Australian Communications Authority in October 2003).
- *Best Practice Contract for Telecommunications* (commissioned and published by the Australian Communications Authority in December 2004);
- *Compliance by the Telecommunications Industry (2004) with the Fair Trading Act 1999 (Vic)* (report commissioned by Consumer Affairs Victoria).

During the period 2000 to 2003, research by the Communications Law Centre showed that telecommunications regulation regarding consumer contracts did not provide effective and comprehensive protection for users of services. At the centre of these problems was the use of SFOAs. The Centre found that the use of SFOAs by the telecommunications industry pursuant to Part 23 of the *Telecommunications Act 1997* (Cth) resulted in the following two industry practices:

- suppliers unilaterally varying their agreements to the detriment of consumers; and
- consumers being inadequately informed of their rights and obligations under their agreement with the supplier when signing up for a service.

Although there are some suppliers who do not use SFOAs for the supply of some telecommunications services, it is general industry practice to use the standard form agreements lodged with the ACA. Furthermore, suppliers who use SFOAs have in the past relied on Part 23 of the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Standard Form of Agreement Information) Determination 2003* ('the Determination") in order to contract with consumers, often in a detrimental way.

Consumer groups have identified two broad categories of detriment in the current use of SFOAs:

- suppliers generally only provide a summary of the SFOA (usually no longer than four A4 pages) to customers when signing up for a service; the summary SFOA is often inadequate for customers to rely on to be informed of their rights and obligations under their agreement with the supplier;

- suppliers vary customers' agreements (subject to certain notice requirements) in a manner that is contrary to principles of fairness under statute (eg *Trade Practices Act 1974* (Cth)) and general law (established contract law doctrines).[4]

SFOAs are often very lengthy (for example, one supplier's contract was over 500 pages long) and a summary of the SFOA is usually no longer than four pages. Moreover, it is industry practice for SFOAs to contain complex terms and a large number of important and potentially detrimental terms. It is almost impossible to summarise these terms in four pages in a manner where the customer is adequately informed of his or her rights and obligations. This is particularly true for internet and mobile services where there are often a number of individual plans with their own terms and conditions in addition to the general terms and conditions.

Problems at the point of sale (such as excessive sales pressure and the provision of inadequate or misleading information) are compounded by the fact that the SFOA is not given to the customer at the time of entering into the agreement.

PART 23 OF THE TELECOMMUNICATIONS ACT 1997 and ACA SFOA DETERMINATION

The supply of telecommunications services in Australia is regulated by the *Telecommunications Act 1997* ('the Act') and the Australian Communications Authority (ACA) under power delegated by the Act. The use of SFOAs by the telecommunications industry is recognised in Part 23 of the Act, specifically section 479, which permits the formulation of an SFOA for the supply of voice telephony services, data transmission, tone signalling, live or recorded information service. Suppliers who use SFOAs are required to have them lodged with the ACA (section 480). Furthermore, the Act imposes obligations upon suppliers to make their SFOAs available upon request to customers (section 481).

Pursuant to s.480A(2) of the Act, the ACA is authorised to make a written determination requiring suppliers to give customers information relating to the supply of the service and to publish this information. Clause 8.2 of the *Telecommunications Regulations 2001* clarifies that the ACA may make such a determination in relation to both voice telephony and data services and s.480A(8) requires that the ACA must ensure that a determination is in force at all times. Currently this part of the self-regulatory regime is operational by way of the *Telecommunications (Standard Form of Agreement Information) Determination 2003* ('the Determination").

The Determination requires suppliers to have summaries of the SFOAs, to give those summaries to new customers and to tell existing customers that they can ask for a summary at least once every two years. Further the Determination requires that suppliers prepare notices for consumers if an SFOA is to be varied in such a way that customer detriment is caused, and for the notice to be published in a place that is reasonably likely for the customer to be aware of its contents.

[4] These findings were identified by the CLC in *Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline* (published by the Australian Communications Authority in October 2003).

The CLC is of the opinion that the combined effect of Part 23 and the Determination does not provide clear legal authority for current industry practice which is otherwise at odds with accepted principles of contract law (that is, the making of changes to a contract by one party without seeking the agreement of the other party). The CLC is of the view that the proper interpretation of these two instruments is that the Act permits the use of SFOAs and requires the ACA to make a determination dealing with notice provisions. The Determination simply instructs suppliers on the method that must be used to notify customers of changes. It is our view that neither the Act nor the Determination adequately deals with the circumstances in which changes may be made to the contract.

CHANGES TO THE ACA DETERMINATION and PART 23

There is potential for this issue to be partially addressed by amendments to the Determination as proposed by the ACA in April 2004 and by the implementation of the Consumer Contracts Code[5] ("the Code") developed by the Australian Communications Industry Forum (ACIF) which is being considered for registration by the ACA. The Centre participated in the ACIF Consumer Contracts Working Committee to develop the Code which will operate to limit the circumstances in which changes can be made and encourages suppliers to simplify their contracts.

However, in our view the most effective way to remedy the detriment that results from the use of SFOAs is to amend the Act and provide certainty as to the circumstances in which unilateral variation can operate fairly for all parties. Assuming the Code is ultimately registered by the ACA we note the following limitations:

- the new arrangements will not apply to the supply of subscription television services or to content providers where they are also not providing a carriage service;
- there will still be legislative uncertainty as to the circumstances in which Part 23 of the *Telecommunications Act 1997* (Cth) and ACA's *Telecommunications (Standard Form of Agreement Information) Determination 2003* may be used to circumvent consumer protection provided under general law or the *Trade Practices Act*.

The ACA's proposals to amend the determination are at a preliminary consultation stage and the actual amendments are not yet drafted. However, the changes foreshadowed by the ACA will rely on those clauses of the code which deal with notice in writing being required for variations being made to a contract by a supplier. In this case it is unlikely that the proposed amendments will adequately address problems such as the desirability of an industry practice which continues to operate in an environment of legislative uncertainty and at odds with general law and specific consumer protection legislation.

This example further illustrates the points made earlier in this submission regarding self-regulation: the co-existence of a statutory provision cited in *support* of unilateral variation and a self-regulatory provision that

prohibits most detrimental variations indicates that the framework for effective self-regulation is not yet in place.

RECOMMENDATIONS

The CLC favours a solution which involves amending Part 23 of the *Telecommunications Act 1997*.

Option One

One option would be to remove the SFOA regime for all services except fixed-line services. This would have the result that consumers would be given full contracts for all mobile and internet services.

Option Two

Another option (consistent with the introduction of the Consumer Contracts Code) would be to retain in substance the operation of the SFOA regime in Part 23 but amend the provision dealing with variation of contracts.

If this option is adopted, the Act should specifically identify in what circumstances an SFOA can be used and variations made unilaterally to that SFOA. Greater clarity than currently exists in section 482 and 483 of the *Telecommunications Act 1997* (Cth)[6] is required. It should be recognised that the reference to inconsistency with the *Trade Practices Act* is not sufficient to provide guidance to regulators, industry, and consumers.

Accordingly, we recommend that section 481(2) be amended to remove the reference to 'any variation of the agreement' and replace the reference to 'the agreement' with 'the current terms of the agreement'. This will remove any implicit support for the proposition that an SFOA is able to be varied unilaterally and to the detriment of consumers. The Code will then come into effect, allowing for variation in some limited circumstances as agreed between suppliers and consumers in the Working Committee. Circumstances not covered by the Code will be covered by general law and other relevant legislation.

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[5] ACIF, C620:2005 *Consumer Contracts* Industry Code (March 2005) available at <http://www.acif.org.au/__data/page/12605/C621.pdf> at 8 April 2005.

[6] Section 482 and 483 of the *Telecommunications Act 1997* (Cth) provides: This Part has no effect to the extent (if any) to which it is inconsistent with the *Trade Practices Act 1974*.

PART FOUR SUMMARY OF RESPONSES TO THE TERMS OF REFERENCE

Term or reference (d) whether consumer protection safeguards in the current regime provide effective and comprehensive protection for users of services

In general, Australia has a sound regime for consumer protection. Experience during the previous eight years of operation of the *Telecommunications Act 1997* suggests that some existing consumer protection mechanisms could be improved and that some fine-tuning is needed to the framework for self-regulation in order to improve that system and ensure that it will provide effective protection for consumers in the future.

Term of reference (e) whether regulators of the Australian telecommunications sector are currently provided with the powers and resources required in order to perform their role in the regulatory regime

Consistent with our recommendations to the ACMA Inquiry, we believe that consumer protection would be enhanced by amendments to existing legislation that enable the new converged regulator to address issues that cross communications and broadcasting (or content) regulation. We further believe that an active regulator requires better financial resources. By 'active regulator' we do not mean a highly invasive regulator, rather a regulator that is able to promote the effective operation of self-regulation and consumer education alongside direct regulatory initiatives of government and parliament.

Term of reference (f) the impact that the potential privatisation of Telstra would have on the effectiveness of the current regulatory regime.

As noted above, this submission only addresses issues of consumer protection, not competition regulation. On this matter, we believe that in general, amendments to the existing framework for self-regulation would serve consumers better in the long-term than a range of additional, speculative licence conditions addressing specific consumer issues. Having said this, we stress that this submission does not consider some important issues such as access to broadband.

Term of reference (j) whether it is possible to achieve the objectives of the current regulatory regime in a way that does not require the scale and scope of regulation currently present in the sector.

We believe that this is a question that relates principally to competition regulation. In relation to consumer protection, we have advocated for amendments to existing provisions in preference to the introduction of new arrangements. We do not believe that it would be appropriate to repeal existing consumer protection measures.

Term of reference (k) whether there are any other changes that could be made to the current regulatory regime in order to better promote competition, encourage investment or protect consumers.

We have made specific suggestions on how the framework for self-regulation could be amended, including recommendations in relation to code formation, the introduction of standards, and the operation of the SFOA regime.

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