

Preventing unfair terms in consumer contracts

Guidelines for businesses



DEPARTMENT
OF JUSTICE

Disclaimer

Because this publication avoids the use of legal language, information about the law may have been expressed in general statements. This guide should not be relied upon as a substitute for the relevant legislation or professional legal advice.

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Preface

These Guidelines provide an overview of the legislation dealing with unfair terms in consumer contracts, and of Consumer Affairs Victoria's (CAV) approach to administering the legislation. This third edition has been updated to take account of the introduction of the Australian Consumer Law (ACL).

Unfair contract term legislation became part of Victoria's *Fair Trading Act 1999* in 2003. This legislation, the first of its kind in Australia, gave CAV and consumers a new avenue to address the content of consumer contracts, and led to the introduction of national unfair contract term legislation into the *Trade Practices Act 1974* on 1 July 2010, as part of the first part of the ACL.

Victoria's unfair contract term legislation was repealed when the ACL was applied in Victoria (and in the other States and Territories) on 1 January 2011, whereupon the ACL version of unfair contract term legislation now applies nationwide.

For convenience, this Guide will simply refer to unfair contract term legislation and the ACL version is reproduced at the end of this Guide. CAV has reviewed the successive versions of unfair contract term legislation and has determined that its conclusions about the unfairness of the terms identified in this Guide are unaffected by the changes.

The legislation covering unfair terms in consumer contracts has significant potential impacts for businesses and consumers. CAV is concerned to ensure that the law, and CAV's approach to enforcement, is well understood. These Guidelines seek to promote this objective.

CAV welcomes comments on the Guidelines. Comments will be taken into account in future revisions of the Guidelines. Comments should be made in writing to the Director of Consumer Affairs Victoria at the address listed on the inside front cover.

The Guidelines include examples of the types of terms that may be considered unfair. However, it is essential to note that the Guidelines do not present a definitive list of what is unfair – or, by omission, fair – under the legislation. The fairness of a term will be considered in the context of the contract in which it appears.

The Guidelines attempt to make the unfair contract term legislation as simple to understand as possible. However, they do not substitute for the actual words of the legislation

If you are unsure whether a term in a specific circumstance may be considered unfair, it is recommended that you seek independent legal advice.

The Australian Competition and Consumer Commission (ACCC) has also published a guide to unfair contract terms under the ACL – *A guide to the unfair contract terms law* – which can be downloaded from the ACCC's website (acc.gov.au). CAV's Guidelines are intended to operate alongside the ACCC's guide.

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Introduction

The Guide represents the views of Consumer Affairs Victoria (CAV) and outlines the basis on which it is likely to take enforcement action in relation to unfair terms. It is, of course, ultimately for the courts¹ to decide if a term is unfair.

This Guide aims to increase the understanding of unfair contract term legislation and to promote the removal of unfair terms from consumer agreements. Its purpose is not to regulate industry but to serve as a Guide to the application of unfair contract term legislation so that the market can function in a fair and open manner for all of the contracting parties.

CAV believes that fair contracts benefit not only consumers but also industry because they encourage consumers to enter the marketplace.

This Guide is designed to help traders and legal practitioners meet the requirements of unfair contract term legislation. CAV expects those who use standard-form agreements in the industry to review their terms and conditions in the light of this Guide and amend or remove any unfair terms from these contracts.

What unfair contract term legislation applies to which contracts?

For consumer contracts entered into between 9 October 2003 and 30 June 2010, the original unfair contract term legislation in the *Fair Trading Act* applies.

¹ In Victoria, the Victorian Civil and Administrative Tribunal also has unfair contract term jurisdiction

For consumer contracts entered into or renewed between 1 July 2010 and 1 January 2011, when the Australian Consumer Law (ACL) applies in Victoria, the current unfair contract term legislation in the *Fair Trading Act* (nationally aligned provisions) and the *Trade Practices Act* version apply².

For consumer contracts entered into or renewed after 1 January 2011, when the *Fair Trading Act* provisions have been repealed, the ACL version will apply³.

How does unfair contract term legislation work?

The legislation empowers consumers and the Director of Consumer Affairs Victoria to seek from a Victorian court or the Victorian Civil and Administrative Tribunal (VCAT) a declaration that a term in a consumer contract is unfair, an injunction against the relevant trader using the term in its consumer contracts and remedial orders for any losses suffered. It also empowers the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) to seek such remedies in State and Territory courts and the Federal Court.

² And to any term of a pre-1 July 2010 contract that is varied between those dates.

³ And to any term of a pre-1 January 2011 contract that is varied after that date

Enforcement of unfair contract term legislation at the regulator level will be shared between the ACCC, ASIC, and the State and Territory consumer protection agencies. These agencies will work together to ensure a consistent approach to compliance and enforcement.

What is an unfair term?

A term is unfair if:

- it causes a significant imbalance in the parties' rights and obligations under the contract
- it is not reasonably necessary to protect a legitimate interest of the trader
- it would cause detriment to the consumer
- it is contained in a standard-form consumer contract.

In assessing whether a term is unfair, the legislation requires that:

- the contract as a whole be taken into account, including any countervailing favourable terms
- the transparency of the term be taken into account ie whether the term is:
 - expressed in reasonably plain language
 - legible
 - presented clearly
 - readily available to the consumer

However, any term that defines the main subject matter of the contract, or that sets the up-front price, or that is permitted by another law is not subject to the legislation.

A term can be unfair regardless of the trader's intention or of the fact that it has not been used.

A significant imbalance in the parties' rights and obligations under the contract is created wherever a term:

- gives powers to the trader that it would not otherwise or usually have
- protects the trader in a way that puts the consumer at a disadvantage

- alters the position under the ordinary rules of contract or the general law
- shifts risks to the consumer that the trader is better placed to manage.

The legislation sets out the following (non-exhaustive) examples of terms that may be unfair:

- a term that permits the supplier but not the consumer to avoid or limit performance of the contract
- a term that permits the supplier but not the consumer to terminate the contract
- a term that penalises the consumer but not the supplier for a breach or termination of the contract
- a term that permits the supplier but not the consumer to vary the terms of the contract
- a term that permits the supplier but not the consumer to renew or not renew the contract
- a term that permits the supplier to vary the price without the right of the consumer to terminate the contract
- a term that permits the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract
- a term that permits the supplier unilaterally to determine whether the contract has been breached or to interpret its meaning
- a term that limits the supplier's vicarious liability for its agents
- a term that permits the supplier to assign the contract to the consumer's detriment without the consumer's consent
- a term that limits the consumer's right to sue the supplier
- a term that limits the evidence the consumer can produce in legal proceedings on the contract
- a term that imposes the evidential burden on the consumer in such legal proceedings.

What is a 'standard-form' 'consumer contract'?

A 'consumer contract' is one for the supply of goods or services to an individual consumer (ie not to a company) who buys them wholly or predominantly for personal, domestic or household use or consumption.

What constitutes a 'standard form' consumer contract is not specified in the legislation but is essentially a pre-prepared contract that a trader uses for its customers which is not open to negotiation by the consumer. When assessing whether a contract is a 'standard form' contract, the following factors are taken into consideration:

whether the supplier has all or most of the bargaining power

whether the contract was prepared by the supplier before any discussion relating to the transaction occurred with the consumer

whether the consumer was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented

whether the consumer was given an effective opportunity to negotiate the terms of the contract

whether the terms of the contract take into account the specific characteristics of the consumer or the particular transaction

What is the effect of an unfair term?

If a term is declared to be unfair, it is void but the contract continues to bind the parties unless it is incapable of operating without the unfair term.

What is the process that Consumer Affairs Victoria follows?

CAV will determine what enforcement action will be taken, applying the criteria set out in its published Compliance and Enforcement Policy.

By taking enforcement action, CAV aims to change marketplace behaviour to promote compliance with the legislation and stop offending behaviour. To raise consumer and supplier awareness of the law, CAV will publicise successful enforcement outcomes and issue media alerts and warnings.

Will this Guide protect me from having a term made void?

This Guide cannot protect a trader from having a term in its agreement declared unfair by a court or VCAT but it does provide an indication of the approach of CAV to the legislation. If you are unsure whether a term is unfair, you should obtain independent legal advice.

Glossary

In this Guide:

references to 'unfair contract term
legislation' mean:

the legislation in Part 2-3 of Schedule 2 of the *Trade Practices Act 1974* (until that is replaced by Part 2-3 of Schedule 2 of the *Competition and Consumer Act 2010* on 1 January 2011)

that Part as applied in Victoria under the ACL on 1 January 2011

the legislation in Part 2B of the *Fair Trading Act 1999* (Vic) until Part 2B is repealed and replaced by the ACL version on 1 January 2011

references to 'consumer guarantees' in relation to defective goods or services mean:

the consumer guarantees set out in Division 1 of Part 3-2 of Schedule 2 of the *Trade Practices Act 1974* (until that is replaced by Division 1 of Part 3-2 of the *Competition and Consumer Act 2010* on 1 January 2011)

that Division as applied in Victoria under the ACL on 1 January 2011

the implied warranties set out in Part 2A of the *Fair Trading Act 1999* (Vic) until Part 2A is repealed and replaced by the ACL consumer guarantees on 1 January 2011.

Compliance and enforcement

The ACL seeks to promote and encourage fair and balanced trading practices, and to encourage and support transparent practices in the market place. CAV's compliance program is intended to reinforce these aims.

Media releases will be issued at the commencement and conclusion of an industrybased project to review contracts for unfair terms, or of other significant work areas.

At the end of the process, CAV aims to produce guidelines for all industry participants, if that is appropriate for the relevant industry.

CAV will not hesitate to pursue remedies in the courts and VCAT if a trader refuses to comply with the law.

Melbourne 2007 World Swimming Championships

The 2007 World Swimming Championships Corporation approached CAV in mid-2006 to discuss its proposed Conditions of Attendance.

CAV provided detailed advice to the Corporation within weeks on its draft terms, particularly the refund policy.

The Corporation amended its draft terms to comply with CAV's concerns in time for their general release to the public.

Mobile phone contracts

CAV obtained copies of contracts from mobile phone companies in 2004. It wrote to the companies identifying significant concerns with contract terms and seeking modification of the terms together with a proposed time frame.

Each of the providers, except AAPT, responded positively. Telstra, Optus, Hutchison and Vodafone agreed to amend their contract terms substantially and sought CAV's responses on an ongoing basis. AAPT initially did not agree to review its terms or discuss the matter further and so in 2005, CAV took action against AAPT in VCAT see *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493.

(Before the matter came on for hearing, AAPT changed its terms to address CAV's concerns, with retrospective effect, and for that reason VCAT did not make any orders against it, although it found that the relevant terms in the previous contract were unfair.)

CAV has engaged with various industries since it set up its Unfair Contract Terms Taskforce in 2004 (see box). It has also dealt with many individual traders on an ad hoc basis.

Industries subject to contract reviews since 2004

- Domestic building
- Curtains and carpets
- Health and fitness centres
- Hire cars
- Internet service providers
- Mobile phones
- Motor vehicles
- Online auctions
- Pay TV
- Residential tenancies

It is also open to individual consumers to defend themselves against debt collection and other contract enforcement actions by pleading that the terms relied upon by the trader are void as unfair.

Categories of unfairness

A guide to the sort of terms that will often be unfair can be found in section 25(1) of the ACL. In *Director of Consumer Affairs Victoria v AAPT*, Justice Morris found the following terms in mobile phone contracts to be unfair, several of which match indicative terms in section 25(1):

- a term that enabled the supplier unilaterally to vary the terms of the contract see sections 25(1)(a)&(d)
- a term that enabled the supplier unilaterally to increase its charges see section 25(1)(f)
- a term that enabled the supplier unilaterally to vary its product mix – see section 25(1)(g)
- a term that enabled the supplier to charge a reconnection fee if it suspended or terminated its services for reasons other than the consumer’s breach
- a term that required the consumer to continue to pay charges during the time services were suspended for reasons other than the consumer’s breach – see section 25(1)(a)
- a term that enabled the supplier to terminate the agreement for an inconsequential breach by the consumer or reasons other than the consumer’s breach.

CAV is only concerned with what the relevant term actually says, not what the trader says the term is trying to say or trying to get at. Claims that the term is never used are not to the point: if the term is never used, there cannot be any objection to its removal so that the contractual situation accords with the operational situation.

Typically, unfair terms fall into the following categories:

- unilateral variation terms
- terms that limit the liability of the supplier, and
- terms that impose penalties.

Unilateral variation terms

These are terms that allow the supplier unilaterally to vary important terms of the contract. The AAPT case illustrated three classical unilateral variation terms – terms that enabled AAPT to vary the terms of the contract in its absolute discretion, to increase its charges and to vary its product mix, with no right for the consumer to exit the contract without penalty.

CAV recognises that in long-term and ongoing contracts, some traders may have a legitimate need to be able change terms to keep abreast of dynamic market conditions or to accord with changes in the terms of their own supply contracts.

However, as the AAPT case illustrates, unilateral variation powers cannot be justified solely on the basis that they are required to enable the supplier to respond to upstream changes in its commercial environment (AAPT argued that it required flexibility in its consumer contracts to enable it to respond to unilateral changes made by its suppliers, Telstra, Optus and Vodafone).

In these cases, consumers must be given adequate (personal) notice of the changes and have the right to exit the contract without penalty where the changes are materially detrimental. In these circumstances, there could still be unfairness if the effect of the variation is substantially to deny the consumer the benefit for which he or she contracted.

In short-term contracts, unilateral variation terms will generally be unfair, one exception being where the change is required to accord with law. The consumer should still be given adequate notice of the change and have the right to exit the contract without penalty where the change is detrimental.

Limitation of liability

Terms that avoid, limit, or restrict the liability of a supplier, its employees or agents for a breach of the contract or otherwise, will be considered to be unfair.

Rights dependent on compliance with a formality

A term may be unfair if its effect is to make the supplier's liability subject to the consumer's compliance with a particular formality. Unless the need to observe the formality is obvious, it will be considered to be unfair.

Transferring inappropriate risks to the consumer

A contract may be considered unbalanced, and therefore unfair, if it contains a term making the consumer carry a risk that the supplier is better able to bear. Suspicion falls on a term that makes the consumer bear a risk that the supplier could remove, or at least reduce, by taking reasonable care. An example is asking the consumer to bear

the risk of damage to equipment that the supplier operates, or the risk of encountering foreseeable structural problems in installation work. The supplier should not make the consumer the supplier's insurer.

Acknowledgements and deeming provisions

Terms that require consumers to acknowledge something as a fact or that deem something to be the fact will often be unfair if their only real purpose is to prevent or deter consumers from proving the opposite.

Such terms operate either to limit the evidence that consumers can lead (see section 25(l) ACL) or limit their right to sue the supplier (section 25(1)(k)) and in both cases also effectively operate to limit the supplier's liability. Examples are terms that:

- require consumers to acknowledge that no oral representations or promises were made to them before they signed the contract, or that deem the written contract to contain the whole of the agreement between the supplier and the consumer to the exclusion of any oral representations or promises
- make variations to or waivers of terms of the contract that are in writing and signed by the supplier the only valid variations/waivers
- require consumers to acknowledge that goods are in satisfactory condition when sold/delivered
- require consumers to acknowledge that they read and understood the contract.

Consumer Guarantees

The ACL sets out a number of consumer guarantees to protect consumers when purchasing goods and services, the principal ones being that goods are of 'acceptable quality', including that they are reasonably fit for their purpose, and that they comply with any description or sample; and that services are rendered with due care and skill and are reasonably fit for any specified purpose.

It is an offence for a supplier to attempt to exclude, restrict or modify these guarantees or to limit its liability for a breach (including liability for economic/indirect/consequential loss) and such terms are void. If it is necessary to decide, CAV would also regard such terms as unfair.

Many terms that exclude or limit a supplier's liability for loss or damage suffered by the consumer from the supplier's acts or omissions attempt to cater for the consumer guarantees with words such as 'to the extent permitted by law', or other words that only indirectly refer to the consumer's statutory rights. Such terms are still likely to be considered by CAV to be unfair terms having the object or effect of limiting the consumer's right to sue the supplier for a breach of a statutory condition (see section 25(1)(k) ACL) because most consumers will not know what that 'law' is. While such terms give the appearance of complying with the law, they signify nothing to consumers who are ignorant of their rights.

CAV considers that these terms may also contravene the provisions of the ACL that prohibit the making of a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy.

CAV will only regard liability exclusion terms as fair or as not breaching the ACL if the main statutory rights are clearly signposted, for example:

'For consumers, our goods come with non-excludable guarantees under the Australian Consumer Law, such as that we are the rightful owner, the goods are reasonably fit for their purpose, are reasonably durable and safe, are not damaged, and match any description or sample. For a major failure, you are entitled, at your option, to a refund or replacement or to payment for the reduction in value of the goods, and to compensation for any other loss. These guarantees are separate from any manufacturer's warranty. In addition to the statutory guarantees and in addition to any manufacturer's warranty, the Australian Consumer Law requires the manufacturer or importer to compensate you for any loss if the goods are, for example, damaged, not reasonably fit for their purpose nor sufficiently durable or safe. You have the option of seeking compensation from the manufacturer/importer or from us.'

'For consumers, our services come with non-excludable guarantees under the Australian Consumer Law that they will be provided with due care and skill and be reasonably fit for any specified purpose. For a major failure, you are entitled, at your option, to a refund of money paid for services not delivered or to payment for the reduction in value of the services delivered, and to compensation for any other loss.'

(Similar consumer protection terms are implied into house construction contracts under the *Domestic Building Contracts Act 1995*, such as that the work will be carried out in a proper and workmanlike manner, in accordance with all laws and legal requirements and with reasonable care and skill; and that all materials will be good and suitable for their purpose.)

Penalty clauses

Terms that require consumers who breach the contract or terminate early to pay an excessive amount in compensation or in cancellation charges.

This includes the following types of terms:

- A requirement to pay a specified amount of compensation for a breach, unless it is a genuine pre-estimate of the loss that the supplier expects to suffer. Higher amounts are unenforceable under the general law relating to penalties, but are also likely to be regarded by CAV as an unfair windfall or as having the object or effect of penalising the consumer but not the supplier for a breach of the contract (see section 25(1)(c) ACL).
- A requirement to pay a cancellation fee unrelated to the reasonable costs reasonably incurred by the supplier from the early termination.
- A requirement to pay unreasonable interest on outstanding payments. Consistent with the Victorian Government's Fair Payments procurement policy, which applies to its purchases from private industry available from www.vgpb.vic.gov.au prima facie, the fair interest rate is the rate published from time to time under the *Penalty Interest Rates Act 1983* or any lower rate.
- A requirement to pay all of the supplier's costs and expenses arising from a breach or early termination, not just the net costs.
- A requirement to pay the supplier's legal costs on an indemnity basis, not just reasonable costs reasonably incurred or, in the case of court costs, a requirement to pay more than the award of the court.

Terms that require excessive deposits

Two types of deposit are considered here:

- an amount, sometimes described as an 'earnest of performance', required to be paid upfront by the consumer to ensure they are bona fide about proceeding with the contract and which is forfeited if, before work is commenced or costs incurred, they elect not to proceed; and
- an amount required to be paid upfront to cover the actual costs incurred by the supplier if, before work is commenced, the consumer elects not to proceed.

These payments are distinguished from part-payments or advance payments (see below) and cancellation fees (see above) although there are some similar features.

A requirement to pay the first type of deposit may be regarded by CAV as unfair if the supplier will not be significantly inconvenienced by a cancellation (eg, through wasted time and effort that could have been spent on other, bona fide, purchasers) and if the amount is not commensurate with the inconvenience likely to be suffered. These deposits should normally be a small percentage of the price. Drawing on the case law and tradition in contracts for the sale of land, such a deposit should not normally exceed 10% of the price, and in many cases should be less.

A requirement to pay the second type of deposit may be regarded by CAV as unfair if the amount exceeds the actual costs likely to be incurred and if there is no provision for a refund of the amount that exceeds the actual costs reasonably incurred.

Terms that allow the supplier to retain a part payment on the consumer's cancellation of the contract

These may also be regarded by CAV as unfair penalties unless retention is limited to the supplier's reasonable costs reasonably incurred which the deposit is insufficient to cover. CAV also regards a requirement to make a part payment or advance payment as unfair if it is not reasonably required to enable the supplier to commence work. It is therefore particularly concerned with requirements to pay the full amount or a large amount of the contract price as a prepayment or advance payment and also, where payment is in stages, with requirements to make the last payment before the work has been completed or all the goods or services have been supplied, unless there is adequate provision for the payments to be held in trust pending the satisfactory performance of the contract.

Terms preventing deductions and setoffs

Terms that require consumers to pay without deduction or setoff may be considered unfair, particularly where the supplier holds an irrevocable authority to debit the consumer's credit card or bank account for payment, if:

- inadequate allowance is made for amounts genuinely in dispute or genuinely owed by the supplier, or for genuine disputes over the adequacy of the supplier's performance of the contract, or

- there is no reciprocal obligation on the supplier to return, in full on termination of the contract, money held by it through prepayments, overpayments or advance payments, or
- there is no proper dispute resolution process, including for holding disputed amounts in trust or for the suspension of the right to debit the disputed amount pending the outcome.

Terms that allow the supplier to pass on unexpected financial burdens to the consumer

If a contract is to be considered balanced, each party must be subject only to obligations that they have agreed to accept. A term that allows the supplier to pass on an unexpected financial burden to the consumer may be unfair.

Examples of unfair terms

Set out below are some examples of terms that CAV believes are unfair, together with terms found to be unfair in *Director of Consumer Affairs Victoria v AAPT Ltd*. See also CAV's guidelines to unfair terms in vehicle rental agreements. When considering the examples below, it must be kept in mind that the assessment of whether a term is unfair can depend on its context such that a term may be considered fair in one context but not in another and is ultimately a matter to be determined by the Courts. CAV recommends that suppliers seek appropriate expert advice.

Terms permitting the supplier but not the consumer to avoid or limit performance of the contract (s.25(1)(a) ACL)

- We may from time to time and without notice or liability to you suspend any of the Services (and at our discretion disconnect the relevant SIM cards from the Network) in any of the following circumstances:
 - (a) during any technical failure, modification or maintenance of the Network (but in that event we will procure resumption of the Services as soon as reasonably practicable)

Notwithstanding any suspension of the Services under this clause you shall remain liable for all charges due hereunder throughout the period of suspension (including without limitation all monthly access fees, and regardless of whether or not any SIM card has been disconnected from the Network) unless we in our sole discretion determine otherwise. (AAPT case).

- The company reserves the right to have the final say on warranty claims. (Carpet/curtain retailer terms and conditions).
- We will make every effort to complete the work on time but we cannot be held responsible for delays due to circumstances beyond our control. In this case, we will complete the work as soon as reasonably possible. (Carpet/curtain retailer terms and conditions: without a right for the consumer to terminate the contract where the delay has taken the completion time beyond the contract date, this term effectively allows the supplier to complete the contract in its own time.)
- In the event that the retailer is unable to supply part of the order and the retailer accepts cancellation of the part, cancellation applies to such part only. (Carpet/curtain retailer terms and conditions: this term allows the supplier to avoid the normal consequences of its breach, as failure to supply a part of the order would normally be a fundamental breach entitling the consumer to cancel whole contract, and allows it to part-perform the contract only.)

Terms permitting the supplier but not the consumer to terminate the contract (s.25(1)(b) ACL)

- The Company has sole discretion to terminate this agreement as a result of breach by me of any terms contained in this agreement or of any membership conditions or rules and regulations overleaf. (Health/fitness centre Membership Agreement: no reciprocal right for the consumer; alternatively, no

provision for notice to the consumer, no allowance for the consumer to rectify a breach, and no distinction between serious and minor breaches).

- We may suspend, cancel or terminate your access to the Service if you breach or fail to observe these Terms and Conditions or for any other reason at our discretion. (Online auction user agreement: as above and also that ability to terminate goes beyond a breach of the contract).

Terms penalising the consumer but not the supplier for a breach or termination of the contract (s.25(1)(c) ACL)

- We will use our best efforts to ensure that any delivery time quoted by us for the delivery or installation of the Goods is met. If we are unable to meet the quoted delivery time due to circumstances such as fabric and material delays, industrial action, strikes or manufacturing delays, we will endeavour to deliver or install the Goods within a reasonable time, which shall not exceed 30 days, failing which, you may terminate this Contract by written notice to us. If you terminate this Contract then we will refund any monies you have paid to us less any reasonable costs incurred by us. (Carpet/curtain retailer terms and conditions: requiring the consumer to compensate the supplier for the failure of the contract, where the failure arises from the supplier's act or omission.)
- The Customer authorises the company to notify any debt collection/credit report agency upon default by the Customer in regard to any obligation under this Contract. Should this occur then at the company's sole discretion it may terminate the contract at which time the full outstanding balance

for the remainder of the minimum term or payments including any current arrears shall be immediately due in full. In addition the company shall add \$50 to the outstanding debt as its fee for dealing with the defaulting member. The Customer authorises the company to add any further amount to the outstanding debt that might be reasonably incurred by the company in collecting the outstanding debt, including addition of an amount equivalent to 25% of the full outstanding balance for the remainder of the minimum term or payments including any current arrears upon initial referral to the debt collection/credit reporting agency (Direct debiting agreement).

Terms permitting the supplier but not the consumer to vary the terms of the contract (s.25(1)(d) ACL)

- We may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation. (AAPT case).
- The Company reserves the right to alter rules and regulations at its sole discretion. (Health/fitness centre Membership Agreement).
- The company may vary those flights for which Points may be redeemed for Award Flights and may impose restrictions on the availability of Awards on certain flights from time to time. (Airline loyalty program).
- Management reserves the right to change the Centre rules without notice. (Health/fitness centre Membership Agreement).

Terms permitting the supplier to determine the price without the right of the consumer to terminate the contract (s.25(1)(f) ACL)

- To the extent permitted by law, AAPT may change a Supplier or its products, or vary our charges from time to time without notice to you. Otherwise, AAPT may vary these terms on 30 days written notice to you. (AAPT case).
- Management reserves the right to amend any fees or charges without notice. (Health/fitness centre Membership Agreement).
- You acknowledge that we can change the Subscription Fees, the prices in the Pricing Guide, the prices in the Digital Guide, the Box Office Charges, Main Event Charges and the General Charges at any time. We can impose new fees or charges. We will tell you about any changes and any new fees or charges not later than when they become effective. If we change the Subscription Fees for the Digital Basic package other than to reflect an increase in CPI during the Fixed Term you can terminate this Agreement. (Pay TV agreement).

Terms permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract (s.25(1)(g) ACL)

- To the extent permitted by law, we may change a Supplier or its products, or vary our charges from time to time without notice to

you. Otherwise, we may vary these terms on 30 days written notice to you. (AAPT case).

- Membership types and categories may change from time to time at the sole discretion of management. (Health/fitness centre Membership Agreement).
- Management reserves the right to:
 - close off any part of the premises or any piece of equipment for maintenance (or for any reason) at any time. The Centre will not be held responsible or liable for such occurrences.
 - Regulate the hours of opening and closing in accordance with the requirements of the Centre.
 - Alter class timetable without notice. (Health/fitness centre Membership Agreement).
- The company does not guarantee the continued availability of any particular Award. (Airline loyalty program).
- The company reserves the right to withdraw any item from sale or any user bid at any time without notice or explanation. (Online auction user agreement: right to withdraw a bid without explanation amounts to a term permitting the supplier unilaterally to vary the characteristics of the services supplied.)
- We may vary the Service including part of the Service by:
 - changing the content or broadcast times of your Programming Package
 - changing or withdrawing a Channel, Box Office Programme or Main Event Programme or withdrawing any Retransmitted Service
 - restricting some of the features of the iQ on any Channel, Box Office Programme or Main Event Programme, including the ability to record any programme on a Channel, any Box Office Programme or any Main Event Programme, and/or

- adding, withdrawing or changing features or functionality of the Service. If these are features or functionality that you pay extra for then we will, where possible give you notice of the withdrawal, replacement or change. (Pay TV agreement).

Terms permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning (s.25(1)(h) ACL)

- The rules and regulations, and the interpretation thereof, are subject to change at management's discretion. Members should ensure that they are familiar with the current rules and regulations applicable at any time. (Health/fitness centre Membership Agreement)
- Management reserves the right to suspend or expel without refund any person whose conduct is deemed improper or in any way detrimental to the Centre. (Health/fitness centre Membership Agreement)
- If in the company's reasonable opinion a Member has committed a material breach of any of the Terms and Conditions or has failed to pay any money owed to the company by the due date, whether intentionally or otherwise, then the company may, at its sole discretion and without any liability, do any one or more of the following:
 - (a) suspend or terminate the Member's Membership and/or the right of the Member to use the Card
 - (b) reverse or cancel the Member's Points or any part thereof, or
 - (c) cancel or refuse to honour any Awards (including ticketed Award Flights). (Airline loyalty program)
- We reserve the right to determine whether or not your conduct is consistent with the spirit and the letter of these terms and conditions and may, at our sole discretion, immediately terminate your Account and use of the Service if your conduct is deemed by us to be inconsistent with these terms and conditions. (Online auction user agreement)
- Users acknowledge that bids placed on the system can be increased by price and/or volume but it is only under exceptional circumstances that bids can be withdrawn. The successful winning user agrees to pay the seller for all goods in which he is deemed to be the successful winning user by the company. (Online auction user agreement whether or not someone is the highest bidder is a question of fact.)
- Suspend or expel without refund any person whose conduct is deemed improper or in any way detrimental to the Centre. (Health/fitness centre Membership Agreement)

Terms permitting the supplier Terms limiting the consumer's right unilaterally to determine whether to sue the supplier (s.25(1)(k) ACL)

- In the event of any dispute arising from the use of the system, the company shall be the sole determinant in such dispute. The company accepts no liability for errors and/or omissions arising from such determination. (Online auction user agreement)
- In the event of suspension or termination of Membership or cancellation of any Points, Awards or Benefits under clause 8.1 subject to applicable laws, the company will not be liable for any loss or damage whatsoever suffered by any person as a result of such suspension, termination or cancellation. (Airline loyalty program)
- In the event of any dispute as to compensation, the dispute shall be settled by an arbitrator who shall be a person mutually agreed upon by the parties. (Online auction user agreement)
- You waive, release, discharge and relinquish any and all claims that you now have or may have against us, our affiliates, subsidiaries, parents, shareholders, directors, officers, employees, agents and representatives which are connected with, arise out of, relate to or are incidental to the use of the Service. (Online auction user agreement)
- In the event of litigation arising between the Company and this customer, the jurisdiction in which such proceedings shall be commenced, heard and determined shall be in the jurisdiction of the registered office of the Company at the time of entering into the contract. (Carpet/curtain retailer terms

and conditions: although this term cannot oust the rules of court and of the Service and Execution of Process Act in relation to the most appropriate court, and therefore cannot have the effect that it seeks, it has the object of limiting the right of a consumer who resides in another jurisdiction, to sue in its jurisdiction.)

- We are not liable for any loss or damage to personal property left in the Vehicle or any property received, handled or stored by us at any time before, during or after the hire period. (Hire car terms and conditions)

Terms limiting the evidence the consumer can lead in proceedings on the contract (s.25(1)(l) ACL)

- I have read and understand my obligations and rights in relation to this agreement and will abide by all membership conditions, rules and regulations stated overleaf. I accept that it is a condition of use of my membership rights that I must comply with them. (Airline loyalty program: if the consumer has not, in fact, read or understood the contract, these terms can only operate to facilitate an attempt to prove what is not true or to prevent evidence being led to prove what is true.)
- It is agreed between the parties hereto that the terms and conditions contained herein constitute the entire agreement between the parties and that oral statements made prior to this agreement neither induced its execution nor form part of it. (Carpet/curtain terms and conditions: where oral statements did, in fact induce the execution of the contract, they form part of the contract and these 'exclusive contract' terms can only operate to facilitate an attempt to prove what is not true or to prevent

evidence being led to prove what is true.)

- The customer acknowledges having received the vehicle in a clean condition and in sound working order, in accordance with the vehicle condition report, and with a full fuel tank and a bottle of gas. (Hire car agreement: where the vehicle was not, in fact, in sound working order, and most consumers would not be in a position to know one way or another, these 'deeming' terms can only operate to facilitate an attempt to prove what is not true or to prevent evidence being led to prove what is true.)

Generally unfair terms (section 24 ACL)

- We reserve the right to suspend provision of Services to you, where charges owing to us or any amount owing under this clause remain outstanding after 60 days, unless we have received written notice from you disputing those charges in good faith. If we suspend or terminate the Services for unpaid charges or any other reason, subsequent reconnection may incur a reconnection fee. (AAPT case unfair requirement to pay reconnection fee for reason not connected to consumer's act or omission)
- We may terminate this Agreement immediately by notice to you if:
 - (c) you change your address or billing contact details without notifying us in accordance with clause 7.4.
(AAPT case unfair power to terminate for inconsequential breach.)

Australian Consumer Law unfair contract term legislation

Section 23 Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
 - (a) a supply of goods or services; or
 - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Section 24 Meaning of unfair

- (1) A term of a consumer contract is unfair if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (a) the extent to which the term is transparent;
 - (b) the contract as a whole.
- (3) A term is transparent if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

Section 25 Examples of unfair terms

- (1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
 - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one

party in proceedings relating to the contract;

- (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
 - (a) the detriment that a term of that kind would cause to consumers; and
 - (b) the impact on business generally of prescribing that kind of term or effect; and
 - (c) the public interest.

Section 26 Terms that define main subject matter of consumer contracts etc. are unaffected

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:
 - (a) defines the main subject matter of the contract; or
 - (b) sets the upfront price payable under the contract; or
 - (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

- (2) The upfront price payable under a consumer contract is the consideration that:
 - (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
 - (b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

Section 27 Standard form contracts

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
 - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
 - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
 - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
 - (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
 - (f) any other matter prescribed by the regulations.

Section 28 Contracts to which this Part does not apply

- (1) This Part does not apply to:
 - (a) a contract of marine salvage or towage; or
 - (b) a charterparty of a ship; or
 - (c) a contract for the carriage of goods by ship.
- (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the *Carriage of Goods by Sea Act 1991*.
- (3) This Part does not apply to a contract that is the constitution (within the meaning of section 9 of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of body.



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Services from Consumer Affairs Victoria are also available at Justice Service Centres in Ballarat, Bendigo, Berwick, Box Hill, Broadmeadows, Geelong, Mildura, Morwell, Wangaratta and Warrnambool. Our mobile service regularly visits rural communities.

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