

Consumer Policy Framework
Productivity Commission Review
2007

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Prepared by the
Consumers' Telecommunications Network

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Introduction

About CTN

The Consumers' Telecommunications Network (CTN) is a national peak body of consumer and community organisations, and of individuals representing community interests, who participate in developing national telecommunications policy. We advocate policies for better access, quality of service and affordability of telecommunications facilities for all residential consumers. CTN's members are national and state organisations representing consumers from non-English speaking backgrounds, deaf consumers, Indigenous people, low income consumers, people with disabilities, young people, pensioners and superannuants, rural and remote consumers, women and consumers in general.

Introductory comments

Creating an appropriate policy framework for an industry as essential and dynamic as telecommunications has been extremely challenging. This submission aims to critique the successes and failures (and highlight the opportunities) of telecommunications policy. We offer examples wherever possible to highlight our experience in policy development. It is appropriate to state at the outset of our submission that CTN sees some merit in the current policy framework as it applies in telecommunications. Essential characteristics of consumer protection are largely entrenched in the policy framework; for example, the right to redress is well established through the existence of the Telecommunications Industry Ombudsman (TIO).

The fact consumer consultation is embedded in the regulatory development process is excellent, particularly in consultative structures such as the Australian Communications and Media Authority (ACMA) Consumer Consultative Forum. The downside, though, is that consumer representatives who contribute to consumer policy development are under-resourced, which can limit how effectively consumers and their interests can be represented and the extent to which the sector as a whole benefits from consumer participation and contribution.

Recommendations

Overview

CTN consulted a broad range of consumer organisations, advocates and individuals in compiling this Submission. There was a high degree of interest in this Review, and this Submission contains a large number of recommendations to improve the functioning of the Consumer Policy Framework in Australia particularly in the area of telecommunications.

CTN's recommendations to the Commission are as follows:

- That the benefits of community impact statements be considered as a tool for consumer policy
- That all consumer policies seek to enable participation through the creation of skills and opportunities that address ongoing digital divide issues
- That there be a thorough review of enforcement of consumer policy relating to e-commerce to ensure that where needed regulation is strengthened to improve outcomes for consumers using this service. Consideration of the consumer policy tool of International MOUs as have been used in the control and regulation of Spam should be an essential part of this review.
- That the Commission consult the Communications Law Centre report *Going, Going, Gone* for recommendations on consumer protection issues surrounding online auctions.
- The Commission refer to the recommendation of CTN's research report *Surfing on Thin Ice: Consumers and Malware, Adware, Spam and Phishing* and the development of effective consumer protection mechanisms, better consumer education tools about how people can protect themselves
- Consider the development of an independent/government advisory service to help consumers make better choices amongst similar product offerings
- Consider how best to provide basic information as opposed to *marketing* information, such as stricter requirements on characterising the offer, minimum font size, and basic comparability between products and more consideration as to when and the format in which information should be provided – such as at point of sale or on a website
- Enforcement and rigorous application of the false or misleading claims provisions of the Trade Practices Act; possibly more detail in the TPA what constitutes false or misleading representations in Section 53
- That telecommunications service providers be required to place (customer nominated) maximum accrual amounts on all services in order to prevent continued instances of unexpected high bills
- The use of the “capped” in relation to telecommunications pricing plans be treated as illegal by regulators, unless it has been used as a correct descriptor of a product or service with set credit limits. Enforcement action and prosecution of providers in breach of this be followed up without delay
- That marketing information be actively monitored for compliance with legislation and self-regulatory instruments on an ongoing basis. Better regulation of selling practices is needed, including the development of a licensing regime and a code of practice for salespeople

- Amend the Trade Practices Act to require all consumer information to be provided in simple, plain language
- There is a need for greater legislative certainty surrounding how a product can be characteristically described (including the use of exceptions around claims of unlimited) and in general some clearer rules for telecommunications providers about what is misleading advertising
- Formal consumer education strategies be developed by appropriate agencies that aim to enhance consumer skills to navigate the marketplace. Information needs to come from trusted and credible sources
- Consumer education campaigns need to be better targeted, include consultation with stakeholder groups, and ensure distribution avenues are part of that campaign
- It must be more clearly stated through amendments to the telecommunications legislation that a Standard Telephone Service is an essential service and therefore cannot be disconnected unless very specific procedures have been followed regardless of whether the STS is a part of a bundled service or not
- The SFOAs be replaced with a 'model contract' used by the entire telecommunications industry which establishing a benchmark of core terms, equitable conditions and a proper balance of consumer and supplier rights and responsibilities
- ACMA request via its powers in section 118 of the CPSS Act 1999 that Communications Alliance develop a VoIP Fault rectification Code and present it to ACMA for registration
- That the public interest is represented in any policy amendments that might occur in negotiating any changed regulatory arrangements for the creation of a high speed broadband network
- Mandate telecommunications as an essential service using the best legislative means of achieving that outcome
- The Federal Government to adopt a Charter of Communications Consumer Rights
- A mechanism for recognising a trigger point for consumer protection to be escalated beyond the realm of self regulation either before a matter is referred to an industry body because it is not conducive to self regulation or during the process if they become "bogged down" and do not progress.
- Consider appropriate mechanisms that rebalance the onus of proof of why a policy is or is not working between industry and consumer groups – one example of this would be to fund more consumer-driven research
- That all policy changes require specific consultation with affected groups with a commitment to developing partnership with advocates with direct links to consumers
- Long, term sustainable projects need development and funding to address systemic gaps in infrastructure roll out
- That government funded infrastructure programs to be based on established foundations and benchmarks. These benchmarks need to be consulted about and publicly committed to by the government authority to avoid poor decision making processes and outcomes

- Better feedback policies be stated, planned and included in the methodology of any participative and consultative processes by legislative, regulatory and industry bodies
- Review the Telecommunications Act with a view to rebalancing the need to develop appropriate consumer policy and the applicability of industry self regulation
- That amendments to the Telecommunications Act be implemented to ensure disability access to all telecommunications services
- Use licensing conditions across all telcos to address asymmetrical regulation of important consumer protections such as priority assistance.
- That the needs of disadvantaged and vulnerable consumers are recognised and addressed at all stages of development and implementation of the consumer policy framework in Australia
- Consider the development and resourcing of an independent body to assist disadvantaged and vulnerable consumers with information and purchasing decisions
- Research must be commissioned by Government on issues for disadvantaged and vulnerable people with specific focus on their function as consumers in the telecommunications marketplace
- The Australian Financial Counselling and Credit Reform Association report be used by the Commission to understand the junction between low income issues and pre-paid mobile phone users
- That the usage patterns of low income telecommunications users be considered in the development of appropriate mobile phone packages that can form part of a reviewed delivery of the Universal Service Obligation under the current legislation
- Payphone policies need review to take account of changed market structures with a view toward ensuring communities continue to have access to these essential services
- That the preference for mobile phones be recognised by providers in the implementation of packages designed to assist low income consumers
- There needs to be some consumer research funded to assess the breadth of implementation of financial Hardship policies in the telecommunications industry
- That the price control regime remain in place, with expansion to cover mobile service and possibly broadband services
- That the range of penalties being unfairly applied to consumers be legislatively banned
- That the development of end user skills be recognised as a priority in encouraging consumer uptake of new services
- That combination of generic and self-regulatory approaches continue, with previously suggested amendments and a rebalancing of the two approaches
- That agencies who took part in the ACMA survey on complaint handling scenarios work with ACMA to ensure that consumer complaints are referred to the right agency

- ACMA needs also to proactively address areas where consumer complaints currently have no avenue for independent redress preferably through proposing legislative amendments or regulations as necessary
- Education campaigns target groups identified from the TIO Review as having low awareness of avenues of redress
- That it be mandatory that contact details for the TIO be listed on every bill, with an equivalent notification for those who use services but do not receive bills (such as SMS for pre-paid mobile and emails for internet users)
- The TIO implement the range of recommendations from CTN's Consumer Submission to the TIO Review and publish a report as a response
- That a formal liaison committee needs to be established to between the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, and the Telecommunications Industry Ombudsman with a committing from participants to use the information provided for enforcement purposes
- That appropriate mechanisms for dealing with complaints be established at the same time as all new legislation, regulation and conferrals of power
- That telecommunications providers be covered by the Uniform Credit Code
- That further credit reforms occur in line with s made in the Consumer Credit Legal Centre (NSW) Report in Relation to Debt Collection, 2004
- That uniform national unfair contracts legislation be created
- That a civil penalties regime be introduced
- That ACMA take a more pro-active enforcement role in the telecommunications industry. This should involve more performance audits and mystery compliance checking as well as publishing regular reports on industry compliance that refer to broader indicators that simply the TIO Statistics which show only one element of compliance. ACMA should follow through with enforcement action wherever regulatory breaches are found so that the industry gets a clear message about compliance expectations
- That accountability mechanisms be developed for regulatory agency responses to systemic complaints raised with them
- That a process be developed whereby complaints that appear to fall between regulatory jurisdictions be addressed by cross agency responses in order to quickly ascertain the correct complaints body
- That the structure of the self-regulatory forum Communications Alliance be reformed in order to facilitate and better accommodate consumer issues and input
- A self-regulatory checklist be developed across all industries to consider the appropriateness of self-regulation to meet address the desired policy outcomes.
- That consumer advocacy bodies that receive public funding and represent consumer interests be required to demonstrate their links to the community they represent
- That a scoping exercise for a national consumer advocacy body be undertaken in consultation with consumer groups
- That funding for consumer representation be significantly expanded to ensure scalability relating consultation workload, stability, and sustainability

- That proper consumer consultation be built into all regulatory development processes without exception
- That there be a review of telecommunications complaints handling taking into consideration the effects of the converging communications environment and the desire of consumers to have a one stop shop. This review should develop recommendations that address the establishment of a Communications Industry Ombudsman and the complaints resolution processes used internally by service providers
- That the s376 compliance regime also apply to the Disability Standards
- That Memorandums of Understanding be used as a tool in conjunction as part of a broad policy response where appropriate (e.g. VoIP regulation, e-commerce and e-security)
- That regulatory reports especially the Annual Communications Review identify key consumer issues and report on those issues on a progressive basis

Section One – The Rationale for Consumer Policy

What are the implications of developments in theory (e.g. behavioural economics) for consumer policy? Do they render some traditional views of the role for government in this area less relevant, or do they simply require more sophistication in the analytical framework and policy toolkit?

We are pleased that in recent years greater attention has begun to focus on consumer behaviour and decision-making processes. The insights of provided by behavioural economics will have a great impact on certain policy tools in some areas of consumer policy. However there is an ongoing need to ensure that appropriate protection mechanisms remain on the telecommunications industry to allow consumers to safely navigate the marketplace. For example when a consumer wishes to buy a mobile phone, they might well be attracted by the colour and sleek design of the handset.

Regardless of, or perhaps because of the motivations that impact on consumer decision-making processes, it is important that information about the consequence of their decision is made known to them. There is an ongoing need for consumer policy to encourage consumers to make informed purchasing decisions, particularly when there are ongoing financial commitments involved. The most critical information must be provided to the consumer directly at the point of sale (as is required under a self-regulatory code of practice). Including the length of the contract they agree to (usually 2 years in telecommunications) and the minimum amount they will be liable to pay over the course of that contract

Under what conditions are markets most likely to develop responses to the various impediments to the effective participation of consumers? To what extent will the actions of well-informed consumers drive outcomes across markets as a whole?

CTN's 4 key advocacy interests highlight what we see as the 4 key impediments to the effective participation of consumers in the telecommunications marketplace.

- Accessibility
- Affordability
- Equitable access
- Universal availability

As we discuss in much greater detail elsewhere in this submission, telecommunications is an essential service. Without access to telecommunications, it is nearly impossible to participate effectively in society. That is why it is critical that barriers to participation are recognised and appropriate policy responses, which aim to facilitate the uptake of telecommunications by all consumers, are made. This means ensuring, for example, that regardless of where a person lives they have access to a Standard Telephone service; requiring mobile phone handsets to have features to allow people with disabilities to use them, such as the pip on the 5 key for blind people; and offering people on low incomes basic services so they can stay connected, such as Telstra's In Contact service.

What are the important costs of intervention? How significant are the hidden costs of intervention? How do these compare to the costs of not intervening?

Whilst cost is a factor in all policy decisions, the cost of costs of exclusion is often disregarded. Not having mobile phones with certain accessible features means that people with disabilities can't use them and are excluded from being able to communicate, which would also possibly be a breach of the Disability Discrimination Act. Not having a national copper wire phone network that reached into remote areas would cause great difficulties for those who need to contact people in those areas. The important point is that while cost is a factor, it is not the only factor. Without good policy frameworks that require basic things like interoperability, quality of access, price controls, and universal coverage, telecommunications policy fails not just certain consumers but all consumers.

We find that consumer policy in this area tends to be weighted in favour of industry because of a legislated deference to self-regulation regardless of the adequacy of the self-regulatory regime to deal with the issue at hand. There is a need for more attention to be paid to the cost of ineffective consumer protection. Instead of just the cost to industry, the benefits of consumer protection to both consumers and industry need to be considered.

In reviews of telecommunications policy, industry representatives often take the view of "if it's not broken, don't fix it". This is useful to a point, but when the issue is asking for a new requirement, there is no way of measuring how beneficial it would be, and as such all considerations are couched in terms of cost. A recent example that has been proposed by consumer advocates is requiring the industry to develop community impact statements for new product or type of service entering the market. The industry have (to date) refused to consider a project scooping this potential policy tool. CTN thinks this would be an effective means of requiring due consideration to be given to consumer issues.

Recommendation: The benefits of community impact statements be considered as a tool for consumer policy

The only attempts to measure the benefit of telecommunications for consumers we are aware of sits in the ACMA Communications Report, however this is very general about the benefits to consumers, only mentioning price savings, faster internet services, and improvements in the quality of those services. The report¹ gives dollar estimates of the benefits to small business, GDP and employment, but nothing about how life-changing some like the impact of a financially ruinous telephone bill can be for someone on a fixed income, for example. Consumer benefits need to be elevated in the telecommunications regulatory framework, for the benefit of everyone.

Time and again consumer groups try to get issues on the agenda only to be asked for proof about the severity of the detriment, yet this often cannot be quantified particularly given the lack of funding for research projects and the split jurisdictions for many telecoms complaints which might go to ACMA, the TIO, Telephone Information Services Standards Council (TISSC), the State Fair Trading Department or Australian Competition and Consumer Commission (ACCC). Similarly, when we ask for consumer protection the responses are always couched in terms of the cost to industry, rather than the benefit to the consumer. This cost versus benefit dichotomy is a problem familiar to other consumer advocates and this review could be a good opportunity to get some better processes that try to find a more balanced way of dealing with issues, rather than simply claiming it will cost too much to fix it.

¹ See Chapter 10 Economic benefits resulting from changes in telecommunications services, online at: http://www.acma.gov.au/WEB/STANDARD/pc=PC_100932

Section Two – Market Trends and Developments

Has the growth in e-commerce made it more difficult to enforce regulation, thereby reducing its effectiveness? Or has the internet empowered a greater proportion of consumers?

Accessing the benefits of E-commerce

The growth of e-commerce has been a mixed experience for consumers. Clearly for many people it can provide great flexibility to buy products and services without the usual constraints of having to shop around in person within certain opening hours. Yet there are a range of risks involved with e-commerce.

Unlike the well-established consumer protections that have traditionally applied through the Trade Practices Act (TPA), provisions about goods being of merchantable quality, the right to a repair, refund or replacement, and so on, are not necessarily being extended to online consumers. So, while some consumers are able to benefit from e-commerce, it appears to largely be technologically savvy, higher income consumers. At the same time, others are being burnt and those who don't have access or trust in the safety of e-commerce services are missing out on the potential consumer benefits.

Clearly consumer trust is critical in encouraging people to buy goods and services, but there are a number of inhibitors (for example security and identity theft concerns) to gaining that trust in an online environment. There are also practical barriers, such as affordability, that influence trust. The Department of Communications Information Technology and the Arts (DCITA) released a report at the end of 2005, *Trust and growth in the online environment*, detailing the findings of a survey of the perceptions, experiences and security practices of Australians who transact online. In this report it is clear that those with higher incomes were more active in e-commerce transactions. The report divided users into 2 categories; 'passive' internet users were classified as those people who did not engage in online ordering or booking, did not make online payments and did not do banking online nor provide personal information online, whereas 'active' users were the set of Internet users who engaged in one or more of the e-commerce related activities or who supplied their personal details online for related or other purposes.

The DCITA report noted that the distribution of passive users is skewed towards lower household incomes, whereas the distribution of active users is skewed in the opposite direction. Over 34 per cent of passive users were from households with an income below \$35 000 whereas more than 30 per cent of active users were from households with incomes over \$85 000.

DCITA suggested that influencing factors may be that:

- persons from low income households are less willing to take risks with what they have;
- less lifestyle-influenced need to transact online;
- less means, such as access to a credit card, to shop online; or
- less disposable income².

² *Trust and growth in the online environment*, Department of Communications Information technology and the Arts, November 2005. Online at: http://www.dcita.gov.au/data/assets/file/35028/Trust_and_Growth_report.rtf

This section of the report concluded that “For these people the staples of life tend not to be transacted over the Internet”³. It is clear to CTN that consumers with higher incomes are the ones able to take advantage of the benefits of using e-commerce. This needs to be understood as another example of how those consumers on the wrong side of the digital divide – meaning those who cannot afford access to the internet or the hardware required to connect to the internet or do not have the skills to use the internet - are the least likely to be able to be able to share in the consumer benefits of using e-commerce.

It is not possible to divorce the issues of affordability and availability from the broader question of why individuals do not always seek to maximise their benefits as consumers. For some consumers, e-commerce is not relevant because they can't afford a computer, can't afford or don't have access to a service provider to facilitate a fast internet connection, or the skills to use computers.

It is critical that government policies create funds and programs are available to bring hardware and skills training to those consumers who are not participating effectively in the marketplace. Without these programs, disadvantaged consumers will remain without access to basic services and will continue to miss out. Consumers cannot take up e-commerce, regardless of how safe and rewarding the experience can be, if they do not have access to a computer or the skills to transact online.

Recommendation: That all consumer policies seek to enable participation through the creation of skills and opportunities that address ongoing digital divide issues

Recommendation: That there be a through review of enforcement of consumer policy relating to e-commerce to ensure that where needed regulation is strengthened to improve outcomes for consumers using this service. Consideration of the consumer policy tool of International MOUs as have been used in the control and regulation of Spam should be an essential part of this review.

Online auctions

For consumers transacting online through auctions (such as ebay), recent research suggests that consumer protection seems to be, effectively, a no-man's land. The Communications Law Centre (CLC) undertook a research project in 2006 on online auctions, to examine the consumer protections around auctions, and found that online auctions are a hugely popular but largely unregulated market, with many instances of fraud going unreported. Whilst we expect the CLC will have raised the issues in their own submission, we would like to highlight a number of key points their report makes:

“... Of the people the CLC surveyed who had bought something at an online auction, almost half had experienced problems. Most commonly, users had bought an item and hadn't received it, or the item was significantly different from the description on the site.”

The CLC findings are substantially similar to a large survey conducted in 2001 in the United States. Further, data from *Consumer Sentinel*, a United States database on fraud and identity theft maintained by the US Federal Trade Commission, shows that online auction fraud was the leading fraud category in 2005 including both online and offline fraud....

³ Ibid.

The CLC also found that some online auction sites were less than transparent about their complaints or dispute data, while law enforcement agencies and consumer bodies failed to adequately record data about complaints.

Going, Going, Gone makes several recommendations and suggestions:

“Law enforcement agencies, and consumer government agencies like the ACCC, need to introduce uniform systems to collect data about online auctions ... Currently, some consumers are getting referred from one to the other without ever resolving their problems. ... The CLC also recommends that online auction sites review their complaints handling procedures, and suggests that industry bodies be set up to deal with complaints.”⁴

The CLC’s findings are an excellent snapshot of consumer experiences with online auctions, and the consumer protection gaps, and we recommend that the Productivity Commission incorporate the findings of that report into its recommendations. We particularly draw the Commission’s attention to the Options and Recommendations section of the Executive Summary of the report.⁵

Recommendation: That the Commission consult the Communications Law Centre report *Going, Going, Gone* for recommendations on consumer protection issues surrounding online auctions.

e-security

In 2006, CTN released a research report titled *Surfing on Thin Ice: Consumers and Malware, Adware, Spam and Phishing*. This research project investigated Australian residential consumers’ experiences with e-security, identifies areas of concern, and the implications for telecommunications policy and regulation. The research was based on a literature review and an online survey of 254 consumers.

Our research shows that many consumers are experiencing e-security attacks despite current consumer protections, and that many consumers may be vulnerable to the unwanted effects of e-security breaches. For example, more than 1 in 3 consumers surveyed had stopped or changed the way they made online purchases, paid bills online, or used online banking because of e-security concerns, and more than 1 in every 10 consumers surveyed had experienced unexpectedly high bills or financial loss as a result of e-security problems.

The research also revealed that whilst awareness of the existence of e-security threats is reasonably high, consumer understanding of threats and how to protect themselves against them are lacking. More than 1 in every 2 consumers surveyed were less than confident they could successfully identify malware, adware, Spam or phishing. More than 4 out of every 5 consumers surveyed thought Internet Service Providers should take more responsibility to provide better security online for consumers, while 2 out of every 3 thought Government or consumers should take more responsibility.

⁴ From Communications Law Centre Media release: *Report finds online auctions sites are not as safe as consumers think*, 25 July 2006.

⁵ A free copy of the Executive Summary of the report is online at: <http://www.comslaw.org.au/auction/GoingGoingGoneEXECUTIVESUMMARY26.7.06.pdf>

We recommend the development of effective consumer protection mechanisms, better consumer education tools about how people can protect themselves online, and further research around e-security issues. A copy of the Executive Summary and those specific recommendations are attached at Appendix B.

Recommendation: The Commission refer to CTN's research report *Surfing on Thin Ice: Consumers and Malware, Adware, Spam and Phishing* and the development of effective consumer protection mechanisms, better consumer education tools about how people can protect themselves

Has greater product complexity made it more difficult for consumers to participate effectively in markets?

(Unnecessary) complexity of products

There can be little doubt that making a telecommunications purchase is one of the most confusing most people will ever make; the diversity of options available to consumers is truly enormous. Whilst consumers want options and choices in the marketplace, they also want to be able to understand what is on offer to them and to be able to compare like products. The policy framework in this area is in serious need of reform and needs to address the issue of varying skills of consumers, as well as the presentation of what is available in the marketplace.

Telecommunications is a perfect example of a market in which where there are innumerable products in the marketplace, most of which are only slightly different. Consumers are unable to make meaningful comparisons even if they did have time to explore a range of market offerings and choose the best option for themselves. Others have coined this term "confusopoly". For many consumers, the range of choice is overwhelming and therefore other factors influence their decision, such as immediate availability and a deal seeming to be good enough, rather than the best to meet their needs. Notably, a government initiative has recently been created to address the confusopoly issues in health insurance, which may be an appropriate model for telecommunications.

Recommendation: Consider the development of an independent/government advisory service to help consumers make better choices amongst similar product offerings or a similar option

There are some quantifiable costs of the paralysing effects of overwhelming and confusing choices. A Roy Morgan survey from 2006 estimated the cost of inertia due to overwhelming choice and lack of time to consider all the options to be around \$5.7 billion dollars per year.

To quote a review of the research:

"Inertia's annual bill, according to calculations by Roy Morgan Research, is \$5.7 billion, and experts say the amount lost is likely to climb even higher as information technology continues to develop. More than half of the 334 respondents aged 18 to 68 interviewed in research commissioned by American Express admitted to failing to take up money-saving deals in the areas of

telecommunications and personal finances, purely because of inertia... And the excuses? 'Not enough time' and 'it's too difficult' were the top two reasons."⁶

While there are information disclosure requirements required by ACIF Codes of Practice, there is a pressing need to consider how to best provide information to consumers. This might involve a number of complementary tools, for example stricter requirements on characterising the offer, minimum font size, and basic comparability between products.

We also think there is also a need to look at requirements for the provision of basic services – that, is information, as opposed to marketing information – which is discussed in detail elsewhere in this submission.

Recommendation: Consider how best to provide basic information as opposed to *marketing* information, such as stricter requirements on characterising the offer, minimum font size, and basic comparability between products and more consideration as to when and the format in which information should be provided – such as at point of sale or on a website

Complexity as a barrier to uptake: Broadband as an example

A 2006 study that looked at broadband adoption and non-adoption also indicates that complexity of choice, and the behaviour of the industry was a deterrent for consumers uptake of broadband. In a journal article published on his research, Peter Adams suggested that there are 3 key themes in the factors surrounding why consumers adopted (or didn't adopt) broadband in their homes. Those themes were:

- that consumers need to feel in control of the technology in their homes;
- a feeling of frustration with the existing technology and service providers;
- the complexity of the purchase decision acting as a barrier to adoption.

Once again, this is a practical example of how the benefits of the service are not being taken up by consumers because of the lack of clear information about the services and a lack of trust in the industry to be fair to end users.⁷

Information and consumers

In telecommunications there is a heavy emphasis on disclosing information to consumers as the means of providing consumer protection. In CTN's experience the provision of information has proven inadequate, given the complexity of the industry and the inability of consumers to compare like products. It is particularly problematic given that many consumers do not just buy a one off product; rather they contract to receive a bundled product and service, usually over a 2 year period.

For many years, consumer groups have advocated for better information provision about products and services. The self-regulatory approach to information provision has, without doubt, become very onerous on the industry. However, this has evolved precisely because the general tenets of the TPA about misleading and deceptive conduct are so liberally interpreted by telecommunications companies. As a result, the most prescriptive and

⁶ Online at <http://www.smh.com.au/news/national/billions-tossed-into-toohard-basket/2006/11/01/1162339918431.html> as at 6 May 2007.

⁷ Peter Adams, "Isolating 'why' Australian households adopt broadband", *Telecommunications Journal of Australia*, Vol. 56 No 3/4, Spring/Summer 2006, pp 27- 36.

onerous codes of practice relate are consumer protection codes, and these are the ones that deal with provision of customer information about the product or service, or the contract between the service provider and the customer. Instead of providing clear concise and comprehensible information to consumers that accurately characterises the product or service, the industry has chosen a gap-stop path, by providing the minimum information they feel they can get away with.

Action is urgently needed on misleading claims

Consumer policy needs to reflect consumer requirements and behaviour in the marketplace, but there is still a need to address the behaviour of the supply side of the market if consumers are to be active and confident in the marketplace. We see one of the most pressing areas for enforcement and reform as being more rigorous application of the false or misleading representations and misleading and deceptive conduct provisions of the TPA.

Recommendation: Enforcement and rigorous application of the false or misleading claims provisions of the Trade Practices Act; possibly more detail in the TPA what constitutes false or misleading representations in Section 53

Many telecommunications services are advertised as unlimited, however they come with a number of exceptions and disclaimers. The result has been consumers experiencing unexpectedly high bills because they have not understood the deal or have been misled by the claims about “unlimited”. There is a need for more stringent restrictions on industry that require suppliers to not deliberately confuse customers through the use of marketing double-speak. The problem of hooking a consumer in with one claim, only to have them buy a product or service that is quite different because of limits, exceptions and acceptable use policies, is a really big issue in telecommunications.

In recent times we have seen a big rise in the complaints to the office receives on how “unlimited” services are being presented to consumers. Regulators have so far taken a light touch approach to enforcement of what CTN considers misleading advertising of the prices terms and conditions of services, which is particularly concerning given the large volume of bad consumer experiences. We have received several complaints from consumers being told by their service provider that the service is unlimited, with a fixed price cap. However, the consumer receives their bill and finds that they are paying more than the capped amount, due to overriding terms and conditions. A number of high-profile cases featured in the media in April 2007, for amounts of up to \$22 000, for services that the customer was told were capped at a fixed price. We think there is a responsibility on telecommunications providers to not allow consumers access to unlimited credit which enables them to accrue such large bills, particularly for new services.

The self-regulatory code of practice was meant to address this type of issue, arising from the 2005 review of the Credit Management Code. Suppliers recognised that they should not be offering unlimited credit, and agreed to undertake a credit assessment of consumers if they were buying services that were not limited in some way (for example a price cap, or a ban on international access). However, what has become apparent is that there is still a disjunct between what a telco tells their customer and what the customer understands the terms of the arrangement to be. As the complaints we receive show, this is often to the significant detriment of individual consumers. There is significant gap between the information a telco should provide to a customer and the information the customer actually comprehends.

Recommendation: That telecommunications service providers be required to place (customer nominated) maximum accrual amounts on all services in order to prevent continued instances of unexpected high bills

Case study of misleading description of goods and services: Capped plans

One only has to look at the promotion of so-called capped mobile phone plans that are being marketed to consumers to see an example of how far telecommunications providers are stretching the boundaries of accurate descriptions of the product on offer. Capped products generally involve an arrangement where a consumer pays a fixed amount to obtain service value for what is stated to be a higher amount, e.g. a customer agrees to pay \$50 per month so they can make calls up to the value of \$300.

However, many capped plans have excluded services that must be paid for in addition to their cap, even if they have not used up their \$300 of included calls. Typical exclusions are premium services, used commonly for reality TV voting lines, and access to voicemail. Caps can apply to pre-paid and post-paid services. If a customer reaches the value on a pre-paid capped plan, their service is suspended. On a post-paid service however, the customer accrues additional charges. Some telcos offer services that allow customers to track their usage to ensure they do not go over their cap allowance. However, there are no foolproof ways of ensure you don't exceed your capped 'limit'.

In many cases, we believe many 'capped' plans cannot actually be correctly characterised as being capped services. As a result of rising complaints about these services, this practice has engaged the attention of the TIO, yet there has been no apparent interest from either ACMA or the ACCC on investigating the characterisation and description of capped services. As a result, consumer dissatisfaction with being misled about the kind of service they are buying continues to grow.⁸

Recommendation: The use of the "capped" in relation to telecommunications pricing plans be treated as illegal by regulators, unless it has been used as a correct descriptor of a product or service with set credit limits. Enforcement action and prosecution of providers in breach of this be followed up without delay

There is also a need to pro-actively monitor the information being provided in markets that are overwhelmingly complex, such as telecoms. CTN recognises that this can be difficult due to the complexity and diversity of products and providers. Strong commercial incentives exist to provide consumer protections might not apply because of the short shelf life of a product, for example mobile premium services have been very hard to identify as a systemic problem, particularly given that the industry ombudsman does not have the power to proactively investigate the problems and potential problems consumers might face in the future. There is also a need to consider whether appropriate safeguards exist around how informed consent can be part of selling practices. We see a need for the development of a licensing regime and a code of practice for salespeople.

⁸ A recent article on the issues surrounding capping is online at: <http://www.smh.com.au/news/planning/the-cap-doesnt-fit/2007/04/30/1177788050877.html?page=fullpage#contentSwap1>

Recommendation: That marketing information be actively monitored for compliance with legislation and self-regulatory instruments on an ongoing basis. Better regulation of selling practices is needed, including the development of a licensing regime and a code of practice for salespeople

We strongly believe that there needs to be an amendment to the TPA to require all consumer information to be provided in simple, plain language. There is also a need to undertake research to ascertain the best way to provide information to telecommunications consumers, given the complexity of the products and services themselves. This evidence-based research should occur before any changes to the current information provision arrangements are amended.

Recommendation: Amend the Trade Practices Act to require all consumer information to be provided in simple, plain language.

We also point the Commission to the FairTel consumer information project⁹, which was recently undertaken by the CLC as a way of providing consumers with clear advice about how to make their telecommunications purchasing decisions.

Recommendation: There is a need for greater legislative certainty surrounding how a product can be characteristically described (including the use of exceptions around claims of unlimited) and in general some clearer rules for telecommunications providers about what is misleading advertising.

Consumer Education

A number of agencies produce information for consumers about their telecommunications rights and entitlements. There seems to be some overlap between all the information produced state consumer protection bodies, the ACCC, DCITA, industry bodies, the TIO and ACMA. We are not aware of any coordinated efforts to work in collaborative ways to ensure precious resources are used to greatest effect. We have also witnessed ACMA scale back their consumer education activities, without another agency take over responsibility for them. This has effectively meant there is very little readily available new or revised information available for consumers.

As far as we are aware, none of the abovementioned bodies have a specific consumer education framework with goals and milestones to measure awareness of their educational work.¹⁰ Clearly consumer education is an opportunity for the various agencies with oversight of telecommunications issues to work together on a whole of government approach to ensuring consumers are provided with the information they need to be satisfied and protected consumers. The Australian Securities and Investments Commission (ASIC) had a Consumer Education Strategy between 2001-2004¹¹, and the UK Office of Fair Trading has, in the past, developed comprehensive strategic approaches to consumer education¹².

⁹ The website is at www.fairtel.org.au

¹⁰ Though we note that the TIO undertakes regular Consumer Awareness surveys, they are not as far as we can tell part of an education strategy

¹¹ Online at:

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/consumer_ed_strategy.pdf/\\$file/consumer_ed_strategy.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/consumer_ed_strategy.pdf/$file/consumer_ed_strategy.pdf)

¹² See: http://www.of.gov.uk/shared_of/consumer_education/oft753.pdf as at 24 April 2007

Consumer education campaigns need to develop people's consumer skills to help them successfully navigate the marketplace. There is a need to develop education strategies and materials to help consumers to help themselves. Importantly, they should also be created by a reliable and trusted source if they are to be credible. Good examples of campaigns that have been undertaken recently include Scamwatch, produced by the Australasian Consumer Fraud Taskforce, which is a group of 18 government regulatory agencies and departments with responsibility for consumer protection regarding frauds and scams, and FairTel, produced by the CLC.

Recommendation: Formal consumer education strategies be developed by appropriate agencies that aim to enhance consumer skills to navigate the marketplace. Information needs to come from trusted and credible sources

Our member organisations who represent Aboriginal consumers report to us that the implementation of consumer rights education programs in remote communities is spasmodic; it is never ongoing. In order to create change through knowledge and awareness of rights and responsibilities, and transferring skills to ensure consumers can better look after themselves, a sustained campaign is required with adequate funding. The outcomes may not be immediately apparent, but this is a long-term problem which will not be rectified without commitment to addressing the issues and developing basic consumer skills. It is critical that education campaigns are culturally appropriate and available in a range of community languages.

We also note that even though CTN is a well-established network of community organisations, we are rarely approached to help disseminate much needed information or comment and advice in the planning stages. We regularly find that information and education materials that are available are not distributed by the agency in question. Creating the materials is not inherently useful if it is not distributed to those who need it, and we think there is a need to incorporate distribution networks in the planning of community education campaigns.

Recommendation: Consumer education campaigns need to be better targeted, include consultation with stakeholder groups, and ensure distribution avenues are part of that campaign

What are the impacts of the greater use of product bundling and standard-form contracts?

Bundling

A few years ago, some in the telecommunications industry were predicting that all telecommunications products would be bundled within six months. While that may have been an exaggeration, bundling does indeed seem to be growing in popularity. For many consumers, it has long been a source of frustration that despite having all their services with one provider they are still getting separate bills, though in recent months at least one major provider has implemented a billing system which means the one bill dream is becoming a reality.

Even so, we see a number of problems with a trend toward bundling. Firstly, the bundle often includes a non-essential service such as pay television. While at present this choice is good for consumers who also want pay television, consumers who don't want it have

difficulty finding bundles that don't include pay TV. The value of a "discount" for taking a bundle that includes a new and unnecessary service is not such great value. The confusing presentation of bundled items also makes it difficult for consumers to ascertain the value of the deal when it's offered. An associated problem is that bundles are typically for a set period of time, which means if the customer finds the value is not what they expected, they are still locked into a contract. Once again, the need for clearer information for consumers, and better enforcement of misleading advertising provisions and unfair contracts rules, are highlighted for consumers who experience problems with bundling.

The other big issue with bundling is a concern about what happens to bundled services when there are payment difficulties. A telephone is an essential service – pay TV is not. The shift toward bundling means that if a consumer can't pay their bill for all 3 or 4 services – mobile, internet, landline, and pay TV – that they risk disconnection from all.

At present, the Code of practice that covers service restrictions, suspensions, and disconnections for credit management reasons is, in our view, inadequate because does not deal with instances where taking such action by the service provider is unreasonable. Furthermore, notifying the customer about impending restriction/suspension/disconnection need only be done by "reasonable attempts". We think that bundling of services could dramatically change the number of instances of consumers having their essential services being suspended basically because of the lack of certainty around bundling. This is one reason that we think telecommunications needs to be declared an essential service, as we discuss in detail elsewhere, and the same importance of staying connected to a utility service is protected.

Recommendation: It must be more clearly stated through amendments to the telecommunications legislation that a Standard Telephone Service is an essential service and therefore cannot be disconnected unless very specific procedures have been followed regardless of whether the STS is a part of a bundled service or not

Bundling is often also unfairly restrictive. Consumers are usually faced with plans that involve use of equipment for which the guarantee on the new equipment is half the length of the plan or less. The equipment guarantee runs out and when the equipment fails, the consumer then has to purchase new equipment, often much more expensive to replace than to purchase initially if the plan is to continue to be utilised.

Contracts and Standard-form contracts

The need for consumer protection from unfair contracts has been a long-standing priority of consumer advocates, and telecommunications has been an area where at least some progress has been made.

Telecommunications consumers are usually bound to Standard Forms of Agreement (SFOAs). Consumers are usually pointed to the information on a website rather than being provided with this vital information. CTN is generally of the view that SFOA's are anachronistic, inaccessible, and inappropriate for consumer needs in a deregulated competitive telecommunications market. What began as a transitional mechanism, to replace the tariff filed by a public utility, has become a device that impedes the consumer's ability to understand and negotiate the terms of their arrangements with their service providers.

The industry perspective that SFOA's are too large and complex to be presented to customers during pre-contract negotiations is belied by widespread and established

practices in other industries such as real estate, consumer credit and insurance where complex and abstract terms and conditions are routinely provided, and explained in plain language, to consumers.

An alternative to the SFOA model is to replace it with a 'model contract' establishing a benchmark of core terms, equitable conditions and a proper balance of consumer and supplier rights and protections. This model should be brief, clearly presented and suitable for being provided to a consumer during pre-contract negotiations. Consumer groups have worked extensively on the model contract in the past, and CTN endorses this approach.

Recommendation: The SFOAs be replaced with a 'model contract' used by the entire telecommunications industry which establishing a benchmark of core terms, equitable conditions and a proper balance of consumer and supplier rights and responsibilities

What other new developments are likely to have material implications for the policy framework over the next decade?

We see a number of new and continuing challenges to the policy framework that will be of great significance.

The continuation of the digital divide

Without policy intervention to ensure that everyone gets access to high level products and services, we think the key failings of telecommunications policy of the last century will continue to exacerbate the trend toward the digital divide. This division between those with access to technology and those without it occurs for a number of reasons, but primarily due to issues of affordability, accessibility, and availability. We have expanded on this later in our submission.

The challenges of VoIP

The emergence of Voice over Internet Protocol (VoIP) services is expected to have a big impact on the Australian market, particularly in the future. VoIP has the potential to replace landline services as we know them, particularly if reliability of service grows, broadband capacity is sufficient to support a mass uptake of VoIP, and affordability levels are met.

To give an overview of the regulatory context of VoIP, in November 2005 DCITA released a series of regulatory recommendation to the Minister Senator Helen Coonan, following a regulatory review by ACMA in October 2004. Senator Coonan accepted all thirty recommendations and committed the Government to their implementation, yet it was considered that there was no immediate need for any changes to the regulatory framework and recommends some small adjustments to existing numbering, emergency services and customer service regulation to accommodate VoIP services¹³. The 2005 report thus left the impression that the government has chosen to adopt a wait-and-see approach to the residential VoIP market in terms of regulation.

¹³ Department of Communication Information Technology and the Arts (DCITA) 2005, *Examination of Policy and Regulation Relating to Voice Over Internet Protocol (VoIP) Services – Report to the Minister for Communications, Information Technology and the Arts*, Department of Communications, Information Technology and the Arts, Canberra.

Currently, only those carriage service providers providing a Standard Telephone Service (STS) are required to join the TIO scheme, and there has been some contention over the small number of VoIP providers who have joined the scheme. VoIP is also a focus of the Communications Alliance (CA), the industry self-regulatory body. Over the past 12 months its VoIP Working Group has expanded to include sub-groups on Interconnection, Quality of Service, Location Information and Fault Restoration, among others.

In 2006 CTN undertook a research project into consumer experiences of VoIP, aimed at developing our understanding of the residential VoIP market. Specifically, we wanted to shed light on consumers' expectations of VoIP, and their experiences with the quality, usability, cost, and consumer education efforts around VoIP services.

Based on our findings, we developed a series of recommendations that have shaped our VoIP policy positions to work towards affordable, accessible and quality VoIP services:

- Ensuring competition in the VoIP market, and steps to keep costs low for consumers.
- More available and better performing broadband services for all Australians. VoIP providers should also be required to explicitly state the minimum and optimum broadband requirements for their service.
- Standards, agreements and technological solutions to deliver higher quality and more reliable VoIP services, especially guaranteeing availability to emergency services and reliable location information.
- Standard and user-friendly VoIP equipment and software, especially for less advanced users, while maintaining a high degree of consumer choice.
- Protection for Australian consumers who use VoIP services based overseas.
- More universally accessible and effective technical support for VoIP services.
- Continued development of consumer education campaigns, by both industry and Government, to aid consumers in making a service choice and alerting them to current issues and concerns.
- Enforcement to ensure VoIP service providers comply with all applicable regulations and legislation, specifically legislation such as the Trade Practices Act 1974 (Cth)¹⁴.

The regulatory response to VoIP related issues, from making sure clear customer information is available, to the need for broadband providers and VoIP service providers to work together on fault rectification issues, has to date been very "hands off". Yet with VoIP looming as the way of the future in communications, we expect that issues will need to be addressed. Ironically, we think that there can be a benefit to industry for ensuring a level playing field with clear rules around VOIP service provision. We think this will encourage VoIP uptake which in turn will ensure it is commercially successful, yet there is considerable resistance from industry and service providers.

In addition to the recommendations from this report it is now more apparent that ever that there must be regulatory intervention perhaps in the form of an ACMA registered industry code to deal with the matter of fault rectification as we are concerned that there is a lack of clarity as to which provider is responsible to resolve complaints as there are so many service providers involved including those providing the telephone network, the broadband

¹⁴ This section of CTN's submission is based on the forthcoming article, by CTN's Ryan Sengara, *Consumer Experiences with VoIP*, to be published in the Telecommunications Journal of Australia.

connection or the VoIP application service. This can be open to dispute resulting in customers and smaller providers missing out.

Recommendation: ACMA request via its powers in section 118 of the CPSS Act 1999 that Communications Alliance develop a VoIP Fault rectification Code and present it to ACMA for registration

New networks – new challenges

Next generation networks will be a challenge for the telecommunications policy framework. Few observers could be unaware of the current debates about two possible Fibre to the Node (FTTN) projects being proposed separately by both the G9 consortium and Telstra. The apparent stumbling blocks in the roll out of a new high-speed broadband network have been around access arrangements for resellers and pricing arrangements.

This is an interesting policy conundrum with no easy answers. There would be enormous benefit for end-users to have access to high quality, super fast services. However, the Australian regulatory context is such that we cannot – and should not – allow new monopolies of communications infrastructure to be created. What is certain is that the policy frameworks around decisions about infrastructure and access need to be subject to public scrutiny, and that public interest is represented in any policy amendments that might occur in negotiating any changed regulatory arrangements.

Recommendation: That the public interest is represented in any policy amendments that might occur in negotiating any changed regulatory arrangements for the creation of a high-speed broadband network

Section Three – Assessing the Overall Framework & Approach

Overall framework and approach

Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required?

The regulatory framework for consumer protection in telecommunications

While the public policy emphasis has been on the development of an open competitive market and largely voluntary self-regulatory arrangements, the *Telecommunications Act 1997* and its amended version, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* contain a wide range of legislated requirements for consumer protection. These operate as a ‘safety net’ in the event of self-regulatory or market failure, provide assurances of equitable access for less commercially attractive customers such as those with disabilities or residents in remote areas, and provide for certain public and national interest requirements such as emergency and defense access, numbering and spectrum management, and Australia’s international obligations.

There are also other more general legislative requirements that impact on consumers of telecommunications, including privacy laws, state-based fair trading regulation, and parts of the Trade Practices Act.

Together, these arrangements cover:

- Universal Service Obligation (USO)
- Customer Service Guarantee (CSG) – connection and repairs
- Payphones
- Disability equipment
- Untimed local calls
- “standard” (voice grade) quality of service
- Emergency call capability
- Law enforcement – interception and monitoring
- Standard form of agreement
- Labelling for compliance with equipment standards – the ‘A’ tick
- Disability standards
- Electro-magnetic emission standards
- Carrier licensing
- TIO

In all, the *legislative* framework around telecommunications is fairly comprehensive. Many of our issues with the current policy framework are about proper implementation and enforcement of these protections, and the over reliance on self regulation when it is not always appropriate and especially when there is no mechanism for recognising when self regulation cannot deliver outcomes. This is particularly problematic when coupled with ineffectual enforcement by regulatory agencies, both of which are discussed later in this submission.

Telecommunications needs to be mandated as an essential service

Whilst the Telecommunication Act recognises that access to services is critical, and attempts to ensure access for all via the USO, CSG, National Reliability Framework and price control regimes, there is still a need for telecommunications to be recognised as an essential utility service like electricity and water. There needs to be better oversight of whether services are meeting current needs and expectations.

The best test for an essential service is to imagine removing access to internet, landline and landline services. The vast majority of people would have great difficulty functioning effectively in Australian society without access to these services. For the most disadvantaged in society, for example low income, remote and indigenous consumers, the homeless, those with mental illness, the need for access to a telephone service in order to facilitate completion of necessary business, let alone participation in typical social activities, is greatest. And yet they are the most likely to be unable to afford or access these services. Often the issue of affordability moderates a person's "right" to a service; that is, one's right to access and supply of a service is conditional on one's ability to pay. It needs to be legislatively recognised that the right to access to imperative.

As discussed in greater detail in the disadvantaged and vulnerable section of this paper, mandated access to a landline service is no longer adequate. Consumers need mandated access to internet services to engage with society, particularly in light of moves toward the provision of essential information online as a means of communication with consumers. For example, consumers are often directed to websites for information provided by government departments. Again, this highlights the assumption that most people should be able to access the internet, and paradoxically the lack of mandatory provision for that access.

It would seem appropriate that an essential service component of a new or revised Telecommunications Act would be an appropriate mechanism to protect the long-term interests of consumers with regard to the price, quality and reliability of essential telecommunications services. We think the consideration of this issue should be part of the anticipated 2009 Telecommunications Act review if not sooner.

Recommendation: Mandate telecommunications as an essential service using the best legislative means of achieving that outcome

The right to consumer protection needs to underlie policy frameworks and priorities

The best approach toward protecting consumers, including disadvantaged and vulnerable people, is by having consumer protections built in to the policy framework that both *prevent* inappropriate products entering the market in the first place and mandates that affordable essential services are available to all. Policies should therefore:

- Prevent unsafe or unfair products entering or remaining in the marketplace
- Require products and services be fully and accurately described
- Require the full disclosure of all costs associated with the purchase
- Ensure the minimum terms of the contract are clearly conveyed
- Ensure the consumer is given the right to redress
- Ensure the avenue of redress is well publicised and easy to use
- Mandate that essential services be available on an equitable basis to all.

Example of unsafe products: unlimited credit on telecommunications services

One of the biggest issues for telecoms consumers in recent years was the ability of consumers to accrue unexpectedly high bills. In many instances, consumers used services (or had their dial up internet service was hijacked and re-routed to an international or 19 number) that caused them to accrue very high bills very quickly. There were a number of issues involved in this phenomenon, including a lack of clarity on the true costs of services, instances of fraud as mentioned above, unauthorised usage. The common feature is that those consumers had access to unlimited credit. If they had been offered safer services by way of a credit limit on their account, in the same way credit cards that are limited based on proper credit assessment, these problems could potentially have been avoided.

Proposal for a Charter of Communications Consumer Rights

Communicating by electronic means has become a central feature of modern society in Australia and overseas. Traditional telecommunications technologies and services have greatly evolved and continue to do so. Considering the essential nature of communications services to all people in Australia, it is crucial that both consumer safeguards and industry regulation continue to evolve with communications technology and patterns of usage. CTN's 2007 Conference was dedicated to considering the viability of a Charter of Communications Rights.

This Charter lists essential rights of users of communications services in Australia. It should form the backbone of any review of existing communications legislation and the development of any new communications legislation, in order to recognise and promote the communications rights of all Australians and to contribute to overall social and economic prosperity. This Charter should also be used by industry, government and the public to underpin the development and delivery of communications services and policy.

1. Universal Access to Communications Services

All people are entitled to a choice of communications services, wherever they live or work in Australia. Communications services include voice, video, text and data, or equivalent depending on the most appropriate technology for a particular user.

2. Universal Accessibility of Communications Services

All people are entitled to equal access to communications services regardless of ability. The needs of people with disabilities must be taken into account in the design of all communications services, and must be met with guaranteed and subsidised additional and/or alternative equipment and services if necessary. Services, including equipment, must be interoperable and allow for backwards compatibility wherever possible.

3. Universal Affordability of Communications Services

All people are entitled to communications services at reasonable cost, including price controls on basic services, and the availability of tools and mechanisms that allow them to control and limit their expenditure on communications. All communications services must provide a reasonable and accessible financial hardship policy to customers.

4. Guaranteed Quality of Communications Services

All people are entitled to services that guarantee a minimum level of performance to ensure reliable communications and, in particular, access to effective emergency services. Furthermore, all communications equipment and services must be safe, and both delivered and repaired in a timely manner.

5. Consumer Protection

All people are entitled to mandatory consumer protections of their communications services, including the right to be given the facts needed to make an informed choice, the right to education resources, the right to fair contracts, the right to privacy, and the right to security.

6. Consumer Representation

All people are entitled to have their needs represented in the development of communications services and policy in Australia through well-resourced consumer consultation and representative processes.

7. Right to redress

All people are entitled to an appropriate form of redress if a breach of their communication rights occurs, including access to an independent dispute resolution body.

Note that the Charter is still in draft format, and issues about how it should be implemented are still under discussion by CTN and our member organisations.

Recommendation: The Federal Government to adopt a Charter of Communications Consumer Rights

Does the current framework focus on the right issues and areas? Are there significant gaps or imbalances in coverage, or particular objectives that are not well catered for? Is there any significant duplication of policy effort?

Is the balance of responsibility between governments, business and consumers broadly appropriate? Does the framework pay sufficient regard to the costs of intervention for consumers and businesses? Does it promote certainty and clarity for consumers and businesses and is it sufficiently evidence-based? How well has it coped with the changing circumstances identified earlier?

Self-regulation isn't always the best way to address consumer issues

There is usually a substantial period of time between when an issue of consumer detriment is identified and when it is acted upon in such a way that actually addresses the matter at hand. In the meantime, more consumers are affected by the same issue and the level of detriment to individuals, and the industry as a whole, grows. Two recent issues stand out as instances where self-regulation failed to look after consumers in a timely and appropriate manner.

Failures of self-regulation - unfair consumer contracts and credit management

In June 2001, the predecessor to the Communications Alliance, the Australian Communications Industry Forum (ACIF), developed a guideline to provide guidance to the Australian telecommunications industry about issues of fairness and unfairness in

consumer contracts. A report published by the CLC in January 2001, *Unfair Practices and Telecommunications Consumers* (the first CLC report), was influential. The first CLC report examined developments in Europe and the United Kingdom, including the European Communities' *Directive on Unfair Terms in Consumer Contracts* and the *Unfair Terms in Consumer Contracts of 1999* and their relevance to Australia.

The first CLC report also provided a listing of current issues, including those identified by an analysis of complaints data from the ACCC and the TIO. The second CLC report, *Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline* was published in October 2003 and as a consequence of this and its own findings, the predecessor to ACMA, the Australian Communications Authority (ACA) in November 2003 formally requested ACIF to develop an industry code on consumer contracts under its powers in Section 118 of the CPSS Act 1999.

Thereafter, the resources ACIF and the industry as a whole contributed were unprecedented- they employed professional drafting services, an independent Chairperson and instigated weekly meetings. Thus, many years after the identification of a significant problem for consumers and an attempt to address it, the regulator formally required the industry to adequately protect consumers from the significant detriment of unfair contract terms.

Another example of the need for formal action in light of inadequate self-regulatory responses occurred with the review of industry credit management issues. Consumer groups, complaint statistics and the regulator identified the sizeable problem of consumers receiving unexpectedly high bills; the industry refused to act, and once again ACIF was formally directed to address the problem.

Identifying a Trigger point for escalating a matter

A recurring issue for consumer groups is how to encourage legislative action when the industry is unable to deal effectively, with a consumer issue via self-regulation. There are any number of reasons that self regulation cannot work from the amount of resources required to the heads of power of industry groups to the fact that competitively charged issues often cannot be resolved with consensus driven processes. We'd like to see attention given to developing a better way to identify instances when industry processes cannot deliver appropriate protections for consumers. There needs to be a trigger point at which an issue of consumer protection can be escalated beyond the realm of self-regulation. This is essential to protect the interests not only of consumers but smaller providers who do not have a strong voice in industry bodies.

There is also a strong argument that there needs to be more focus on measuring the outcomes of regulation both industry and government initiated. This Productivity review is a good place to start with such as audit however there needs to be more proactive steps taken by the telecommunications industry to measure the actual outcomes from their regulatory interventions or lack there of on consumers and the telecommunications market. In the past the ACA Section 105 Report attempted to do this to some extent. There needs to be a standard review of all regulation including self regulatory tools held on at least at triennial basis.

Recommendation: A mechanism for recognising a trigger point for consumer protection to be escalated beyond the realm of self regulation either before a matter is referred to an

industry body because it is not conducive to self regulation or during the process if they become “bogged down” and do not progress.

Rebalancing the onus of proof

There is also a related issue about need for a mechanism by which policy makers can give consumer issues priority when necessary over the needs of industry, rather than always relying on industry to self-regulate. The ability to “prove” that problems really have to be dealt with is one discussed elsewhere in greater detail, but essentially there needs to be a rebalancing of the onus of proof.

Most consumer advocates who participate in self-regulation are not funded to undertake research or take complaints. They rely on their constituents and other sources of information, such as TIO statistics, to identify consumer protection issues. There needs to be recognition that definitive “proof” is not always at hand to be discussed in self-regulatory forums, and this works against the consumer voices in those forums. One way the imbalance toward industry in self-regulatory matters could be addressed is by requiring industry to prove why a current policy is acceptable and should remain unchanged, rather than rely on consumer groups to demonstrate policy failure. A mechanism needs to be developed and built into the self-regulatory framework which requires industry to demonstrate why they are reluctant to regulate on an issue raised by consumer groups.

Recommendation: Consider appropriate mechanisms that rebalance the onus of proof of why a policy is or is not working between industry and consumer groups – one example of this would be to fund more consumer-driven research

What broad changes to the framework could be made to deliver greater benefits or more cost effective outcomes for the community? In this regard, what can Australia learn from the experience of other countries?

Need for resourcing for advocates who work directly with the public in policy development

We have found consistently that financial counsellors and community legal centre workers who work “at the coal face” have an enormous amount of information and examples about the types of problems consumers are experiencing and where the regulatory gaps and compliance issues exist. Often they are dealing with the most disadvantaged and vulnerable in society and those least able to function within a competitive marketplace, for any number of reasons. However, because of the fact they are over-stretched with their caseloads, they are often unavailable to help devise policy to address systemic problems. Caseworkers and advocates, particularly consumer credit lawyers and financial counsellors, tell CTN that telecommunications issues are a large proportion of their workload¹⁵.

In the Communications Alliance, a number of financial counselling representatives and community credit legal centre representatives have in the past contributed in code developments and reviews and their input. Because their input is based on their case-work experiences, it has been invaluable in illustrating a policy failure. They are not specialist consumer advocates, but caseworkers who understand the issues at hand and participate in regulatory reform based on their practical experience. In CTN’s experience, many of

¹⁵ From TIO review report Exec Summary

those representatives have been unable to sustain their participation because their participation was un-funded, and the amount of time taken to make relatively incremental changes to codes, rather than directly address the source of the problems, meant that the trade off between working on cases for individuals versus working for the greater good was too great. It is also worth noting that some financial counselling bodies do not support the self-regulatory regime because of the unwillingness of industry to deal with ongoing systemic issues that affect their clients.

There is a critical need to ensure that those working at the coal face, who know the problems that consumers are having, are integral to devising policy to resolve those problems. It should be a high priority of all regulatory development bodies that the consumer organisations they consult must be able to demonstrate a direct link with those who directly assist consumers, because they are best placed to ensure the issues are recognised and addressed. At present, the lack of proper resourcing of those advocates means they are unable to participate and contribute their expertise. Their input to collaborative forums at the national and international level would be of enormous value.

Recommendation: That all policy changes require specific consultation with affected groups with a commitment to developing partnership with advocates with direct links to consumers

Piecemeal approaches characterise government funded programs and undermine outcomes

One of the continuing problems we see is that telecommunications programs are not developed to deal with long term systemic issues, and as such, the “hard” issues remain unaddressed. A good example this are the policies for extending infrastructure to rural and remote areas, which have been a priority of a number of government-funded campaigns. Remoteness has regularly been used as an excuse to avoid providing basic infrastructure and services for consumers – in the oft-cited “98% of the population” who can access services, it is the same 2% who continue to miss out on access to new services. In a country of 20 million people, that is around 400 000 people.

There is a need for government funded infrastructure programs to be based on established foundations and benchmarks. These benchmarks need to be consulted about and publicly committed to by the government authority to avoid poor decision making processes and outcomes. We think the following principles should guide decision makers:

- Programs and funding policies need to be strategic and long-term in their approach, to ensure the deficiencies of the Higher Bandwidth Incentive Scheme (HiBIS) scheme are not replicated
- Funded infrastructure should be 'future proof' as much as possible, that is, it should embody capacity and service delivery characteristics that minimise
- Ongoing investment to accommodate future demand
- Government/public monies should only be spent on infrastructure that is bundled with previously agreed arrangements permitting competitive access.

The key objective is to get infrastructure rolled out and services in use, but we need to think about how to maximise efficiencies. This will be achieved by minimising barriers to the sharing of infrastructure and the facilitation of competition.

Sustainable solutions are much more likely to be achieved if funded infrastructure is shared by competitive service providers. The long-term commitment of infrastructure partners must be part of the selection criteria. Programs and decisions must embody a commitment to getting useful outcomes for the end users, rather than seek to simply give money to providers in a way that will encourage them into areas they probably already seek to go.

Recommendation: Long, term sustainable projects need development and funding to address systemic gaps in infrastructure roll out

Recommendation: That government funded infrastructure programs to be based on established foundations and benchmarks. These benchmarks need to be consulted about and publicly committed to by the government authority to avoid poor decision making processes and outcomes.

Incorporating consumer input to policy decisions

At times, CTN has been extremely frustrated that our input to various policy decisions, via the public comment mechanisms, does not seem to be incorporated into the end policy. There is little transparency about why a certain decision is made and why, and what priorities guide certain decisions. There is much room to improve the transparency and accountability of governmental decision-making processes.

We'd like to see feedback policies need to be stated, planned and included in the methodology of any participative and consultative processes by legislative, regulatory and industry bodies. There would also seem to be a need for government agencies tasked with addressing consumer issues to develop strategic plans with specific measurables and deliverables, and then subject to consultation and reporting against those measurables.

Recommendation: Better feedback policies be stated, planned and included in the methodology of any participative and consultative processes by legislative, regulatory and industry bodies.

Community Impact Statements

Once a product or technology is researched and developed and ready for introduction to the market, consumers find it is too late to do much about it even, particularly if the product or technology is going to have major disadvantages for consumers. Influencing a process such as the development of customer equipment is seemingly out of the capabilities of consumer advocates. Time and again, inappropriate products and services come to the market without consultation that could have prevented consumer detriment, to a degree.

Given the complexity of the telecommunications marketplace and the confusopoly approach toward consumer information, we see a need for the industry to develop community impact statements for all major new products and services in consultation with consumers before their introduction. This should be done in tandem with trials and pilots to ensure that it is as usable and accessible by as many sectors of the community as possible and that it does not cause any interference with existing technologies or equipment.

Section Four – Assessing Policy Tools

Are the right tools being used to meet the objectives of consumer policy? Is the current range of tools sufficiently diverse?

What sort of considerations should guide choices between different instruments? How well do current choices reflect such considerations? Is there too much emphasis on particular approaches and, if so, why? Are there examples of where the use of an inappropriate instrument has either given rise to significant net costs or led to ineffectual intervention?

Government and Industry preferences for Self-Regulation

The typical understanding of the Telecommunications Act highlights the apparent legislative preference for self-regulation. On countless occasions we have seen industry refer to Section 4 of the Telecommunications Act 1997 that states:

“The Parliament intends that telecommunications be regulated in a manner that:

- (a) promotes the greatest practicable use of industry self-regulation; and
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry”.

However, this is only half of Section 4 of the Act. The rest of the section contains a notable clause that is usually dropped when the above reference to self-regulation is made. Part 4 a and b apply:

“but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3”.

Section 3 relates to the purpose of the Act:

- (1) The main object of this Act, when read together with Parts XIB and XIC of the Trade Practices Act 1974, is to provide a regulatory framework that promotes:
 - (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
 - (b) the efficiency and international competitiveness of the Australian telecommunications industry.

Without exception the telecommunications industry and regulators have chosen to interpret the Act as preferring self-regulation at all costs, without proper consideration of the best policy tools. There is a need for all policy decisions to consider the full intent of Sections 3 and 4 of the Act, rather than uncritically rely on the part of section 4 referring to the greatest practicable use of self-regulation. This requires an amendment to the Act giving greater emphasis to the needs of consumer protection and other interests, rather than just industry interest.

Recommendation: Review the Telecommunications Act with a view to rebalancing the need to develop appropriate consumer policy and the applicability of industry self-regulation

Better use of policy tools

Policy tools utilised by governments and industry need to be better considered with the aim to meet the issue at hand. This is a huge problem in telecommunications because we

are bound to try self-regulating wherever practicable, rather than whenever appropriate. There is a tendency of to prefer "light touch" consumer protection tools, that is, do nothing, or create a voluntary guideline, regardless of the issue and the detriment to consumers, as is discussed elsewhere in this submission. Sometimes this has resulted in countless more resources going into creating a regulatory instrument that is ineffective only to have to repeat the process until appropriate tools are developed such as in the instance of consumer contracts provided earlier in this submission. There needs to be better risk analysis of consumer policy tools at the outset when developing regulatory solutions. Such a risk analysis would equally take into consideration both the detrimental effects and positive outcomes on consumers as well as industry.

Case study on the use of inappropriate policy tools: Disability issues

An excellent example of this uncritical consideration of the easiest approach, rather than the most appropriate approach, has been with regard to the telecommunications needs of people with disabilities.

Consumer advocates have been consistently blocked by industry in their attempts to ensure that the needs of consumers with disabilities are addressed by self-regulation. There is ample evidence to suggest that industry is extremely unwilling to self-regulate in this area, and that the correct policy tool for addressing telecommunications disability issues is perhaps the Telecommunications Act.

In 1997, CTN undertook a research report for the then ACA on Technical Standards for Disability Needs. The final outcome of that report was that a Technical Standard was required to ensure equal access to products and services. The CTN report contained 47 recommendations, yet only 2 were adopted in the eventual standard. The Standard eventuated 4 years later, and the need for a review is currently being considered. The Human Rights and Equal Opportunity Commission's report *When the Tide Comes In* captured the tension between industry and consumers in deciding appropriate mechanisms¹⁶.

In 2004, Communications Alliance (at that stage ACIF) began work on Code of practice to require manufacturers to make available information about the accessibility features of their products. This Code took an enormous amount of time and resources, significantly longer than expected, due to industry refusal to cooperate in the Code development. The Code was only finalised when the Minister's office became concerned at the delay in developing the Code.

Mandating accessible features is unwanted by industry on the grounds of it being an impediment to industry. From a consumer perspective, it's an important issue because it aims to ensure all people have access to telecommunications, regardless of a disability. The legislated right is currently being eroded through the primacy of self-regulation which allows industry to delay addressing issues it does not economically wish to deal with. The appropriate policy tool is quite clearly an expansion of the Act to supersede the self-regulatory instruments. As it is currently for a number of reasons including the matter of access to equipment consumers with disabilities are still unable to reap the benefits of access to a competitive telecommunications environment.

¹⁶ William Jolley and Associates, *When the Tide Comes In: Towards Accessible Telecommunications for People with Disabilities in Australia*, discussion paper commissioned by the Human Rights and Equal Opportunity Commission, 2003. Online at: http://www.hreoc.gov.au/disability_rights/communications/exec.doc

Recommendation: That amendments to the Telecommunications Act be implemented to ensure disability access to all telecommunications services

Other examples of ineffectual regulation are cited elsewhere in this submission, particularly self-regulatory responses to unfair contract terms and credit management issues.

Licensing Conditions are a highly effective policy tool

As is discussed elsewhere in this submission, there are big issues with enforcement of telecommunications consumer protection and an over-reliance on self-regulation. The use of license conditions has proven to be an excellent policy tool for achieving good outcomes and high levels of industry commitment to achieving the aims of those conditions.

Telstra's low-income measures are a good example of this, as is the requirement that Priority Assistance customers have their fault rectifications fast-tracked. It is also notable that a self-regulatory code of practice was developed with a view toward having consistency across the industry and eligible Priority Assistance customers were treated equitably. However, it is understood that there are only a small number of signatories to that Code, which undermines how effectively self-regulation has been able to achieve equitable outcomes without stronger policy tools.

We think license conditions are an ideal way to deal with key consumer protections, and give a strong message to industry players that consumer protections are mandatory, rather than voluntary. We strongly recommend that license conditions be utilised in the future.

Recommendation: Use licensing conditions across all telcos to address asymmetrical regulation of important consumer protections such as priority assistance

Section Five – Assisting Vulnerable & Disadvantaged Consumers

What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy?

Conceptualising disadvantage

It is important to recognise that given the particular circumstance, any consumer can be considered a vulnerable consumer. That is, they may find in their decision-making capacity that they do not have the skills and expertise to be able to ensure their best interests are being met. A consumer could be highly adept at purchasing a mobile phone plan, based on their past usage patterns, but be completely out of their depth when needing to understand how to contract for a broadband service if they have never used it before and don't know what their usage is likely to be.

At the same time, some consumer groups are subject to ongoing and systemic disadvantage. It is critical that consumer policy recognise and address this issue by enshrining the concepts of universal access, affordability, and accessibility into telecommunications policy decisions. There is, at present, too much emphasis on the notion that everyone has equal skill, capacity and opportunity to be a smart consumer and this is simply not the case. It is imperative that the needs of marginalised people who are not able to participate fully in the marketplace without assistance are not doubly penalised as a result.

Recommendation: That the needs of disadvantage and vulnerable consumers are recognised and addressed at all stages of development and implementation of the consumer policy framework in Australia

Informed Consent

One ongoing issue for CTN pertains to the concept of informed consent, and how it impacts on disadvantaged consumers in the marketplace. There appears to be a number of conflicts between the best interests of consumers and both the interests of industry to capture sales, and the capabilities of industry to deal with complex consent situations.

This was exemplified in a recent case in the Federal Court, where the ACCC argued that Radio Rentals engaged in unconscionable conduct by entering into various rental, loan and service agreements, worth more than \$20 000, with an intellectually disabled man. In the judgement, Justice Finn found that Radio Rentals had not acted unconscionably as the man had not put them on notice of his disabilities. Thus, as Radio Rentals had not knowingly taken advantage of the man's disabilities, it was irrelevant that appropriate risk-management procedures may have avoided the situation in the first place. The adverse judgment surprised consumer advocates, who fear that it could encourage an already reluctant industry to take an increasingly "hands-off" approach to any obligation toward vulnerable consumers.

In late 2005, the Communications Alliance (then ACIF) organised a roundtable discussion on informed consent, which was attended by members of the ACIF disability and consumer councils, industry and the ACCC. The discussion indicated a range of issues that must be considered and addressed if progress is to be made, including:

- A time commitment to understand consumer needs, wants and capacity to decide and pay.

- A responsibility to communicate with consumers in the language and format they are comfortable with.
- The need to help vulnerable consumers understand agreements they may enter into.
- A challenge in industry to practically train staff to ensure best practice of informed consent.
- A danger facing industry over Discrimination Act charges if they refuse to sell products to consumers.
- The challenge of 'organisational change' in industry, specifically in altering relationships with resellers and altering the commission structures of staff to better support informed consent.

How informed consent can be achieved will require careful thought, consideration and collaboration between all stakeholders. One option that arose in discussion is the creation of a non-commercial organisation that would provide consultation services to vulnerable consumers, and in doing so would get around the issues hampering industry moves toward best practice. It is envisaged that the organisation would place itself where consumers' needs, wants and capacities can be understood and dealt with appropriately by trained staff who are not in danger of discrimination claims. The service could act as a mediator between vulnerable consumers and the services and products offered by the telecommunications industry. Industry and government could jointly fund the organisation and vulnerable groups could direct their members to the service. The revenue that won't be defaulted on, and the savings in training industry staff may convince industry of its viability.¹⁷

Recommendation: Consider the development and resourcing of an independent body to assist disadvantaged and vulnerable consumers with information and purchasing decisions

Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?

A number of important agencies have recently undertaken research on disadvantage¹⁸, but it would seem that some more detailed research into consumer needs, as opposed to the causes and effects of being vulnerable and disadvantaged, are needed to fully inform the debate around which is the best approach. The diverse needs of disadvantaged and vulnerable telecommunications consumers highlights current policy failings and suggests a need for urgent reform.

Recommendation: Research must be commissioned by Government on issues for disadvantaged and vulnerable people with specific focus on their function as consumers in the telecommunications marketplace

¹⁷ Extracted from "Informed Consent", *CTN Quarterly*, Issue 63 December 2006.

¹⁸ See for example T Vinson, *Dropping off the edge: the distribution of disadvantage in Australia*, Jesuit Social Services, 2007 online at <http://www.australiandisadvantage.org.au/pdf/summary.pdf> and Wesley Mission Research Department & Urbis Keys Young, *Financial stress and its impact on the individual, family and the community*, Wesley Mission, Sydney, 2006 online at: <http://www.wesleymission.org.au/news/publications/finstress/>

Mobile phones and low income consumers

In recent years, the pattern of telecommunications usage has shifted dramatically. Mobile phones are the first choice for many consumers, and for a number of reasons. Affordability is one of the key drivers, as many people find the monthly landline connection fee prohibitively expensive, particularly given the increase in single person households and the near ubiquity of mobile phones, which for some consumers renders a traditional landline obsolete. The Australian Financial Counselling and Credit Reform Association (AFCCRA) undertook a project in 2005 looking at telecommunications issues, and financial counselors indicated that line rental charges were a significant affordability issue for them.¹⁹

The other key driver is the perceived affordability and flexibility of mobile services compared with landline services. Pre-paid services seem to be particularly popular as it means people can budget a set amount. It also means that when credit runs out, the service can still receive incoming calls for a set period of time, depending on what the service provider offers. It allows people to be responsible and budget for their access to services.

The downside to mobiles is that the cheapest basic plans often have significantly higher call rates, and there is considerable difficulty for consumers in making the best choice to maximise the utility of their service. There is also the issue of the proclaimed “capped” services that we discuss elsewhere in this submission in further detail. We suggest the Commission seeks out the full AFCCRA report to get a better idea of the junction between people who seek the services of financial counselors and pre paid mobile phone users.

Recommendation: The Australian Financial Counselling and Credit Reform Association report be used by the Commission to understand the junction between low income issues and pre-paid mobile phone users

Mobile phones and Aboriginal Consumers

Other recent research undertaken by the Tangentyere Council and Central Land Council shows that Aboriginal people in Central Australia, who have very limited access to fixed telecommunication services, are turning to mobile phones as a way of accessing basic telecommunications services.²⁰ Telecommunications services in that central region of Australia are limited; in remote regions, there are limited residential phone services in communities, and public phones are not available on many communities. In Alice Springs, public telephones are available in thirteen out of nineteen Town Camps, with home phone services generally available in urban areas but generally not available in Town Camps. Mobile phone coverage is available in some of the larger communities and towns.

That report made a number of findings relevant to the need to consider how well the telecommunications needs of disadvantaged and vulnerable consumers are being met. Aboriginal people in the survey region increasingly opted to use mobile phones, and overwhelming they are using pre-paid services. It was also a significant expense for users, who spent an average \$42 per fortnight on their mobile service, which for those on fixed Centrelink pensions equated to 13.5% of their fortnightly income. It should also be noted

¹⁹ Australian Financial Counselling and Credit Reform Association, *Financial Counsellors Experience with Clients' Telecommunications Issues*, 2005, p14. Available online at: <http://www.afccra.org/documents-12-06/telsta%20survey.doc>

²⁰ Tangentyere Council and Central Land Council, *Ingerrekenhe Antirrkweme: Mobile Phone Use Among Low Income Aboriginal People, A Central Australian Snapshot*, Tangentyere Council and Central Land Council, Alice Springs 2007. Available online at: <http://www.clc.org.au/media/publications/MobilePhone.pdf>

that this was not the only telecommunications expense, as many also used payphones or landlines.

Despite some limitations in cost and coverage, the strong take-up of mobile phones supports the notion that mobile phone communication has much potential in providing telecommunications services for a mobile Aboriginal population. Increasingly, mobile phones need to be considered an essential service. The research recommended that a low-income mobile phone package be developed, in consultation with the major mobile phone providers, as a matter of urgency. To ensure that this product is only accessible to people on low incomes, access could be regulated by health care card or be distributed by welfare agencies.²¹

The report also suggested that appropriate home phone packages and community education programs be further developed by phone companies and community organisations to assist Aboriginal people on low incomes access and manage a home phone.

If, as the evidence in both reports suggests, low income consumers are utilising pre-paid services for a whole range of reasons, there would seem to be a need to ensure that consumer protections for those who are disadvantaged and on low incomes are reflective of these emerging preferences. The utility of a mobile phone package for low incomes users needs to be developed to ensure that those using essential services are able to access telecommunications services that are affordable.

Recommendation: That the usage patterns of low income telecommunications users be considered in the development of appropriate mobile phone packages that can form apart of a reviewed delivery of the Universal Service Obligation under the current legislation

Payphones

Access to public payphones remains a priority issue for consumers, particularly those on lower incomes who rely on pre-paid services and payphones. In 2004, the ACA looked at payphone users and found that payphones were used by consumers with mobiles who were sensitive to the cost of using a mobile, and that even at that stage around 63% of payphone users had a mobile²². There is little to suggest that the factors that were influencing the use of payphones at that time have changed.

A lack of choice caused by a lack of payphone access forces a shift from payphone use to mobile phone use. This puts those on low fixed incomes in danger of incurring heavy and potentially unserviceable debt levels in attempting to maintain essential connections, by using their mobiles. There is a continuing need for payphones services, and furthermore, a need to ensure they remain available to users. Payphones continue to be the de facto home phone for many communities. This to be recognised and USO requirements applicable to home phones should also relate to payphones in communities that do not have opportunity for other services eg mobiles.

The Government delegates the provision of the USO to Telstra, who won a tender to be the Universal Service Provider (USP). As a part of their obligations as the USP Telstra must ensure payphones are reasonably accessible to all Australians no matter where they

²¹ *Ingerrekenhe Antirrkweme*, Tangentyere Council and Central Land Council, pp 7-8.

²² Australian Communications Authority, *Payphone Policy Review*, 2004. Available online at: http://www.acma.gov.au/webwr/aca_home/publications/reports/payphones/payphonepolicyreview.pdf

live or work, on an equitable basis. However, Telstra provides only a little over half of the more than 60,000 payphones across Australia.

Telstra is required to identify which payphones in a community are provided under the USO, and to ensure there are robust consultation processes where a non-USO payphone is to be removed or relocated. Telstra is also required to enhance its consultation processes for the removal of payphones by including on the removal notice the reasons why Telstra intends to remove that payphone and details on how a person can object to the proposed removal. The removal notice will also include an explicit reference to the ACMA's role as the regulator of Telstra's payphone obligations.

However, the payphones that are provided under the USO are a "moveable feast", with Telstra unable to provide a list of which payphones are USO phones for apparent commercial reasons, in that there would be no reason to install a payphone in an area where Telstra was required to provide one. Similarly when payphones are removed, the justification of the USO payphone is not necessarily clear. For example in a recent case in Otford, NSW, a community objected to Telstra's removal of one of the 2 payphones in the township, despite requests from a residents action group that the payphone that was actually removed should remain as the USO phone.

Whilst Telstra is required to provide payphone services under the USO, private payphone operators have no such obligations on them. In CTN's experience, Telstra has become increasingly disinclined toward maintaining the number of payphones in Australia, partly because they are effectively required to keep and maintain unprofitable payphones whilst their competitors are able to install payphones in areas with high usage and profits. Given that payphones are still essential services for some consumer groups, it seems time to expect that the financial burden of payphone provision be more equitably spread across the industry that profits from providing those services in the unprofitable areas.

Recommendation: Payphone policies need review to take account of changed market structures with a view toward ensuring communities continue to have access to these essential services

What are the examples of policies that are very effective in targeting vulnerable and disadvantaged consumers? Are there instances where a desire to protect these groups has imposed significant net costs on the wider community?

Telstra's low income measures package

One targeted program that exists for low-income telecommunications consumers is Telstra's Access for Everyone program. Access for Everyone currently offers services worth more than \$200 million a year, with an estimated 1.5 million Australians benefiting. Its success is attributed to the thorough consultation Telstra undertook with community agencies in designing the package and implementing the programs.

The Access for Everyone package was developed in conjunction with Telstra's Low Income Measures Assessment Committee. It is worth noting Telstra's assessment of the 12 month consultation period that occurred in the development of the package, as it captures the diversity of the needs of low income consumers and the difficulties in ensuring basic needs are met:

“Discussions revealed that the telecommunications needs of each segment were different. Needs included assistance to gain access to a basic telephone service, different ways to pay telephone accounts, and options for managing monthly costs of telecommunications. There wasn’t a single product or service that Telstra could offer that would benefit all of the groups and off-set the effect of increasing line rental and decreasing call costs. Telstra needed to create some new options to meet all the needs which had been identified”.²³

When considering this example of an excellent initiative, it must be recognised that having a low-income package is a Telstra license condition. The Access for Everyone program is not always easily accessible, according to some financial counsellors²⁴, does not apply to mobile phone services (which is most significant to low income consumers in recent times), and finally, applies to a single telecommunications carrier rather than industry wide. It is noted though that the program offers significant benefits to consumers in need of financial relief.

In many ways, Access for Everyone is exemplary of the fact that provisions for low income and disadvantaged consumers are social policies and have been designed specifically around the need to act in a limited way where service to a certain portion of the market is dominated by one carrier (landlines, Telstra), rather than the actual needs and uses of end users. This does not reflect the current market situation and consumer policy in telecommunications needs to be refocused on the reality that the majority of end users now rely on mobile phones and appropriate frameworks that spread the industry burden of ensure access and affordability need to be created around this fact.

Recommendation: That the preference for mobile phones be recognised by providers in the implementation of packages designed to assist low income consumers

Financial Hardship policies

It should be recognised that telecommunications lagged way behind other utility industries in agreeing to develop financial hardship policies for their consumers. However, this is now a requirement under the ACIF Credit Management Industry Code. This is a good development for consumer protection and we think it should be recognised as a targeted response to the needs of disadvantaged and vulnerable consumers. We are unable to offer any assessment of how hardship programs are being implemented, as they are still relatively new. CTN sees that hardship programs are an excellent tool for helping those in temporary need, but believe there is still a need to ensure those who are in need on an ongoing basis are also adequately protected and able to access appropriate products and services.

Recommendation: There needs to be some consumer research funded to assess the breadth of implementation of financial Hardship policies in the telecommunications industry

Price control regime

The price control regime administered by the ACCC has had some success, although as the increasing lack of affordability of landlines suggests, it has not been successful as a means of ensuring a landline service has remained affordable for most consumers. In part,

²³ Jenni Barbour, *All About Access*, online at: <http://www.sustained.com.au/content/view/130/32/> as at 21 May 2007

²⁴ See AFCCRA report

it suffers the same lack of relevance because of the applicability to only landline services. The tendency towards increasing the fixed cost component of the landline phone bill (line rental) decreases the discretionary spend available to consumers and thus impedes the growth of a competitive market. Whilst not perfect, and arguably not affordable enough, price controls are still appropriate. It is important to recognise that there are still many landlines services and they are often preferable because of the relative high quality of service, affordability issues for the calling party, and safety concerns. It would appear that older Australians on a fixed income are particularly disinclined to switch to a mobile only service, for example, and as such they are always impacted by rising prices and a lack of real competition to drive down prices.

We see a continuing need for a price control regime – albeit an expanded regime that applies across the industry as a whole. Australians have a notably high up-take of new technologies; recent examples include mobile phones, premium rate short and mobile message services (SMS and MMS respectively), and of course the internet. Any suggestion that price controls stifle innovation and technological progress is without merit or substance. The very nature of innovation is such that new technologies will emerge and create their place in the market based on their merit and suitability to the end users, whether locally developed or imported. We support new and innovative technology, and we do not accept that protecting the interests of telecommunications users is correlated with stifling such developments.

It is entirely unlikely affordable pricing would continue without being specifically mandated. Some consumer groups believe that discounts afforded under the current regime are largely inadequate. Pensioner discounts are tokenistic and don't take into account that they are heavy users of telecommunications; rural subsidies do not extend far enough in any sense of the term. Any watering down of provisions will impact hardest on those who can least afford it, as has been the effect of allowing the process of "rebalancing" the costs of line rental and call costs.

There is also a need for the Price Control regime to better reflect the primacy of mobile phone usage for disadvantaged consumers, and we think there is a clear case for SMS to be included in the regime. There is no correlation between the amount a service costs a provider and the amount a consumer is billed for that service. SMS only costs around 2c per message to send, yet the consumer is charged a proportionately massive amount (usually between 20-25c) resulting in a staggering profit margin for the service provider. The Australian Association of the Deaf suggests that Deaf consumers use SMS at 10 times the average rate. Uncapped SMS costs, therefore, disproportionately affect the affordability of telecommunications for deaf consumers²⁵. In the interests of equity, price controls on text-based services is needed to protect vulnerable consumers who rely on a heavily marketed and heavily utilised service.

The pricing of mobile services are also of the utmost importance to young people. Recent research conducted for the Youth Action Policy Association indicates around \$1 billion is spent on SMS each year, of which a significant proportion is likely to belong to young people²⁶. Like other low income consumers, pre-paid services are used widely by young

²⁵ Australian Association of the Deaf, 2002, *Mobile Phones and Deaf People Discussion Paper*, Retrieved from

<http://www.aad.org.au/download/MobileIssues.pdf> on May 25 2007

²⁶ Youth Action and Policy Association (NSW), "YAPA and SIMplus Mobile release Newspoll data on young people and mobile phone use", Retrieved May 23 2007 at:

<http://www.yapa.org.au/youth/facts/mobilespending.php>

people as a means of avoiding debt, but one of the biggest trade off's they make is that they often pay higher rates for calls. Price controls are therefore an appropriate means of protecting vulnerable young consumers whose access to telecommunications services can be impeded for a variety of reasons, such as not being old enough to sign a contract, deemed a credit risk by contract service providers due to their age, or having no steady income to enable them to sign up for a plan with all their cost benefits.

Should any major amendments to the current regime be recommended under this review, an inquiry which fully explores all the potential ramifications for disadvantaged and vulnerable consumers must first be undertaken.

Recommendation: That the price control regime remain in place, with expansion to cover mobile service and possibly broadband services

Penalty fees disproportionately affect disadvantaged consumers

CTN has long opposed the telecommunications industry's use of incidental fees and charges, such as late fees, administration fees, fees for itemisation of local calls, paper bill fees, statement fees, cash payment charges, bill inquiry line charges, handset provisioning fees and directory assistance fees. These fees disproportionately affect those least able to afford them, which poses significant problems of inequity. Even more basically, they have the potential to impact on the very affordability of having telecommunications services.

There is little opportunity for customers to take their business elsewhere when they are simply met with a different set of unfair, unjustified fees. The benefits gained by the implementation of effective price controls could be undermined if such fees are not carefully monitored by the ACCC, or preferably, legislatively banned.

Recommendation: That the range of penalties being unfairly applied to consumers be legislatively banned

Uptake of broadband – tackling the digital divide head on

Australian households are increasingly finding that having a reliable broadband connection is critical, as access to the internet becomes integral to our daily lives. As more of our information, banking and shopping transactions become data-delivered, the importance of protecting the reliability, universality and affordability of the household service increases. There has been government attention paid to creating incentives to roll out broadband (particularly in areas where there is no commercial imperative) via Broadband Connect and associated programs. While it is important to implement strategies to encourage widespread take-up of broadband, it is equally important to be aware of, and inclusive towards, those who do not have access to or experience of on-line transactions. It is critical that particularly attention is diverted to ensuring disadvantaged consumers are identified and strategies are created to ensure digital divide issues are addressed appropriately.

For example, organisations such as computer clubs need to be supported and networked by both government and industry so as those who have the technical knowledge and assets have better opportunities to share them. Programs need to be developed to ensure people have computers in order to get online. Skills development is critical. Feedback we have received suggests that these kinds of skills are best transferred on a one to one

basis, which can be quite resource intensive but ultimately would meet the purpose in a realistic way. The price cap regime may need to be extended to basic broadband services. In short, rolling out infrastructure alone is not the solution to ensuring all Australians get the access they will need into the future and the solutions need to be flexible and responsive.

Recommendation: That the development of end user skills be recognised as a priority in encouraging consumer uptake of new services

Section Six – Assessing Generic vs. Specific Industry Regulation

How effective are the generic provisions in the TPA and Fair Trading Acts in meeting their intended objectives? What, if any, changes are required to deliver better outcomes?

As discussed elsewhere, the generic provisions of the TPA have been very liberally interpreted by the telecommunications industry. The result has been very prescriptive descriptions of what is fair and reasonable in regulating relations between suppliers and consumers. Product offerings are often highly complex and the terms of an offer are not always readily comprehensible. Thus the detailed prescriptions of self-regulatory codes have served a useful purpose in encouraging good practice. At the same time though, a culture of fixing things retrospectively, rather than setting good minimum practices, has evolved.

Is industry-specific regulation particularly well suited to some areas? Are there examples where specific regulation has been helpful in putting a particular sector on notice? To what extent has the growth in specific regulation reflected inadequacies in generic regulation or its enforcement?

Prescriptiveness of self-regulation

It is important to recognise that the highly prescriptive nature of self-regulatory codes of practice has evolved as a direct response to the failures of the telecommunications industry to behave appropriately in the marketplace. For example, common sense and good practice – and indeed the TPA – would suggest that it is not only misleading but contrary to law to advertise a product as being “free” when it is not free. Yet, in telecommunications, the practice was rife until legal action sent a clear message, which at least 2 regulators could have sent many years earlier.

On 30 July 2004, the Federal Court of Australia found that Telstra's use of \$0 mobile phone advertising was misleading and/or deceptive, in breach of the TPA. The court did not accept all of the ACCC's submissions but upheld some of its concerns, but did find that the use of “\$0” by Telstra was misleading in some respects, as Telstra effectively charged more for \$0 phone packages than it did for the other items in the package without the handset. The judgment did not accept that readers of the Telstra advertisements would not have understood that they were going to have to pay Telstra something to get the free mobile handset on offer²⁷.

In the most recent (2004) revision of the ACIF Customer Information on Prices, Terms and Conditions Code, a section was added to specifically to explain to suppliers how to not misuse the claim of “free”. The need to codify not misleading customers about a product or service being “free” is a good indicator of how difficult it can be to encourage telecommunications providers to behave fairly in the marketplace without being very, very specific.

It is notable that same kinds of problems keep occurring. At present, the use of “unlimited” with relation to broadband services is a hot topic. We think there is a need to investigate what may be non-compliance with industry codes of practice pertaining to claims about unlimited broadband services. We note that the ACCC has, after many months of publicly

²⁷ Analysis online at: <http://www.deacons.com.au/NewsUpdates/Newsroom/LegalUpdates.cfm?objid=5065> as at 24 April 07.

warning Internet Service Providers (ISPs) not to mislead consumers on broadband, started an ISP education campaign about the TPA and the use of “unlimited”²⁸.

So while we agree that self-regulation can be highly onerous, it is often because the general tenets of the TPA about misleading and deceptive conduct are so liberally interpreted by telecommunications companies. It is also notable that a self-regulatory solution to an issue is often the result of a direction from the Minister, or ACMA, to develop a Code or Standard or the directing body will make a Code/Standard itself. As discussed elsewhere, it is high time for a mechanism to measure self-regulatory outcomes, rather than simply force the industry to create an instrument that may be an inferior policy option.

What principles should guide the choice between generic and industry-specific regulation? How well does current mix of regulation accord with these principles?

For a range of essential services, particularly for those in the industries in the transition from monopoly provision to a competitive market regime, there remains a need for industry-specific regulation. This is especially so where disconnection or denial of service has an extreme outcome, which effectively prohibits individuals from functioning effectively in society.

The specific nature and complexity of the supply of electricity, gas, water and telecommunications requires specific regulation above and beyond generic consumer regulation. In telecommunications, regulation has the effect of ensuring those in areas that are not likely to yield a profit to the service provider still get access to services, for example, those in regional and remote areas. It also important that quality and service levels are set at a standard which reflects the importance of telecommunications in everyday life.

We reiterate our calls elsewhere in this submission for telecommunications to be legislated as an essential service.

Are there significant areas of industry-specific regulation that do not provide a net benefit to the community? To what extent does this reflect the pursuit of redundant objectives or objectives that could be adequately addressed using the available generic regulatory instruments? Are there any substantial inconsistencies between industry-specific regulation and the generic regime and, if so, with what consequences?

Are there ways that the costs of industry-specific regulation could be reduced without reducing its effectiveness? For example, would more emphasis on principles-based regulation be helpful?

We note that the need to avoid regulatory overlap is given high priority in telecommunications self-regulation, and is often cited as a reason not to act within any given policy arena. Based on our critique of the function of the self-regulatory regime detailed throughout this submission, we see an ongoing need for strong generic regulation to complement the detailed self-regulatory regime.

Recommendation: That combination of generic and self-regulatory approaches continue, with previously suggested amendments and a rebalancing of the two approaches

²⁸ <http://www.accc.gov.au/content/index.phtml/itemId/779422/fromItemId/2332> as at 24 April 2007

Section Seven – Enforcement & Redress

Are there significant enforcement gaps in the current framework? If so, do they mainly reflect the level of resourcing for those entities responsible for enforcement or are there other factors at work?

Complaint Handling practices need greater enforcement

Consumers have ongoing problems consumers are having in accessing the TIO because they are not being advised about their avenues of redress in case of a problem. According to the most recently available statistics published in TIO Talks, Issue 38, complaints about Complaint Handling issues accounted for 15.2 per cent of all complaints, representing a total of 5,506 complaints over a 3 month period. To quote directly from that publication:

“Complaints related to the alleged failure of suppliers to advise dissatisfied customers of the existence of the TIO accounted for 69 per cent of all Complaint Handling complaints... The second worst performing Complaint Handling category remained Failure to Action Undertakings, which accounted for 17 per cent of complaints.”²⁹

This is only the latest example of evidence that suggests telecommunications service providers are not advising consumers about their right to redress through the TIO. There are clear systemic failures to action complaints, and enforcement action by ACMA on the ACIF Complaint Handling Code is well overdue.

Research into regulatory and enforcement agency response to telecommunications complaint processes

CTN is a member of the ACMA Consumer Consultative Forum (CCF), a relatively new forum bringing together industry peak bodies, consumer groups and a number of telecommunications regulators to consider industry issues. In December 2006, ACMA was asked by members of the CCF to co-ordinate a research paper on the consumer experience of complaint handling agencies. Following input from some CCF member organisations, ACMA wrote to the eight state and territory Offices of Fair Trading (OFTs), the TIO, ACCC and ASIC in February 2007, seeking information about how each body would handle twelve common typical telecommunications complaint scenarios.

The result of that research was overwhelming, with widespread confusion and uncertainty about jurisdiction and willingness of various agencies to deal with the complaint at hand. There is a pressing need for better understanding of where complaints belong in a telecommunications context. The spreadsheet of agency responses is attached as Appendix B.

Recommendation: That agencies who took part in the ACMA survey on complaint handling scenarios work with ACMA to ensure that consumer complaints are referred to the right agency

Recommendation: ACMA needs also to proactively address areas where consumer complaints currently have no avenue for independent redress preferably through proposing legislative amendments or regulations as necessary.

²⁹ TIO Talks Issue 38, Online at:

Gaps in TIO jurisdiction

Interestingly, it is worth noting that according to the TIO's 2006 Annual Report, out of its 107,601 total contacts, 20,008 of those enquiries were deemed out-of-jurisdiction.³⁰ Consumers expect that all elements of their telecommunication experience should be part of telecommunications regulation, and are increasingly dissatisfied with the issues that are not included. Handset complaints cannot be dealt with by the TIO except in limited circumstances, nor can the (mis)behaviour of dealers and agents. Interactive voice response systems seem to be covered by no regulation at all, with consequent high levels of consumer dissatisfaction. There, is at present, no complaints handling process for pay television service issues. As bundled household offerings are likely to increase in the market, this has grave implications for the loss of quality control for all our communications services.

At present TISSC has the power to proactively monitor the premium service marketplace offerings and is effective in identifying problems before they begin to impact on consumers. If the TIO's powers and jurisdiction were expanded, which we recommend it should be, it would need to have power and resources to:

- Pro-actively investigate whether industry practices are in line with regulatory arrangements
- direct compliance to members (membership of all carriers and carriage service providers being compulsory)
- make binding decisions, in the same way other similar bodies are in other industries (such as banking and financial services industries).

Recommendation: That the TIO cover pay television disputes, all handset complaints, have a monitoring capacity, compliance powers, and binding decision making powers

Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals, readily accessible and effective?

Assessing the existing avenues of redress: the TIO

Our knowledge of complaints and dispute resolution is principally from dealings and information provided by the TIO, rather than the plethora of other agencies who can deal with telecommunications complaints, so our comments about accessibility and effectiveness in this section will apply quite specifically to the TIO.

In 2006 the TIO Scheme was formally reviewed and measured against benchmark principles and practices for industry based customer dispute resolution schemes. CTN was engaged to provide a consumer submission to the consultant undertaking the review³¹, and we found that overall support for the existence of the TIO, and consider it provides a vital avenue for consumers to resolve their disputes which may otherwise remain unresolved. In an ever changing, increasingly complex arena, consumers agreed the TIO provides an absolutely essential consumer protection mechanism in the telecommunications industry.

³⁰ Online at: http://www.tio.com.au/publications/annual_reports/ar%202006/annual_200601.htm

³¹ The comments in this section are based on CTN's Consumer Submission to the review of the TIO, available online at: <http://www.ctn.org.au/content.cfm?ContentType=Content&ContentID=222>

Awareness issues were among the most commented on in the consultation process. There was a consistent view expressed by consumer groups and representatives that the TIO has a low profile and there is very limited public awareness of its existence and lack of awareness about jurisdiction over internet complaints due to its name. Levels of awareness are particularly low amongst older consumers, culturally and linguistically diverse people, indigenous consumers, consumers outside metropolitan areas and people with disabilities. Whilst campaigns need to target users who are under-represented in complaint statistics produced by the TIO, there is a continuing need for regular general awareness-raising.

CTN's consultation found that when combined with low awareness of its existence, "complaint fatigue" is a key barrier to use of the TIO. This is occurring partly because of the requirement that a consumer formally try to resolve their dispute with their service provider before the TIO will mediate the dispute. There needs to be a much better understanding of what proportion of complaints are being resolved by the referral process, and what proportion of complainants drop out of the process, if the effectiveness of the TIO is to be understood and improved.

Recommendation: Education campaigns target groups identified from the TIO Review as having low awareness of avenues of redress

Consumers surveyed also had a very strong view that there was a key role for service providers to promote and advise customers of their external dispute resolution scheme. There is a widespread view that the TIO is deliberately not promoted by the industry, to avoid complaints being made. The repeatedly suggested way to address this problem was to make it mandatory that contact details for the TIO be listed on every bill, with an equivalent notification for those who use services but do not receive bills (such as SMS for pre-paid mobile and emails for internet users).

Recommendation: That it be mandatory that contact details for the TIO be listed on every bill, with an equivalent notification for those who use services but do not receive bills (such as SMS for pre-paid mobile and emails for internet users).

Aside from awareness issues, other accessibility concerns were raised about the fairness of TIO processes. These included comments relating to the structural independence of the TIO governance bodies; the lack of jurisdiction in some key areas and the need to improve internal dispute resolution processes for TIO members.

There was also some concern expressed about the transparency of the appointment process for the Ombudsman, largely because consumers were on the whole unsure about how that process actually worked. It was noted, however, that a robust selection and appointment process for the Ombudsman role appears to exist in line with the expectations of consumer groups, but greater transparency of this process would allay some concerns. Concerns about the governance structure overall, particularly the Board's dominance over the Council, fuelled concerns about the credibility and viability of the TIO governance structure.

Determinations are a powerful tool available to the Ombudsman, but there appears to be some reticence to use them, not just as a means to sanction but also as a deterrent to the industry. This is frustrating for consumer advocates, who see determination as a means to

address recurring systemic issues. The effect of this means there can be a perceived lack of independence in choosing to finalise a complaint that would appear to be appropriately done by a determination.

An issue raised by consumer stakeholders involved reports of the TIO staff allegedly pressuring the consumer or their advocate to finalise a dispute, without a fair outcome being achieved from the complainant's point of view. We recommended that the TIO conduct complainant satisfaction surveys to ensure consumers are not inappropriately pressured to accept dispute resolutions that do not meet their needs and that staff receive on-going training to prevent these practices occurring.

Many consumers were unsure of exactly how the TIO scheme is accountable to government. There is a general view that even though the TIO is an industry-run scheme, it should be directly accountable to government for its activities. For consumer groups, it is absolutely critical that there be a formal mechanism for the TIO to report to ACMA and the ACCC on systemic complaints issues, and for enforcement action to be undertaken by the appropriate regulatory agency. A formal liaison committee needs to be established to provide transparency, with ACMA committing to using the information with which it is provided for enforcement purposes.

Recommendation: The TIO implement the range of recommendations from CTN's Consumer Submission to the TIO Review and publish a report as a response

Recommendation: A formal liaison committee needs to be established to between ACMA, the ACCC and TIO to development proposals for the appropriate enforcement agency to consider when it is evident that systemic issues must be addressed

Assessing the existing avenues of redress: ACMA

The only non-TIO dispute resolution agency we can provide further comment on is ACMA. ACMA also has a dispute resolution function, with the power to deal with individual complaints about payphones and Spam. ACMA also has the power to enforce registered self-regulatory Codes.

ACMA became the dispute resolution agency for payphones, as part of the Ministerial response to a privatised Telstra's payphone removal policies. CTN has had complaints from community organisations who have appealed to ACMA in a payphone removal dispute, on the grounds that ACMA did not have an established process for mediating the cases that came to them. It is perhaps not the fault of ACMA for not having a process when they were give jurisdiction over a complaints area, but it is disappointing and unacceptable that consumers are having problems getting access to a dispute resolution process.

Recommendation: That appropriate mechanisms for dealing with complaints be established at the same time as all new legislation, regulation and conferrals of power

The Uniform Credit Code

There is a need to consider making telecommunications providers subject to the Uniform Credit Code. There are huge issues of service providers extending large amounts of credit to consumers, particularly through the use of new and expensive products and services.

Consumers can quickly accrue huge bills through lack of complete information about how much the services cost. The problems of telecommunications and credit provision continues to occur despite attempts to self regulate to fix the problems.

Default listings were a key consumer issue in 2005, and one that we believe needs to be better regulated. Being default listed can have an enormous impact on an individual, and telecommunications providers are the biggest default listers, and notably for relatively small amounts. The present arrangements see the biggest credit listing agency BayCorp declining to list consumers for debts under \$100. This practice was implemented only after significant negative publicity in 2005 about listing telecommunications debts of as little as \$29.

Despite having raised that minimum limit, being credit listed for a \$100 phone bill can have a serious impact. The regulatory arrangements around default listing are extremely poor. It can, and does, happen without the knowledge of the person being listed. Many critical issues are identified in the NSW Consumer Credit Legal Centre's 2004 report on Debt Collection, which we strongly recommend the Commission consult³².

Recommendation: That telecommunications providers be covered by the Uniform Credit Code

Recommendation: That further credit reforms occur in line with recommendations made in the Consumer Credit Legal Centre (NSW) Report in Relation to Debt Collection, 2004

Are current redress and penalty provisions appropriate and effective? Would changes to these provisions in the TPA, Fair Trading Acts and other generic regulation reduce the incentive to employ specific regulation?

Unfair Contracts

In 2003, Victoria introduced Pt2B (Unfair Terms in Consumer Contracts) into the *Fair Trading Act 1999*. The Victorian legislation essentially sets a two-part test for determining if a contract term is unfair and therefore void. It asks 1) is the term contrary to good faith and 2) does the term result in a significant imbalance in the parties' rights and obligations. The legislation also imposes pecuniary penalties for suppliers with SFOAs containing prescribed unfair terms.

The case *Director of Consumer Affairs Victoria (director) v AAPT Ltd (AAPT)* (Civil Claims) [2006] VCAT 1493 (2 August 2006) gave the message to telephone companies using standard form contracts that where terms in a consumer contract (in Victoria) are unilateral and too broad, it is probable that they will be declared void.

The Law and Justice Committee's (NSW) report on unfair terms in consumer contracts was tabled in the NSW Legislative Council on 23 November 2006. The Committee recommended that the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW), to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999* (Vic). Furthermore, a number of Inquiry participants emphasised the need for consistency between jurisdictions in implementing specific unfair terms legislation, particularly in the absence of a national scheme.

³² Consumer Credit Legal Centre (NSW) Inc, *Report in relation to Debt Collection*, 2004. Online at: <http://www.cclcnsw.org.au/DebtCollectionRptApr2004.pdf>

CTN believes that such legislative uniformity would ensure jurisdictional parity and ensure community expectations of fairness were actually met.

Recommendation: That uniform national unfair contracts legislation be adopted. by Federal Parliament

Civil Penalties

In 2005, we submitted comments to the Ministerial Council on Consumer Affairs discussion paper considering Civil Penalties for Australia's Consumer Protection Provisions. We have not received any response or feedback on the outcomes of that review, but would like to reiterate our views to the Commission.

In that submission, we argued that alternative dispute resolution schemes are an appropriate and effective means of affording consumers the right to redress when problems arise. Such schemes have been developed to reasonable success within the telecommunications and banking industries. These industry-based customer dispute resolution schemes form a useful basis upon which to develop schemes suitable to all consumer transactions.

However, such schemes should not prevent a consumer from pursuing alternative remedies under the TPA, or other relevant avenues of redress, nor should they impose exorbitant costs on consumers. Improved comprehension of the major incentives for industry in establishing and maintaining such schemes should be developed through consultation. Businesses should be educated about such incentives in order to encourage effective schemes that deliver benefits to consumers. Most importantly, education of consumers and better promotion of the alternative dispute resolution schemes and processes available is required. Efforts in developing a coordinated approach to these schemes in transactions across jurisdictions should continue in order to encourage consumer certainty in cross-border business.

The problems in existing enforcement mechanisms are, in our view, significant. In summary, the evidential rules and burden, the cost of bringing an action and consumer protection agencies' limited resources all hinder any simple and cost effective restitution for consumers. We were concerned that the addition of a civil penalties regime may further increase the number of orders sought and that civil penalties will not be used in appropriate and justifiable contexts.

In *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd* (No. 2) [2002] FCA 1548, Justice French, commenting on the large number of remedies sought in the application by the ACCC, suggested that such practice ran the "...risk of devaluing the importance of the remedies..." and it was "...not necessary or desirable that the contravenor be metaphorically mummified under overlapping layers of redundant orders." As Justice French reiterated "[t]he contravenor should be sanctioned with *appropriate relief*" (our emphasis).

Appropriate relief requires transparent best practice guidelines written for regulators, legal practitioners and the regulated community to be devised so as to limit the need to seek redundant orders and foster certainty and consistency. The US Department of Justice has

developed an integrated enforcement policy³³ concerning coordination of civil and criminal enforcement in environmental regulation. Such guidelines should address optimum pathways to enforcement and provide certainty to all stakeholders avoiding double punishment and evidence issues.

CTN supports the introduction of a civil penalties regime. Our main concern is that the resources of the consumer protection agencies, the Department of Public Prosecutions and consumers generally could continue to be used to service actions with no strategic goal for optimising relief. CTN urges that guidelines be developed to optimise actions similar to the US Department of Justice integrated enforcement policy concerning the coordination of civil and criminal enforcement in environmental regulation.

Recommendation: That a civil penalties regime be introduced

To what extent has more regulation been substituted for better or more timely enforcement?

Lack of enforcement is an ongoing problem

The highly prescriptive nature of self-regulatory Codes of practice supports our view that, in telecommunications, more regulation has indeed been substituted for more timely enforcement. The TIO's last annual report showed that the TIO handled a total of 107,601 contacts in 2005/06, which is a 10.0% increase the previous year's total of 97,798³⁴. TIO statistics record breaches of Codes of practice against what is contained in any given (ACMA registered) Code, and publishes complaints information on a quarterly basis. Time and again, the TIO highlights the same clauses being breached. Yet when industry members fail to decrease the numbers of complaint they receive, time and again, ACMA does not take enforcement action. It is frustrating that despite being presented with information about market failure, ACMA does not choose to direct compliance, as many would reasonably expect.

Although ACMA appears to have appropriate and adequate powers of regulatory oversight, and the information and resources to initiate enforcement activities, in practice there appears to be been a culture of non-interference. As a result, many consumers have become disillusioned with ACMA and it's apparent reliance on corporate 'good citizenship' as a means of regulation.

ACMA has the power to direct compliance with registered industry Codes. The lack of enforcement not only undermines government policy, more importantly it has negative impacts on the consumers having problems and the image of the industry as a whole.

Similarly, elements of the TPA pertaining to unconscionable conduct and misleading and deceptive conduct also appear to remain deliberately un-enforced by the ACCC. Several years ago reports were circulating of unscrupulous sales of mobile phone handsets to remote Aboriginal communities, where mobile phone coverage was not even available. The ACCC's reported action was to ask for more complainants before they would investigate – a highly disappointing response, to say the least.

³³ US Department of Justice, *Directive 99-21 Integrated Enforcement Policy*. Retrieved May 24 2007. Online at: http://0225.0145.01.040/enrd/Electronic_Reading_Room/integrated.htm

³⁴ Online at: http://www.tio.com.au/publications/annual_reports/ar%202006/annual_200601.htm

Once again, we call on regulatory agencies to undertake more active enforcement action in order to send a clear message to industry players who do not take regulation seriously that they will be penalised and that regulatory compliance is a pre-condition to operating in the Australian marketplace. It is one thing to have the rules but effective regulation also requires enforcement and monitoring. There is at present not a lot of transparency about ACMA's role in monitoring the industry except in relation to the production of the Communications Review in December 2006. This will be an annual exercise however in order to fulfil its monitoring role effectively there needs to be both qualitative and quantitative research on an on-going basis, there needs to be performance audits and shadow shopping. There could even be a role for more detailed compliance statements to be published by service providers. Measuring customer satisfaction is a role that ACA took very seriously as an independent regulator and this should be taken up by ACMA as well.

Recommendation: That ACMA take a more pro-active enforcement role in the telecommunications industry. This should involve more performance audits and mystery compliance checking as well as publishing regular reports on industry compliance that refer to broader indicators that simply the TIO Statistics which show only one element of compliance. ACMA should follow through with enforcement action wherever regulatory breaches are found so that the industry gets a clear message about compliance expectations

Need for consistent action of systemic issues

The arrangements for demonstration of a 'systemic failure' that could invoke a regulator's power to intervene have not been clear or consistent. Despite several instances of widespread non-compliance with codes that we have brought to the attention of the relevant authorities, we have found that action is unlikely to be taken of any more serious nature than correspondence expressing general concerns. This has not had any noticeable effect on behaviour in the market, nor on the pace of development of codes of practice.

Recommendation: That accountability mechanisms be developed for regulatory agency responses to systemic complaints raised with them

Section Eight – Self and Non Regulatory Approaches

What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework? What are the best examples of effective self-regulation, co-regulation and non-regulatory approaches and why have they worked well in these cases? Is enough use currently made of such measures? If not, where are the main opportunities for further uptake?

Utilising self-regulation

CTN's view of self-regulation has been outlined throughout this submission. It has some benefits, and without doubt an ongoing role due to the legislative framework. Yet it must be recognised that self-regulation has a number of bottlenecks in creating effective consumer protections, and in many instances it has proven ineffective without complementary legislation to provide an impetus to act.

The structure of Communications Alliance as the self-regulatory body has a number of problems that make it difficult for consumer issues to be addressed. For example there are no consumer interests represented at the highest levels (on the board) and therefore the demand side has no impact on the strategic direction of what issues need to be addressed. As discussed elsewhere in this submission, the lack of "proof" and demands for evidence-based research into consumer detriment can make it difficult for consumer regulatory issues to become projects.

Similarly, the direction of a project requires the approval of Communications Alliance management, not just the approval of industry and consumer representatives who discuss and debate the issues around the table. Accordingly, there are a number of structural issues that serve to create barriers to consumer issues being addressed by self-regulation.

Recommendation: That the structure of the self-regulatory forum Communications Alliance be reformed in order to facilitate and better accommodate consumer issues and input

In terms of what works well in self-regulation, it is important to recognise that when work relevant to consumer protection is undertaken, there is usually good consumer representation. The existence of standing Disability and Consumer Councils are excellent examples of this policy being implemented.

Some argue that self-regulation has led to inconsistencies, due to the creation of a range of consumer protection Codes with different scopes, and different meanings attributed to certain terms within those Codes. The development of a Telecommunications Consumer Protection Code which will bring six consumer codes into one regulatory instrument will address this in part, but there are still clear gaps that could be addressed but only with the commitment of industry at some future date.

Self-regulation is complementary to legislative responses rather than an alternative to legislation

An ongoing problem that faces self-regulation is when self-regulation is the wrong policy tool. Many of the examples of where regulation has properly addressed pressing consumer issues have actually been where there has been a legislative response or there

has been government enforcement or threat of legislative responses or government intervention.

For example Spam has been relatively effectively combated by the Spam Act and enforcement action has been taken. The development of the aforementioned contracts code is a good example given the probability of national legislation being introduced to bring the rest of the country in line with Victoria.

The development of a self-regulation checklist would assist in determining if the area is appropriate to be self-regulated, or if there is a general need to enact a consumer protection due to the benefits it will provide.

Recommendation: A self-regulatory checklist be developed across all industries to consider the appropriateness of self-regulation to meet address the desired policy outcomes.

Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved? Should such a body's role be limited to advocacy, or should it also be responsible for bringing forward consumer complaints? Do consumer advocacy bodies adequately represent the interests of all consumers? If not, what other means could be used to elicit the views of consumers? Is there a need for greater research into consumer and market behaviour to inform policy development? If so, who should be responsible for carrying out and resourcing such work?

Consumer advocacy bodies

In our view, it is critical that consumer advocacy groups have clear connections to the community if they are to be credible in their advocacy work. CTN, for example, has a national network of members across the breadth of the community CTN's members include national and state organisations representing consumers from non-English speaking backgrounds, deaf consumers, indigenous people, low income consumers, people with disabilities, pensioners and superannuants, rural and remote consumers, women and consumers in general. The need for direct links with the community is critical because it allows information and experiences to, shape and influence policy, to flow in both directions.

Consumer advocacy bodies with constituencies have credibility and expertise, and we think that it is imperative that those who advocate on behalf of consumers have established consultation and accountability mechanisms. This helps ensure that what is being advocated for is an accurate reflection of the wants and needs of the community. The principle of "nothing about us without us" is an important one. Whilst there is a place for consumer groups who are not directly representative of a constituency, there is still a need to ensure close links between the views being espoused by an organisation and the views of those being represented.

Recommendation: That consumer advocacy bodies that receive public funding and represent consumer interests be required to demonstrate their links to the community they represent

CTN supports further consideration of a national consumer advocacy body. Much like a debate about what form a republic should take, we think that the preferred model can only be decided when one proposal is offered and debated. We also see the value in a

standing consumer advocacy body, as long as the members on that body have established links to the Australian public.

Recommendation: That a scoping exercise for a national consumer advocacy body be undertaken in consultation with consumer groups

There may also still be a need for groups with specific expertise such as CTN in telecommunications and the Consumer Health Forum as well.

Funding for consumer bodies

CTN has been engaged by DCITA to undertake a one-off project: “*Review of Consumer Advocacy & Representation in Telecommunications*”. In this project, we will consider the question of whether the current mechanisms for representing consumers, and for funding consumer advocacy in telecommunications, are adequate and also whether they will remain relevant in the future. We will provide the Commission with a copy of the final report in the next round of consultation on the Consumer Policy Framework review.

CTN is of the view that there is a severe funding crisis in the communications sector for consumer participation in the development of consumer protections, laws, and self-regulatory instruments. The Telecommunications Consumer Representation Grant Scheme (of which CTN is the primary recipient) has had no increase in funding for 9 years and will remain the same for another 3, despite the explosive growth of the telecommunications industry in that time, and of consequently of consumer issues, and also of general inflation/cost of living.

Government, consumer groups and industry all need consumer and public interest organisations to be adequately funded to be able to provide a voice for consumers.

We have long advocated that the current grants scheme be overhauled to ensure:

- Scalability – ensure the funding level grows with the industry
- Stability – ensure a sustainable funding base for consumer groups
- In addition to project based funding, program funding for periods longer than 1 year.

Consumer groups need to be funded to enable improved co-ordination of input to regulatory reviews. This will mean that the expertise of groups with specialist knowledge can be shared, and information is shared. This will ensure that smaller organisations are still able to provide input, without which they may not have the resources to be able to contribute. Funding should also be allocated specifically to raising consumer awareness and presenting alternative views on issues from a consumer viewpoint. DCITA should ensure that in expanding assistance to new groups under the grants for consumer advocacy and research, that organisations currently receiving funding continue to be allocated sustainable levels of funding.

Recommendation: That funding for consumer representation be significantly expanded to ensure scalability relating consultation workload, stability, and sustainability.

Lack of Consumer Consultation is Unacceptable

There have been a number of recent examples of consumer interests not been appropriately represented in the regulatory development processes. This is seemingly despite the generally agreed desirability of consulting all relevant stakeholders with an interest in the outcome. A good example was the development of the Internet Industry Association's (IIA) guideline on Adware. Consumer groups attended a roundtable held by the IIA but were not allowed to participate in the guideline development process. This was a missed opportunity to engage all stakeholders as a best practice industry model for no apparent reason other than a lack of inclusive practice on the part of the IIA.

Another recent example that has had a far greater (and negative) impact, was the exclusion of consumer input to the development of the Mobile Premium Services Industry Scheme. The scheme sets rules about providing mobile customers with clear and transparent information about the costs and terms and conditions on which mobile premium services are offered, and about the handling of complaints about mobile premium services. An earlier incarnation of the Scheme was developed under TISSC, with a Committee that represented both consumer and industry members. However, in the latter stages of the development of the Scheme, the project was removed from under the auspices of TISSC and industry representatives alone continued work on the scheme.

The final draft Scheme was significantly different to what was envisaged when consumer groups were involved in the project, and a public consultation period was no substitute for having input to the pre-public concept. It was a very disappointing outcome and consumer groups consider it a worst practice model. ACMA subsequently registered the scheme, despite the fatally flawed consultation process. Whether the scheme sets adequate consumer protections remains to be seen.

Recommendation: That proper consumer consultation be built into all regulatory development processes without exception

Section Nine – Jurisdictional Responsibilities

What are the main areas of duplication, overlap and inconsistency in consumer regulation across jurisdictions (and with New Zealand)? How significant are the costs of this inconsistency, overlap and duplication relative to any benefits provided?

Are there areas of regulatory responsibility that could readily be consolidated within one level of government? Are there areas which could be harmonised across jurisdictions? What particular considerations arise in relation to facilitating greater integration with New Zealand and international trade more generally?

The different elements of telecommunications legislation and regulation is well recognised in the Commission's discussion paper. It would be exceedingly difficult to move all legislation pertaining to telecommunications into a single jurisdiction.

A One-Stop-Shop for communications complaints

A large number of regulatory agencies have jurisdiction over some aspect of telecommunications issues. Given the convergence of the products and services provided by the industry, and the convergence of the regulatory agencies who oversee the industry as a whole, we think there is an opportunity to consider whether having multiple agencies with jurisdiction over individual telecommunications complaints, namely the TIO, TISSC, ACMA, ACCC and state fair trading agencies, needs to be combined.

Without a single complaints body it can be hard to get a good idea about the extent of a problem. For example, if a consumer has a problem with their new mobile phone handset, the appropriate complaints body depends on whether they bought the phone as part of a bundled service and product offering (in which case the TIO has jurisdiction) or whether they bought it outright (in which case it would be their state fair trading body).

What we do not wish to lose is the ability to identify systemic complaints and act on them, where the regulator is so inclined. If there is consolidation of complaint resolution jurisdiction, it will be absolutely critical that the body has the power to pro actively investigate industry practices and direct compliance.

Recommendation: That there be a review of telecommunications complaints handling taking into consideration the effects of the converging communications environment and the desire of consumers to have a one stop shop. This review should develop recommendations that address the establishment of a Communications Industry Ombudsman and the complaints resolution processes used internally by service providers

Standards Development

In many respects, developing telecommunications Standards is an example of how a self-regulatory approach is working effectively, driven primarily by the global nature of the customer equipment manufacturing industry. Communications Alliance has the responsibility for the development and maintenance of Customer Equipment Standards that are called up under the Telecommunications Act 1997 under a Memorandum of Understanding between ACMA (then the ACA) and Communications Alliance (then ACIF). Committees are formed to create or amend Standards, which are then submitted to the ACMA for making under the Telecommunications Act 1997.

Section 376 of the Act requires ACMA to make technical standards in relation to specified customer equipment and customer cabling in line with ACMA's heads of power, namely:

- protecting the integrity of a telecommunications network or a facility;
- protecting the health or safety of persons who;
 - operate; or
 - work on; or
 - use services supplied by means of; or
 - are otherwise reasonably likely to be affected by the operation of a telecommunications network or a facility; or
- ensuring that customer equipment can be used to give access to an emergency call service; or
- ensuring, for the purpose of the supply of a STS, the interoperability of customer equipment with a telecommunications network to which the equipment is, or is proposed to be, connected.

While the general approach in Standards development aims for international alignment wherever possible, there are still provisions to ensure Australian specific Standards can still be developed where necessary.

This is an important consumer protection mechanism that balances the needs of industry with the needs of Australian consumers. The only problem with this arrangement is the difficulty getting industry to recognise the social benefits of having high minimum standards, such as an adequate range of accessible features for people with disabilities.

Recommendation: That the s376 compliance regime also apply to the Disability Standards

Memorandums of Understanding (MOU's)

MOU's have also proven useful policy tools to deal with issues that cross national boundaries. The Australian regulatory response to Spam emails has been multi-faceted, and significantly has involved signing MOU's with a number of international agencies.

It is highly unlikely Spam will ever be entirely eliminated, but the Australian approach of addressing Spam on a number of fronts, including the sharing information across jurisdictions, is generally considered to have been a successful approach that has minimised the amount of Spam being received. The use of MOU's is an appropriate and useful response to international communications issues, in conjunction with other programs such as community education, filtering, reporting, and so on.

Recommendation: That Memorandums of Understanding be used as a tool in conjunction as part of a broad policy response where appropriate (e.g. VoIP regulation, e-commerce and e-security)

Poor responses to issues that fall “between the gaps”

We also see evidence to suggest regulators are unwilling to recognise problems as within their jurisdiction. An excellent example relates to the so-called missed call scam. The scam involved the victim’s mobile phone ringing only once, leaving the number of the calling party displayed on the phone. When the recipient phones back the number displayed on their caller ID, they receive a pre-recorded advertisement. If the customer agrees to be redirected to the quiz/competition line, they are then charged at a premium rate as advised in the recorded message.

At the time it was unclear where consumers should complain to – the TIO, ACCC, ACMA or State Consumer Protection departments. After around nine months or so of all the above parties declining to take responsibility for investigating the practice, ACMA recognised that these marketing activities are likely to constitute serious and extensive contraventions of the *Spam Act 2003*. ACMA undertook to investigate and the companies involved ceased to use the tactic.

Recommendation: That a process be developed whereby complaints that appear to fall between regulatory jurisdictions be addressed by cross agency responses in order to quickly ascertain the correct complaints body

Section Ten – Gate Keeping & Review Arrangements

CTN has no comments on this section.

Section Eleven – Regulatory & Oversighting Arrangements

Do consumer regulators have the appropriate structure, resources, skills and powers? Is there scope to consolidate industry regulators, or to subsume their functions within generic bodies? Are there tensions or problems where regulators are involved in both policy making and enforcement, and/or in enforcement and advocacy, and how might these be addressed? Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?

Are the Ministerial Council arrangements working well? If not, what changes are required? Would changes to other policy oversighting arrangements help to deliver better outcomes for consumers?

Is there a need for improved policy and enforcement arrangements between Australia and New Zealand?

Reporting arrangements

In telecommunications, there is significant imbalance in the ability of consumer groups to get consumer issues addressed through self-regulation and the ability of industry to prevent those issues being addressed through inactivity. The reporting arrangements of regulatory bodies are important for consumer groups, because the regulator often has access to information which provides the “evidence” that is needed to provoke show industry there is a problem that needs to be addressed.

Traditionally, the annual report of the telecommunications regulator has been an important tool for consumer groups to demonstrate the problems of the industry and advocate for changes. It is a useful complementary document that backs up the anecdotal evidence of consumer advocates. Because there is no funding for evidence based research, or funding for proper representation for those consumer advocates who can demonstrate problems (eg credit legal centres and financial counsellors), the ACA’s annual report served to identify systemic problems and flagged the kinds of issues the ACA expected the industry to act upon in the coming year. It was a way of signalling to industry where the regulator expected progress, and the next report actually tracked the progress (or lack thereof). It was reflective of a regulator at a distance from industry and holding industry to account by the benchmarks industry itself had set.

When the ACA and Australian Broadcasting Authority merged to become ACMA in 2005, consumer groups were disappointed to find that the new Communications Report was a very different kind of report that looks largely at figures and contains but a few paragraphs of analysis.

Particularly disturbing was the fact that there was no progress reports on developments identified as the key issues in the preceding report. This was not only disappointing, but surprising, given that the critical issue of default listings (which has a particularly insidious effect on consumers in the longer term effect on their personal credit rating) was not even referred to.

Consumer groups were very disappointed with this lack of continuity and analysis, and CTN raised this issue directly with ACMA. We are yet to see any progress on suggestions that perhaps a stand alone consumer issues report will be published come to fruition.

ACMA has the power to oversight and if necessary enforce the USO and CSG, as well as provide general reports on service quality and consumer satisfaction. However, it is not resourced to conduct independent testing and is largely reliant on information provided to it by carriers and service providers. Many newer and smaller Telco's seem to be able to avoid close scrutiny, adding to consumer uncertainty about signing up to an unknown brand.

We believe that as the enforcement agency, there is an imperative on the regulator to report on the issues of concern and flag where they expect progress. This is a non-policy tool which has in the past been very effective from a consumer point of view. There is an onus on the regulator to ensure industry is aware of when it is not meeting expectations and the annual report is the place to do this. We'd like to see requirements on regulators to analyse the industry against the established benchmarks and much clearer indications via reporting arrangements on the areas where improvements are expected.

Recommendation: That regulatory reports, especially the Annual Communications Review, identify key consumer issues and report on those issues on a progressive basis

Acronyms

ACMA Consumer Consultative Forum (CCF)
Australian Communications and Media Authority (ACMA),
Australian Communications Authority (ACA)
Australian Communications Industry Forum (ACIF)
Australian Competition and Consumer Commission (ACCC)
Australian Financial Counselling and Credit Reform Association (AFCCRA)
Australian Securities and Investment Commission (ASIC)
Communications Alliance (CA)
Consumers Telecommunications Network (CTN)
Customer Service Guarantee (CSG)
Department of Communications Information Technology and the Arts (DCITA)
Internet Industry Association's (IIA)
Internet Service Providers (ISPs)
Memorandum of Understanding (MOU)
Short Message Service (SMS)
Standard Forms of Agreement (SFOA)
Standard Telephone Service (STS)
Telecommunications Industry Ombudsman (TIO),
Telephone Information Services Standards Council (TISSC),
The Communications Law Centre (CLC)
Trade Practices Act 1974 (TPA)
Universal Service Obligation (USO)
Voice over Internet Protocol (VoIP)

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Appendix A - CTN Online Security Report

Surfing on Thin Ice: Consumers and Malware, Adware, Spam & Phishing

A consumer research report by the
Consumers' Telecommunications Network

November 2006

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Executive Summary

This research investigates Australian residential consumers' experiences with e-security and identifies areas of concern and their implications on telecommunications policy and regulation. Findings and recommendations have been formed through a literature review and an online survey of 254 Australian consumers. In age, gender and location, the collection of consumers we surveyed reasonably represents a wider group of Australian consumers. However, the majority of consumers we surveyed were frequently online, and active once online, and results may therefore not adequately represent consumers who are rarely online.

In summary, though a minority of Australian consumers may be suffering financially as a result of e-security problems, many more may be suffering productivity-wise, and stopping or changing the way they use the Internet because of e-security concerns. Furthermore, though awareness of e-security threats may be reasonably high, consumer understanding of these threats and how to protect themselves against them may be lacking. Consumers we surveyed looked to Internet Service Providers, Government and fellow consumers to take more responsibility for e-security. With the potential for many consumers to be "surfing on thin ice", our recommendations include development of consumer protections, development of consumer education, and further research around e-security issues.

Key Findings

F1. The strong majority of consumers had experienced many e-security threats despite using a range of security products and despite current consumer protections.

- More than 4 out of every 5 consumers we surveyed had experienced Spam.
- Approximately 2 in every 3 consumers we surveyed had experienced computer viruses or spyware.
- More than 1 in every 3 consumers we surveyed had experienced adware, trojan horses, phishing or worms.
- 2 in every 3 consumers we surveyed had used anti-virus software, firewall software, software updates, or anti-spyware software.

F2. A small but significant proportion of consumers suffered financially, but many more suffered from a loss of productivity and had changed how they used the Internet because of security problems and concerns.

- More than 1 in every 10 consumers we surveyed had experienced unexpectedly high bills or financial loss as a result of online security problems.
- Many consumers we surveyed commented on the loss of time and frustration they experienced when dealing with e-security problems.
- More than 1 in every 3 consumers we surveyed had stopped or changed the way they made online purchases, paid bills online, or used online banking because of online security concerns.

F3. Consumer awareness of security threats was reasonable, but understanding and confidence to identify and guard against security threats was a concern.

- Almost 9 out of every 10 consumers we surveyed answered that they were aware of and understood Spam and computer viruses, and more than 2 out of every 3 answered that they were aware of and understood spyware and adware.
- However, more than 1 in every 4 consumers we surveyed had either never heard of phishing, adware, worms, trojan horses or diallers, did not fully understand how they worked, or did not fully understand how they might get them.
- More than 1 in every 2 consumers we surveyed were less than confident they could successfully identify malware, adware, Spam or phishing.
- Almost 1 in every 3 consumers we surveyed rated their understanding of how security products protected them as less than good.

- Approximately 1 in every 3 consumers we surveyed had used security products installed by someone else, and many indicated that they relied on products or other people to manage their e-security.

F4. A small proportion of consumers were mishandling Spam and phishing attacks.

- The majority of consumers we surveyed had recognised and ignored phishing e-mails, but more than 1 in every 20 had been confused by a phishing e-mail, or had visited the websites they were asked to by a phishing e-mail.
- The majority of consumers we surveyed had deleted Spam without investigating it further, but more than 1 in every 4 had read or tried to unsubscribe from Spam, and 1 in every 20 had replied to it.

F5. Use of independent sources of information on e-security was low, and many consumers questioned the reliability and accessibility of information they had used.

- Less than 1 in every 4 consumers we surveyed had used Government information on e-security, while most used security software companies and the media.
- More than 1 in every 2 consumers we surveyed did not fully trust the sources of information they used, and many raised concerns over the availability and complexity of the information they used.

F6. Most consumers wanted Internet Service Providers, Government and fellow consumers to take more responsibility to improve e-security.

- More than 4 out of every 5 consumers we surveyed thought Internet Service Providers should take more responsibility to provide better security online for consumers.
- 2 out of every 3 consumers we surveyed thought Government should take more responsibility to provide better security online.
- 2 out of every 3 consumers we surveyed thought consumers themselves should take more responsibility to provide better security online — Approximately 2 out of every 3 consumers we surveyed did not regularly read end-user license agreements, change passwords once every 6 months, switch to more secure software, or read terms and conditions of websites, while only half regularly used web browser security features.

Recommendations

R1. Development of consumer protections:

- a. A central, user-friendly, and well-promoted system for consumers to report e-security threats, and for subsequent investigation, encompassing and extending the Australian Communications and Media Authority's SpamMATTERS, the Australian Competition and Consumer Commission's ScamWatch, the Australian Federal Police's High Tech Crime Centre and AusCERT's reporting systems.
- b. Test cases, case studies and audits of existing consumer protection legislation to ensure adequate protection from current and emerging e-security threats.
- c. Informed consumer consent to the use of adware should be a central principle of Australian Adware guidelines, currently under development by the Internet Industry Association and the Australian Direct Marketing Association.
- d. Internet Service providers and software producers should be required to address e-security issues of the products they offer, including providing warnings and consumer education, making software patches available, and providing e-security tools.
- e. Action on an international front, possibly forming international information sharing and enforcement arrangements with other governments and agencies, as has been done in the case of Spam.

R2. Development of consumer education resources:

- a. Up-to-date lists of confirmed e-security threats, especially phishing scams, for consumers to refer to.

- b. Using animated demonstrations, real-life examples and plain language to explain how e-security threats work, how to identify them, and how to best deal with them.
- c. Using animated demonstrations, real-life examples and plain language, explanations of how e-security products and other e-security measures work, especially in the context of online transactions.
- d. Addressing the challenges consumers face maintaining security measures across multiple computers, including work computers.
- e. Education resources should be delivered through an independent, central organisation and website – potentially encompassing or extending the NetAlert website or the Stay Safe Online website.
- f. Education resources should be widely promoted across all sectors of society, especially to young people, seniors and new computer users.
- g. Consumers should be encouraged to take more responsibility for their own e-security by actively accessing information, including www.staysafeonline.gov.au and www.netalert.net.au.

R3. Further research into consumers and e-security:

- a. The extent of financial loss, emotional distress and productivity loss on consumers as a result of e-security issues – the Productivity Commission may be well-placed to conduct such research.
- b. The financial capacity of consumers, especially low-income consumers, to effectively protect themselves online, and the viability of subsidised or free e-security products such as e-mail filters.
- c. A focus on e-security for consumers under the age of 30.
- d. A focus on e-security for consumers who are not regularly online.
- e. The most user-friendly ways to present information about online security to beginners, intermediate and advanced computer users of diverse backgrounds.
- f. The best distribution channels to reach beginners, intermediate and advanced computer users of diverse backgrounds with information about e-security, including point-of-sale information, and computer user and community groups.
- g. How the speed of an Internet connection, data download limits, or choice of operating systems may impact a consumer's ability to protect against e-security attacks.

Appendix B – Complaint Handling Survey Spreadsheet

Agency able to deal with the complaint	TIO	ACCC	ACMA	ASIC	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
1. Misleading advertising	Yes (unless about unbundled equipment)	Yes, if significant	No	No		Yes		Yes	Able but unwilling	Yes	Yes	Yes
2. Misrepresentation by a dealer or agent	Yes (unless about unbundled equipment)	Yes, if significant	No	No		Yes		Yes	Able but unwilling	Yes	Yes	Yes
3. Faulty handset outside warranty	Yes (if part of bundled service)	Yes	No	No		Yes		Yes	Yes	No	Yes	Probably not
4. Faulty handset where supplier attempts to exclude a warranty	Yes (if part of bundled service)	Yes, if systematic	No	No		Yes		Yes	Yes	Possibly	Yes	Yes
5. Detrimental change in contract terms	Yes	No	No	No		Yes		Reluctantly	No	No	Yes	No
6. Billing of a bundle including pay-TV	Yes (except separately itemised pay-TV component)	No	No	No		Yes		Yes	No	No	Yes	No
7. Offensive content on a mobile phone	No (except billing disputes and age verification)	No	Yes (for prohibited or restricted content on 19 numbers)	No		No		Reluctantly	No	No	Probably not	No
8. High phone bill on a capped plan due to calls to premium services	Yes	No, unless misleading or deceptive conduct	No	No		Yes		Reluctantly	No	No	Maybe	No
9. High phone bill due to services not subscribed to	Yes	No	No	No		Yes		Reluctantly	No	No	Yes	No
10. Mobile phone spam	No	No	Yes	No		No		Reluctantly	No	No	Maybe	No
11. Unwillingness to provide broadband	No (except if fees paid or information misleading)	No unless misuse of market power	No	No		No		Yes	No	No	Maybe	No
12. Inability to make a complaint	Yes	No	No	No		No		Yes	No	No	Yes	No

Does agency have restorative powers?	TIO	ACCC	ACMA	ASIC	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
1. Misleading advertising	Yes	Yes	No	No		Yes		No	No	No (unless successfully prosecuted)	No (unless successfully prosecuted)	No (unless successfully prosecuted)
2. Misrepresentation by a dealer or agent	Yes	Yes	No	No		Yes		No	No	No (unless successfully prosecuted)	No (unless successfully prosecuted)	No (unless successfully prosecuted)
3. Faulty handset outside warranty	Yes	No	No	No		Yes		No	Yes - conciliation	No	No	No
4. Faulty handset where supplier attempts to exclude a warranty	Yes	Yes	No	No		Yes		No	Yes - conciliation	No	No (unless successfully prosecuted)	No (unless successfully prosecuted)
5. Detrimental change in contract terms	Yes	No	No	No		Yes		No	No	No	Yes (mediation)	No
6. Billing of a bundle including pay-TV	Yes	No	No	No		Yes		No	No	No	No (unless successfully prosecuted)	No
7. Offensive content on a mobile phone	No (except billing)	No	No	No		No		No	No	No	No	No
8. High phone bill on a capped plan due to calls to premium services	Yes	No	No	No		Yes		No	No	No	No	No
9. High phone bill due to services not subscribed to	Yes	No	No	No		Yes		No	No	No	No	No
10. Mobile phone spam	No	No	No	No		No		No	No	No	No	No
11. Unwillingness to provide broadband	No	No	No	No		No		No	No	No	No	No
12. Inability to make a complaint	Yes	No	No	No		No		No	No	No	Yes (representation)	No

Referrals to other agencies?	TIO	ACCC	ACMA	ASIC	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
1. Misleading advertising	ACMA, ACCC if systemic. ACCC re equipment	OFTs	TIO, OFTs	TIO, OFTs		TIO, ACCC or trader's OFT if significant		ACCC if national issue	TIO	Possibly trader's OFT	Possibly ACCC or trader's OFT if significant	No
2. Misrepresentation by a dealer or agent	ACMA, ACCC if systemic. ACCC re equipment	TIO, OFTs	TIO, OFTs	TIO, OFTs		TIO, ACCC or trader's OFT if significant		No	TIO	Possibly trader's OFT	Possibly ACCC or trader's OFT if significant	TIO
3. Faulty handset outside warranty	OFTs	OFTs (for info)	TIO, OFTs	TIO, OFTs		No		No	ACCC if national issue	No	No	No
4. Faulty handset where supplier attempts to exclude a warranty	ACMA if systemic	OFTs	TIO, OFTs	TIO, OFTs		No		ACCC if national issue	TIO, ACCC if national issue	ACCC	Possibly ACCC or trader's OFT if significant	TIO
5. Detrimental change in contract terms	ACMA if systemic	TIO	TIO, Vic OFT	TIO, OFTs		TIO if significant		TIO	TIO	TIO	Possibly TIO	TIO
6. Billing of a bundle including pay-TV	OFTs (pay-TV)	TIO	TIO	TIO, OFTs		TIO if significant		TIO (except pay-TV)	TIO	TIO	Possibly TIO, ASTRA, Energy Ombudsman	TIO
7. Offensive content on a mobile phone	ACMA (content)	TIO	TIO (for non-content issues)	TIO, OFTs		ACMA		TIO	TISSC	ACMA	ACMA, Police	TIO
8. High phone bill on a capped plan due to calls to premium services	No	TIO	TIO	TIO, OFTs		TIO if significant		TIO	TIO & TISSC	TIO	TIO, possibly ACMA	TIO
9. High phone bill due to services not subscribed to	No	TIO	TIO	TIO, OFTs		TIO if significant		TIO	TIO	TIO	TIO	TIO
10. Mobile phone spam	ACMA	ACMA	No	TIO, OFTs		ACMA			TISSC	Possibly TIO	ACMA, TIO (re billing)	TIO
11. Unwillingness to provide broadband	DCITA	TIO	No	TIO, OFTs		No		ACCC if national, TIO	TIO, ACCC	TIO	TIO, ACMA	TIO
12. Inability to make a complaint	ACMA if systemic	TIO	TIO	TIO, OFTs		TIO		ACCC if national, TIO	TIO	TIO	TIO	TIO