

AUSTAR Entertainment Pty Limited

**An Australian Consumer Law: Fair Markets – Confident
Consumers**

Response to Consultation Paper



17 March 2009

**To: SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
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Contents

- 1. Introduction..... 4
- 2. Background 4
- 3. Unfair Contract Terms 5
 - 3.1. In Principle Support 5
 - 3.2. Banning of Specific Terms..... 5
 - 3.3. The Model..... 6
- 4. Enforcement Powers 7
- 5. Consumer Law Reforms in Existing State and Territory Laws 8
 - 5.1. Definition of Consumer 8
 - 5.2. Door To Door Regulation..... 9
 - 5.3. Telemarketing Regulation..... 11
- 6. Conclusion..... 12

1. Introduction

AUSTAR Entertainment Pty Limited (**AUSTAR**) welcomes the opportunity to respond to the information and consultation paper developed by the Standing Committee of Officials of Consumer Affairs and released by the Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs in February 2009 (**Paper**).

We have a keen interest in the development of consumer policy and regulation due to our position as a major provider of subscription television and communications services to consumers throughout regional Australia.

2. Background

AUSTAR is one of Australia's leading subscription television providers, supplying digital television services to customers in regional and rural Australia. AUSTAR also offers internet and mobile telephone services.

AUSTAR provides services to consumers in regional areas of NSW, Victoria, Queensland, and South Australia and to all areas of the Northern Territory and Tasmania (**AUSTAR Areas**). Our television, mobile and dial-up internet products are made available to consumers in all AUSTAR Areas; our broadband product is currently available in two regional markets.

As a major provider of consumer services across nearly all states and territories in Australia, we are acutely aware of the challenges and barriers raised by the different regulatory regimes in each jurisdiction. We support the Paper's view that the differences arising in consumer protection across the different jurisdictions provides an inconsistent message to consumers about their rights and responsibilities. This is in addition to the very real burden that we face in implementing multiple compliance systems and processes for the divergent regulatory regimes. The compliance costs associated with reviewing, advising, implementing and monitoring the differences (which in most cases are peripheral in their impact) outweigh, in our view, the benefits delivered. We welcome the Council of Australian Governments (**COAG**)'s agreement to the consumer law reforms which will deliver a single national consumer law and we strongly support the objective of reducing regulatory complexity for business.

Within the context of our overall support for this initiative, we have provided some particular comments on certain of the agreed reforms and their implementation, and other areas proposed for reform, as set out in the Paper. We may comment on further issues as the draft law develops.

3. Unfair Contract Terms

3.1. In Principle Support

We fully support COAG's agreement to the inclusion of a provision regulating unfair contract terms in the proposed new Australian Consumer Law. We agree that a national approach to unfair contract terms regulation is key. For most businesses already providing goods or services to consumers on a national basis, the Victorian regime for unfair contract terms has had a significant impact on the development of consumer contracts. AUSTAR has a standard form consumer contract for subscription television services which is used nationally and which has been developed to be compliant with the Victorian regime for unfair contract terms. It is therefore critical that divergent regulatory regimes be minimized both across jurisdictions and at a sector specific level.

3.2. Banning of Specific Terms

With regard to the model agreed by COAG and set out in the Paper, AUSTAR supports the general features of this model. The key to the model is the principle that:

"a term is '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".

In addition the model proposes that the regime will:

"require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected."

With these principles in mind, AUSTAR does not support the proposal that any contract terms be expressly banned in the initial text of the Australian Consumer Law. The general principle of the model recognises that the question of whether a term is 'unfair' or not depends in part on the context of the use of that term and the surrounding circumstances, namely whether it is or is not "reasonably necessary to protect the legitimate interests of the supplier". In addition the model acknowledges that the operation of the regime must take into account "the broader interests of consumers". Whether a term is unfair or not depends on the context. Extenuating circumstances may exist which cause the term to be justified. In light of this, banning certain types of unfair contract terms would be too prescriptive at this early stage of the law. Retaining the power to prescribe terms where there is a demonstrable failure in the general application of the law is sufficient.

In the event that it is considered necessary to prescribe specific terms at this early stage, we strongly urge the Standing Committee of Officials of Consumer Affairs (**SCOCA**) to remove the suggested term relating to flat/fixed early termination fees and those requiring paying out of the contract.

Early Termination Fees

An early termination fee (**ETF**) in the context of a service provided on a continuing basis which requires a significant upfront cost for activation (and which is waived by the service provider for the benefit of the subscriber) is a fair and appropriate means for the service provider to recover certain sunk subscriber acquisition costs where a subscriber terminates a fixed term contract earlier than originally agreed. Such costs would otherwise have been recovered through the pricing for the service if the contract had run its full term. Without such provisions, the upfront costs for many consumers in a number of different service areas would be prohibitive, cutting off access to such services for many consumers. We welcome the fact that there is no suggestion that such a provision is in itself unfair.

We are, however, concerned with the suggestion that flat or fixed ETFs be prescribed as unfair. To do so without taking into account the particular circumstances both of the supplier and consumers more generally (as would occur if the general model was applied) may result in unintended consequences. For example, AUSTAR, in its provision of subscription television services on a 12 month fixed term contract, has chosen to average out the sunk costs incurred for each subscriber and apply one fixed amount as the ETF in order to recover a significant portion of its sunk costs for that subscriber. Accordingly, consumers who terminate early in the term of the contract will be paying a considerable amount less than the actual costs incurred by AUSTAR. Our statistics show that consumers, who terminate prior to the expiry of the term of the contract, terminate on average prior to the 6 month mark. Accordingly, the majority of AUSTAR subscribers who are liable for the ETF are liable for an amount which is considerably less than AUSTAR's costs. By banning this type of provision, we believe that ETFs payable for the majority of consumers who incur an ETF would be considerably higher than they are now – this would certainly be the case for AUSTAR. We have chosen to apply this averaging approach (albeit that in the majority of cases it will leave AUSTAR out of pocket) for simplicity reasons. The approach is easily understood by a consumer and the complexity in our billing systems and processes is considerably reduced (with a commensurate reduction in the operating costs we take into account in determining the price of our product to consumers).

The application of “paying out the contract term” as opposed to paying the fixed ETF is applied in AUSTAR's case because a fixed fee exists, recognising that in these circumstances, it may be cheaper for the consumer to pay out the term. For AUSTAR this provision is only applied because of AUSTAR's decision to apply a fixed fee model (for the reasons explained above) and in order to provide a simple and easily understood framework for consumers.

If you were to apply the general model, it would be reasonable for you to consider both the legitimate interests of the supplier and the broader interests of consumers, ie not just the specific consumers affected by a late termination. In this case, the majority of consumers are in a better position through the application of the averaged ETF.

3.3. The Model

The remaining principles of the model are integral to the operation of an equitable regime recognising the needs of both consumers and businesses, and avoiding the risk of regulatory overreach. In particular, we support the inclusion of the principles that remedies only be available where the claimant shows detriment or a substantial likelihood of detriment; that the

provisions apply only to standard form non-negotiated contracts; and that the upfront price of the goods or service be excluded from the regime. These elements are critical to a workable regime and we support their inclusion.

We note that there is reference to the provision being extended to standard form contracts entered into by businesses, ie the regime would not be confined to individual consumers. We disagree with this proposal and have provided further comment on this issue in Section 5.1 below.

We fully support the proposal that the regime and its implementation be reviewed within 5 years of its introduction.

4. Enforcement Powers

AUSTAR supports the inclusion of additional enforcement powers to deal with breaches of the new Australian Consumer Law, however we believe that certain of the proposals outlined in the Paper are too heavy-handed within the context of consumer protection and could severely increase the burden of compliance by business without any material benefit.

In particular, AUSTAR does not believe that the regulator requires the ability to issue a substantiation notice. The addition of this investigative tool could require a business to undertake large-scale internal investigations at an excessive cost in order to comply with a possible wide-reaching notice from the regulator.

If COAG intends to support their introduction, we urge COAG to restrict the operation of such notices to avoid regulatory overreach. At a minimum, the power should be restricted in a manner similar to the way that section 155 notices under the *Trade Practices Act 1974 (TPA)* are currently crafted. A regulator must have a 'reason to believe' that a person is capable of furnishing information relating to a possible contravention before issuing a notice.

We also recommend that the power to issue a notice be limited to circumstances where the regulator is investigating a specific alleged breach of the consumer protection provisions – the power should not entitle a regulator to issue notices as part of a “fishing expedition”. In addition, the recipient of a notice should be entitled to negotiate the width of the notice with the regulator to ensure that an investigation is appropriate and targeted to the relevant areas of the business' operations. This is important to ensure that a notice does not require unwarranted investigation and the expenditure of unjustified time and cost by the recipient of a notice.

In addition, AUSTAR does not support the proposed reform to include powers to impose civil pecuniary penalties, such as disqualification orders in relation to breaches of the Australian Consumer Law. The redress in relation to breaches of consumer rights should remain at the consumer level, and should not disproportionately extend in the same way as Part V penalties under the TPA operate in relation to the competition provisions. AUSTAR believes that redressing a breach of a consumer provision, should be limited to the specific circumstances surrounding that consumer.

5. Consumer Law Reforms in Existing State and Territory Laws

We note that the suggested reforms in Chapters 10 and 11 have not yet been agreed by the federal and state governments. We appreciate the opportunity to comment at this early stage. We support the view that any potential reforms be subject to an appropriate regulatory impact assessment based on the principle of best practice regulation.

In principle, we fully support proposed reforms to the generic consumer protection provisions in order to harmonise existing state and territory laws and to develop a uniform national legislative approach. The reduction in cost and complexity in operating our business due to these reforms will be material, and we welcome the proposals.

AUSTAR agrees with the PC's recommendation that the consumer protection provisions of the TPA be modified by reference to best practice in existing state and territory laws where it is agreed that the TPA is not adequate. However, it is critical to ensure that a workable and consistent approach is taken. In most cases, the regulatory framework of each jurisdiction is successful in functioning as a whole in its own independent capacity. It would be difficult, in our view, to take a position of pulling separate elements of different jurisdictions (albeit that each element is viewed as "best practice") into one system. We suggest that one state's framework for each particular area be adopted in its entirety. Our views on this are further expanded below where we have commented on specific areas of regulation.

5.1. Definition of Consumer

The TPA's existing definition of "consumer" should not be expanded to cover a wider range of circumstances, such as goods or services used in a business context.

Under the section on unfair contract terms, the Paper suggests that in the case of standard form contracts, the interests of business are essentially the same as those of an individual consumer in respect of the potential for unfair contract terms. We disagree with this analysis. Where a business is acquiring goods or services for business as opposed to personal purposes, the business has the requisite knowledge to understand the scope of the agreement, even where the agreement is of a standard form. The acquisition is generally for re-supply or incorporation in the business' own products and so there is, or should be, a detailed understanding of the implications of any contractual terms. This position of knowledge enables a business to make an informed decision about the use of such goods or services in its own business and can be easily distinguished from an individual consumer.

AUSTAR believes there should be a single definition of "consumer" and that this definition should be based on whether the consumer is acquiring a service or product for business purposes as opposed to private or household consumption. The monetary threshold (at least in the context of unfair contract terms) should not apply.

5.2. Door To Door Regulation

By way of background, door-to-door sales are a critical part of AUSTAR's residential sales. The local face to face consultation facilitated by door to door trading allows a real time review of a customer's entertainment needs and the handling of pre sale enquiries. On average, AUSTAR employs around 220 employees and contractors to carry out our door-to-door activities across Australia each year. Many of these individuals have been comprehensively trained and provided with new skills – skills and opportunities that are not readily available in many of the regional cities or towns they live in.

In light of the importance of door-to-door activity to AUSTAR and the wider economy, we strongly support the proposal to harmonise door-to-door practices across all States. We believe that the regulatory burden of compliance with six separate State regimes in AUSTAR Areas is unnecessarily onerous. For example, the costs of creating, formatting, reproducing and printing six different versions of a cooling-off notice for use in each AUSTAR Area, is extremely high – using a uniform approach would reduce this cost by 70%. In addition, it is necessary to conduct separate training for each of our sales representatives who conduct door-to-door sales in AUSTAR Areas and to adopt different policies and procedures in each State in order to comply with the different regulatory requirements. Further, from an operational and technical perspective, we are required to administer different systems and IT specifications across each AUSTAR Area. Accordingly, as a business operating nationally, having to control separate processes in each AUSTAR Area reduces the ability of the business to streamline operational costs and create efficiencies in the management of our door-to-door activities. These costs in turn are reflected in the pricing of our services to customers.

Even though we agree with the principle of harmonisation, we do not believe that 'cherry picking' different aspects or provisions from different State jurisdictions is an appropriate way of creating uniform door-to-door regulations under the Australian Consumer Law. We believe that the most appropriate way of creating consistent regulation is to adopt the approach contained under Part 4, Division 3 of the Fair Trading Act 1987 (NSW) – as applied to door-to-door sales only. As discussed later in this submission, we do not believe that there is a need for telemarketing regulation in the Australian Consumer Law.

We believe that the following elements of the NSW legislation adopt the principles of best practice regulation, in that they appropriately balance the need for consumer protection with the practical reality of operating a business.

a) Calling hours

The NSW legislation prohibits calling on a consumer after 8pm on any day or before 9am on any day for the purposes of negotiating a door-to-door contract, unless the dealer has made an appointment with the consumer. The same prohibited hours operate across all other States except for QLD.

By way of background, the products AUSTAR offers are based on a variety of packaging options. In general, customers can acquire a base package of channels; and then choose from a number of optional tiers of entertainment and premium content channels (eg a sports tier of sports channels, a movie tier of movie channels). In addition, customers may acquire additional

single channel options, and in many cases other optional services, such as interactive services, additional connections, and alternative functionality, such as personal digital recorders, etc. The products we offer require a level of detailed collateral and information for customers to be fully informed and capable of choosing the most suitable product to meet their needs. The face to face contact that we provide through our door to door activities enables customers to ascertain exactly the level of service they require.

Most householders are at home between the hours of 5pm to 8pm, and therefore these trading hours are the most beneficial for consumers. In light of the complexity of the products on offer, the provision of local trained representatives with appropriate collateral information, which explains our services, our products and pricing, is a valuable resource to assist consumers in making informed purchase decisions. After 5pm, there is a far greater likelihood of both or all family decision makers being present enabling a more informed enquiry and an appropriate choice for the whole family being made at the point of sale.

Therefore, we strongly believe that the prohibited hours should extend from 8pm and no earlier, as is the case across most jurisdictions currently.

b) Provision of service where requested during cooling-off period

As a matter of consumer policy, AUSTAR believes that any uniform door-to-door regulation should provide consumers with the ability to make an informed choice whether or not they wish to be provided with services during the cooling-off period. This is particularly so for services that are provided to a consumer on a continuing basis, such as the provision of subscription television. AUSTAR does not believe that is the place of regulation to inhibit a consumer's ability to make an informed decision to accept services immediately after a sale is made.

We believe that there are very real circumstances in which a consumer will want to accept service during the cooling-off period. For example, if a customer signs up to an AUSTAR contract because they are an avid sports fan and want to be able to watch a particular rugby, cricket or football game that week, under all of the State legislation (except NSW), we cannot provide service to that customer until the cooling-off period expires, even where the customer has specifically requested it in order to view the upcoming match.

However, under the NSW legislation, dealers can provide services during the cooling-off period (and in addition, where services are supplied to a consumer on a continuing basis, can collect money for those services)¹. Of course, there is a requirement to refund fees collected during the cooling-off for unused services². This means that, in effect, where services are provided to a customer during the cooling-off period, and the customer subsequently cancels the contract during the cooling-off, that service will have been provided for free, and the only cost lies with the dealer in such circumstances and not with the consumer.

¹ Regulation 105 of the Fair Trading Regulation 2007 (NSW) provides that section 40H of the Fair Trading Act 1987 (NSW) does not apply in respect of any direct commerce contract for services that are supplied to the consumer on a continuing basis. Section 40H prohibits the collection of money during the cooling-off period.

² Regulation 107 of the Fair Trading Regulation 2007 (NSW)

AUSTAR strongly endorses these provisions and believes that such an approach is completely in line with the principles of consumer protection and best practice regulation – it provides consumers with flexibility and choice, while at the same time providing businesses with the ability to offer their products and services in a consistent and cost effective manner.

c) Cooling-off period and notices

AUSTAR acknowledges that the cooling-off period in the NSW legislation is 5 business days, whereas across all other States it is 10 days. AUSTAR does not endorse one length of time over the other. However, given that the systems in place across the majority of AUSTAR Areas (and we assume a majority of national businesses) are already operating on 10 days, we believe that adopting a cooling-off period of 10 days is appropriate.

Not only will the impact of reform be minimal to businesses conducting door-to-door sales, but it will require less consumer education of the new uniform regulation if the cooling-off period remains the same as it currently is across the majority of States. In this regard, we strongly oppose the European Commission's proposal to extend the cooling-off period to 14 days. AUSTAR does not believe that the length of time within which to cancel a consumer contract is currently too short and is of the view that 10 days appropriately provides consumers with enough time to cancel a contract.

In addition, AUSTAR believes that a cooling-off notice be uniform across all States. Although certain requirements for a cooling-off notice should be specified to ensure that consumers are appropriately protected, we do not believe that a prescribed form is necessary.

d) Summary

In summary, as a major provider of services conducting door-to-door activity in regional Australia, we recommend that the Australian Consumer Law adopt a provision regulating door-to-door sales (in place of state regulation) and that the provision be based on the NSW regime.

In developing regulation in this area, we also suggest that there be lighter regulation, or in certain circumstances, exemption from specific provisions for "*services provided on a continuing basis*", ie services which cannot be truly reviewed or assessed until activation, for example subscription television services and other communications services. For example, the risks associated with providing service and paying for service during a cooling-off period are minimal where the service is a continuing subscription service and the consumer is still entitled to terminate without cost. We would be happy to comment further on this issue and in more detail if and when specific provisions are drafted.

5.3. Telemarketing Regulation

AUSTAR does not believe that the Australian Consumer Law should extend to the regulation of telemarketing activities. Telemarketing is already heavily regulated and the current national regulations are effective, in our view, in protecting consumers' interests. As outlined in the Paper, this can be seen by the following:

- *Do Not Call Register Act 2006* – this legislation provides consumers with the ability to exclude themselves from receiving marketing calls from businesses at all.

While, of course, we understand and support the consumer objective driving the introduction of the Do Not Call Register, its introduction has significantly affected the effectiveness of our outbound sales channel. This will be an ongoing factor determining AUSTAR's future investment in this activity.

- *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* – this standard establishes a minimum set of requirements (including national standard calling hours) for making telemarketing and research calls and attempts to balance community and industry expectations in relation to the making of telemarketing and research calls by businesses.
- *ADMA Direct Marketing Code of Practice* – although voluntary, most organizations engaging in direct marketing comply with the best practice outlined by this Code which provides guidelines on how to make and carry out telemarketing activities to ensure the protection of consumers.
- *Spam Act 2003* – this regulates the ability of AUSTAR to send unsolicited electronic messages to prospective customers.

In light of the existing regulation in this area at a national level, we do not believe additional telemarketing laws are required. They would, in our view, be redundant and yet they would impose a significant burden on business. We are already heavily regulated in this area at a national level and believe further regulation (including the extension of the NSW and Victoria approaches) would have a severely limiting effect on the telesales industry. We do however recommend, for harmonization purposes, the removal of state regulation in this area.

If COAG does proceed to introduce additional telemarketing regulation as part of the Australian Consumer Law, we would urge COAG to adopt the NSW regime for the same reasons identified in Section 5.2 above.

6. Conclusion

We welcome the announcements and steps taken by COAG to develop a national consumer law and look forward to providing further comment as the Australian Consumer Law develops. If you require further information or have any queries relating to the comments we have made, please do not hesitate to contact myself or Sophie Jackson of this office on 02 9394 9883.

Yours sincerely,



Deanne Weir
Group Director Corporate Development & Legal Affairs