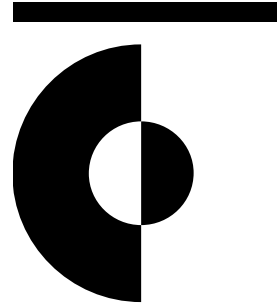


17 March 2009

SCOCA Australian Consumer Law
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600
Email: australianconsumerlaw@treasury.gov.au



**Telecommunications
Industry
Ombudsman**

Deirdre O'Donnell
Ombudsman

Dear Sir/Madam

An Australian Consumer Law: Fair Markets – Confident Consumers (A Discussion Paper)

The TIO welcomes the initiative of the Ministerial Council on Consumer Affairs to introduce a national consumer law to enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy.

A national framework for consumer protection in Australia will enhance consumer confidence and ensure consistency in decision making by suppliers, regulators and industry alternative dispute resolution schemes such as the Telecommunications Industry Ombudsman (TIO).

The TIO supports the broad initiatives and proposed consumer law reforms as envisaged in the Discussion Paper on 'An Australian Consumer Law: Fair Markets – Confident Consumers'. The TIO's responses to the specific questions set out in the Discussion Paper are set out below. Please note that we have only commented on the questions that are of relevance to, or within the expertise of, the TIO. We also include some material about the TIO for your information.

I trust that the responses set out in this document will help further inform the proposed reforms in this area. I am happy to provide clarification about any of the points outlined below, if required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D O'Donnell'.

Deirdre O'Donnell
Ombudsman

"providing independent, just, informal and speedy resolution of complaints"

Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787

Website: www.tio.com.au
Email: tio@tio.com.au

Postal address:
PO Box 276
COLLINS ST WEST VIC 8007

Street address:
Level 3
595 Collins Street
MELBOURNE VIC 3000

Tel freecall*: **1800 062 058**
Fax freecall*: 1800 630 614
Telephone: (03) 8600 8700
Fax: (03) 8600 8797

*calls from mobile phones may incur charges

About the TIO

The TIO is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone, mobile or internet service. We aim to settle disputes quickly in a fair, objective and non-bureaucratic way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances.

We are “an office of last resort” meaning that, in the interests of fairness, the service provider must be given a reasonable opportunity to settle a complaint with a customer before the TIO will become involved.

The TIO investigates complaints by considering the facts provided by both parties in a dispute and seeks to assist both parties to reach a fair and equitable resolution.

We are independent of telecommunications companies, consumer groups and government. Further information about the TIO is available at www.tio.com.au.

We record complaints according to the types of issues that complainants report to us. These include provisioning/connection delays, credit management disputes, contractual disputes and customer service/complaint handling. TIO complaints are broadly classified according to service types – internet, mobile, landline and mobile premium services – and are investigated according to the types of issues that complainants report.

In 2007/08, we received almost 150,000 complaints and over 23,000 enquiries from small business and residential consumers in Australia about their telecommunications services. Each complaint may raise one or more complaint *issues*. For example, a complaint about a provisioning delay may also raise customer service and/or complaint handling issues. We therefore recorded over 268,000 complaint issues in 2007/08.

Information about TIO complaints and complaint issues recorded in 2007/08 is available at http://www.tio.com.au/publications/annual_reports/ar2008/annual_2008index.html.

Responses to the questions in the Discussion Paper

1. **Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?**

A change in name that more accurately reflects the ambit and function of the legislation, will in the longer term provide greater clarity and ease of understanding as to its underlying purpose – that of consumer protection and competition regulation.

If the TPA is to be renamed, the TIO supports the proposed name of the *Competition and Consumer Act*.

2. **Please set out any views on whether the types of terms described in this chapter (unfair contract terms) should be banned in the initial text of the Australian Consumer Law.**

We often investigate complaints involving claims that a telecommunications supplier’s contractual terms (under their standard form of agreement) are unfair. In 2007/08, approximately 42% of complaint issues recorded about contractual complaints involved disputes about the supplier’s point of sale advice or information about the terms and conditions of the service. We investigate these complaints having regard to the State law applicable to that contract, good industry practice (including the Consumer Contracts chapter of the Telecommunications Consumer Protections Code – TCP Code)

and what is fair and reasonable in the circumstances of a particular complaint.

We find that where State legislation or the Consumer Contracts chapter of the TCP Code provides clear guidance on types of terms that are considered unfair, this provides greater certainty and clarity for consumers and suppliers alike. Conversely, we find that where State legislation (or the Consumer Contracts chapter of the TCP Code) is silent or does not describe examples of unfair contract terms, there is greater room for uncertainty and the potential for consumer detriment.

The TIO is of the view that unfair contract terms regulation modeled on Part 2B of Victoria's Fair Trading Act 1999 (the Consumer Contracts chapter of the TCP Code contains similar provisions) and which sets out a non-exhaustive list of unfair contract terms, should be incorporated in the proposed Australian Consumer Law. We believe that this will help to achieve a national, consistent and clear framework for the regulation of unfair contract terms in consumer contracts.

3. Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts? Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

The TIO receives complaints from both individual consumers and small businesses.

We note that small businesses at times do not meet the definition of 'consumer' under some State legislation – particularly in relation to those provisions relating to cooling off periods in door-to-door or telemarketing sales. We have heard from some small businesses that claim they are targeted by telecommunications suppliers who seek to take advantage of gaps in the applicable State legislation.

We note that small businesses are sometimes sold telecommunications services bundled with equipment leases on four to five year fixed term contracts, without being given the option of a cooling off period. In circumstances where small businesses are not given an opportunity to consider such contracts, significant detriment may result. This is because such bundled agreements can be difficult to interpret and the financial obligations attached to equipment leases are typically substantial.

In our experience, small businesses do not always have the resources to negotiate telecommunications contracts which suit their needs and some small businesses subsequently find themselves in positions of unequal bargaining power.

We believe there may be merit in expanding the definition of 'consumer' to cover a wider range of transactions particularly where the contractual obligations have significant impact on small businesses.

The TIO is not in a position to comment on whether this definition should be expanded to include farming undertakings.

4. Should a new definition of 'consumer' retain the monetary limit of \$40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

As mentioned above, in the telecommunications context, suppliers can offer telecommunications services to small businesses on the basis of four to five year fixed term contracts. In these circumstances, the overall value of the contract over its lifetime can exceed \$40,000.

The introduction of small businesses within the scope of 'consumers' would therefore require a consideration of whether the current monetary limit of \$40,000 should be increased.

5. Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties?

**Should a new definition retain the exclusion in relation to ‘resupply’?
Are there other approaches to the way that ‘consumer’ can be defined?**

For the reasons set out in points 3 and 4 above, the TIO believes there may be merit to the view that the definition of ‘consumer’ should incorporate small businesses – and that the protections currently conferred on individual consumers should be extended to small business consumers. This position may need to incorporate a reasonable threshold for what constitutes a ‘small business consumer’.

6. Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

See our response to question 7 below.

7. Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

The TIO receives and investigates complaints involving door-to-door sales and telemarketing of telecommunications services. These types of complaints are typically captured under the TIO’s categories of ‘contracts’ or ‘transfers’ under the sub-categories of ‘denial of all knowledge’ (of the contract), ‘point of sale advice about product or terms’ or ‘unauthorised transfers – no informed consent’.

In most instances involving individual consumers, we find that existing State legislation can diverge on a number of aspects – the cooling off periods, the notification of how to exercise consumers’ right to cancel, visiting times, cancellation procedures, etc. We have noticed that from time to time, some telecommunications suppliers appear to have taken advantage of this divergence when engaging in door-to-door sales or telemarketing of their products.

A national legislative framework with consistent and clear provisions regulating unfair practices in the areas of door-to-door sales and telemarketing, will address the current divergence in regulation of these practices. The proposed Australian Consumer Law should include provisions regulating telemarketing and door-to-door sales. The introduction of provisions regulating telemarketing and door-to-door sales should be aimed at providing greater protection for consumers – in this regard, we propose that small businesses be included within this scope of protection.

We have found the Victorian provisions (see Part 4 of the Victorian Fair Trading Act 1999) in these areas comprehensive and useful in addressing the types of complaints we often encounter. Some of the areas of specific approaches that we have found useful include:

- requirements for ‘explicit informed consent’ of consumers
- the minimum requirements for a valid agreement to exist
- notice for cancellation of the agreement, and
- the consequences if a supplier does not comply with these requirements.

**8. Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?
If an approach like that in section 16 of the Victorian FTA were adopted, should a ‘reasonable time’ be defined? If so, what would a reasonable time be?**

The TIO receives complaints where complainants claim that the telecommunications suppliers offered them ‘free’ items if they agreed to a telecommunications service contract. In some instances, the ‘free’ item is a mobile handset – in other instances the ‘free’ item is a plasma television or goods of

significant value that are not 'free', but are instead provided as a subsidised part of the agreement or are subject to separate rental agreements. Usually the dispute centres around allegations of misrepresentation as to whether these items are 'free' with claims by the consumer that verbal representations at point of sale are inconsistent with the written contract. Occasionally, the dispute centres around a delay in the delivery of the 'free' items.

In instances where there is an inordinate or unreasonable delay in providing these items, the TIO examines whether it would be fair and reasonable for the supplier to release the consumer from the contract without early termination fees or further costs.

The introduction of a 'reasonable time' in section 54 of the TPA along similar lines to section 16 of the Victorian Fair Trading Act 1999 would add greater robustness to section 54 of the TPA. A 'reasonable time' in our view, should be defined to encompass what would be reasonable in the circumstances of a particular transaction.

9. Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

The Guidelines to the telecommunications industry's TCP Code contain minimum standards for telecommunications standard form contracts. Despite this, the TIO notes that telecommunications standard form contracts often are not accessible, legible or comprehensible for the average consumer. Some contracts involve lengthy paragraphs, complex language and run into multiple pages. Whilst some State legislation makes provision for minimum standards in consumer contracts, these provisions are not always consistent or of sufficient scope.

The proposed Australian Consumer Law should include a provision for minimum standards for consumer documents – that addresses issues of legibility and comprehensibility. The average consumer should be able to read and understand their contract. In this respect, we have found the provisions in the Victorian Fair Trading Act 1999 a useful benchmark.

10. Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Our view is that the proposed Australian Consumer Law should include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements – with an addendum that this disclosure should be clearly legible or visible. One area of significant consumer impact as a result of such a provision is in relation to mobile premium services – where content service providers may, when they do disclose their addresses or contact details in advertisements, do so in very small print.

11. Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

The Billing chapter of the TCP Code currently allows consumers to request an itemised bill (if not already provided) for the current billing cycle from their telecommunications supplier. The TIO notes that more and more telecommunications suppliers are providing itemisation via online bills, but are unwilling to provide printed copies of itemised bills without payment of a fee. Under the TCP Code, telecommunications suppliers are not allowed to charge for providing itemisation of recent bills if this request relates to a billing complaint.

Any introduction of a provision in the proposed Australian Consumer Law relating to the provision of an itemised bill on request should address whether suppliers are entitled to charge for providing this and the circumstances when this may occur.

12. Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

The TIO often receives complaints about unsolicited mobile premium services. In 2007/08, approximately 55% of issues recorded about mobile premium services related to disputed charges where consumers claimed that they had not requested these services.

Whilst unsolicited mobile premium services are currently regulated under the Mobile Premium Services Industry Scheme (an industry code is in the process of being developed to take over the obligations under the Scheme), the extension of the current application of section 65 of the TPA to services would assist in reducing the likelihood of incidence of these types of unsolicited services and provide better protection for consumers in this sector of the economy.