

**Optus Submission to  
the Productivity Commission**

**on its**

**Draft Report**

**Review of Australia's Consumer Policy Framework**

**8 February 2008**

## 1. Executive Summary

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- 1.1 Optus is a leading integrated national telecommunications provider, delivering cutting-edge communications, information technology and entertainment services throughout Australia. Our services are used by consumers, businesses, corporate entities and government agencies.
- 1.2 As such (and consistent with the shortcomings of Australia's consumer policy framework identified by the Productivity Commission, such as regulatory complexity and costly variations in regulation with few or no offsetting consumer benefits), Optus is obliged to operate in (and be compliant with) a consumer policy regulatory environment which encompasses national, state and territory laws and regulations, including mandatory industry-specific consumer protection codes and standards developed by industry and registered and enforced by the Australian Communications and Media Authority (ACMA).
- 1.3 Optus therefore commends the Productivity Commission for its thorough review and supports many of the Commission's conclusions and recommendations. There are also some areas where we do not agree with the Commission. Optus in particular believes that there is considerable merit in the adoption of a streamlined national approach to consumer policy in order to reduce the regulatory burden on business while maintaining a viable consumer protection regime.
- 1.4 Optus' submission has focused on those recommendations which are of greatest relevance to us. In particular, we:
1. **Support** the Commission's **draft recommendation 3.1** for the Government to adopt a **common overarching objective for consumer policy**; and support the content of the Commission's proposed objective and its subsidiary operational objectives;
  2. **Strongly support** the Commission's **draft recommendation 4.1** that all Australian Governments should establish a new **national generic consumer law** to apply in all jurisdictions and to be based on the consumer protection provisions of the *Trade Practices Act 1974* (TPA);
  3. **Support** the Commission's **draft recommendation 4.4** to adopt a **single national regulator model** and, in-principle, would support the Australian Competition and Consumer Commission (ACCC) as the regulator of a new generic consumer law;
  4. Offer **in-principle support** for the Commission's **draft recommendation 5.1** that the Council of Australian Governments (CoAG) should instigate and oversee a **review and reform program for industry specific regulation** to, among other things, identify and repeal unnecessary regulation and give consideration to transferring policy and regulatory enforcement to the national Government;
  5. Could **not support** the Commission's **draft recommendation 5.4** that the Government should **remove any retail price caps applying to**

**telecommunications products and services** unless it was made clear that removing retail price caps would only occur where analysis had revealed effective competition existed in the relevant market/s;

6. **Support** the Commission's **draft recommendation 7.1** that a provision be incorporated into a new generic consumer law that **voids unfair terms in standard form contracts where a number of specific criteria have been met**, including where there is evidence of material detriment to consumers and where there is an overall public benefit from remedial action;
  7. **Support in-principle** the Commission's **draft recommendation 9.1** that the ACCC provide an **enhanced web-based information tool** for guiding consumers to the appropriate dispute resolution body;
  8. Do **not support** the Commission's **draft recommendation 9.2** to **extend the functions of the Telecommunications Industry Ombudsman** to all premium content services, pay TV and other associated services and hardware;
  9. Do **not support** the Commission's **draft recommendation 9.5** to **permit consumer regulators to take representative actions on behalf of consumers**, whether or not they are parties to the proceedings;
  10. Do **not support** the Commission's **draft recommendation 10.1** to provide **additional enforcement tools to consumer regulators**;
  11. **Support in-principle**, where such regulation is demonstrably warranted and reasonable, the Commission's **draft recommendation 11.1** regarding **mandatory information disclosure requirements** placed on firms, especially with respect to requiring the provision of comprehensible information that has been subject to consumer testing; and that complex information be layered; and
  12. **Support in-principle** the Commission's **draft recommendation 11.3** that the **Government provide funding** to support specified research on consumer policy issues, the basic operating costs of a representative national peak consumer body and the network and policy functions of consumer groups.
- 1.5 Optus also commends to the Commission the submissions lodged with respect to this review by the Communications Alliance (the communications industry's self-regulatory body), the Australian Mobile Telecommunications Association (AMTA) and the Australian Subscription Television and Radio Association (ASTRA). Optus is a member of each of these organisations.

## **2. Objectives for consumer policy**

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### *Draft Recommendation 3.1 – Common overarching policy objective*

- 2.1 Optus agrees with the Commission's view that effectively competitive markets without constraints on the availability of information are likely to deliver the best outcomes for consumers. It follows that where regulation can be justified, it should be focussed on promoting the opportunity for competitive outcomes and removing impediments that lead to deficiencies in market information.

- 2.2 These steps can be seen as providing the most important safeguards for consumers. As such, we endorse the Commission’s draft recommendation that the Government should adopt a common overarching objective for consumer policy and that that objective should be to “promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith”.
- 2.3 While Optus also supports the Commission’s six operational objectives to guide consumer policy development and implementation, we believe that there would be value in the Commission including a seventh formal operational objective in its final recommendation:
1. Ensure that new regulations are enacted only if they are based on evidence, where cost benefit analysis has determined that a problem exists and that the introduction of regulation would assist manage or resolve the problem, and where it does not duplicate or overlap with existing regulation.

### **3. A new national generic consumer law**

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#### *Draft Recommendation 4.1 – New national generic law*

- 3.1 Optus strongly supports the Commission’s draft recommendation that all Australian Governments should establish a new national generic consumer law to apply in all jurisdictions and to be based on the consumer protection provisions of the TPA. Importantly, the definition of “consumer” for this law should also be derived from existing trade practices law.
- 3.2 As a national telecommunications provider delivering communications, information technology and entertainment services to consumers in every State and Territory in Australia, Optus incurs needless compliance costs and operational complexity and inefficiency on a daily basis as a direct result of operating in an uncoordinated and inconsistent consumer regulatory environment. For example, with respect to regulations governing door-to-door sales, Optus operates under eight different State and Territory regulatory regimes.
- 3.3 This regulatory environment also fosters uncertainty and confusion for consumers and, as the Commission notes in its Draft Report, raises the costs of doing business and therefore ultimately the costs faced by consumers. It is a “lose-lose” situation.
- 3.4 Optus also considers that a multi jurisdictional approach to consumer law and policy development is in stark contrast to the majority of regulation that governs the commercial operations of firms such as Optus that operate in a national market for consumer products and services.

#### *Draft Recommendation 4.4 – Single national regulator*

- 3.5 Optus supports the Commission’s draft recommendation to adopt a single national regulator model. Subject to consideration of the means and scope to overcome the identified obstacles to establishing this model, Optus would also support the ACCC as the regulator for a new generic consumer law.

#### **4. Industry specific consumer regulation**

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##### *Draft Recommendation 5.1 – Review and reform program*

- 4.1 Provided that it was conducted in consultation with relevant industry stakeholders, Optus supports the Commission's draft recommendation that CoAG should instigate and oversee a review and reform program for industry specific regulation (including the telecommunications industry-specific regulation) to, among other things, identify and repeal unnecessary regulation and give consideration to transferring policy and regulatory enforcement to the national Government.
- 4.2 More broadly, Optus also endorses the Commission's stated objective that all consumer policy regulation be well targeted, based on solid evidence and that it actually address the specific problem to which it has been created to resolve or reduce.

##### *Draft Recommendation 5.4 – Telecommunications industry retail price caps*

- 4.3 Optus supports the removal of retail price caps applying to telecommunications products and services where there is effective competition. As such, we could not support the Commission's draft recommendation that the Government remove any retail price caps applying in the telecommunications industry unless such a decision followed a rigorous analysis of whether effective competition existed in the relevant market/s.
- 4.4 As the Commission would be aware, retail price caps are designed to protect consumers from monopoly price exploitation. Where competition between alternative suppliers in retail markets is effective, retail price caps are not required to protect consumers since the process of competition may be expected to keep retail prices low. Retail price caps may also distort the operation of the competitive market by, for example, causing prices to be set below economic cost.
- 4.5 With respect to fixed line telecommunications products and services offered in Australia, effective retail competition depends in large part on the ability of competing providers to obtain access to Telstra's network at cost-reflective wholesale prices. Wholesale access is ensured by the Telecommunications Access Regime as set out in the TPA and administered by the ACCC, which sets wholesale prices in line with the economic cost of service provision incurred by Telstra.
- 4.6 It is important for the Commission to be aware, however, that Telstra is currently challenging the Telecommunications Access Regime through legal action in the High Court. If successful, this action could allow Telstra to prevent wholesale access to its fixed line network at cost-reflective prices. Moreover, Telstra has launched a number of actions seeking exemption from access regulation in defined areas. If successful, these actions could also have implications for access to Telstra's network and potentially impair competition in telecommunications.
- 4.7 As such, there exist elements of uncertainty and fragility with respect to the effectiveness of competition in some areas of the telecommunication industry.

Optus would encourage the Commission to amend its draft recommendation 5.4 to state:

1. The Australian Government should remove any retail price caps applying to telecommunication products and services where analysis has revealed effective competition to exist in the relevant market/s.

## **5. Unfair contracts**

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### *Draft Recommendation 7.1 – Unfair contract terms in standard form contracts*

- 5.1 Optus supports the Commission’s proposal to incorporate a provision into a new generic consumer law that voids unfair terms in standard form contracts where a number of specific criteria have been met, including that the term is contrary to the requirements of good faith and causes a significant imbalance in the parties’ rights and obligations arising under the contract; that there is evidence of material detriment to consumers; that all of the circumstances of the contract have been considered; and that there is an overall public benefit from remedial action.
- 5.2 Moreover, we agree with the Commission that where an unfair term is voided it is done so only for the contracts of those consumers subject to detriment.
- 5.3 Optus also endorses the Commission’s draft recommendation that an industry or specific business should have the capacity to secure regulatory approval for ‘safe harbour’ contract terms that would be immune from any action under the unfair contract provision.
- 5.4 In the telecommunications industry, the Communications Alliance has developed an Industry Code that deals with unfair contract terms, the ACIF C620:2005 Consumer Contracts Industry Code. The Code has been registered by ACMA as providing appropriate community safeguards in relation to the matters it deals with.
- 5.5 In general terms, the Industry Code provides guidance on unfair contract terms in the context of the particular services, supply characteristics and legislated standard form contracting arrangements of the telecommunications industry. The safe-harbour provisions cited above should provide for specific individual terms or industry arrangements, including those set out in registered Industry Codes where they are consistent with the national framework.
- 5.6 More broadly, the introduction of a new generic consumer law would eliminate the inefficient and costly inconsistencies in how unfair contract terms are dealt with in the different States and Territories.

## **6. Access to remedies**

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### *Draft Recommendation 9.1 – Referral of complaints and sharing of information*

- 6.1 Optus agrees that there may be benefit in having the ACCC provide an enhanced web-based information tool for guiding consumers to the appropriate dispute resolution body, as proposed by the Commission. Such an outcome could have efficiency benefits for consumers and companies such as Optus.

We also see some merit in the Commission's draft recommendation that all consumer regulators participate in the shared national database of serious complaints and cases, AUZSHARE.

*Draft Recommendation 9.2 - Functions of Telecommunications Industry Ombudsman*

- 6.2 Optus does not support the extension of the functions of the Telecommunications Industry Ombudsman (TIO) to all premium content services, pay TV and other associated services and hardware. With respect to premium content services, the TIO is already performing as the formal escalated complaints handling body on behalf of the communications industry.
- 6.3 With respect to pay TV and other associated services and hardware, the *Broadcasting Services Act 1992* (BSA) provides for pay TV operators to develop codes of practice addressing complaints handling and other matters relating to pay TV services. For example, Section 123(h) of the BSA provides for the creation of codes with respect to complaint handling and Section 123(k) refers to codes dealing with issues such as billing, fault repair, privacy and credit management. Moreover, these issues are already being dealt with by the ASTRA Codes of Practice, registered with ACMA.

*Draft recommendation 9.5 – Consumer regulators representative actions*

- 6.4 Optus does not support the incorporation into a new generic consumer law a provision to permit consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.
- 6.5 We believe that it would be more efficient and cost-effective for both consumers and companies such as Optus for attention to be focused on measures to foster improved information to consumers and consumer awareness such as by having the ACCC develop an enhanced web-based information tool, as outlined above, and for more effective use to be made of alternative dispute resolution bodies such as the TIO.

## **7. Enforcement**

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*Draft recommendation 10.1 – Consumer regulator enforcement powers*

- 7.1 Optus believes that consumer regulators already possess a range of enforcement tools for dealing with breaches of the law that are completely sufficient to carry out their responsibilities.
- 7.2 We would agree with the Commission that there is little evidence to indicate that lack of access to particular enforcement tools is imposing significant costs on consumers and that adding to the current range of tools may result in additional compliance costs on firms and the risk of regulatory error.
- 7.3 As such, we do not support the Commission's proposal to give consumer regulators any additional enforcement tools.

## **8. Empowering consumers**

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*Draft Recommendation 11.1 - Disclosure requirements on firms*

- 8.1 In responding to the Commission’s draft recommendation 11.1, Optus believes that it is necessary to first consider the circumstances in which it is reasonable for governments to contemplate imposing regulation requiring industry sectors and/or firms such as Optus to provide certain information to customers. Optus would assert that these circumstances are where:
1. there is an obvious market failure and demonstrable overriding consumer need;
  2. the benefits are likely to outweigh the costs, and the costs are not borne unfairly by certain sectors of the economy or by an industry;
  3. provision of information has been considered against other potential options and been determined as the most appropriate;
  4. both efficient means of delivery and effective communication techniques are available; and
  5. there is reasonable prospect of the mandated requirements meeting their stated objective.
- 8.2 With the above in mind, the Government should initiate research into efficient and effective methods of communicating information to consumers. This research should consider both economy-wide and industry/issue-specific information requirements.
- 8.3 Moreover, where regulation is being considered which would require firms to provide consumer information with respect to Government policies or initiatives, close consideration should also be given to providing on-budget funding of the costs.
- 8.4 In the context of having made the above points, it is Optus’ view that the Commission’s draft recommendation 11.1 appears to be a subsidiary consideration to the actual decision whether or not to regulate mandatory provision of information. That is, if the threshold articulated above is passed and it is justified to impose an obligation on firms to provide information, then Optus is supportive of the Commission’s proposal that, when imposing information disclosure requirements on firms, Australian Governments should require that information is comprehensible such that it facilitates good consumer decision-making. We believe that such an outcome is in the interests of firms as well as consumers.
- 8.5 With respect to specific mandatory disclosure requirements, Optus endorses in-principle the Commission’s view that consumer testing is a valuable exercise, noting that we understand this activity would be funded by government before specific obligations were introduced.
- 8.6 Optus also agrees with the Commission that complex information be layered, with business being required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available by right on request or through other channels.

*Draft Recommendation 11.3 – Funding for research and consumer representation*



- 8.7 Optus generally supports the Commission's proposal that the Government should provide modest additional funding to support specified research on consumer policy issues, the basic operating costs of a representative national peak consumer body and the network and policy functions of consumer groups.
- 8.8 We believe that such an approach would be consistent with a broad economy-wide approach to consumer regulation and, to the extent that Government funds consumer organisations it should be to foster input about common principles and approaches to consumer protection that can be adopted across the economy. That is, funding should be targeted at the maintenance of the new generic law and the input of consumer organisations to that end. With respect to research on consumer policy issues, Optus believes that this should be of a general or industry-specific nature.