Telcos drive push for new contracts

Your article ("Telcos face legal action threat", October 20) is wrong in making the unattributed assertion that Hutchison has failed to co-operate with a Victorian government initiative to improve mobile phone contracts.

Hutchison and other carriers have already introduced changes to their contracts and have produced a code for mobile contracts that specifically adopts aspects of the new Victorian Fair Trading laws.

This code was developed and drafted by Hutchison and the rest of the mobile phone industry, without government assistance, and released for comment weeks ago. How could this positive, active response be described as "largely ignoring government requests"?

Hutchison took the lead from early in the process, contacting Consumer Affairs Victoria to arrange meetings with suppliers and drive development of the code.

Since changing our own contracts, and the release of the industry code, we have had no communication from CAV to describe any inadequacy in either.

Your article was critical of lengthy contracts, hundreds of pages long, but failed to mention Hutchison's contracts are only 10 pages long.

Presumably to try to help prosecute its case, the article quoted a Hutchison spokesman as saying the company did not regard consumers in Victoria as any different to those anywhere else, without including the second half of the quote, which was "... they all deserve to be treated fairly, and that is what the ACIF code is all about".

Steve Wright,
Director, stakeholder relations,
Hutchison Telecoms,
Sydney, NSW.

AFR, 27.10.04, p. 60

The Debate About Self-Regulation

The Communications Law Centre figured heavily in recent debate about the merits of self-regulation in telecommunications and the role of the Australian Communications Industry Forum (ACIF). These issues are timely since there are several forums in which the objectives as well as the mechanics of the regulatory framework are under review.

These issues have arisen in the following contexts:

- the merger of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) progressed with the referral of the Australian Communications and Media Authority Bill 2004 and the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and related bills to the Senate Environment, Communications, Information Technology and the Arts (ECITA) Committee;
- ACIF this year faced a crucial test of its effectiveness in the form a request from the ACA to develop a Consumer Contracts Code dealing with unfair terms in contracts – the test is whether industry and consumers can agree on the content of such a code to a satisfactory standard and complete the task within the required time;
- The ACA has commissioned several consumer groups to review the extent and effectiveness of consumer participation within the regulatory framework and this project (*Consumer Driven Communications*) is nearing completion on a set of recommendations that includes some adjustments to consumer protection regulation.

The Communications Law Centre is a member of both the ACIF Working Committee for the Consumer Contracts Code and the ACA's project group for *Consumer*

Flawed process for telco consumers

Steve Wright's letter ("Telcos drive push for new contracts", October 27) defending Hutchison Telecoms' role in improving consumer contracts raises some big-picture issues in telecommunications regulation.

This process of developing a new contracts code of practice has been very much like commercial contract negotiations or workplace bargaining: Hutchison, Vodafone, Telstra and Optus on one side, four consumer reps on the other. It is true that Hutchison has been a leading player, probably the lead negotiator, tough but fair, in the development of the new code. There are a number of problems with this draft code, but with some improvements it could still be a reasonable mechanism for improving consumer contracts.

This whole process has prompted several consumer groups to ask whether regulation for consumer protection is something that is best achieved by negotiation.

Is bargaining over consumer rights something that was anticipated when co-regulation was crafted in the Telecommunications Act?

With the passage of both this act and the Broadcasting Services Act, power shifted from the regulators to industry. In some cases (such as classification of TV content or problems with telephone information services) that system has worked well. But Wright gets it wrong when he says that the initiative demonstrated by industry was exercised without government assistance.

The problem of lengthy, unintelligible consumer contracts with unfair terms (and yes, some of them are hundreds of pages long) is a matter that was raised by the Communications Law Centre and recognised by the industry body, the Australian Communications Industry Forum, four years ago.

The industry consistently failed to remedy the problem until this year.

What brought about the change? In 2004 the Australian Consumers Association took decisive action against ACIF, the Australian Competition and Consumer Commission got tough with Telstra, and Consumer Affairs Victoria put a number of suppliers on notice that it would enforce its new unfair terms legislation.

Three years of industry inaction doesn't constitute good, self-regulatory practice. And it doesn't reflect well on the enterprise bargaining culture that has developed under the act.

Derek Wilding,
Director, Communications Law Centre, University of NSW,
Kensington, NSW.

AFR, 3.11.04, p. 59

Driven Communications. We have also been approached by the ECITA Committee to provide comments on the bills relating to the creation of the Australian Communications and Media Authority.

Against this background, the CLC has on several occasions publicly stated the view that while we do not oppose self-regulation and we think that overall the regulatory framework is sound, some improvements are called for. In the broadcasting arena, for example, we have noted that experience with the operation of the Commercial Radio Standards indicates that some matters are simply not suited to industry self-regulation. Twelve years of experience in navigating the co-regulatory environment should indicate that 'best endeavours' will not always be successful and that the regulator should retain an active role in the management of important policy issues.

Similarly, in telecommunications regulation, experience with self-regulation demonstrates that improvement is needed if consumer protection is to be anything other than perfunctory. In fact, ACIF has implemented changes in the last year and introduced several features to code development which are designed to redress the imbalance.

These are not mere process issues. If consumers or their representatives cannot effectively participate in co-regulation, the foundations for the co-regulatory model collapse. The alternative is that the regulator makes the rules.

The Communications Law Centre has not advocated the end to self-regulation, but we do think that the system needs some fine-tuning. As we (and others) develop our views on the important policy issues relating to the ABA-ACA merger, we have decided to re-print a series of 'Letters' published in *The Australian Financial Review* in November this year. These 'Letters' feature the Directors of both offices of the CLC engaging with industry representatives on some of these issues.

Derek Wilding
Director (NSW)

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Test to come for telco industry

David Havyatt's defence of telecommunications self-regulation ("Crossed signals on telco contracts", Letters, November 10), makes the valid point that self-regulation has achieved some results.

For that reason, the Communications Law Centre has participated in industry code development when other leading consumer groups have refused.

A brief review of mobile contracts conducted this week by the Melbourne office of the CLC reveals that the leading suppliers still have clauses in their contracts which breach the industry's own guideline. An example is a clause which attempts to exclude the legal liability of the supplier by requiring the customer to indemnify the supplier for any loss or damage suffered.

So far, the impetus for change has not been strong enough to promote across-the-board improvement. How this might be promoted is now a matter for government and regulators.

Success for self-regulation means across-the-board improvement and presumably industry compliance with its own guideline. This is the test the Australian Communications Industry Forum will face with the release of its contracts code early next year. It is premature to announce a passing grade.

Elizabeth Beal,
Communications Law Centre,
Victoria University,
Melbourne, Vic.

AFR, 15.11.04, p. 60

Crossed signals on telco contracts

Recent commentary on telecommunications contract issues has included statements that are so misleading that they would have been prosecuted if perpetrated by industry participants.

In his letter, Derek Wilding ("Flawed process for telco consumers", November 3) claims that the issues around consumer contracts were raised by the Communications Law Centre and recognised by industry four years ago, but that industry has failed to remedy the problem until this year. The letter concludes: "Three years of industry inaction doesn't constitute good self-regulatory practice".

The reality is that in response to the original CLC report, the Australian Communications Industry Forum published a consumer contracts guideline in December 2002.

In October 2003 the CLC prepared a report for the Australian Communications Authority on compliance with the guideline.

That report concluded that there were some areas of contracts that did not meet the guideline, or that were potentially unfair under new Victorian legislation. However, most importantly, the report noted that "there are important cases of industry improvement and the examples do not rest with a single supplier, rather they are spread across the industry".

The report concluded, "In the centre's view, it is likely that improvements to these clauses have come about as a result of the ACIF Guideline. In this respect, industry self-regulation has produced results." So the accusation by the CLC of inactivity is belied by the CLC's own report of a year ago.

The Australian Communications Authority last week issued a press release based on research into consumer contracts, but has not made the research available. Providers wishing to make claims in their media releases about what research reveals would be required to make the research available.

Wilding noted that the process of developing the new code has been like commercial negotiation or workplace bargaining.

ACIF is unique among self-regulatory bodies in the extent to which consumer representatives are welcomed as equal participants from the board down. The self-regulatory framework has supported a dynamic environment delivering innovative services and price reductions.

The industry deserves to have regulators and consumer advocates behave to the same standard of propriety that the suppliers as commercial firms face. Consumer protection should involve continuing to work with suppliers in the development of the industry.

The achievements of the self-regulatory framework should be lauded, not criticised.

David Havyatt,
Chair, Consumer Codes Reference Panel, Australian Communications Industry Forum,
Sydney, NSW.

AFR, 10.11.04, p. 59