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An Australian Consumer Law

Fair Markets – Confident Consumers

Submission to Treasury by: Australian Mobile Telecommunications Association

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1. Introduction and overview

- 1.1 The Australian Mobile Telecommunications Association (**AMTA**) is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile Carriage Service Providers (**CSPs**), handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry.
- 1.2 AMTA takes a keen interest in consumer issues and regularly engages in telecommunications-related consumer policy and regulatory debates. This has included providing input to the Productivity Commission's 2007 and 2008 reviews on the consumer policy framework.
- 1.3 AMTA has also actively sought to assist consumers of all ages enjoy the benefits of mobile phones in a financially affordable and responsible manner through its various educational initiatives. This has included producing 'consumer tips sheets' on issues as diverse as financial management, safe driving and mobile bullying. AMTA has also produced a website specifically for young people, addressing a number of mobile phone-related issues. For more details about AMTA, see <http://www.amta.org.au>.
- 1.4 AMTA welcomes the opportunity to comment on the Department of Treasury's Consultation Paper: *An Australian Consumer Law, Fair Markets – Confident Consumers* (**ACL Paper**) and looks forward to providing further more detailed input in relation to the draft provisions of the Australian Consumer Law as they are made ready. In the interim, AMTA would be happy to discuss or provide further information to Treasury on any of the issues raised.

Overview

- 1.5 As stated in its previous submissions, AMTA agrees in principle with the high level stated aims of the legislation; it is desirable to have a nationally consistent framework for consumer policy with a view to delivering consumer protection more efficiently and effectively by minimising the duplication and inconsistency evident in existing State, Territory and Commonwealth regulation.
- 1.6 In addition to the duplication and inconsistency evident in industry-wide legislation, the mobile telecommunications industry contends with a complex industry-specific co-regulatory environment where further duplication and inconsistencies are evident.

- 1.7 Such duplication and complexity results in sub-optimal policy processes and outcomes and increases the cost of compliance. As such, AMTA supports the Rudd Government's commitment to regulatory reform and considers the development of the Australian Consumer Law (**ACL**) as a logical time to consider review and reform of the current regulation.
- 1.8 While it is desirable to identify unnecessary or divergent industry-specific regulation with a view to repealing or harmonising it across jurisdictions, government should remain focused on the key objectives of removing duplication and unnecessary regulation and addressing any clearly defined gaps in consumer protection. It should resist the temptation to extend the reach of the ACL existing provisions unless it is clearly demonstrated that it is beneficial to do so.
- 1.9 It would also be unhelpful and ineffective if the ACL were overly prescriptive; it would be more appropriate to continue to provide for detailed guidance on the practical interpretation of some aspects of the legislation through industry-specific codes and guidelines.

2. The current regulatory environment

- 2.1 The mobile telecommunications industry operates in an environment that is subject to both generic business regulation and industry-specific regulation. Industry-specific regulation is administered through both government legislation and regulations and self-regulatory processes.
- 2.2 The stated aim of the *Telecommunications Act 1997* is to establish a telecommunications regulatory regime that *promotes the greatest practicable use of industry self-regulation*¹. This is important in a dynamic, fast-moving industry where it is desirable to be able to respond to identified problems quickly. The reality, however, is a complex co-regulatory model with overlap and inconsistency between jurisdictional and agency responsibilities and numerous bodies developing policy without adequate reference to other agencies or industry.
- 2.3 Such duplication and complexity results in sub-optimal policy processes and outcomes. Even where a good outcome is eventually achieved, poor process increases the cost of development and compliance. These costs are inevitably passed on to consumers.
- 2.4 An indicative but not exhaustive list of consumer protection regulation for the mobile telecommunications industry is provided at Attachment A.

¹ Section 4a, Telecommunications Act 1997

3. Unfair contract term provisions

General comments

- 3.1 AMTA's members provide mobile telecommunication services to millions of Australians nationally. A large proportion of these consumers are provided services under Standard Forms of Agreement (**SFOAs**).
- 3.2 The right to contract with customers on a general, non-individual basis is specifically provided for under *The Telecommunications Act 1997* (Part 23), with more detailed legislative rules governing SFOAs in the industry set out under the *Telecommunications (Standards Form of Agreement Information) Determination 2003* (as amended, 2006). The industry is further governed by regulation in the form of industry codes, under the Communication Alliance C628 2007: *Telecommunication Consumer Protections Code* (**TCP Code**).
- 3.3 AMTA's members are also subject to the various State and Territory regulations governing unfair contract terms. These regulations vary widely across Australia. In practice this means that businesses with national operations (such as AMTA members) manage their compliance burden by complying with the most stringent of these regulations, nationally. That is, they comply with the Victorian *Fair Trading Act 1999* and the TCP Code.
- 3.4 As the ACL Paper recognises, standard form contracting is beneficial both to consumers and suppliers in that it would be impractical, costly and unnecessary for telecommunication providers to negotiate individual contract terms with each and every customer. SFOAs represent a practical, cost-effective solution.
- 3.5 Clearly, however, it is inefficient, confusing and therefore undesirable for both industry and consumers to have to navigate such a range of legislation and regulation and attempt to understand which rules and regulations are applicable or take precedence. It is also inefficient, with AMTA and its members having invested significant time and resources into reviewing, developing and ensuring compliance with each individual piece of regulation/code.
- 3.6 As such, AMTA believes a uniform national approach can benefit both consumers and business and supports a national approach to unfair contract terms.
- 3.7 It is critical, however, that any national unfair terms regime provides appropriate balance between the interests of consumers and the legitimate interests of industry and avoids any prescriptive level that risks the inadvertent prevention of a term that may be unreasonable in one circumstance but entirely reasonable in another. AMTA is concerned that some of the proposals within the ACL Paper do not currently appropriately guarantee this balance.

Terms that might be covered by the unfair contract term provisions

- 3.8 On a general level, AMTA does not believe that it is practical, necessary or helpful to ban certain 'problematic' types of contract term. As recognised by Consumer Affairs Victoria (**CAV**), there are instances where terms which may on face value appear to be "unfair" are justified, or even desirable from a consumer perspective.
- 3.9 AMTA also notes that CAV has, for five years, had the power to declare unfair terms, but has not declared a blanket ban on any.

The legitimate interests of the supplier

- 3.10 AMTA notes that the ACL will consider a term 'unfair' "when it causes a significant imbalance in the parties' rights and obligations arising under the contract, *and it is not reasonably necessary to protect the legitimate interests of the supplier*" (italics added).
- 3.11 This test recognises that it may be necessary to include a range of contract terms that may initially appear to be 'unfair'. However, it is unclear how the ACL would seek to ban all such 'unfair terms' on the one hand while also applying a test to consider their legitimacy on the other. This is further explored below.

Detriment

- 3.12 The ACL paper states that 'use of the provision should be confined to situations where there is detriment (including a substantial likelihood of it)'. AMTA has serious concerns about this definition, suggesting that it could increase business and consumer uncertainty and prevent changes in the telecommunications space that are clearly considered reasonable under current regulations and under carefully considered and widely debated industry-specific codes.
- 3.13 For example, the TCP Code includes clear rules to ensure consumers are adequately informed about changes to their contract, with different requirements applying to changes likely to have a beneficial, neutral, minor detrimental or major detrimental effect on a class of consumers. Importantly, the Code benefited from considerable consultation between consumer groups and suppliers and was approved by the industry regulator.
- 3.14 The inclusion of 'detriment' as currently defined could also destroy a company's ability to sell its customer base to another supplier. A company's customer base may be a significant asset, and from time-to-time it may be appropriate for a company to consider the sale of that asset, either when faced with financial difficulty or if it wants to pursue other business opportunities. This is particularly so if the company encounters financial difficulty, and the sale or transfer of the customer base may be an important option to consider in order to keep the company operating as a going concern and to ensure the continued provision of services to the customer base.

- 3.15 Any law that would interfere with a company's ability to effectively deal with its assets could ultimately result in that company winding up, resulting in significant job losses and reduced competition on the market place.
- 3.16 AMTA further notes that "substantial likelihood of detriment" is likely to be difficult to assess legally as courts award damages based only on actual loss, not potential loss. Further, the term is unnecessary in that the court system already provides for a party to obtain injunctive relief where there can be an appropriate assessment of the likelihood of detriment and the balance of convenience between the parties.
- 3.17 AMTA therefore proposes that the issue of consumer detriment be clearly limited in the ACL to *material* detriment, with the 'likelihood' of detriment' excluded.

Unilateral variation

- 3.18 Notwithstanding the fact that 'detriment' and the 'legitimate interest of suppliers' are to be considered in the application of the ACL, as already noted, AMTA is concerned that the practical effect of banning certain terms will be to prevent suppliers from initiating reasonable and even beneficial changes.
- 3.19 For example, an outright ban on any clause that permits a supplier to unilaterally vary a contract could have the practical effect of preventing suppliers from introducing an amendment to reflect changes in law or changes to industry codes. It could also prevent changes that could reasonably be viewed to have a neutral effect on consumers. For example, a supplier 'unilaterally' changing its customer service operating hours from 8.30am – 4.30pm to 9am – 5pm.

Changes to pricing

- 3.20 Another example of unilateral variation that may appear on first examination to be unfair and unnecessary is a change to the price of a service offered by a supplier.
- 3.21 It would be unreasonable (and it is not currently permitted) for a supplier to unilaterally increase prices substantially without providing the consumer adequate notice of the change and the opportunity to exit the contract without penalty. However, it may not in all circumstances and in all industries be unreasonable to allow unilateral variation of price under certain conditions.
- 3.22 For example, mobile telecommunication suppliers may need to make changes to prices from time-to-time; this includes price decreases as well as price increases. As there is no fixed date on which customers start their fixed-term contract (they can begin on any working day of the year), price changes must be introduced within a contract period. It is unreasonable to expect that prices will never change and it is impractical and unreasonable to suggest that a price change to any component of a contract, however small, would be considered sufficient to allow a consumer to terminate their contract. It must be considered in the context of the whole contract.

- 3.23 Clearly it is important to ensure adequate consumer protection from unreasonable supplier behaviour. It is equally clear, however, that it is difficult to define what is 'unreasonable' behaviour in all circumstances as it will vary from industry to industry and situation to situation.
- 3.24 AMTA notes that the telecommunications industry has worked through these issues in detail with consumer representatives during TCP Code negotiations. The outcome is a Code that clearly defines "reasonable" behaviour for telecommunication suppliers, providing a reasonable balance between industry and consumer rights.
- 3.25 AMTA suggests that, in addition to consumer detriment being clearly limited in the ACL to *material* detriment, it may be necessary to continue to recognise industry Codes and allow the detail of terms such as 'reasonable behaviour' and 'material detriment' to be covered therein.

Consumer acknowledgement that a contract is read and understood

- 3.26 AMTA considers that it is reasonable to request that consumers acknowledge that they have read and understood the contract. The requirement, at a minimum, prompts the consumer to read the contract and to ask questions. Consumer acknowledgement is also critical in providing business certainty about the service the company has agreed to provide the consumer.
- 3.27 The inclusion of such a term in contracts does not of itself prevent consumers challenging particular terms should they subsequently find that they did not understand a term or were not aware of a key term. Whether or not a customer did read and understand a contract, in circumstances where a customer has given that acknowledgement is a matter of fact. Consumers have a range of avenues open to them to pursue this issue, including requesting a tribunal make a determination. It may be that the customer has given the acknowledgement because it is correct. AMTA does not therefore support such terms being banned.

4. Definition of consumer

- 4.1 AMTA agrees that it is undesirable to have numerous definitions of 'consumer' in legislative instruments and regulation across Australia. As stated in our previous submissions, AMTA believes that the definition should be limited to individual consumers and should not include business consumers. This is because the nature of business-to-business transactions and business-to-consumer transactions is substantially different.
- 4.2 AMTA suggests the ACL adopt the definition of consumer from the Victorian Fair Trading Act. That is, the ACL should apply to a person that:

- (a) acquires goods or services of a kind originally acquired for personal, domestic or household use; and
- (b) uses those goods or services for the primary purpose of personal, domestic or household use.

5. Enforcement

- 5.1 As stated in our previous submission, AMTA submits that the suite of remedies already available to regulators to enforce consumer protection laws is adequate. There is no evidence to suggest that this has changed.
- 5.2 The imposition of further enforcement instruments would inevitably increase compliance costs, ultimately resulting in higher prices to consumers without commensurate benefit.
- 5.3 Recognising that a decision appears to have been made to extend existing powers, however, AMTA considers it critical that safeguards are included and thresholds defined to ensure that action is only taken where there is adequate justification and very good evidence of a breach. As the ACL Paper identifies, any 'naming and shaming' powers could have devastating and irreversible effects. Although arguably this might be their intent, the potential for error and the danger that the penalty is disproportionate to the 'crime', mean that the introduction of a 'naming and shaming' power must be very carefully considered.
- 5.4 AMTA further considers that regulators should not be provided immunity from prosecution with respect to public warning notices and notes that this was also the position adopted by the Productivity Commission².

6. Door-to-door trading and telemarketing

- 6.1 In principle, AMTA supports a move towards nationally consistent regulations for door-to-door trading and telemarketing. The current arrangements, with different door-to-door and telemarketing arrangements in each jurisdiction, are unnecessarily burdensome and costly for business and difficult for consumers and business to navigate.
- 6.2 AMTA does not currently have a position on what form a national regulation might take, but notes that taking the most restrictive regulations from each state to form a 'national' regulation would not necessarily be the best solution for either business or consumers.

² *Review of Australia's Consumer Policy Framework, P251*

- 6.3 AMTA proposes that protections currently afforded under existing legislation (e.g. cooling off periods) be limited to traditional door-to-door and telemarketing sales where consumers may feel 'pressured' into entering a transaction. The broader protection currently available under the Victorian Fair Trading Act arguably extends well beyond the 'pressure' situations that legislation seeks to regulate, is unduly burdensome to suppliers and should not be adopted.
- 6.4 AMTA also notes that door-to-door and telemarketing sales have similar features. To this extent, there may be merit in considering alignment of the two provisions, where applicable.
- 6.5 AMTA would be keen to engage with Treasury on this issue as it considers its options moving forward.

7. Mandatory disclosure

- 7.1 AMTA is keen to ensure that consumers have access to plain-English information about mobile telecommunication products and works to help consumers enjoy mobile phones in a financially affordable and responsible manner through its various educational initiatives. This has included producing 'consumer tips sheets' on issues as diverse as financial management, safe driving and mobile bullying. AMTA has also produced a website specifically for young people, addressing a number of mobile phone-related issues.
- 7.2 Industry players are also individually required to provide consumers with information at various stages of the consumer lifecycle, often in a prescribed format.
- 7.3 AMTA suggests that imposing further requirements on industry to provide consumers with yet more information would not be effective in improving consumers' understanding. It would just be information overload. What is required is a review of not only what information is provided, but how it is provided and by whom, to ensure that consumers are educated in a manner they understand and provided with information they can retain and reuse.
- 7.4 AMTA suggests that it may be worthwhile considering an approach such as that being followed by the Financial Literacy Taskforce, with a coordinated, nation-wide approach to improved awareness of legal issues for consumers, starting from school age.

8. Other issues

Return of replaced parts

- 8.1 AMTA does not consider that it would be beneficial to require suppliers to return replaced parts to consumers in all circumstances. Indeed, it may be environmentally irresponsible to request that mobile handsets are always returned; the mobile industry is a standout performer in the area of recycling, with AMTA running a world-leading scheme on industry's behalf, "MobileMuster". MobileMuster is the only industry-wide program for electronic waste offering free recycling for all mobile phone brands in Australia. It is believed to be the only such scheme in the world.
- 8.2 The mobile telecommunications industry voluntarily initiated the program, which collects mobile phone handsets, batteries, chargers and accessories from a network of over 3000 public collection points, in 1999. More than 90 percent of the materials in mobile phones, batteries, accessories and chargers can be recovered. These materials are then turned into useful products. Recycling mobile phone materials avoids between 60 to 90 percent of the greenhouse gases that would normally be emitted when making these products from new materials. The program also allows the small amount of potentially harmful substances within mobile phones to be safely disposed of.
- 8.3 Service centres are a key channel for recycling, with 18 per cent of the mobile handsets and parts (by weight) currently recycled collected via service centres. The risk of these handsets and parts ending up in landfill would be substantially increased if service centres were required to return them to consumers.

False and misleading representations

- 8.4 AMTA does not consider it necessary to augment Sections 53, 53A and 53B of the TPA to include specific provisions against false and misleading representations. The current provisions already cover these examples.

False billing

- 8.5 Similarly, AMTA does not consider that Section 64 of the TPA requires amendment. It is effective in its current form.

Disclosure of a supplier's address

- 8.6 AMTA suggests that it is unnecessary to include a requirement that a supplier's address be disclosed on all documents, statements and advertisements. It would be impractical, particularly for some mediums (such as SMS). AMTA notes that it is important that consumers are easily able to identify the sender, but suggests that this is already adequately covered by existing rules and regulations. (For example,

the Spam Act requires that legitimate commercial messages sent from Australian businesses include the name of the individual or business sending the message, their contact details and a way of opting out.)

Itemised billing

- 8.7 AMTA does not consider it necessary to include a provision relating to itemised billing. The telecommunications industry already operates under sector-specific regulations in the form of the TCP Code. This includes provisions for itemised billing.
- 8.8 If itemised billing is to be considered, AMTA urges the costs and benefits to be carefully considered and that adequate consideration be given to provisions already guiding specific industry sectors on this issue (such as the TCP Code).

9. Conclusions

- 9.1 The current regulatory environment in Australia is complicated and duplicative, particularly for industries such as telecommunications that are subject to both generic and industry-specific legislation. To that extent, the development of the ACL provides a welcome and logical opportunity to review and reform the current regulation.
- 9.2 It is critical, however, that the review remains focused on the key objectives of removing duplications and inconsistencies and filling any clearly defined gaps in consumer protection. It needs detailed consideration to avoid the risk of imposing an onerous and impractical burden on suppliers that is incommensurate with the consumer risks that the law intends to address.
- 9.3 AMTA is concerned that government may be considering changes that unnecessarily extend the current provisions without clear justification that it is beneficial to do so, and without adequate cost-benefit analysis of the options. AMTA holds particular concerns about the proposals to introduce an outright ban of certain contract terms as such a move may have the practical effect of preventing reasonable and desirable changes.
- 9.4 AMTA appreciates that the 'devil is in the detail' on many of these issues, and would welcome the opportunity to provide more detailed input to the draft provisions as they are made ready.
- 9.5 AMTA would also welcome the opportunity to contribute to the process of reviewing current generic and industry-specific regulation with a view to repealing or harmonising it.

9.6 AMTA thanks Treasury for the opportunity to comment and looks forward to further discussing the many issues in due course.

10. Apendices

Attachment A: Indicative List of Regulation for the Mobile Telecommunications Sector

1. **Primary legislation** includes:
 - Australian Communications & Media Authority Act 2005
 - Telecommunications Act 1997
 - Trade Practices Amendment (Telecommunications) Act 1997
 - Telecommunications (Universal Service Levy) Act 1997
 - Telecommunications (Carrier Licence Charges) Act 1997 as amended in 2005
 - Telecommunications (Numbering Charges) Act 1997 as amended in 2005
 - NRS Levy Imposition Act 1998
 - Telecommunications (Consumer Protection and Service Standards) Act 1999 as amended in 2005 regarding the National Relay Service
 - Spam Act 2003

2. **Delegated Legislation made by ACMA - Consumer Protection Examples**
 - Performance Standards
 - Telecommunications (Performance Standards) Determination 2002
 - Premium Services
 - Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)
 - Telecommunications Service Provider (Premium Services) Determination 2004 (No.2)
 - Telecommunications Service Provider (Premium Services) Amendment Determination 2004 (No.1)
 - Telecommunications Service Provider (Premium Services) Determination 2004 (No.1)
 - Standard Form of Agreement
 - Telecommunications (Standard Form of Agreement Information) Determination 1999
 - Telecommunications (Standard Form of Agreement Information) Determination 2003
 - Telecommunications (Consumer Protection and Service Standards) (ATS Marketing Plans) Determination 2001 (No.1)
 - Telecommunications (Customer Service Guarantee) Standard 2000 (No.2)
 - Telecommunications (Customer Service Guarantee) Amendment Standard 2001 (No. 1)
 - Telecommunications (Customer Service Guarantee) Standard 2004 (No. 1)

- Telecommunications (Customer Service Guarantee) Amendment Standard 2004 (No.1)
3. **Industry Codes in Consumer Protection Area – adopted by the Australian Communications Industry Forum (not exhaustive)**
- ACIF C513:2004 Customer and Network Fault Management
Specifies the minimum requirements to manage Customer and Network faults across networks
 - ACIF C518:2000 Call Charging and Billing Accuracy
Defines the minimum required level of call charging and billing accuracy. Note: C518:2000 is not relevant to individual billing complaints.
 - ACIF C522:2007 Calling Number Display
The Code was revised to clarify C/CSP use of CLI information, clarify requirements on C/CSPs to provide a per line display for unlisted entries and review code requirements in relation to VoIP providers.
 - ACIF C564:2004 Deployment of Mobile Phone Network Infrastructure
The Code specifies the best contemporary practices in the areas of design, installation and operation of radiocommunications infrastructure. The Code requires the application of a precautionary approach to the deployment of radiocommunications infrastructure and contains obligations on carriers to consult.
 - ACIF C570:2005 Mobile Number Portability
The Industry Code has been developed to specify the procedural arrangements required to Port a Mobile Service Number between Carriage Service Providers, where there is a change in Mobile Carrier network. Elements of the Industry Code could be utilised by Carriers and Carriage Service Providers in other customer transfer scenarios. Carriers and Carriage Service Providers (including long distance CSPs) must fulfil their routing obligations under the Numbering Plan. This Industry Code provides for automated interfaces between Mobile Carriers/Carriage Service Providers to support Mobile Number Portability in the distribution of routing information.
 - C628:2007 Telecommunications Consumer Protections (TCP)
This industry code contains service provider rules about:
 - advertising of products and informing customers about the prices, terms and conditions of products on offer;
 - determining when consumer contract terms may be considered unfair, including having regard to the intelligibility and accessibility of contract terms;
 - billing procedures and the provision of billing information to customers;

- the credit assessment of customers, the provision of security and credit control tools, and a requirement to have a financial hardship policy to assist customers experiencing financial difficulties;
- ensuring all transfers of service that occur are authorised and verified; and
- complaint handling procedures for information provision to customers and recording of their complaints.