

Preventing unfair terms in health and fitness centre membership agreements

A guide for the health and fitness industry



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.

© Copyright State of Victoria 2011

No part may be reproduced by any process except in accordance with the provisions of the *Copyright Act 1968*. For advice on how to reproduce any material from this publication contact Consumer Affairs Victoria.

Published by Consumer Affairs Victoria
Department of Justice
121 Exhibition Street Melbourne Victoria 3000

Authorised by the Victorian Government
121 Exhibition Street Melbourne Victoria 3000

Preface

This Guide explains how Consumer Affairs Victoria (CAV) applies unfair contract term legislation to health and fitness centre membership agreements.¹ The Guide was first published in 2009. This edition takes 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Victoria's unfair contract term legislation was repealed when the ACL was applied in Victoria (and in the other States and Territories) on 1 January 2011, whereupon the ACL version of unfair contract term legislation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 health and fitness centre contracts identified in this Guide are unaffected by the changes.

The original version of this Guide was the third in a series on unfair terms in consumer contracts. The first Guide, *Preventing unfair terms in consumer contracts*, which was released in 2003 and updated in 2007, is of general application. It has also been updated in 2011 to take account of the ACL.

Preventing unfair terms in health and fitness centre agreements – a guide for the health and fitness industry is based on a sample of membership

agreements that CAV has reviewed. This industry review was initiated in response to a number of complaints CAV received about health and fitness centres. A large number of the complaints related to the fairness of terms in membership agreements.

The Guide is also based on the decisions of the Victorian Civil & Administrative Tribunal (VCAT) in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd and Matrix Pilates and Yoga Pty Ltd* [2008] VCAT 482 (here called "Langley and Matrix (No.1)"), *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd and Matrix Pilates and Yoga Pty Ltd* [2008] VCAT 1332 (here called "Langley and Matrix (No.2)") and *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 (here called "the Trainstation case").

This Guide has been designed to help health and fitness centre operators, legal practitioners and consumer advocates understand how CAV will apply unfair contract term legislation to membership agreements. It includes examples of the types of terms that may be considered unfair. However, this is not a definitive list of what is unfair under the legislation.

If you are unsure whether a term in a specific contract could be considered to be unfair, you should obtain independent legal advice.

CAV will be actively monitoring compliance with unfair contract term legislation in the health and fitness centre industry.

CAV welcomes comments about this Guide. You can send written comments to the address listed on the inside front cover.

¹ The words 'contract' and 'agreement' have the same meaning and are both used in this document.

Contents

Introduction	3
Typical unfair terms in health and fitness centre membership agreements	7
Unilateral variation clauses	14
Direct debiting of membership fees	24
Australian Consumer Law unfair contract term legislation	30

Introduction

Consumer Affairs Victoria (CAV) has written this Guide to explain why it considers that some common terms used in health and fitness centre membership agreements are unfair.

The Guide represents the views of CAV and outlines the basis on which it is likely to take enforcement action. It is, of course, ultimately for the courts² to decide if a term is unfair.

This Guide aims to increase the understanding of unfair contract term legislation in the context of the health and fitness centre industry and to promote the removal of unfair terms from membership agreements. Its purpose is not to regulate the 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 operators of health and fitness centres 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.

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 apply³.

For consumer contracts entered into or renewed after 1 January 2011, when the *Fair Trading Act* provisions have been repealed, the ACL version will apply⁴.

² In Victoria, the Victorian Civil and Administrative Tribunal also has unfair contract term jurisdiction

³ And to any term of a pre-1 July 2010 contract that is varied between those dates.

⁴ And to any term of a pre-1 January 2011 contract that is varied after that date

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.

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 contracts
- 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.

Typical unfair terms in health and fitness centre membership agreements

This section explores the areas of health and fitness membership agreements in which CAV most often found terms that it considered unfair. It includes examples of unfair terms.

Most health and fitness centre agreements cover similar subject matter. For example, they generally include membership categories, payment options, minimum term structure, termination of agreement, liability and centre rules. However, the order in which these issues are addressed in membership agreements varies.

Casual cards or forms and preexercise questionnaires are often considered to be contractual, so this guide also covers these documents.

General

A health and fitness centre agreement needs to be in writing and, if in parts, these should be packaged together. All health and fitness centre agreements should clearly state the health and fitness centre's obligations to the consumer, including a description of membership types, the facilities and services on offer. Very few membership agreements reviewed by CAV contained an explicit statement of the services being provided by the health and fitness centre. The agreements were almost exclusively a statement of the *consumer's* obligations to the centre.

Most health and fitness centres have rules, a code of conduct or statement of etiquette to guide consumers' behaviour while they are at

the centre. Any rules should be included in or attached to the membership agreement, together with the privacy policy. All applicable fees, such as those for child care or lockers, should be itemised in the agreement. The agreement should be clearly distinguishable from marketing (noncontractual) material.

Consumers should be given the opportunity to read the entire contract before signing it. In its review of membership agreements, CAV found terms that suggested that consumers were only given a copy of the contract after joining. For example, the following term appeared in a contract:

Thank you for becoming of member of X health and fitness centre.

Consumers should always be given a copy of the completed contract (bearing their signature) after they have joined the centre.

Where the agreement is signed as part of a 'trial period' promotion, the terms of the contract need to clearly state:

- start and end dates of the trial, and
- what will happen at the end of the trial period.

The consumer must be presented with a clear, unambiguous choice about whether they continue as a member at the end of the trial.⁵

⁵ Traders will need to take advice to ensure that trial period promotions are not misleading or deceptive.

Membership categories

Many health and fitness centres offer a variety of membership categories. CAV's review revealed that membership categories were sometimes poorly explained. This makes it difficult for consumers to understand the differences between the categories and the significance of those differences.

Membership categories should include relevant information about:

- the range of services and facilities to which the member has access
- the times during which the member has access to those services and facilities
- membership payment methods
- how to cancel the contract, and
- the cost of cancellation.

Minimum terms

Most of the health and fitness centre agreements reviewed by CAV referred to a 'minimum term', 'minimum period', 'minimum agreement period', 'fixed minimum term' or 'agreed term'. These refer to the minimum amount of time that the consumer has committed to be a member of the health and fitness centre and to pay membership fees. (For the purposes of this guide, 'minimum term' will be used to describe this concept.) CAV found minimum terms of between three and 12 months in the health and fitness contracts reviewed.

Minimum terms are an alternative to 'payasyougo' or 'monthtomonth' memberships. Typically, the advantage of a minimum term contract is that it has lower monthly membership fees than a 'monthtomonth' contract.

CAV does not consider 'minimum terms' to be unfair.

Minimum term memberships and automatic renewal

Minimum term memberships are often used in conjunction with an 'automatic renewal' function in a way CAV considers unfair. Typically, when a consumer's minimum term expires, his or her membership is automatically renewed. Some agreements allow consumers to advise at the time of signing that they do not wish the agreement to be automatically renewed, but many offer no choice. A contract that is automatically renewed usually becomes an 'ongoing' or a 'monthtomonth' contract. (It is usually not the case that the consumer is locked into another membership period equal to the length of his/her membership term, which would clearly be unfair). Typically, the consumer is not notified when this occurs.

Many consumers do not appear to understand the concept of automatically renewing, minimum term memberships. This is evidenced by the large number of complaints lodged with CAV by consumers under the impression that their memberships would *automatically terminate* at the conclusion of the minimum term.

In the Langley and Matrix (No.2) case, the front of the membership agreement Terms and Conditions document provided for the commencement and expiry dates of the minimum term to be inserted. With respect to this, Judge Harbison stated that "a consumer entering into the Matrix Membership Agreement *might quite properly think that the agreement expires on the date which has been inserted into the Membership Agreement as being the date of expiry of the minimum term*" (emphasis added) (Reasons paragraph 46).

CAV has serious concerns about any contract that locks a consumer into subsequent purchases. Consumer Affairs Victoria considers that if an automatically renewing minimum term is to be included in a membership agreement, compliance with the the legislation requires:

- consumers to be given a choice in both the application form and the contract between their membership terminating at the end of the minimum term and it automatically renewing at the end of the minimum term
- the application form to require consumers to 'opt in' to having their memberships automatically renewed at the end of the minimum term. (This means that if the consumer does not select the automatically renewing minimum term option, his or her membership will automatically terminate at the end of the minimum term.)
- the consumer documents, particularly the application form, to specifically draw consumers' attention to the choice between memberships that automatically renew versus those that automatically terminate at the end of the minimum term, and
- a reminder notice to be sent to consumers whose memberships will automatically renew at the end of the minimum term. To serve its purpose, this notice must be sent close to the expiry of the minimum term. However, it must also be sent sufficiently in advance to enable consumers to comply with any notice periods required by the contract.

In the Langley and Matrix (No.1) case, the following term was found to be unfair because, among other reasons, "it provides for automatic renewal of the contract on a periodic basis with no provision for consumers to prevent same...thereby creating a significant imbalance in the parties' rights and obligations arising under the Craig Langley Membership agreement to the detriment of the consumer" (Orders paragraph 5).

I understand that after the minimum term has been completed, the instalments will continue automatically giving me the right to use the club and its services as per the minimum term agreement and will continue at the instalment rate and frequency as detailed in 'payment terms' until such time as the Member provides to the Billing Agent written notification 30 days prior to terminate this agreement.

(Orders paragraph 5)

In the Langley and Matrix (No.2) case, where the front of the membership agreement Terms and Conditions document provided for the commencement and expiry dates of the minimum term to be inserted, Judge Harbison found the following terms to be unfair:

We reserve the right at any time after the minimum term on a contract, to increase the fees to be charged, and will give written notice to the most current address you have provided at least one month prior to this occurring.

You can terminate your Membership after the minimum term by giving us 30 days notice in writing.

I/we acknowledge that the business is to provide 14 days notice if proposing to vary the terms of a debit arrangement.

(Declaration 5(i), (ii), (iii))

Judge Harbison stated that the terms "presume that the agreement will continue past the expiry date unless the consumer takes active steps by giving notice of termination to avoid this happening. The effect of these clauses is that if the consumer does not take any action after the expiry date then the agreement continues. The clauses convert what appears to be a contract for a fixed period into a contract for an indefinite period" (emphasis added) (Reasons paragraph 48).

Cancellation of membership agreements

A significant number of the complaints lodged with CAV about health and fitness centres concern the cancellation of membership agreements. In its review CAV found that many cancellation terms which it considered unfair, were also not clearly expressed.

All health and fitness centre membership agreements should have fair, prominently flagged terms that clearly explain how consumers can cancel their memberships.

Cancellation by the consumer

Written notice

Consumers should be able to cancel their memberships by written notice to the health and fitness centre.

A number of contracts reviewed by CAV stated that the contract could only be terminated upon the completion of a specific cancellation form provided by the centre. Some contracts even required that members made appointments to complete the particular cancellation form in person. For example:

Any cancellation must be notified on the required form supplied by us.

You can terminate your monthly deduction at any time, with a minimum notice of 30 days, by completing in person, by appointment, the X cancellation notice ...

CAV considers that requirements to fill in specific forms and/or complete certain procedures to cancel a contract constitute unnecessary formalities and are unfair. Cancellation forms may be provided for consumers, but their use should be optional.

Cancellation when fees owing

CAV also found that some centres would not accept or process a request for termination by a member unless all fees were paid and up to date. For example:

At the time of lodgement of the cancellation form, your membership fees must be paid up to date. ... So there can be no mistake, for your membership cancellation to be effective, all your membership fees must be paid up to date and on the date you give notice AND you must pay or make satisfactory arrangements to pay all membership fees for the period from the date of notice until the date it takes effect. Should you have outstanding fees, your cancellation will not be processed and you will have to reapply to cancel in writing once payment is up to date.

Any amounts owed to the Company by the member must be paid prior to the cancellation of the membership agreement.

CAV considers the above clauses unfair. It is strongly opposed to such clauses because they could lead to spiralling debt for the consumer.

A membership contract should terminate upon written notice by the consumer to the health and fitness centre, allowing for any notification period. Any outstanding fees can still be pursued from the member once the contract is terminated.

When cancellation becomes effective

Some contracts reviewed by CAV stipulated that termination was not effective until the member had received written confirmation from the health and fitness centre. For example:

The Customer shall not consider this contract has been terminated until such time as this is confirmed in writing to the Customer by X.

Your cancellation will not take effect until we give you a copy of your cancellation notice and receipt for

payment of all required fees both of which we will provide promptly.

CAV considers the above terms to be unfair. The contract should be terminated upon written notice by the consumer to the health and fitness centre, allowing for any notification period.

Cancellation for automatically renewing, minimum term memberships

Consumers who have signed up for automatically renewing, minimum term memberships should be able to prevent the automatic renewal from taking place at the time of signing the contract. Some health and fitness centre membership agreements require consumers to wait until the minimum term has expired before they can give notice of cancellation. When combined with the typical notice period of 30 days, this effectively extends the contract 30 days beyond the minimum period for which the consumer thought he or she was contracted. This is considered unfair by CAV.

Consumers who have automatically renewing, minimum term contracts should be able to give notice before the minimum term expiry date, allowing for any notification period, so that their membership will terminate when the minimum term expires.

In the Trainstation case, the following term was declared unfair because, among other reasons, “it implicitly provides for automatic renewal of the agreement, on a monthly basis, after the term or period of the agreement has expired, with no provision for the relevant consumer to prevent the same from happening without incurring a cancellation fee⁶ or having to pay one month’s

⁶ Term 3b of the Trainstation contract stated that “The Customer may terminate this contract before the expiry of the minimum term...by provision of 1 full calendar month of notice in writing, accompanied by a payment of a cancellation fee...”.

membership fees. The term thus transforms an apparently 12 month minimum term into a 13 month minimum term, and an apparently two month minimum term into a three month minimum term, thereby creating a significant imbalance in the parties rights and obligations arising under the Trainstation Membership Agreement to the detriment of the consumer” (Declaration paragraph 6(e)(f)).

The unfair term read:

3a. The Customer may terminate this Contract on or after the expiry of the minimum term, provided that all instalments and fees due up to the date of termination are paid, by provision of one full calendar month notice in writing.

Cancellation within the minimum term

Contracts reviewed by CAV tended not to allow consumers to terminate their membership agreements within the minimum term. Where it was permitted, consumers were often required to pay out the entire contract. For example:

Any obligation to a minimum agreement period must be honoured in full... Memberships may only be cancelled after the minimum agreement period.

Where a minimum term membership has been entered into, cancellation can only occur after the minimum term has expired or the minimum term payment has been paid out in full.

CAV considers that a requirement for consumers to pay out the entire contract – in other words, make all payments until the minimum term expires – is likely to be unfair. The fee charged upon a consumer’s voluntary cancellation should be a genuine preestimate of the service provider’s costs.

Even a fee of 50% of the balance owed under a contract has been held not to be a genuine preestimate of a fitness centre’s loss arising from early cancellation (Langley and Matrix (No.1) case paragraph 6).

Cancellation by the health and fitness centre for breach of contract by the consumer

In the Trainstation case, the parts of the following clauses that relate to the breach of the centre's rules and regulations (bold) were not found to be unfair (Reasons paragraphs 165174):

Termination of Contract by the Operator: The operator may terminate entitlement to use the services provided by the operator for any customer if the customer fails to comply with the operator's rules and regulations.

Entitlement: The operator may terminate entitlement to use the services provided by the operator for any customer if the customer fails to comply with the operator's rules and regulations; or if the customer, in the opinion of the operator behaves in a disorderly or offences manner, whether verbal or physical, towards staff or other customers.

(Reasons paragraphs 165174)

CAV however considers it is good practice for health and fitness centres to give notice to consumers to allow them the opportunity to remedy.

Payment default

Most membership agreements reviewed contained provisions allowing health and fitness centres to take action against members who default on payments. The consequences for default in the payment of fees included:

- immediate termination of membership
- a requirement to pay out the entire contract immediately. (For example, if there were six months remaining in the minimum term with payments being made each month, all remaining payments would immediately become due)

- immediate notification of the default to a credit reporting agency
- immediate referral of the debt to a debt collection agency, and
- the charging of discretionary and at times multiple fees (refer to Late fees below).

CAV considers all these consequences, whether applied individually or in combination, to be unfair, regardless of whether the consumer paid upfront or is paying in instalments. A consumer may have withheld payment because he/she disputes the obligation to make it, for example, because the trader has breached the contract.

In the Langley and Matrix (No.2) case, the following terms were declared unfair because among other reasons, they penalised the consumer but not the centre for a breach or termination of the contract, thereby creating a significant imbalance in the parties' rights and obligations arising under the membership agreement, to the detriment of the consumer (Declaration paragraph 2(e)(i)). Judge Harbison stated that the problem with the clauses is "that they presume that the consumer has failed to pay the fee on time without having a valid reason doing so" and they "effectively prevent a consumer from withholding payment even if the trader does not fulfil its part of the bargain" (Reasons paragraph 38).

...If fees are not paid on the due date, you agree that we may continue to debit the nominated account with the total amount due without notice to you (we will endeavour to contact you prior to effecting such payment)...

In the event that you do not pay the amount payable under this Agreement within 31 calendar days of the due date expressed on the Agreement, the Club and the Billing Agent may at their discretion terminate the Membership and this Agreement. Upon such termination of this Agreement, all amounts outstanding shall become immediately due and payable without further notice of demand...

(Declaration paragraph 2(i), (ii))

In the Trainstation case, the following terms were declared unfair because among other reasons:

- they provided an unqualified and substantial right reserved to the centre that could be triggered by a disproportionately minor breach by the consumer
- they penalised the consumer, but not the centre, for a breach of the agreement.

The terms thereby created a significant imbalance in the parties' rights and obligations arising under the membership agreement to the detriment of the consumer (Declaration paragraph 5(a)).

The terms read:

Termination of Contract by the Operator: The Operator may terminate entitlement to use the services provided by the Operator for any Customer ...if the Customer fails to make payments of any amount on the due date.

Entitlement: The Operator may terminate entitlement to use of the services provided by the Operator for any Customer if the customer...fails to make payment of any amount due on the due date.

(Declaration paragraph 5)

Other examples of payment default terms that CAV considers unfair are as follows:

Default in payment of any agreed payment terms, either by part payment or direct debit, renders the full amount of any outstanding monies due and payable immediately.

The Customer authorises X 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 X'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 X shall add \$50 to the outstanding debt as its fee for dealing with the defaulting member. The Customer authorizes X to add any further amount to the

outstanding debt that might be reasonably incurred by X 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.

Management reserves the right to alter the length of the membership or cancel it completely, without notice, if a member fails to complete payment.

CAV considers that in the event of a payment default, the consumer should be notified in writing. The consumer should also be given a defined and reasonable period of time in which to remedy the default. This process should be clearly spelled out in the contract.

If ultimately the consumer's contract is terminated as a result of a payment default, notification of that termination and of any other actions taken by the health and fitness centre or billing services provider, such as the referral of the debt to a debt collection agency, should be given.

Late fees

Where a membership contract stipulates that a late fee will be charged in the event of payment default, that amount should be specified. The late fee should reflect the cost to the centre of the member's late payment. Where the late fee does not reflect actual costs to the health and fitness centre, the term may be considered unfair.

Access to the health and fitness centre

Some membership agreements reviewed by CAV clearly stated that a member whose fees were outstanding would be suspended from using the facilities until those fees had been paid. CAV does not consider such clauses to be unfair.

Unilateral variation clauses

Most health and fitness centre membership agreements reviewed by CAV contained one or more 'unilateral variation' clauses. These are clauses that allow a health and fitness centre to vary items such as the goods and services supplied under the contract, the price of those goods and services and the terms of the contract itself, while still binding the consumer to the contract.

CAV has serious concerns about unrestricted unilateral variation clauses in membership agreements – particularly in fixed term agreements. Consumers have a right to receive the goods or services for which they originally contracted. CAV considers that membership fees and the terms of a contract *should not* be changed during the minimum term. In the Langley and Matrix (No.2) case, the following term was declared unfair. Judge Harbison stated: "In my view, this term is unfair because it renders the bargain between the parties as to the price to be paid by the consumer meaningless" (Reasons paragraph 30).

I/We authorise the business to vary the amount of the payments from time to time as provided for in the business agreement. I/We authorise Ezi Debit to vary the amount of the payments upon instructions of the Business. I/We do not require Ezi Debit to notify me/us of such variations to the debit amount.

(Declaration paragraph 2(iii))

Other examples of unilateral variation terms that CAV considers unfair are as follows:

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.*

- *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.*
- *Amend any fees or charges without notice.*
- *Alter class timetable without notice.*
- *Change the Centre rules without notice.*

Availability of Centres & Facilities

- *X may delete, change, discontinue, repair or replace any part or all of the centre or centres or any facilities without any effect on this agreement.*

Membership types and categories may change from time to time at the sole discretion of management.

Alternatively, unilateral variation clauses can be separated into discrete clauses. In that case, a court may find a clause allowing unilateral variation to the rules for example to be fair (Trainstation case paragraphs 99125). CAV considers the discretion of the health and fitness centre should always be reasonable.

CAV appreciates that change is occasionally unavoidable. Where the contract contains a right to make changes, those changes should be confined to objectively verifiable occurrences where possible (for example, a change to laws or health regulations), specific and clearly spelled out. Where significant change is unavoidable, health and fitness centres should provide individual, written notice to members in advance. When the consumer is adversely affected by the change, he or she should have the right to terminate his or her contract without penalty.

The notice to consumers advising of the forthcoming change should alert them to the option of terminating their membership without penalty.

Notice of the change needs to be given sufficiently in advance to allow the consumer to terminate his or her membership *before* the changes are implemented. This means that the amount of notice given to consumers of a forthcoming change needs to be greater than the amount of notice they are required to give to cancel their membership agreements. The following terms were found to be unfair in the Langley and Matrix (No.2) case because, among other reasons, they enabled the increase in fees to be effective immediately upon expiry of the minimum term, but restricted the ability of the relevant consumer to give 30 days' notice of cancellation until after the expiry of the minimum term, thereby creating a significant imbalance in the parties' rights and obligations arising under the membership agreement, to the detriment of the consumer (Declaration paragraph 5(a)).

We reserve the right at any time after the minimum term on a contract, to increase the fees to be charged, and will give written notice to the most current address you have provided at least one month prior to this occurring.

You can terminate your membership after the minimum term by giving us 30 days notice in writing.

(Declaration paragraph 5(i), (ii))

Where a consumer is terminating his or her agreement in response to a unilateral variation, no penalties should be imposed. For example, during a minimum term, an early termination fee should not apply.

Liability

Many of the contracts CAV reviewed had terms addressing liability that were considered to be unfair. Often terms denied traders' liability for loss or damage. For example:

I herein irrevocably and unconditionally release X and each and all of it's (sic) workers to the maximum extent permitted by law from any claim, actions, suits, demands, proceedings, and causes of action and any direct, indirect, resulting or consequential loss, cost, expense or damage of whatsoever kind which I may incur, suffer, or sustain, whether in respect of my person or property or otherwise, arising out of or in connection with my use or access to or presence in or supervision, instruction, evaluation or counselling by X or any of the workers in connection with the Facilities, or during organised exercise outside the Premises using public streets, footpaths, parks or beaches or by reason of or arising from the negligence of X or any of it's (sic) workers.

CAV's review of health and fitness centre contracts found that terms addressing liability in membership agreements often:

- denied all liability towards consumers, sometimes only to the extent permitted by law, but often beyond the extent permitted by law
- did not provide for compensation to the consumer where the centre was negligent or wilfully defaulted
- contained broad indemnities
- placed all risks and responsibilities for using the health and fitness centre on the consumer, even where it was more appropriate for such risks and responsibilities to be borne by the centre as they were within its control
- deemed something to be the case with the intent of ensuring that no liability arose, and
- limited consumers' rights to sue the health and fitness centre.

Often these terms were not reciprocal.

Consumers have positive rights under the consumer guarantee provisions of the ACL. The principal guarantees in this context are 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 and/or consequential loss). Such terms are void under the legislation. 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 only by indirectly referring to the consumer's statutory rights. They do this through the use of phrases such as 'to the extent permitted by law'. These phrases are still likely to be considered by CAV to be unfair terms. This is because they have the object or effect of limiting the consumer's right to sue the supplier for a breach of a consumer guarantee. While such terms give the appearance of complying with the law, they provide no assistance to those consumers who are unaware of their statutory rights. For example:

Whilst on the Operator's premises both my property and my person shall be at my own risk and I will not hold the Operator or instructors liable for personal injury or loss of property whether caused by negligence of the Operator, its employees or its agents, or otherwise.

CAV considers 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.

In the Langley and Matrix (No.2) case, Judge Harbison declared the following term to be unfair stating that "it presumes that the consumer has no rights to cancellation of a contract except in the circumstances set out in that term. So it purports to do away with the protection given to a consumer under various consumer protection laws including the protection of implied conditions, warranties or remedies under the FTA...The consumer is misled into thinking

that the only available mechanisms for cancelling a membership are set out in this term" (Reasons paragraph 43).

You can only cancel your Membership prior to the expiry of the minimum term if you become medically incapacitated, or if you relocate to an area not within 20 kilometres of the studio or if we make changes to the contract, which adversely affects you.

(Declaration paragraph 4)

In the Trainstation case, the following terms were found to be unfair because, among other reasons:

- they were inconsistent with the consumer's right to terminate the agreement and seek damages where the centre failed to supply its services in accordance with the consumer guarantees
- they had the object or effect of preventing or deterring the consumer from pursuing or exercising rights arising from a breach by the centre of the express or implied terms of the agreement.

These terms thereby caused a significant imbalance in the parties' rights and obligations arising under the membership agreement to the detriment of the consumer (Declaration paragraph 3(a)(c)).

The terms read:

Memberships: Memberships are nonrefundable...

Refunds: Refunds, other than rectification of an error made by the Operator, will only be given at the discretion of the Operator.

(Declaration paragraph 3)

Trainstation submitted that "the terminology 'no refunds' is common in the community in a consumer setting, and is known to mean only that monies will not be refunded where the refund is unwarranted" (Reasons paragraph 154). Judge Harbison did not agree, stating "If the clauses were meant to only cover a situation where the consumer had no grounds to seek termination of

the contract, the clauses should have been clearly expressed in this way” (paragraph 155).

CAV will only regard liability-exclusion terms as fair or as not breaching the legislation if the main statutory rights are clearly signposted.

For example:

For consumers, our services come with nonexcludable guarantees under consumer protection legislation that they will be provided with due care and skill and be reasonably fit for any specified purpose. You are entitled, at your option, to a refund or the resupply of the services for a breach, and to compensation for any other loss.

Liability for death and personal injury

Many health and fitness centre membership agreements sought to draw on legislation that enables providers of recreational services to limit their liability for a breach of the consumer guarantees. Under that ‘recreational services’ legislation, suppliers of recreational services can require consumers to waive their rights to sue for death or personal injury. Normally, terms containing waivers of a supplier’s legal obligations under the consumer guarantees would be considered unfair. However, unfair contract term legislation does not apply to terms of consumer contracts that are required or expressly permitted by law, but only to the extent required or permitted. Therefore, a term in a ‘recreational services’ contract that contains such a waiver cannot be regarded as unfair provided it is limited to:

- recreational services, not recreational goods
- participants in those services not spectators
- the recreational service provider’s liability under the consumer guarantees, and does not extend to its liability under other laws, for example, common law negligence

- the defaults of the recreational service provider short of reckless disregard, and
- waivers that contain the prescribed consumerwarning notice.

Many agreements reviewed by CAV contained terms that went beyond these limits and were considered unfair.

In the Trainstation case, the following terms were declared unfair because, among other reasons, they:

- were very broad, unqualified noliability terms
- gave the centre immunity from liability for noncontractual causes of action such as negligence or even breaches of consumer protection laws
- did not comply with the requirements of the ‘recreational services’ legislation.

These terms thereby created a significant imbalance in the parties’ rights and obligations arising under the membership agreement to the detriment of the consumer (Declaration paragraph 7 (a), (b), (e)).

Limitation of Liability: The Operator and the Operators (sic) employees and agents shall not be liable or responsible for:

- a) Any loss, damage or theft of any property (belonging to, or brought into the Club premises by the Customer, or any guest of the Customer) on the Club premises.*
- b) Any death, personal injury or illness occurring upon the Club premises or as a result of the use of the facilities and/or equipment provided by the Club*

Club Rules and Regulations:

- e) Customers are solely responsible for their decision to undertake any form of exercise, and the intensity thereof. The Operator accepts no responsibility for any injury or loss suffered as a consequence.*

Declaration: Whilst on the Operators (sic) premises both my property and my person shall be at my own risk and I will not hold or any of the Operators (sic) employees, instructors, contractors, suppliers or agents liable for personal injury or loss of property whether caused by their actions or otherwise.

(Declaration paragraph 7)

Other examples of liability terms, which did not comply with the 'recreational services' legislation and which CAV considers unfair are as follows:

I, and if being a minor, my parent/s, guardian/s for and on behalf of myself, acknowledge that during such times as I am present on the premises of or included in any activity external to the premises which is organised, approved or endorsed by the Centre as an activity for me to take part in, both my property and person shall be at my own risk and I will not hold the Centre liable for any personal injury or loss of property which may arise from the negligence of the Centre, its servants, agents, independent contractors, voluntary workers, other users of the facility or participants in the activities or spectators or other parties providing services through or in the facilities of the Centre.

Assumption of Risk The use of facilities at X naturally involves the risk of injury to you or your guest whether you or someone else cause it. As such, you understand and voluntarily accept this risk and agree that X will not be liable for any injury whatsoever including without limitation, personal bodily, or mental injury, economic loss or any damage to you, your spouse, partner, guest, unborn child or relatives from the negligence or other acts or agree to indemnify X against any claim whatsoever including legal costs commenced by yourself or other parties referred to above as a result of the use of the facilities at X.

Wet Area Usage – You and your Guests may use all wet areas including but not limited to the swimming pool, sauna, steam, monsoon shower etc. These areas are unsupervised and you use them at your own risk.

Most membership agreements seeking to draw on the 'recreational services' legislation did not track the legislation exactly as required. Typically, the waivers did not contain the prescribed consumer warning notice. CAV considers such terms unfair. Also, without the prescribed consumer warning notice, recreational service providers are unlikely to gain the protection of the waiver they seek to apply.

Suppliers seeking a waiver from consumers must include one of the consumer warnings set out in the 'recreational services' legislation.. The warnings alert consumers that they are being asked to agree to waive some of their rights under the consumer guarantees. The term must also be brought to the attention of the consumer prior to the supply of the recreational service. Suppliers who want a waiver under the 'recreational services' legislation should seek legal advice.

Casual users and guests

Many health and fitness centres allow consumers to use the facilities on a casual basis and also allow members to bring guests. In these cases, the casual user is not usually required to complete a membership application form and contract. Instead, he or she may be required to fill out documentation for example a 'casual card' or 'preexercise questionnaire'.

Health and fitness centres usually want the 'recreational services' legislation waiver to apply to casual users and members' guests. But in its review of health and fitness centre contracts, CAV found that most documents for occasional users did not contain the particulars required by the 'recreational services' legislation. CAV stresses that health and fitness centres must provide occasional users with the prescribed warnings.

Liability other than for death and personal injury

Representations

Health and fitness centres are responsible for the actions and representations of their employees and agents. However, many terms in the membership agreements reviewed sought to exclude or limit the supplier's liability in this area.

In the Trainstation case, the following term was declared unfair because, among other reasons, it operated to deny the consumer's rights under the consumer guarantees (Reasons paragraph 163) and purported to exclude oral representations made to a consumer (Declaration paragraph 4(c)).

Entire Agreement: The Membership Agreement together with the Membership Terms and Conditions Schedule, the Privacy Statement and the Direct Debit Service Agreement constitutes the entire agreement, understanding and arrangement (express or implied) between the Customer and the Operator relating to the subject matter of this Contract and supersedes and cancels any previous agreement, understanding and arrangement relating thereto whether written or oral.

(Declaration paragraph 4)

Other examples of terms about representations that CAV considers unfair are as follows:

This Membership Agreement embodies the entire agreement and understanding between the parties concerning its subject matter and succeeds and cancels all other agreements and understandings concerning the subject matter of this Membership Agreement and any warranty, representation, guarantee or other term and condition of any nature not contained in this Membership Agreement is of no force or effect.

You acknowledge that neither X nor anyone else, made any representations or promises upon which you relied that are not stated in this agreement.

It is important that the terms of the contract between you and us are clear and for this reason, if there is any conflict between what is set out in this booklet and anything you have been told at the club or over the telephone, the terms in this booklet will prevail.

Indemnities

CAV encountered indemnities in a number of the health and fitness centre membership agreements reviewed. Wide indemnities that do not match the scope of a fair waiver (refer to Liability for death and personal injury on page 15) are considered unfair and should be removed from membership agreements.

In the Langley and Matrix (No.1) case, the following term was declared unfair because, among other reasons, it:

- was a broad, unqualified and ambiguous exclusion clause (Orders paragraph 2(a))
- exempted, excused or saved the centre from all liability for any breach of contract (except as may be precluded by statute) without any, or any corresponding reciprocity or offset for the consumer (Orders paragraph 2(b)).

The term thereby created a significant imbalance in the parties' rights and obligations arising under the membership agreement to the detriment of the consumer.

As a member I specifically release, indemnify and hold harmless the club, its management and employees, in consideration of the acceptance of my payment for participating in the activity (and except that the same may be precluded by statute), with respect to any and all events resulting in injury, loss, damage or death to me or my property, whether by negligence, breach of contract, in any way whatsoever, which might otherwise have given rise to action against the club by myself or on my behalf or by other parties. I also understand that in the event that I am injured or my property is damaged, that I will bring no claim, legal or otherwise against Matrix Pilates and Yoga, its owners, servants or agents.

(Orders paragraph 2)

Other terms containing indemnities that CAV considers unfair are:

As such, you understand and voluntarily...agree to indemnify X against any claim whatsoever including legal costs commenced by yourself or other parties referred to above as a result of the use of the facilities at X.

I hereby certify that I have voluntarily elected to participate in exercise/s at X and do not hold this organization or the people involved in the organization, responsible for, and indemnify them from, any personal injury, loss or damage which may occur as a result of my attendance at 'The Club'.

Liability for property

Many health and fitness centre membership agreements reviewed by CAV sought inappropriately to exclude a health and fitness centre's liability for consumers' personal property, in particular, personal property secured in lockers and vehicles in centre car parks. The supplier is liable at law for damage or loss caused through its own fault or negligence, and any clause which implies exclusion of liability for loss to property in all circumstances is considered unfair.

In the Trainstation case, the following term was declared unfair because among other reasons it purported to exclude, restrict or modify, or purported to have the effect of excluding, restricting or modifying the consumer guarantees, thereby creating a significant imbalance in the parties' rights and obligations arising under the membership agreement to the detriment to the consumer (Declaration paragraph 7(f)).

Limitation of Liability: The Operator and the Operators (sic) employees and agents shall not be liable or responsible for:

a) Any loss, damage or theft of any property (belonging to, or brought into the Club premises by the Customer, or any guest of the Customer) on the Club premises...

(Declaration paragraph 7)

Other examples of terms relating to liability for property that CAV considers unfair are as follows:

Lockers are available for use in some facilities. All care is taken, however the centre does not accept responsibility for items, which are lost/stolen from lockers. Bags are not permitted in the health club except to be placed in lockers provided.

Lockers – Lockers are provided for use whilst exercising and will be cleared daily once the club is closed. Please be advised that the lockers provided are not security lockers and therefore we request all valuable items are carried. Whilst care is taken to safeguard locker contents, thefts can occur. Please be aware that X does not accept responsibility for any loss or damage to property. When using lockers, please ensure that the locker key is secure at all times on your person. (Reception can supply a safety pin for this purpose, however, we do strongly suggest the keys should be pinned INSIDE a pocket). Should a locker key be lost or contents be left in a locker overnight, there is a \$25 charge for replacement of the key/return of items. If your belongings are left in a locker overnight, they may be removed and the Company will take no responsibility for loss or damage.

CAV considers that health and fitness centres should provide secure storage facilities for users' personal effects such as wallets and clothing. Health and fitness centres are obliged under the consumer guarantees to provide these services with due care and skill, and ensure that the services are fit for any specified purpose. CAV agrees that consumers should not unnecessarily bring valuable items into health and fitness centres.

Provision of health and fitness advice

Many health and fitness centres require users to undergo a 'health check' or complete a 'preexercise questionnaire' before they use the facilities. Many centres design exercise programs for members and offer personal training services. Consumers often ask centre staff questions about fitness and the equipment while using the facilities.

Despite this, many of the health and fitness club membership agreements reviewed by CAV contained clauses requiring consumers to acknowledge that centre staff had not provided and would not provide any advice about a member's health, physical fitness, or his or her ability to use the facilities or to engage in active or passive exercise. For example:

Representation – You represent that you are in good physical condition and have no complaint, impairment or disability that may prevent you from using all of X's facilities. As such you acknowledge that X did not give you medical advice before you joined, and cannot give you any after you join, relating to your physical condition and ability to use the facilities. If you have any health or medical concerns now or after you join, discuss them with your doctor before using the facilities.

CAV considers this unfair as the purpose of health and fitness centres is to help users improve their health and fitness. Requiring consumers to acknowledge that centres have not provided and will not provide any advice to members' on matters such as their physical fitness or ability to use the facilities is unfair. This is an example of a supplier 'deeming' something to be the case, whether it is or not, with the intent of ensuring that no liability arises.

Members' health

CAV found that 'health checks' or 'preexercise questionnaires' often asked consumers to state that they *did not have* any medical reason or condition which meant they should not exercise. CAV considers this unfair. Consumers should only be required to state that they *know* of no medical reasons.

Limiting the consumer's right to sue the health and fitness centre

In the Trainstation case, the following term was declared unfair because, among other reasons, it had the object or effect of limiting the consumer's right to sue the centre or the evidence the consumer could lead in proceedings against the centre based on the agreement, and thereby created a significant imbalance in the parties' rights and obligations arising under the centre membership agreement to the detriment of the consumer (Declaration paragraph 4d).

Entire Agreement: The Membership Agreement together with the Membership Terms and Conditions Schedule, the Privacy Statement and the Direct Debit Service Agreement constitutes the entire agreement, understanding and arrangement (express or implied) between the Customer and the Operator relating to the subject matter of this Contract and supersedes and cancels any previous agreement, understanding and arrangement relating thereto whether written or oral.

(Declaration paragraph 4)

Other examples of terms that explicitly limit the consumer's right to sue the health and fitness centre that CAV considers unfair are as follows:

I will bring no claim, legal or otherwise against, its owners, servants or agents.

I also understand that in the event that I am injured or my property is damaged, that I will bring no claim, legal or otherwise against X, its owners, servants or agents.

Many membership agreements reviewed by CAV also contained terms that could be used to deter consumers from pursuing their legal rights. This has the effect of limiting their rights to sue the health and fitness centre. The terms did this by 'deeming' something to be the case, whether it was or not, with the intent of ensuring that no liability arose. For example, look at the use of the verb 'understand' in the terms below. This would deter consumers from exercising their rights where they did not understand the contract or relevant term, because its nature and effect was not explained to them by the supplier.

Before signing this document I have read and understood it and how it affects my legal rights.

By signing below you agree to all the terms and conditions on the front and back pages of this agreement and acknowledge that you understand the terms and conditions.

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.

Whether consumers have read a document is an objective fact that they can be asked to confirm. But whether they understood the document is subjective and ambiguous. Consumers should not be asked to state that they 'understand' the terms of a contract.

Membership suspension/ on hold

Health and fitness centres often offer consumers the opportunity to suspend their memberships – typically for a nominal fee – to accommodate holidays or periods of sickness. CAV considers this a valuable response to consumer needs. The longer the membership term, the more important it is for centres to provide suspension terms to accommodate life events.

Some agreements stated that during the suspension period, membership fees would continue to be deducted as per usual and the amount of time the membership was on hold would be added to the end of the agreement. CAV considers this to be unfair because in effect, the consumer is paying when he or she is not using the service. The consumer should be charged suspension fees and not membership fees while his or her membership is on hold. The direct debit amount should be adjusted accordingly while the consumer's membership is on hold.

When health and fitness centres operators were asked about the ways in which membership suspensions worked, they typically said onhold periods did not contribute towards minimum terms (where relevant). For example, if a consumer signed up for a 12month minimum term, he or she would have to pay full fees for 12 months. If he or she suspended the contract for one month, the new total length of the contract would be 13 months. However, often this was not clearly spelled out to consumers in the terms on suspension.

Privacy

Sales Calls

Many health and fitness centre membership agreements include a privacy policy as part of the agreement. The policy requires consumers to agree to the personal information they provided to the health and fitness centre being used for a range of purposes, including direct marketing. This direct marketing may be conducted by the centre itself, but some contracts reviewed by CAV allowed the direct marketing to be conducted by third parties. Some membership agreements do not enable consumers to opt out of having their personal information used for direct marketing purposes. Consumer Affairs Victoria considers that this may be unfair.

CAV recommends an 'opt out' box on membership application forms so consumers can elect not to have their personal information used for direct marketing purposes. This will not restrict the centre from contacting the consumer with important information about their membership and the centre.

Use of consumers' images

A number of membership agreements reviewed by CAV required consumers to consent to having their photographs taken while using the health and fitness centre facilities. They were also required to consent to having those images used in the centre's promotional material. For example:

By signing this agreement, I consent to the Company using my image in any promotional or other material in the course of business. Members will be informed of media presence or photographic sessions through general notification as soon as is practical.

By signing this Application and Agreement you consent to us using your image in any promotion or other material in relation to the business.

CAV considers a term setting out consent in advance is unfair and such clauses should be completely removed from membership agreements. Individual specific consents should always be obtained.

If visual recordings of any member are to be made on the premises, the centre should:

- alert members before they enter the centre that recording devices are present
- advise the member how the images will be used
- obtain written consent from the member prior to recording.

Direct debiting of membership fees

Many health and fitness centres collect membership fees by direct debit. Some health and fitness centres manage these debits but others contract the work to a third party, typically a dedicated billing services company.

Consumers complete a Direct Debit Request (DDR). The DDR authorises and requests a consumer's financial institution to debit the fees and contains the terms of the debit arrangement such as the amount and frequency of the direct debits.

There are also terms that set out the basis on which the health and fitness centre (or the billing services company) provides the direct debit service to the consumer. These are known as the Direct Debit Request Service Agreement (DRS).

Where the health and fitness centre arranges the debit, the DDR and DRS are typically contained within the centre's general application form and membership agreement. When a centre engages a dedicated billing services company to conduct the direct debiting, the DDR and DRS is typically a separate form to be completed by the consumer.

Health and fitness centres that engage a billing services company to conduct the direct debiting should ensure that the arrangement does not constitute 'third line forcing'. This occurs when goods or services are supplied on the condition that the purchaser acquires other goods or services from a particular third party, or when there is a refusal to supply because the purchaser will not agree to that condition. 'Third line forcing' is prohibited under the provisions of the ACL regarding 'exclusive dealing'. Health and fitness centres are encouraged to seek independent legal advice on this issue.

Both the DDR and DRS must comply with unfair contract term legislation.

Note: This chapter only covers issues specific to DDR and DRS identified in CAV's review. Other relevant issues are discussed throughout this guide. These chapters should also be read and applied in drafting the DDR and DDS.

Direct debit transactions are managed through a system called the Bulk Electronic Clearing System (BECS). The Australian Payments Clearing Association Ltd (APCA) coordinates, manages and ensures the effective implementation and operation of this system. APCA has published *Procedures for the Bulk Electronic Clearing System*. This document, which can be downloaded from www.apca.com.au, includes specific requirements for the DDR and DRS. Relevant requirements are discussed below. Health and fitness centres and billing services companies drawing up a DDR and DRS are encouraged to familiarise themselves with the procedures and to seek legal advice.

Relationship between the health and fitness centre, the billing services provider and the consumer

The relationship between the health and fitness centre, the billing services company and the consumer should be clearly spelled out in the agreement/s. This should include an explanation of how the arrangement works in practice.

The agreements should clearly outline which problems should be addressed to the health and fitness centre, and those that should be taken up with the billing services company.

The name of the billing services provider and its contact details should be stated, as sometimes the name of the billing services provider rather than the health and fitness centre appears on the consumer's financial statements.

In the Langley and Matrix (No.2) case, the following term was found to be unfair because among other reasons it purported "to allow a third party to the agreement who is not identified in the agreement, and whose rights and obligations visàvis the consumer are not identified in the agreement, to terminate the agreement... thereby creating a significant imbalance in the parties' rights and obligations arising under the membership agreement, to the detriment of the consumer" (Declaration paragraph 8(a)).

In the event that you do not pay the amount payable under this Agreement within 31 calendar days of the due date expressed on the Agreement, the Club and the Billing Agent may at their discretion terminate the Membership and this Agreement.

(Declaration paragraph 8)

This was also thought to create uncertainty, confusion or doubt for the consumer and was thereby declared to be not clearly expressed. Judge Harbison stated: "A business may quite properly wish to nominate a third party as agent to perform some part of that business' obligations or to enforce its rights under a contract. However if it chooses to do so, the contract must be written in such a way that the consumer is able to understand clearly who that third party is, how they may be contacted, and the rights to be exercised by that third party under the contract with the consumer" (Reasons paragraph 3435).

Several membership agreements reviewed by CAV stipulated that consumers must contact the health and fitness centre and not their financial institutions with enquiries about direct debits. For example:

Direct all your enquiries regarding your monthly deductions to us, rather than to your financial institution...

If you believe that a drawing has been initiated incorrectly, we encourage you to take the matter up directly with us by contacting us in writing... Note: your financial institution will ask you to contact us to resolve your disputed drawing prior to involving them.

Should you wish to discuss these [direct debit] arrangements, including any possible disputed amounts, please call your Club Manager directly or the Administration office on... rather than your financial institution.

This contradicts APCA procedures and the Australian Bankers' Association Code of Banking Practice and is potentially misleading:

- APCA procedures require that a DRS must:
 - set out in reasonable detail how a consumer can dispute a direct debit, stop a direct debit, and cancel a DDR with the health and fitness centre/billing services company, and
 - advise the consumer that he/she may contact his/her own financial institution in these circumstances. (Refer to *Requirements for Direct Debit Request Service Agreements* box – 7.11(e),(f))
- Clause 19.1 of the Code of Banking Practice states that on the issue of direct debits, banks "will not direct or suggest that you should first raise any such request or complaint directly with the debit user", although they may suggest that the consumer *also* contacts the debit user. (This does not apply to direct debits on credit cards. To read the Code of Banking Practice go to www.bankers.asn.au.)

Consumers are entitled to contact their financial institution with direct debit enquiries and should not be instructed otherwise.

Consistency

The health and fitness centre membership agreement and the DRS must be consistent. In its review, CAV discovered an agreement that contained safeguards for consumers that fees would not be increased during the minimum term, while the DRS included a term allowing the centre to unilaterally vary membership fees at any time. CAV considered this term unfair.

In the Langley and Matrix (No.2) case, the membership agreement was found to be not clearly expressed because the documents when read together created confusion, uncertainty or doubt by using terms which were ambiguous or inconsistent with each other, including the following terms (emphasis added):

I/We acknowledge that the business is to provide 14 days notice if proposing to vary the terms of the debit arrangements.

We reserve the right, at any time after the minimum term on a contract, to increase the fees to be charged, and will give written notice, to the most current address you have provided, at least one month prior to this occurring.

(Declaration paragraph 9(b))

APCA procedures require at least 14 days' notice to the consumer of any change to the terms of the DRS. But to achieve consistency with the health and fitness agreement, more than 14 days' notice may be necessary. This would be the case if the consumer was required to give 30 days' notice of his or her intention to terminate a membership.

The APCA procedures also require that a DRS set out in reasonable detail the procedure available to the consumer to request deferment or alteration of any of the debit arrangements. (Refer to *Requirements for Direct Debit Request Service Agreements* box – 7.11(d)). CAV welcomes this requirement as the unfairness of a unilateral variation term may be mitigated by giving the consumer reciprocal unilateral variation rights.

DDR to cover membership fees only

The DDR and DRS should be restricted to the debiting of specified membership fees at specified times. There should be no blanket terms allowing the debiting of unspecified amounts, particularly in the event of default. In the Langley and Matrix (No.1) case, the following term was found to be unfair because, among other reasons, where the payment (or obligation to make it) was bona fide in dispute, it enabled the centre to recover payment without notice to the consumer, preventing the consumer from raising the dispute with the centre or from stopping the payment being debited from his/her account. It was also found to be unfair because in this scenario the centre could debit for more than the 'payment due' (Orders paragraph 4(b)).

If any payment due to X under my membership agreement is not made on the due date from my nominated bank account, my signature below and initials here _____ will constitute my unconditional and irrevocable authority for X to, without notice, debit my nominated bank account/credit card for the total amount due.

(Orders paragraph 4)

Another example is the following term, which Consumer Affairs Victoria considers unfair. CAV considers that specific consent should be sought for any amounts other than the regular membership fees to be direct debited.

I request and authorize X to arrange, through its nominated billing agent, for any amount X may debit or charge through the Bulk Electronic Clearing System from an account held at the financial institution identified in the DDR agreement and paid to X, subject to the terms and conditions of the DDR Service Agreement.

Cancellation and direct debiting

Single written notice only

Written notification to the health and fitness centre of a consumer's intention to cancel should terminate *both* the membership agreement and the DDR/DRS. Cancellation terms in membership agreements are often unclear as to whether terminating the membership agreement also terminates the DDR/DRS.

CAV considers that because a business finds it useful or necessary to split off the DRS into a separate form, this should not make it more difficult for the consumer to cancel his or her membership.

Cancellation of DDR/DRS only

APCA's procedures require that the DRS set out in reasonable detail the procedure available to the consumer to cancel a DDR/DRS. (Refer to *Requirements for Direct Debit Request Service Agreements* box- 7.11(e)). Clause 19 of the Code of Banking Practice⁷ requires banks to honour requests from consumers to cancel a DDR/DRS (although this does not cover DDR/DRSs on credit cards or accounts at nonbank financial institutions). However, cancelling a DDR/DRS does not necessarily cancel the consumer's health and fitness centre membership agreement. This complex situation creates practical confusion for both consumers and traders. CAV welcomes any attempt in the documents to explain the situation and consumers' rights. An example of this follows.

Cancellation of the authority to debit your account will not terminate this contract or remove your liability to make the payments you have agreed to.

⁷ Australian Bankers' Association Inc's Code of Banking Practice (May 2004). Clause 19, page 9.

Advance notice

Typically, consumers are required to give advance notice of their desire to terminate their memberships (this is usually 30 days). CAV does not consider the requirement to give advance notice to be unreasonable. However, some terms concerning advance notice for consumers paying by direct debit in contracts reviewed by Consumer Affairs Victoria were considered unfair and potentially misleading.

Some membership agreements stated that a consumer's membership cancellation would be effective from the first direct debit date after the 30day notice period. An example is outlined in the diagram below. The last direct debit would occur on 1 March and the consumer's cancellation would not become effective until 1 April, resulting in a notice period that was significantly longer than 30 days. CAV considers this unfair.

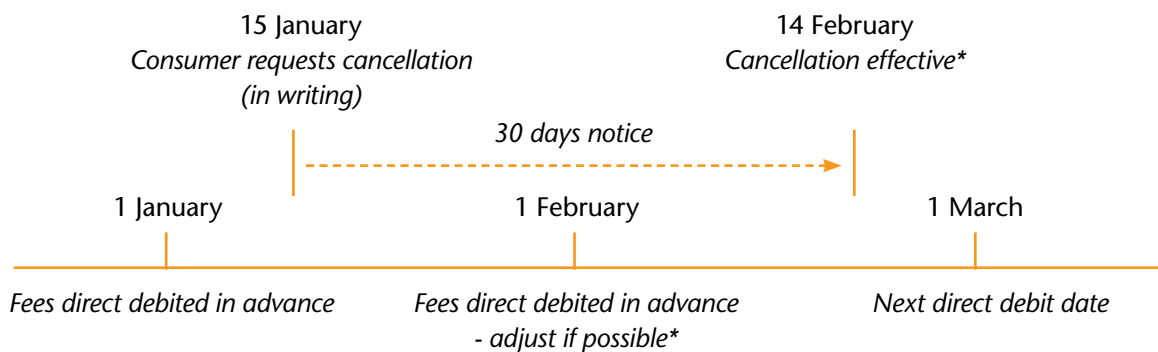
CAV considers that where consumers are required to give 30 days' advance notice of their intention to cancel their memberships, the direct debit date that falls within those 30 days should be the last direct debit. In the example below, the last direct debit would take place on 1 February. The direct debit amount needs to be reduced to reflect only a further 15 days' membership. If the adjustment cannot be processed in time, the remainder should be refunded to the consumer.

In the Langley and Matrix (No.2) case, Judge Harbison found the following term unfair because when the consumer gave written notice of termination after the minimum term expired, there was no provision in the relevant membership agreement for a refund of the consumer's fees, paid in advance, where the termination occurred before the end of the month (Declaration paragraph 5(b)).

You can terminate your membership after the minimum term by giving us 30 days notice in writing.

(Declaration paragraph 5(ii))

Correct application of a 30 day notice period for membership cancellation



* Refund required if adjustment not made

Payment default

The payment issues discussed in Chapter 2 apply equally to DRSS. CAV is particularly concerned about terms in DDR or DRS that allow unspecified amounts to be deducted in the event of default. CAV considers this to be penalising the consumer for breach of contract. This is unfair. For example:

If any payment due to X under my membership agreement is not made on the due date from my nominated bank account, my signature below will constitute my unconditional and irrevocable authority for X without notice to debit my nominated credit card, details which are set out below, with the total amount due.

CAV welcomes the APCA procedures that require the DRS to state what happens when direct debits are returned unpaid by the consumer's financial institution. This includes a clear statement of any related fees that will be applied by the health and fitness centre or billing services company. (Refer to *Requirements for Direct Debit Request Service Agreements* box – 7.11(j)). CAV considers that these fees should be specified and reflect the actual cost to the health and fitness centre and/or billing service company of the direct debit being returned unpaid. If they do not reflect the actual costs, the term may be considered penal and unfair.

Requirements for Direct Debit Request Service Agreements

Section 7.11 of the Australian Payments Clearing Association Ltd's *Procedures for the Bulk Electronic Clearing System* states that each DDR Service Agreement must, amongst other things:

- set out reasonable details (or, if such details are contained in the DDR refer the customer to it) of the terms of the debit arrangements to apply between the health and fitness centre/billing services company and the customer, including if applicable, the basis on which the health and fitness centre/billing services company will issue billing advices to the customer (7.11(b))
- provide for not less than 14 days' notice to the customer if the health and fitness centre/billing services company proposes to vary any of the terms of those debit arrangements (7.11(c))
- set out in reasonable detail the procedure available to the customer to request deferment of, or alteration to, any of those arrangements (7.11(d))

- set out in reasonable detail the procedure available to the customer to stop any direct debit or cancel a DDR with the health and fitness centre/billing services company, and advise the customer that all requests for such stops or cancellations may be directed to the health and fitness centre/billing services company or the customer's financial institution (7.11(e))
- set out in reasonable detail the procedure available to the customer to dispute any direct debit with the health and fitness centre/billing services company and the dispute resolution process to apply, and advise the customer that claims may also be directed to his/her financial institution (7.11(f))
- state its policy when direct debits are returned unpaid by the customer's financial institution, including the application by the health and fitness centre/billing services company of any related fees (7.11(j)).

Refer to www.apca.com.au for full details.

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.



consumer.vic.gov.au



1300 55 81 81



consumer@justice.vic.gov.au

Victorian Consumer & Business Centre
113 Exhibition Street
Melbourne 3000

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.

January 2011

TIS Telephone Interpreting Service 131 450

TTY Textphone or modem users only, ring the NRS on 133 677, then quote 1300 55 81 81

Callers who use Speech to Speech Relay dial 1300 555 727, then quote 1300 55 81 81