COMMUNICATIONS
ALLIANCE LTD

SUBMISSION TO:
AUSTRALIAN CONUMER LAW: CONSULTATION ON DRAFT PROVISIONS ON UNFAIR CONTRACT TERMS

May 2009

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1. GLOSSARY OF TERMS

COAG Council of Australian Governments.

MCCA Ministerial Council on Consumer Affairs, made up of ministers responsible for consumer affairs from the Australian, New Zealand and state and territory governments.

PC Productivity Commission.

2. INTRODUCTION

Communications Alliance welcomes the opportunity to provide a submission on the proposed unfair terms legislation contained in *The Australian Consumer Law - Consultation on draft provisions on unfair contract terms*.

Communications Alliance is the peak industry body for the Australian communications sector. Its mission is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry and foster the highest standards of business behaviour.

Members of Communications Alliance will be making individual submissions and this submission is made additional to and complements any other submission you receive from the telecommunications sector.

We note the Australian Government's intention to introduce the Second Commonwealth Bill in early 2010 which will contain the bulk of the Australian Consumer Law. In addition, further measures are intended by the government to address duplication (eg, through reviewing industry-specific regulation)and to achieve national consistency. Communications Alliance's comments on the draft provisions on unfair contract terms are subject to its review of the further contemplated measures once the Australian Government makes those details available.

3. EXECUTIVE SUMMARY

Communications Alliance would like to restate its firm commitment to an effective consumer protection regime in Australia.

As previously submitted, Communications Alliance strongly supports the broad goal of a nationally consistent and simplified consumer policy framework. We support the articulation of consistent national objectives and the establishment of a national generic consumer law for the consumer policy framework in Australia.

Communications Alliance in general supports the introduction of the unfair terms provisions to apply to standard form contracts with consumers.

We have proposed changes primarily to:

- reflect where we saw differences between the stated objective of the terms and the draft provisions; and
- clarify some requirements.

We note that the draft provisions do not address removal of duplicating industry-specific regulation of unfair terms. Accordingly, we have assumed for our comments that, at least for a transitional period, the proposed unfair terms laws may apply in addition to the requirements of the current regime including the telecommunications industry-specific requirements.

4. CONSEQUENCES AND SIGNIFICANT BUSINESS COMPLIANCE COSTS

We note the Productivity Commission's comments in *Review of Australia's Consumer Policy Framework* Inquiry Report No 45 (30 April 2008) described on page 2 of the explanatory paper for the draft provisions as follows:

> "in Victoria and countries that have enacted laws against unfair contract terms, there has been little evidence of adverse unintended commercial consequences or of significant business compliance costs".

Communications Alliance doubts that any consequences or compliance assessment undertaken for the United Kingdom or Victorian provisions will be relevant to the Australian Government's proposed terms. This is because the Australian Government's proposed provisions differ from those applied in other jurisdictions in important material respects, namely:

- the United Kingdom and Victoria both limit their unfair terms laws to consumer contracts, whereas the proposed provisions apply to all standard form contracts whether with a consumer or business party;
- the United Kingdom and Victoria both limit their unfair terms laws to regulating the actions of the supplier, whereas the proposed provisions apply to any party proposing a standard form contract (other than governments – see below); and
- the Victorian legislation does not contain the equivalent of the proposed presumption that a term is not reasonably necessary to protect a party's legitimate interests. Businesses will need to identify evidence that may rebut the presumption in relation to any term in a standard form contract which could demonstrate an imbalance in rights or obligations. This will carry a significant cost.

Impact on business-to-business contracts

We have had insufficient time since the release of the proposed provisions on 11 May 2009 to conduct a detailed industry consultation and assessment of the likely business impact of these requirements on telecommunications providers. However, as the requirements mean that the proposed unfair terms legislation would have wider application than previously considered, there would be an associated impact on cost. We set out below details of some difficulties which will inevitably arise in applying the unfair terms to business-to-business standard form contracts.

It was not clearly explained in the document "An Australian Consumer Law Fair markets – Confident consumers" issued by the Standing Committee of Officials of Consumer Affairs (17 February 2009) that it was intended to apply the unfair terms provisions to all parties proposing standard form contracts (whether as a supplier of goods or services, a franchisor, a licensor, a customer or another

capacity).[1] Had this been identified, submissions on this issue may have been made in response to that document.

As a particular area of focus, Communications Alliance recommends that further thought be given to application of the proposed unfair terms laws to standard form contracts between mature and often large businesses in the telecommunications sector (eg, to facilitate provision of access and supply of telecommunications services) and how the proposed laws would operate with other existing legislative regimes, such as the telecommunications access regime under Part XIC of the *Trade Practices Act*.

Finally, in the context of standard form contracts issued by government, we note that the proposed laws would not apply to the Commonwealth Government except in so far as it is carrying on a business and would not apply to State or Territory Governments due to the operation of sections 2A and 2B of the *Trade Practices Act*. Whether this should be the case is a matter on which we suggest that industry consultation be sought.

Difficulties applying unfair terms laws to business-to-business standard form contracts

- ***Franchise Agreements:*** As drafted, the proposed unfair terms could apply to franchise agreements which are typically issued by franchisors in a standard form. Franchise arrangements are currently expressly regulated under the *Franchising Code of Conduct* issued under Part IVB of the *Trade Practices Act*. The *Franchising Code of Conduct* already contains provisions that prohibit inclusion of certain terms in franchise agreements. It would be an unnecessary burden on and create confusion and uncertainty for franchisors and franchisees to apply both the *Franchising Code of Conduct* and the unfair terms provisions to franchise agreements.

- **Commercial reality of use of standard terms:** The explanatory paper for the draft provisions contains the point that it would be invidious have separate unfair contract terms regimes for consumer and business transactions.[2] This premise does not reflect commercial reality, where businesses regularly enter into contracts as part of their normal activity and have the resources and skills to consider whether a contract should be negotiated or not. This difference is recognised in the Victorian legislation and United Kingdom regulations by applying the unfair contract terms provisions to consumers only.

  If the unfair terms regime applied to business-to-business standard form contracts, a business would have the opportunity to use the provisions to revisit the terms of a contract that it had agreed. This could occur despite

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[1] For example, the commentary on page 32 of that document explaining that the terms will apply to businesses as well as consumers does not allow a person to conclude that the customers proposing standard form contracts would be regulated.

[2] Page 8 of the explanatory paper explains that "it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term."

(as outlined above) that business having the resources and skills to consider whether a standard form contract should be agreed or not. As such, a business may seek to rely upon unfair contract terms if it wishes to exit an agreement because it subsequently decides that it is not an agreement it wishes to maintain.

The proposed provisions do not provide any safeguards to deter a party from attempting to use the provisions to avoid an arrangement where the party had adequate opportunity to negotiate alternate terms, but chose to accept the terms presented.

- **Erosion of business certainty:** The application of the unfair terms regime to allow businesses to avoid agreements based on standard form terms would undermine the level of certainty of the agreement that is required in business-to-business transactions (which involve significantly higher values than consumer transactions).
- **Business costs:** As noted above, the Productivity Commission's comments (that there has been little evidence of adverse unintended commercial consequences or of significant business compliance costs as a result of laws against unfair contract terms) reflects a view based on contracting with consumers. It does not reflect analysis of the cost impact of these changes on business-to-business activities and contracting.

  It is expected that applying the unfair terms provisions to business-to-business standard form contracts will result in adverse effects and costs for business on operational, commercial and risk matters:

  (1) **Operational** effects will include a restriction on the ability to vary price via unilateral variation of business terms. This is often a convenient mechanism not in contention and not considered unfair by either business party. The costs and process changes that would be required to design and implement alternative arrangements for an unfair terms regime would be non-trivial in a business-to-business context.

  (2) **Commercial** impacts may include limitations on the ability to structure deals and pricing arrangements that are acceptable to business-to-business customers at the point of contracting which could include early termination payments or cancellation fees. Where such fees have been agreed upfront as part of the deal that has been struck, there should not be an opportunity to later unwind them. Use of such fees are widely accepted and are in common usage in business contracts. If a supplier does not have certainty of whether early termination or cancellation fees can be enforced, then it will need to consider repricing supplies with higher upfront charges.

  (3) **Risk:** Applying the examples of unfair terms in the proposed section 4 to business-to-business standard form contracts will create problems for management of risk (in particular, the examples dealing with rights to limit performance, rights to terminate and

limiting the right to sue). The new provisions will increase cost in business transactions by forcing additional risk to be priced-in. The provisions will also increase the risk of litigation through increasing the incentive for parties to challenge such terms.

5. SPECIFIC COMMENTS ON DRAFT PROVISIONS

5.1 Application of unfair terms is not limited to consumers

We request that the unfair terms provisions be limited in their application to reflect a similar approach to that taken in Victoria and be limited to standard form contracts with consumers.

Applying the unfair contracts provisions in all cases where a party agrees to accept standard form contracts would impose a heavy burden on the telecommunications industry. It would:

- substantially increase the range of contracts that service providers would need to consider for review;
- fail to give weight to the fact that many business customers are sophisticated buyers with substantial bargaining power; and
- fail to take into account that business customers may prefer not to negotiate a contract for telecommunications supplies, despite having sufficient bargaining power and the expertise to do so.

We also refer you to the examples in section 4 of our submission of other difficulties in applying the unfair terms to business-to-business contracts.

5.2 Section 1 Definitions

Delete the definition of "prohibited term". Please see our comments on section 6.

5.3 Section 3 Meaning of unfair

5.3.1 Subsections 3(1) and 3(2)

We have set out below a number of comments on parts of subsections 3(1) and 3(2). We set out consolidated drafting for these subsections in paragraph (d).

(a) Subsection 3(1)- treatment of detriment

The drafting does not enable detriment to be considered in determining whether a term is unfair in the manner contemplated by the PC. The PC recommendation as accepted by the MCCA and COAG was that there would need to be material detriment for a remedy to be available.

As subsection 3(1) is drafted, if paragraphs (a) and (b) are satisfied then the term is deemed to be unfair and void. There is no opportunity in this situation to move to subsection 3(2) to consider detriment (nor any of the other matters listed in subsection 3(2)).

This could be addressed by moving subsection 3(2)(a) to subsection 3(1) as a new paragraph (c). Alternatively, we set out below drafting that consolidates subsections 3(1) and 3(2).

The detriment should be identified as needing to be "material" to reflect Recommendation 7 of the PC. Our understanding (see page 11 of the explanatory paper issued with the draft provisions) is that the recommendation to include "material" is part of the MCCA agreed model that was accepted by COAG. Inclusion of material detriment as a clear requirement for assessing a term as unfair in subsection 3(1) would reduce the risk of a party incurring costs due to unfounded claims, as it would deter those who would not genuinely suffer detriment from making a claim under the unfair terms provisions.

(b) Subsection 3(1)(b) – legitimate interests

We request subsection 3(1)(b) be reworded as:

> "(b) it is not reasonable in order to protect the legitimate interests of the party who would be advantaged by the term".

Requiring that a term be established as "necessary" to protect a legitimate interest is a very high test. Establishing that a term is necessary will require that the term pass a test of being essential, indispensable or compulsory. We do not agree that this is the right standard to apply. The test for protection of a legitimate interest in the context of an unfair term should be whether the term is appropriate or proportionate to the legitimate interest to be protected. If the term is established as "reasonable" to protect a legitimate interest, then that should be sufficient to establish that the term is not unfair.

We note that the language used in the proposed provision reflects sections 51AB(2)(b) and 51AC(3)(b) of the *Trade Practices Act*. These sections allow the court to have regard to whether the conduct in question required the consumer or business consumer to comply with conditions "that were not reasonably necessary for the protection of the legitimate interests of" the corporation or supplier. Allowing a court to have regard to such an element is quite different from deeming a term to be unfair simply because the burden of proof is not made out. Yet, as drafted, both the onus of proof and the impact on the party advantaged by the term would be significantly greater for unfair terms than for unconscionable conduct. This is a strange outcome given that engaging in unconscionable conduct should be viewed as a significantly more serious wrong than inclusion of an unfair term.

We also refer you to our comments below on subsection 3(4).

(c) Subsection 3(2)(c) – the circumstances as a whole

Delete subsection 3(2)(c) and replace with:

> "(c) the circumstances as a whole".

All the circumstances relevant to the entry into the contract must be matters considered in determining whether a term in a standard form contract is unfair. Limiting the criteria to "the contract as a whole" is narrower than the description of the MCCA model accepted by COAG

which is described on page 4 of the explanatory paper for the draft provisions as:

> "it would require all the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected".[3]

Other matters that may be highly relevant to an assessment of whether a term is unfair but that would not be considered by a review of "the contract as a whole" include the availability of competitive alternative products in the market at the time the contract was made and industry practice.

(d) Consolidation of proposed changes to subsections 3(1) and 3(2):

As outlined above, if paragraphs (a) and (b) in subsection 3(1)are satisfied then the term is deemed to be unfair and void. With this drafting we do not see how the other elements of the meaning of unfair in subsection 3(2) can be given a role. The PC report and subsequent papers reflect that the matters listed in subsection 3(2) were elements to be met in order for a term to be found to be unfair.

To address this, we propose that subsections 3(1) and 3(2) be consolidated more in line with the approach taken in Victoria as follows:

Delete subsections 3(1) and 3(2) and replace with:

"(1) In determining whether a term of a standard form contract is unfair, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) if it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

(b) if it is not reasonable in order to protect the legitimate interests of the party who would be advantaged by the term;

(c) the extent to which it would cause, or there is a substantial likelihood that it would cause, material detriment (whether financial or otherwise) to a party if it were to be applied or relied on;

(d) the extent to which the term is transparent; and

(e) the circumstances as a whole."

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[3] Also see page 34 of "An Australian Consumer Law Fair markets – Confident consumers" issued by the Standing Committee of Officials of Consumer Affairs (17 February 2009).

5.3.2 Recommended change – subsection 3(3):

Subsection 3(3) should include as a deeming provision:

"A term is transparent:

(a) if:

(i) a provision of legislation; or

(ii) an instrument issued pursuant to legislation; or

(iii) an applicable industry code or other industry code developed under legislation,

prescribes criteria to be met in presenting that term to the other party to the contract; and

(b) the term complies with the criteria."

Rationale:

This deals with potential inconsistency between existing legislative instruments and industry codes and the definition of "transparent" in the proposed unfair terms provisions. At the least, this is a transitional issue needing to be addressed until guidance on the new laws can be issued. It is not clear to us how the Government plans to deal with industry specific requirements and practices which have been sanctioned by legislation or by regulators, but which could be open to challenge under the proposed legislation.

For example, clause 5.2 of the telecommunications industry code C628:2007 *Telecommunications Consumer Protections Code* deals with presentation of consumer contract terms. It sets out requirements on use of clear language, format and style and information accessibility that suppliers are required to follow for their consumer contracts. The unfair terms must reflect that, if a supplier complies with the applicable criteria of such a code, the supplier will not be in breach of the unfair terms provisions that deal with the same issue. Put another way, if the supplier complies with clause 5.2 of the code, the term should not be void for lack of transparency under the proposed provisions.

5.3.3 Recommended change - subsection 3(4):

Delete subsection 3(4) and replace with:

"(4) For the purposes of paragraph (1)(b), a term of a standard form contract is presumed not to be <u>reasonable</u> ~~reasonably necessary~~ in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise. <u>Without limiting what a party may have as a legitimate interest, a party will have a legitimate interest if, at the time the contract was made, the party had a reasonable belief that the term was</u>

required to protect a legitimate interest even if that belief is later found to be incorrect."

Rationale:

If the presumption is included then it should be rebuttable by the reasonable beliefs held by the party seeking to rely on the term at the time it entered the contract, even if those beliefs are subsequently found to be mistaken. For example, a perceived security risk with use of a particular technology for a service may cause a telecommunications provider to include one-sided rights to suspend a service.

5.4 Section 4 Examples of unfair terms

Recommended change – subsection 4(n)

Delete subsection 4(n).

Rationale:

The list in section 4 is extensive and has been produced after much consultation and assessment. Additions to the list should be implemented through amending the legislation. Any amendments to the list in section 4 would also need to be accompanied by appropriate transitional provisions.

5.5 Section 5 Terms that define main subject matter of standard form contracts etc. are unaffected

5.5.1 Subsection 5(1)(c) - term required or permitted by law

Recommended change:

Delete subsection 5(1)(c) and replace with:

"(c) is a term required, or permitted, by a law of the Commonwealth or a State or Territory or an applicable industry code or other industry code developed under legislation."

Rationale:

Conduct that is sanctioned by an industry code, such as *C628:2007 Telecommunications Consumer Protection Code,* should not be unlawful under the unfair terms provisions. Amendment is required to reflect this. We see the inclusion of "expressly" permitted as likely to cause confusion. The test should be simply whether the term is permitted or not.

5.5.2 Subsection 5(2)(a) - Upfront price

Recommended change:

At the end of subsection 5(2)(a) insert:

"or exercise of any right under the contract".

Rationale:

We do not think that "grant" is sufficiently broad to include the exercise of a right under a contract that is agreed as part of the original deal. For example, the exercise of a right to take another service or to move to another mobile plan.

5.6 Section 6 Prohibited terms of standard form contracts

Recommended change:

Delete section 6.

Rationale:

Our reasons for requesting deletion of section 6 are the same as those for requesting deletion of subsection 4(n).

5.7 2 Application and transitional provisions

(1) There should be a minimum 18 month period from the commencement of Part 2 of Schedule 2 to the *Trade Practices Act* before Part 2 applies. The telecommunications industry needs sufficient time to review all types of contracts to which the provisions could apply. That is, review of all:

  (a) consumer and business arrangements that may use a standard form contract; and

  (b) arrangements where a party may propose standard form terms as a customer, supplier of goods or services or in another capacity (eg, as a franchisor).

  This is a broader range of contractual arrangements than previously proposed by the PC or indicated by the government as intended to be covered by the unfair terms provisions.

(2) The requirement in (2) assumes that the party advantaged by the unfair term:

  (a) has the right to unilaterally vary or renew the contract at the time of the renewal, which may not be the case; or

  (b) must refuse to make any variation or renewal unless the other party agrees to amend terms that would otherwise be unfair. This is both impractical and likely to lead to disputes.

  For these reasons, in our view, the unfair terms provisions should not apply to any contract entered into before the legislation commencement date, even if varied or renewed after that date.

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