

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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Chair
Standing Committee on Law and Justice
Parliament of New South Wales
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Submission to the Inquiry into unfair terms in consumer contracts

CLC welcomes the opportunity to make this submission to assist the Committee with its deliberations on *"the incidence and impact of unfair contract terms in consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption."*

The Communications Law Centre ('the CLC') is an independent, not-for-profit public interest organisation specialising in media, communications, online law and policy in telecommunications. It undertakes research and advocacy, conducts teaching and training and provides legal advice on a range of issues.

This submission is informed by the CLC's research and consumer representative work in the area of telecommunications. In particular the CLC has had a unique opportunity to monitor consumer contracts for the provision of telecommunications services since the introduction of Part 2B and the *Fair Trading Act (Vic)* ("the Victorian legislation"). Unfair contract terms, specifically in telecommunications consumer contracts, have been a priority issue for the Centre for the past five years. Relevant output includes the following:

- *Compliance Review on Unfair Terms in ISP Consumer Contracts Pursuant to Part 2B of the Fair Trading Act 1999 (Vic)* (September 2006) (Commissioned by Consumer Affairs Victoria)
- *Compliance Review on Unilateral Variation and Early Termination Clauses in Mobile Phone Consumer Contracts Pursuant to Part 2B of the Fair Trading Act 1999 (Vic)* (Commissioned by Consumer Affairs Victoria, February 2006);
- *Compliance Review of Unfair Terms in Consumer Contracts for Mobile Services Pursuant to Part 2B of the Fair Trading Act 1999 (Vic)* (Commissioned by Consumer Affairs Victoria May, 2004);
- *Compliance Report and Research Consultancy for the Australian Communications Authority (ACA) to develop a Model Consumer Contract* (published by ACMA May 2004);

- *Submission to the Standing Committee of Officials of Consumer Affairs (SCOCA) Unfair Contract Terms Working Party* (provided to SCOCA in March 2004);
- *Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline* (published by the Australian Communications Authority in October 2003).
- *Report on Fair Terms in Telecommunications Consumer Contracts* (published by the CLC in May 2003);
- *Unfair Practices and Telecommunications Consumers* (published by the CLC in January 2001);

CLC is of the view that the introduction of *Part 2B Fair Trading Act (Vic)* has had a demonstrably positive effect on consumer contracts used in the telecommunications sector. Furthermore that consumer contracts commonly used in this industry contain terms that cause a significant imbalance in the rights and obligations arising under a contract to the detriment of the consumer. Unilateral variation of contract terms without notice to consumers is an area that significant work has been done by consumer representatives and the ACIF Consumer Contracts Code along with the Victorian legislation have both assisted to reduce the incidence and imbalance of rights and obligations that occur. This view has been reached through in depth review of consumer contracts used by telecommunication service providers carried out systematically by the CLC over the past five years.

For this reason the CLC supports the introduction of specific purpose legislation such as the UK Unfair Terms Consumer Contracts Regulations 1999 and *Part 2B Fair Trading Act (Vic)*. The CLC believes it is important that the development of Uniform National Scheme legislation is a focus of the states, to ensure that consumers in every Australian jurisdiction are afforded the same protections when entering into contracts for products and services. CLC believes that the rights and obligations at law in the consumer/supplier relationship should be consistent, particularly where the same services are available across jurisdictions. What follows are extracts from some of our work in the development of unfair terms regulation in the telecommunications industry.

Australian Communications Industry Forum (ACIF) Industry Code on Consumer Contracts

In early 2003, the ACA sought comment from industry and consumers on the operation of the Guideline. ACIF provided an industry response, and ACIF's Consumer Advisory Council and several consumer groups also made submissions. As a member of the Consumer Advisory Council, the CLC reviewed the contracts in use at that time. Our [Report on Fair Terms in Telecommunications Consumer Contracts 2003](#) was submitted to the ACA in early May.

On the basis of submissions, and with reference to the fact that the Guideline had only been in operation for five months, the ACA decided to conduct a full review at the end of 2003. At this point, the Guideline would have been in operation for almost a year, and suppliers would have had an opportunity to review and amend their contracts.

In August 2003, the ACA commissioned the CLC to help it review the Guideline by examining the consumer contracts of nine major telecommunications suppliers for fixed-line, mobile and internet services. The [report](#), delivered in October 2003, found that:

- a number of clauses breached the unfair terms provisions of the Guideline
- other clauses were contentious and would fail the tests for fairness used in other instruments (for example, the Victorian *Fair Trading Act* or the UK Guidelines)
- there were some specific examples of improvement by industry participants¹.

Following the CLC's findings, the ACA made a [formal request](#) for ACIF to develop a code of practice on behalf of the industry. The code was to be registered with and enforced by the ACA. On 4 May 2005, the [ACIF C620:2005 Consumer Contracts Code](#) was registered with ACA (now ACMA) pursuant to section 117 of the *Telecommunications Act*. The CLC was on the ACIF working committee that developed the consumer contracts code.

The ACIF acknowledges in the background to the Code that:

"A report published by the Communications Law Centre (CLC) in January 2001, Unfair Practices and Telecommunications Consumers (the First CLC Report), was influential in the Consumer Codes Reference Panel's (CCRP's) decision." to develop the code and notes the objective of the Code is to:

*"address aspects of consumer detriment arising from the imbalance in bargaining power between service providers and their residential and small business customers. The Code covers mass market contracts used by residential and small business consumers. This Code seeks to ensure that the terms of contracts between service providers and residential and small business consumers are fair and are presented by service providers in a form that is readily accessible, legible and capable of being readily understood by consumers."*²

The development of a code in relation to consumer contracts has been a positive development for consumers. The willingness of suppliers of goods and services to agree to establish National Standards appears anomalous with the inconsistencies found in consumer and fair trading legislation across Australia's States and Territories.

Section 6 of the ACIF code specifies that terms are not to be unfair (6.1), outlines assessment of terms for unfairness (6.2) and lists exceptions (6.3). Section 7 of the Code specifies that contracts are to be written in plain language (7.1), outlines requisite format and structure (7.2) and prioritises information accessibility (7.3).³

The use of standard form of agreements (SFOAs) by the telecommunications industry is recognised in Part 23 of the *Telecommunications Act*, specifically section 479, which permits the formulation of a SFOA for the supply of "a standard telephone service, a carriage service of the kind specified in the regulations." However, the *Telecommunications Act* does not deal with the validity of the specific terms and conditions of a SFOA. Instead, these matters are dealt with by the ACIF Consumer Contracts Code.

¹ CLC, Report on Fair Terms in Telecommunications Consumer Contracts, p1. (Research report prepared for the Australian Communications Authority, October 2003.)

² ACIF C620:2005 COPYRIGHT
INDUSTRY CODE – CONSUMER CONTRACTS

³ Ibid

Victorian legislation on Unfair Contracts Terms

On 9 October 2003, the Victorian government introduced specific legislation dealing with unfairness in consumer contracts. The *Fair Trading Act 1999* (Vic) was amended to:

- prohibit the use of unfair terms in consumer contracts
- allow for terms to be prescribed as unfair
- require consumer contractual documentation to be clearly presented.

In 2004, Consumer Affairs Victoria (CAV) commissioned the CLC to review consumer contracts for mobile phone services that were in use in Victoria by major telecommunications suppliers for compliance with the new legislation. The compliance audit which was completed in May 2004 found a significant number of unfair terms in the contracts.

On 13 December 2004 the Director of CAV brought proceedings in the Victoria Civil and Administrative Tribunal (VCAT) against AAPT for the use of unfair terms in its mobile phone contracts contrary to the requirements of Part 2 B of the *Fair Trading Act 1999* (Vic).⁴ On the 2 August 2006 VCAT found that some of the terms in the AAPT mobile phone consumer contracts were unfair pursuant section 32W of the *Fair Trading Act 1999* (Vic).⁵ Terms dealing with unilateral variations, suspension of service and immediate termination of the agreement were found to be unfair.⁶ No declaratory or injunctive relief was granted because as of the 1 May 2005 the AAPT terms and conditions had been replaced by new ones that intended to deal with the concerns raised by the Director of CAV.⁷

It appears that since 2004, there has been appreciable improvement in the consumer contracts used by industry participants. In addition to AAPT replacing its terms and conditions in 2005, it was also apparent that unfair terms were less common when our review of mobile phone contracts was conducted for CAV in February 2006. Although this second mobile phone contracts review had a particular focus on unilateral variation and early termination clauses, it was apparent that improvement had been made.

CLC is of the view that this reduction in unfair terms and conditions has been brought about as a consequence of both the 2003 amendment of the *Victorian Fair Trading Act 1999* and to a lesser extent the introduction of the ACIF consumer contracts code.

The CLC would be pleased to provide further information on request.



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⁴ See [Director of Consumer Affairs v AAPT Ltd \(Civil Claims\) \[2006\] VCAT 1493](#).

⁵ [Director of Consumer Affairs v AAPT Ltd \(Civil Claims\) \[2006\] VCAT 1493](#) [49-59].

⁶ [Director of Consumer Affairs v AAPT Ltd \(Civil Claims\) \[2006\] VCAT 1493](#) [49-59].

⁷ [Director of Consumer Affairs v AAPT Ltd \(Civil Claims\) \[2006\] VCAT 1493](#) [8, 60-75].