

# Fair Trading Act 1999 (Vic) Compliance Review

Unilateral variation and early  
termination clauses in mobile  
phone consumer contracts

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February 2006

# The Communications Law Centre

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The Communications Law Centre is an independent non-profit public interest research, teaching and public education centre specialising in media, communications and online law and policy. It is affiliated with Victoria University.

Level 1, 283 Queens St

Ph: 03 9600 3841

Melbourne VIC 3000

Fax: 03 9670 7902

Email: [melbourne@comslaw.org.au](mailto:melbourne@comslaw.org.au)

Web: [www.comslaw.org.au](http://www.comslaw.org.au)

## Acknowledgments

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This report was researched and written by Elizabeth Beal (Director) and Nick Moustakas (Legal Officer). Dr Scott Beattie, Victoria University Law Lecturer, assisted with the research for this compliance review and made contributions to this report.

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# Introduction

1. The nature of many service based consumer contracts has shifted. Rather than fixed agreements that terminate when terms change, current contracts often assume a changing and ongoing relationship between consumer and service provider. Both sides of the bargain often benefit from a degree of flexibility. But it seems that in the area of mobile phone contracts, providers still rely heavily on fixed term contracts to lock consumers into terms, while retaining the ability to change terms for their own benefit, such as increasing the prices. Because of this, consumer legislation such as the *Fair Trading Act 1999* (Vic) serve an important role in redressing power imbalances.
2. Providers often cite technological change as a major justification for their ability to vary contract terms, to provide new services and to phase out redundant ones. However, when consumers are locked into fixed term contracts, often over a two year period, they risk being bound to the same redundant technologies without the ability to take advantage of new innovations or cheaper technologies. Contrast the position of suppliers who write contracts giving them the ability to change the way they deliver services so as to keep pace with changing operational factors such as technological advances, government taxes or regulation, and even profit margins. In some cases, this imbalance is addressed by allowing consumers a limited timeframe to exit the contract if they suffer more than a minor detriment. However, in many other instances supplier's variation rights operate without such exit rights or with extra complexities that diminish the value of the right.
3. This review considers the balance between certainty of contract and the need to accommodate new developments and technologies. While this is an issue for all mobile phone contracts, including prepaid and fixed term contracts, contractual and fairness issues are intensified for fixed term contracts.

## THE TERMS OF THE REVIEW

4. This review examines fairness in unilateral variation and early termination clauses in seven consumer contracts under the *Fair Trading Act 1999* (Vic). The providers are: [Telstra](#), [Optus](#), [AAPT](#), [Vodafone](#), [Virgin](#), '3' trading as Hutchinson 3G Australia Ltd and [Orange](#). The CLC also considers some general accessibility issues for these contracts. For example, if a consumer cannot read and understand

all the terms of a contract, they will be in no position to understand the impact of variations or to judge what potential detriment they may suffer. Many of the contracts considered in this review continue to fail this preliminary accessibility or clarity hurdle. In some ways, it then becomes irrelevant how fair or unfair further variations may in fact be.

5. Consumer contracts that contain bundled services/plans are beyond the scope of this review. These types of contracts raise complex issues that require careful analysis and should be the subject of a separate compliance review. In addition, terms and conditions that are contained in plans, application forms and other contractual documents that are separate from the supplier's standard form of agreement are beyond the scope of this review. These documents are difficult to identify and obtain without the assistance of telecommunications providers.

## CONSEQUENTIAL EFFECT

6. An important part of this process has been analysing whether the termination rights attached to unilateral variation are affected by other terms in the contract. For instance, some terms limit the operation of the consumer's right to terminate the contract, even though elsewhere in the contract an appropriate termination right is provided for the supplier if it varies the contract. For example, see Optus: Consumer Terms, clauses 11.6 and 2.8. Clause 11.6- the payment of the cancellation fee is not excluded when there is an exit or termination right upon the suppliers' unilateral variation.

## THE FAIR TRADING ACT 1999 (VIC)

7. Sections 32W of the *Fair Trading Act 1999 (Vic)* defines unfair terms as those which cause significant imbalance in the parties' rights and create obligations that disadvantage the consumer. Section 32X provides a non-exhaustive list exemplifying unfair terms, without limiting the scope of 32W. Several of these are relevant for mobile phone contracts:

- a. permitting the supplier but not the consumer to avoid or limit performance of the contract;
- b. permitting the supplier but not the consumer to terminate the contract;
- c. penalising the consumer but not the supplier for a breach or termination of the contract;

- d. permitting the supplier but not the consumer to vary the terms of the contract; [...]
  - e. permitting the supplier to determine the price without the right of the consumer to terminate the contract;
  - f. permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract; and
  - g. permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning.
- 

## THE POTENTIAL EFFECT OF A TERM IS ASSESSED

8. In assessing whether a term is unfair pursuant to section 32W of the FTA the CLC has considered the potential effect of a term in addition to what the supplier's intention may have been when the contract was being drafted. This is consistent with the test for an unfair term pursuant to clause 32W of the FTA which looks at whether the term in question "causes a significant imbalance ... to the detriment of the consumer". Considering the potential effect of a term rather than the intention of the supplier alone is also consistent with the approach taken by the UK Office of Fair Trading.<sup>1</sup> In adopting this approach, a term may be considered unfair if it potentially can cause detriment to a consumer even if that was never the supplier's intention when the contract was drafted.

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<sup>1</sup> See eg UK Office of Fair Trading, *Unfair Contract Terms Guidance* (February 2001), [1.11, 2.7.2, 6.1.3] available at <http://www.oft.gov.uk/Business/Legal/UTCC/guidance.htm>.

## Part A: Telecommunications regulation in Australia

9. The supply of telecommunications services in Australia is regulated at a Federal level by the *Telecommunications Act 1997* (Cth) and the Australian Communications and Media Authority (ACMA) under power delegated by the *Telecommunications Act*. The use of Standard Form of Agreements (SFOAs) by the telecommunications industry is recognised in Part 23 of the *Telecommunications Act*, specifically section 479, which permits the formulation of a SFOA for the supply of voice telephony services. The CLC considers it important that s.479 says nothing as to the validity or otherwise of the terms and conditions in a SFOA.
10. Under s.480A(2) of the *Telecommunications Act*, the ACMA is authorised to make a written Determination requiring suppliers to give customers information relating to the supply of the service and to publish this information. Clause 8.2 of the *Telecommunications Regulations 2001* clarifies that the ACMA may make such a Determination in relation to both voice telephony and data services. The ACMA has made a determination relating to these matters, the *Telecommunications (Standard Form of Agreement Information) Determination 2003* (“the Determination”). Clause 5(2)(b) of the Determination echoes s.482 of the *Telecommunications Act* in stating that the Determination is not intended to affect obligations under state laws dealing with fair trading or consumer protection.
11. ACMA has signaled an intention to amend the Determination, and at the time of writing this report are in the final stages of public consultation on a final form draft. At various times and at ACMA’s request the CLC has provided comments to ACMA on its proposed amendments to the Determination.
12. The telecommunications industry has historically used SFOAs and relied on the Determination as the mechanism for varying the SFOA and for notifying consumers of any changes.
13. The *Consumer Contracts Industry Code - ACIF C620:2005* (“ACIF Contracts Code”)<sup>2</sup>, developed by the Australian Communications Industry Forum (ACIF)<sup>3</sup>, provides

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<sup>2</sup> Staff of the Communications Law Centre including Elizabeth Beal and Nick Moustakas (authors of this report) were part of the ACIF working committee that developed the Consumer Contracts Code.

<sup>3</sup> ACIF is an industry-funded organisation established to develop codes of practice and technical standards



suppliers with some further guidance in regard to informing consumers of a unilateral variation. For example, section s 6.2(j) of the Code requires that consumers on fixed term contracts be notified at least 21 days before a detrimental unilateral variation takes effect by 'notice in writing'. Under the ACIF Contracts Code, 'notice in writing' includes notification by mail, in person or by notice on the consumer's bill (see definition of 'Notice in Writing' in section 4.2 of the ACIF Contracts Code).

14. Consumers anticipated that ACMA's amendment to the Determination would provide consistency with the ACIF Contracts Code regarding notifying consumers of unilateral variations. However, a recent draft form of the Determination provides for 'reasonable notice' to be given to consumers for unilateral variations having regard to all the circumstances. The CLC has voiced its criticism of this approach from a consumer protection perspective. A copy of the CLC's comments on the draft is included at [Appendix II](#).<sup>4</sup> Regardless of the outcome of ACMA's proposed amendments to the Determination, the CLC has a long-held view that general principles of contract law and statutory provisions that deal with matters such as unfair terms or unconscionability also apply to SFOAs. Specifically, Part 2B of the *Fair Trading Act* (the FTA) applies to SFOAs formulated for the purposes of s.479 of the *Telecommunications Act*.

15. The CLC is aware of previously expressed concerns that valid Commonwealth laws in the area of telecommunications mean that inconsistent State laws are inoperative to the extent of the inconsistency. To the extent that this requirement, as per s109 of the *Commonwealth Constitution* has relevance to the operability of the Victorian *Fair Trading Act* in the area of telecommunications, the CLC maintains its view that there is nothing in Part 23 of the Commonwealth *Telecommunications Act* or the ACMA Determination which gives rise to an inconsistency with the provisions in Part 2B of the FTA, for the purposes of s.109 of the Constitution. Potentially, this issue will be dealt with by the AAPT case in which CAV is a party to and is currently pending before the Victorian Civil and Administrative Tribunal (VCAT).

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<sup>4</sup> A copy of the latest version of the draft Determination is currently not available on the ACMA website ([www.acma.gov.au](http://www.acma.gov.au)). Kath Silleri, Manager, Consumer Interests, ACMA can provide information on the review of the SFOA determination and can be contacted on 03 9963 6800 or at [ConsumerInterests@acma.gov.au](mailto:ConsumerInterests@acma.gov.au).

## Part B: Unilateral variation

### INDIVIDUAL NOTICE

16. Most of the contracts were compliant with the notice requirements as per the ACMA Determination as it currently exists, but few gave consumers the right to opt out of contracts on this notice. Most contracts provided for direct notice to consumers – which is appropriate, as the practice of placing advertisements in national newspapers is unlikely to provide real notice to anyone. However as discussed further below, the method and form of notice provided to consumers raises issues as to whether consumers are been given adequate notice.
17. The CLC is of the view that Part 2B of the FTA requires consumers to be adequately informed of a unilateral variation (when it is detrimental), irrespective of notice provisions contained in other regulatory instruments (such as the ACIF Contracts Code or the SFOA Determination). In order to satisfy Part 2B, the CLC and other consumer representatives in the telecommunications sector are of the view that suppliers must, at a minimum, provide individual notice to the consumer. Public notice of a unilateral variation, for example by a notice in a national newspaper is in our opinion unsatisfactory and potentially unfair.
18. Section 32X (f) of the *Fair Trading Act* specifies that when a provider changes the pricing terms of a contract, they ought to give the consumer the right to terminate. While this right is not mentioned for other forms of variation, the Act does provide that there should be equality of variation rights (in 32X(d)) so as a matter of good practice any detrimental variation ought to also give consumers a right to terminate.

### TIME OF NOTICE

19. In informing consumers of a unilateral variation, suppliers must give adequate notice so as to allow the customer not to suffer detriment by either terminating the contract or not using the service prior to the changes taking affect. The timing of the notice of the unilateral variation (ie how much notice is given) will depend on the reasons for the variation and the detriment that it may cause. The ACIF Contracts Code prescribes for fixed term contracts a minimum of 21 days notice

prior to the date on which the unilateral variation takes effect. **It is our view that 21 days notice for a unilateral variation of a fixed term contract is fair** based on our experience with consumer and industry issues in the telecommunications sector. Consumer and industry representatives in the telecommunications industry have generally considered 21 days notice to provide sufficient time for suppliers to notify consumers of unilateral variations and for consumers to have enough time to adequately be informed of such changes.

20. A unilateral variation of the terms of a non fixed term contract (e.g. pre-paid/casual contract) will not cause detriment if the consumer is adequately informed of any variations before purchasing/obtaining new credits. Adequate notice is established through personal notice and not public notice (see [Individual Notice](#) discussed in paragraph 16). With regards to how a consumer's unused credits are to be dealt with upon the supplier's unilateral variation see [Unused Credits & Unilateral Variation](#) discussed at paragraph 33.

## NOTICE OF CANCELLATION RIGHT

21. In addition to individual notice (see [Individual Notice](#) discussed at paragraph 16) provided to the consumer of any (detrimental) unilateral variation, it is the CLC's view that the **notice informing the consumer of the unilateral variation must also include information regarding any right to exit/cancel the contract** that the consumer may have. This is particularly important in light of past industry practice where suppliers would unilaterally vary their agreements and not allow consumers to cancel their contracts without incurring an early termination fee. This research found that in some cases this practice is continuing. Due to past industry practice, consumers are unlikely going to be aware of any right to terminate their contract (without paying an early termination fee) unless they are informed of this right by suppliers. Even if a consumer was aware of Part 2B of the *FTA* it is reasonable for a consumer to assume that they are forced to accept a unilateral variation if the supplier provides a notice stating that the contract has been changed but is silent on any cancellation right that the customer may have.
22. It remains unfair for suppliers to rely on the fact that the contract (Standard Form of Agreement) stipulates the cancellation rights of customers because many customers do not receive a copy of their contract (where SFOAs are used) and

contracts of suppliers are usually very long and complex. Thus, even if the contract provides an exit right, it is unlikely that a customer would be adequately informed of any cancellation right they may have as a result of a unilateral variation (see also section 6.2(j)(ii) of ACIF Contracts Code where the supplier's unilateral variation notice should also offer the consumer the right to terminate the contract).

## NOTICE TO PREPAID/CASUAL CUSTOMERS

23. In certain circumstances, a cancellation right may not be required to balance the supplier's unilateral variation rights. For instance, a customer not on a fixed term contract can stop using the supplier's service at any time and not suffer detriment as a result of the supplier's variation. However, it is the CLC's view that customers not on a fixed term contract (often referred to as casual or pre-paid customers) must be adequately informed of any detrimental unilateral variation. Without adequate notice of a unilateral variation, customers may not be aware of any changes and potentially incur hidden charges. For example a customer can continue to use a particular feature/service in the belief that charges are as advertised at the time of entry into the contract without knowledge of price increases. A customer that is not on a fixed term contract that is adequately informed of a unilateral variation, must be afforded the opportunity to stop using the suppliers service if to continue to use the service following the implementation of the change will cause them to suffer detriment. **To be adequately informed of a detrimental unilateral variation, a customer that is not on a fixed term contract must receive individual notice** (eg sms advising of price increase) and not public notice (for example, notice in newspaper – see eg clauses 4(a) and 18(a) of the Virgin Terms and Conditions; see also clauses 3.1, 3.2 and 13 of the Orange prepaid services terms and conditions). See also [Unused Credits & Unilateral Variation](#) discussed at paragraph 33 and [Time of Notice](#), at paragraph 20.

## DETRIMENT

24. If there has been a unilateral variation that is detrimental to the consumer then the consumer should have the right to cancel the contract. However, there is a difficult issue here: who decides detriment? Many contracts give the provider the

right to decide, but concepts of detriment may vary from customer to customer. This is particularly the case when content is considered - some content may be incidental to one customer yet for another may be the entire reason they signed up with a particular provider. Specifically, many contracts actually require the consumer to satisfy the supplier that greater than minor detriment has been suffered and then misleadingly provide in their contracts examples which do not necessarily reflect a minor detriment. To be fair, the consumer should have a right to cancel the contract when a unilateral variation is detrimental per se and not when the supplier has been satisfied that detriment has or will occur. This would make it consistent with the test of what is an unfair term under section 32X of the *FTA* which looks at the detriment to the consumer and not what the supplier considers to be detrimental.

## MINOR DETRIMENTAL IMPACT

25. Some suppliers stipulate that unilateral variations that cause minor detrimental impact or minor detriment do not give rise to a right to cancel the contract. The term minor detrimental impact is taken from section 6.3(t) of ACIF Contracts Code. It is difficult to reconcile the definition of an unfair term under section 32W of *FTA* with 'minor detrimental impact'. We note the view of CAV that unilateral variation will be unfair on the basis of creating a significant imbalance in the rights and obligations of the parties to the detriment of the consumer, even if this is a minor detriment. It is clearly arguable that the provision of a termination right off-sets the unfairness but this is only provided in cases of 'detriment'. Terms that exclude an exit right in circumstances of "minor detrimental impact" have been classified as unfair in this analysis in the following circumstances:

- a. there is no opportunity for the consumer to establish more than minor detrimental impact;
- b. the consumer is not informed of the unilateral variation to determine the impact of the variation.

## INFORMED CONSENT

26. A supplier may specify in the contract that the contract may be varied if the consumer's consent is obtained. If the method of obtaining consent for a unilateral

variation is not specified then this can potentially be unfair. Without specifying how consent is to be obtained the supplier can obtain consent for a unilateral variation from the customer that is not express but rather implied which can result in the customer not providing informed consent. Without the customer's informed consent, a unilateral variation will be unfair. To ensure that a customer has fairly consented to a unilaterally variation, consent should be expressly provided by the customer. The same is true for customers that are not on fixed term contracts. For example, a unilateral variation of a pre-paid customer's contract can result in the customer's unused credits being forfeited in circumstances where informed consent has not been obtained.

## CONTENT & PREMIUM SERVICES

27. One of the more problematic areas for variation is content and premium services. As mentioned above (See [Detriment](#) discussed at paragraph 24), these may be irrelevant to some consumers and yet provide the lynchpin in choosing that particular service over others. While providers may not be able to guarantee continuation of their own contracts with the third parties who provide the content, they ought not to bind a consumer to a fixed term contract after key content has been withdrawn or prices have been increased.
28. Supplier's should not lock-in customers using exclusive content/premium services. Even though a customer may not incur an early termination fee for canceling the contract/service the supplier can use exclusive content/premium services to force customers to accept unilateral variations and effectively lock them into the contract. The term 'third party' is often not defined in suppliers' agreements and thus permit suppliers to use a subsidiary company to offer exclusive content and increase the prices whilst knowing that customers will have to accept the increased prices because they cannot receive the content/service elsewhere. In such circumstances it can be argued that such price increases have the potential to be unfair.
29. Clauses that do not offer a right to cancel the contract for all unilateral variations of content/premium services/prices (without an early termination fee applying) are potentially unfair. These terms have the potential to cause detriment to a consumer. For example a customer can be induced to entering into a two year

contract with a particular supplier for the purchase of a mobile phone handset and service plan as a result of particular content/premium service offered on that plan by the supplier. The handset may have been purchased because an upgraded phone was needed for the content/premium service and a service plan may have been selected because of particular content/premium service offered even though it has call and sms charges that are more expensive than other suppliers. It is unfair in these circumstances for the customer to be forced to continue to use the service plan selected if the price of the content in question is increased and the customer cannot exit the contract for service plan without incurring an early termination fee. The more complex issue is the **upgraded handset** that was purchased for the content/premium service. If the consumer was induced to purchase an upgraded handset solely for the purpose of particular content that is exclusively available by the supplier and then a unilateral price variation occurs, there is a strong argument that it would be unfair in these circumstances if the customer is not able to return the phone and obtain a refund. (See discussion on [Outstanding Equipment Charges](#) at paragraph 46 and [Supplier Specific Equipment](#) at paragraph 31).

## UNILATERAL VARIATION & EARLY TERMINATION FEES

30. The main concern with variation clauses is the inequality this creates when consumers are locked into fixed term contracts. This is further exacerbated in some contracts where consumers have to pay penalty fees to change from one plan to another, thus denying the consumer any right to vary the contract of their own volition (see further at paragraph 45.) As a matter of good practice, detrimental variations ought to give all customers a right to opt out of a contract without having to pay termination fees. As further good practice, some contracts provide examples of what are minor variations and which ones give cancellation rights. However, note that these examples can sometimes be misleading (see eg Optus Consumer Terms clause [2.8\(d\)\(i\)\(B\)\(ii\)](#)). Either providers lock consumers into fixed term contracts and undertake to also be bound by those terms, or they move to a more flexible contract model which gives them the right to make variations – and consumers who do not like these variations the right to walk away.

## SUPPLIER SPECIFIC EQUIPMENT

31. Pursuant to section 6.2(j)(ii)(B) of ACIF Contracts Code, where a consumer has cancelled the contract as a result of the supplier's detrimental unilateral variation, the supplier is permitted to seek outstanding installation and equipment costs *where such equipment can be used in connection with the services provided by other suppliers*. Telecommunications consumer representatives are generally of the view that this is fair because a consumer will not normally suffer detriment when the equipment can be used with another supplier. However, see discussion on exclusive content and upgraded handset in [Content & Premium Services](#) at paragraph 27 and discussion on payment period of outstanding equipment at [Outstanding Equipment Charges](#) at paragraph 46.
32. The CLC and telecommunications consumer representatives are generally of the view that where equipment cannot be used in connection with services provided by other suppliers then a consumer should be offered a refund when canceling the contract for a detrimental unilateral variation. Although pursuant to the ACIF Contracts Code (which most suppliers in this compliance review have complied with) the consumer is permitted to cancel the contract and not pay for outstanding installation and equipment costs *where such equipment can be used in connection with the services provided by other suppliers*, it is the CLC's view that the consumer will suffer detriment by not being reimbursed for the installation and equipment costs already incurred up until the time the contract is cancelled. If the consumer cannot use the equipment in connection with the services provided by other suppliers and is not permitted to obtain a refund for a detrimental unilateral variation, then the consumer will effectively be locked into the contract so as to not lose the money already invested on installation and equipment costs. See for example clause 5.2 of '3' (Three) Customer Terms for Postpaid where it is implicit that in some circumstances handsets cannot be unlocked and used on another supplier's network. However, at clause 11 of that agreement, a pro rata refund is provided for headsets that cannot be unlocked and used on other providers' networks in circumstances where the termination was because of the supplier's unilateral variation or supplier's inability to provide the service. See also discussion at [Handset Unlocking Fees](#) at paragraph 49.



## UNUSED CREDITS & UNILATERAL VARIATION

33. When there has been unilateral variation of a contract that is not for a fixed term (e.g. casual/prepaid contracts), the consumer should either have a right to obtain a refund for any outstanding credits at the time the variation takes effect or be allowed to use the outstanding credits as per the terms originally agreed upon and only be subject to the varied terms when the existing credits have been used and the consumer has purchased/obtained new credits. Otherwise, the supplier can unfairly force the consumer to be subject to different terms than those that were originally agreed upon. See also [Notice to Prepaid/Casual Customer](#) at paragraph 23 and [Time of Notice](#), at paragraph 20.

## EXCLUSIVE NETWORK COVERAGE

34. Where a customer resides or predominantly uses a mobile service in an area that a supplier provides exclusive coverage in then a unilateral variation clause that offers a right to terminate the contract upon detrimental variation must be carefully examined. The problem that a consumer may face in such circumstances is that although a cancellation right may be offered for a unilateral variation, the consumer is effectively locked into the contract because no other supplier provides network coverage in the area where the consumer resides or predominantly uses the mobile service. Regional consumers are more likely to face this problem and suppliers like Telstra are likely to be the provider that offers exclusive mobile network coverage (see e.g. clause 11.3 of Telstra Mobile Section: Part A where Telstra's network coverage is 95% of Australian population 90% of the target area for 90% of time).

## INTERNATIONAL CALLS/ROAMING

35. Sections 6.3(n)-(o) of ACIF Contracts Code permit unilateral variation of international services & international roaming services. The argument put forward by suppliers for justifying this type of unilateral variation is that they cannot control the pricing of international call rates from overseas carriers (which they rely upon and which constantly change). Representatives of telecommunications consumers generally have accepted that international call rates/roaming are beyond the control of suppliers. Moreover, with regards to

international services it is considered unlikely that customers will suffer detriment from variable international call rates because consumers cannot be forced to go through a particular carrier so as to use their international telecommunications services due to international call cards that customers can use on any network. There is intense competition for these services and consumers can generally purchase an international call card from many different companies. For example, a customer can buy an international call card from supplier XYZ to make phone calls overseas without using their regular provider's international services. The customer can make international calls but never use their supplier's international services.

36. Consumer representatives have historically held the view that variable pricing of international services/roaming is fair **if the variable nature of the service is clearly stated to the customer and forms part of the contract and the applicable variable charges are available to the customer** (see e.g. sections 6.3(n)-(o) of ACIF Contracts Code). In holding this view consumer representatives have also taken into account the fact that protection exists in the misleading and deceptive conduct provisions of the State/Territory Fair Trading Acts and *Trade Practices Act* which would cover a failure to advertise variability of price. It is the CLC's view that the arguments used to justify unilateral variation of international services/roaming in the telecommunications industry would be accepted under Part 2B of the *FTA* and thus would not be unfair when the variable nature of the service is clearly stated to the customer and forms part of the contract and the applicable variable charges are available to the customer. In addition, it is the CLC's view that these types of clauses should be drawn to the customer's attention given the potential detrimental impact it may have if the customer is not adequately informed of the variable nature of international services/roaming (eg by including a notice in the supplier's Summary SFOA). However, individual notice at the time of each variation is not necessarily required and may be an unreasonable burden on suppliers.

## CHARGES FOR ANCILLARY SERVICES

37. The telecommunications industry generally is of the view that if a reasonable alternative is offered at no additional charge for a unilateral variation of a charge regarding an ancillary service, then a customer will not suffer detriment (see e.g.

section 6.3(q) of ACIF Contracts Code). This is so because the unilateral variation only concerns ancillary services and not the primary service that the customer has acquired and because suppliers are required to offer a reasonable alternative at no additional charge. The CLC is of the view that terms which provide a right to unilateral vary charges for ancillary services would not be unfair under Part 2B of the *FTA* provided that notice of the variation is given and a reasonable alternative is offered at no additional cost. If this alternative causes detriment to the customer (unlikely given it is ancillary services that are being varied) then the exit rights ought to continue to exist (see [Detriment](#) at paragraph 24).

## LEGITIMATE REASONS TO VARY

38. The CLC is of the view a supplier should be permitted to unilaterally vary the agreement for legitimate reasons such as security and fraud and for technical reasons such as network issues. The problem however with these types of clauses usually is that the contracts do not adequately define terms such as ‘technical reasons’ which remain vague and undefined and permit the supplier to unilaterally determine the meaning. If the supplier wishes to unilaterally vary the agreement for legitimate reasons (eg ‘technical reasons’) then the term used (eg ‘technical reasons’) should be defined or examples should be provided so as to eliminate this problem.

## AUTHORISED EQUIPMENT

39. While limiting the consumer to authorised equipment only will not usually be a problem, this does have the potential of creating unfairness when technological changes occur. Contracts which give the provider the sole right to determine technological compliance create potential for misuse by forcing consumers to upgrade to new technologies, especially while bound into a fixed term contract. The better drafted contracts refer consumers to ACMA standards of technical compliance (see eg [clause 22.1](#) AAPT General and Home Phone Terms).

## TAX IMPOSED CHARGES

40. Suppliers generally provide clauses that allow them to unilaterally vary charges based on additional government taxes imposed. It is reasonable for the consumer

not to have a right to cancel the contract for a tax imposed unilateral variation but adequate notice of any detrimental change is required to make it fair. The consumer should be given reasonable notice of a tax imposed price increase so as to have the opportunity to deal with price increases or cancel the agreement and possibly incur a legitimate early termination fee. Because State or Federal law would ever give a supplier a short period of time to impose a new tax and thus only give the supplier a short period of time to notify a customer of such a tax change (see [Individual Notice](#) discussed in paragraph 16 and [Time of Notice](#), discussed at paragraph 19).

41. An alternative view is that a tax imposed by law ought not necessarily be passed onto the consumer and there is no basis for doing so without giving adequate notice and a termination right. All clauses regarding tax imposed charges are identified in the analysis and some have been deemed unfair on this alternative view (see eg Optus Standard Pricing Table Section 2 - Current Offer Pricing Plans for Consumer Customers, [clause 2.7](#)).

## Part C: Early termination

### EARLY TERMINATION FEES GENERALLY

42. All fixed term contracts contain early termination fees as the primary device for keeping customers bound for the duration. Two year contracts may be good for the providers but there is little evidence of any benefit for the consumers, particularly where new technologies develop, old technologies become cheaper and consumers' own financial positions may change over that time.
43. Section 32X(c) of the *Fair Trading Act* deems early termination fees as unfair because they penalise the consumer and not the provider for terminating the contract. (The idea that the supplier also should be required to pay early termination fees need only be stated to be recognised as fanciful.)
44. It is impossible to determine whether termination fees reflect the genuine cost to providers. What these costs may be and how they are calculated is not established in any of the contracts. There is significant variation in the amount of termination fees – from \$22 to \$1200 – and very little explanation as to establish why these costs vary so much.
45. Some contracts also penalise consumers for varying their plans within a fixed term. Some contracts have no fees for doing this; others go as high as \$560. These terms would be considered unfair under 32X(d).

### OUTSTANDING EQUIPMENT CHARGES

46. Early termination is more complicated where consumers are also purchasing handsets and other equipment from the provider. All contracts require consumers to pay off their equipment on early termination (which is generally fair, unless the equipment cannot be used with other services (see [Supplier Specific Equipment](#) at paragraph 31) but some suppliers demand a lump sum payment on the date of termination, some even where the termination comes from a provider's breach (see eg Optus Digital Mobile Service, Standard Pricing Table Section 3, [clause 22.4\(a\)\(iii\)](#)). This is a substantial penalty for consumers, especially early on in the repayment period. Better practice would be to allow consumers to continue to pay off equipment on existing terms for the remainder of the repayment period.

47. As a matter of good practice, contracts for sale of equipment and contracts for service provision ought to be kept separate. In any case, the amounts of equipment repayment and service costs must be clearly delineated. Most of the contracts the CLC reviewed did this.

## UNUSED PREPAID CREDITS & EARLY TERMINATION

48. Cancellation of prepaid services often results in the consumer losing unused credits. Generally, this is considered to be unfair as it penalizes the consumer but not the supplier for a breach/termination of the agreement. Clauses of this kind are worse when the consumer loses unused credits upon termination from the provider's breach or as a consequence of variation.

## HANDBSET UNLOCKING FEES

49. Unlocking fees charged to allow consumers using their hardware on other networks are unfair under 32X(c). These types of clauses penalise the consumer but not the supplier upon termination/breach of the agreement and generally have the potential to lock-in customers to a particular supplier's network. See for example clause 5.2 of '3' (Three) Customer Terms for Postpaid where it is implicit that in some circumstances handsets cannot be unlocked and used on another supplier's network. See also discussion at [Supplier Specific Equipment](#) at paragraph 31.

## UNILATERAL INTERPRETATION OF CONTRACT BREACH/MEANING

50. Where termination occurs because of a breach of the contract, rather than a consumer's choice, the *Fair Trading Act* also applies. Specifically 32X (g) will apply where the provider has the sole power to determine if a contract has been breached. While there are some circumstances where providers need to be able to suspend service without notice, such as fraud and other illegal activity, all contracts ought to have fair procedures for determining contract breach. At a minimum, consumers ought to have the right to present their own case and have the opportunity to have service reinstated before a contract is terminated. The

contracts varied as to accountability provided to consumers and the fairness of supplier procedures on suspected breach.

51. All of the contracts contained a list of terms which bind consumers and most had a “**fair use**” policy. Some of these ought to be more clearly defined and many included “unusual use” on the list of breaches – an uncertain and unfair term. Many contracts referred to minor or material breaches but few provided any guidance as to which terms resulted in what degree of breach. As a matter of good practice, these contracts ought to contain simple examples of each and description of the consequences of breach – suspension, warning or so forth – along with the consumers’ right to present their own arguments.
52. While providers need to protect their own interests they also must bear in mind their responsibilities to consumers. This includes the consumers’ rights on termination of the contract.

## RETURN OF SIM CARD

53. The requirement of having the customer return the SIM card upon termination of the agreement is not unfair per se. However, a term is likely to be unfair when the requirement to return the SIM card (or pay a replacement fee for failing to do so) is not adequately brought to the customer’s attention. This requirement is potentially burdensome and consumer normally would not expect to have to return a SIM card to the supplier when the contract ends. Terms of this type need to be highlighted and brought to a consumer’s attention in order to be more transparent and fair.

## CONSUMER CANCELLATION RIGHT

54. Consumers should be given an *immediate* right to cancel the agreement without incurring an early termination fee when the provider is in material breach of the contract. Requiring the consumer to give the supplier notice (eg 14 days) and an opportunity to remedy a material breach is unfair because in some circumstances the consumer will have a right to terminate the agreement immediately. For instance s 75A *Trade Practices Act 1974* (Cth) provides consumers with a statutory right regarding purchased goods to rescind the contract upon material breach.

Some contracts were inadequate in recognizing these consumer protections and clauses inconsistent with these rights exist.

55. In addition, requiring the consumer to continue to pay for a monthly network access fee whilst the supplier is in material breach (eg during 14 day notice period) is unfair. It is also unfair to require a consumer to pay an early termination fee because the consumer canceled the service for the supplier's material breach *immediately* rather than provide the supplier 14 days to remedy the breach.

## CONSUMER BANKRUPTCY/INSOLVENCY

56. Suppliers often include in their agreements a cancellation right upon the consumer's bankruptcy/insolvency. This has been a contentious issue within the telecommunications industry where suppliers have argued that they need to protect themselves from bad debts and consumers have argued that telecommunications services are important to individuals and although someone may be bankrupt they still should have a right to use a mobile phone so long as they continue to pay their bills. It is the CLC's view that the supplier should not have the right to terminate a bankrupt customer's service unless there are reasonable grounds for believing that the customer cannot pay future bills. Bankruptcy alone however is not a reasonable ground (see e.g. section 6.3(b) ACIF Contracts Code).

## TRIVIAL/MINOR BREACH

57. Often suppliers provide a cancellation right for a trivial or minor breach by the consumer (eg a long standing customer paying a bill late for the first time). This is unfair particularly when the customer is often only permitted to cancel the agreement without incurring an early termination fee for a material breach by the supplier or a detrimental unilateral variation. In all other circumstances suppliers usually require consumers upon early termination to pay a termination fee. This is a significant imbalance in the parties' rights and obligations regarding canceling the contract where the consumer is penalized upon breach/termination and the supplier is not. These types of clauses are unfair even if no termination fee is



charged because unequal cancellation rights that favour suppliers can cause significant detriment to consumers.

## Part D: General accessibility issues

58. Like most legislation, the *Fair Trading Act* requires a person who is aggrieved by a breach of the legislation to bring an action to protect their rights. A consumer who does not know what their rights and responsibilities are under a contract – because it is too long, too poorly drafted or otherwise inaccessible to them – cannot protect their own rights. Contract variation clauses are particularly difficult. Not only must consumers be able to access and understand the variation clause, but they must be able to access all future contract variations and understand the impact that these variations have on their existing contract.

59. The *Telecommunications Act* allows providers to keep a standard form of agreement online and make updates to this under different forms of notice, including advertisement in national newspapers. While this system may have been aimed at protecting customers, in practice it may have the opposite effect, by allowing more frequent updates and changes than would have occurred in the past. Even presuming easy access to the current online standard form of agreement (SFOA), the consumer has no way of knowing what the previous versions were (including the one they signed under in the initial contract) and what effect variations along the way have had. One provider keeps an archived list of updates on their website. While this is good practice, with large and complex contracts it can be difficult for consumers to judge which variations affect them and to what degree.

60. Some other access issues are worth noting briefly:

- Most contracts were not dated which makes it difficult to judge from what date it became valid, especially where breaches may have occurred over a period of time. If consumers keep paper copies of documents it is impossible to tell which is the most recent.
- Many contracts continue to be extremely long. In the UK, regulations prevent contracts from being more than 20 pages long – still quite long

for a consumer contract – but many of the contracts we reviewed exceeded this.

- Some contracts lacked page numbers.
- Many of the contracts were repetitive and expressed the same information several times in slightly different ways. A key recommendation of this research is that terminology must be used consistently.
- Some of the contracts were difficult to print in different web browsers. Some would only print the first page, others cut off the right hand side of the page. Providers ought to test their documents on the major browsers. The CLC recommends that providers use PDF format, as this will print consistently from computer to computer.
- Many of the contracts lacked organisation, especially when referring to different plans such as prepaid, ongoing contracts and fixed term contracts. It can be difficult for a consumer to tell which term applies to which contract. Misunderstanding the true meaning of the contract is therefore a real risk. For example, a term relating to prepaid contracts may state that there are no cancellation fees, but because it is buried deep within nested subsections it is not immediately obvious that this only applies to prepaid customers. Different plans should either have different standard contracts or should clearly state which contract is involved on each page.
- Online materials are only effective when they are accessible. Many websites were confusing, it was difficult to locate documents and some contracts referred customers to inaccurate URLs. The SFOAs are linked to the ACMA page but it is extremely difficult to find this link page on the ACMA site, even using the page's search option. While this last factor is outside of the providers' control, the CLC recommends providers take more responsibility to ensure their own sites are better organised.

61. Language and technological literacy must be considered as factors when deciding how readable contracts are and how easy they are to access from provider

websites. It should not be assumed that all customers have English as a first language and sophisticated information technology skills. The CLC recommends auditing for compliance from this point of view as a separate area of research.

# Part E: Summary Checklist

## A: ACCESSIBILITY ISSUES

- Contracts should be dated.
- The contract should be a reasonable length.
- Contracts should include page numbers.
- Contracts should be succinct, not repetitive, and use consistent terminology.
- Web browser compliance should be checked.
- Multi-plan contracts should be organised so it is clear what plan each term applies to.
- Websites ought to be clearly organised and accessible.
- Providers should not assume consumers have sophisticated language skills and technological literacy.

## B: VARIATION

- Consumers ought to have a right to terminate on any detrimental variation.
- Consumers have a right to argue detriment.
- Authorised equipment ought to refer to ACMA standards.
- Variations to content and premium services, while outside of provider control, may result in consumer detriment and give rise to a right to terminate.
- Notice should be individual, not in the newspaper.

## C: EARLY TERMINATION

- Early termination fees are unfair unless providers can demonstrate genuine costs to their detriment.

- Consumers should be able to change plans without paying fees.
- Sale of equipment and service contracts ought to be kept as separate as possible.
- Where consumers have outstanding equipment fees, they should be able to repay over the original period, even where the service contract has been terminated. Lump sum payments amount to an unfair penalty.
- Unlocking fees are unfair.
- While providers ought to have the right to unilaterally suspend service where serious breaches are alleged, there ought to be a clear and accountable process by which consumers can challenge this and get service reinstated before termination.
- Lists of breaches and “fair use” policies ought to give examples of these breaches and what the consequences of breaches are.

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# Appendix I: Analysis of Mobile Contracts

The Communications Law Centre conducted a compliance review into unfair terms pursuant to Part 2B of the *Fair Trading Act 1999* (Vic) related to unilateral variation and early termination in consumer mobile phone contracts in use in Victoria during January 2006 by the following major telecommunications providers:

- [Telstra](#) (page 32);
- [Optus](#) (page 44);
- [AAPT](#) (page 48);
- [Vodafone](#) (page 58);
- [Virgin](#) (page 68);
- ['3' trading as Hutchinson 3G](#) (page 77);
- [Orange](#) (page 82).

Below is the compliance review undertaken for each of these providers.

# TELSTRA

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
General Terms for Consumer Customers	4	N/A	32X(d)	<b>Exclusive network coverage:</b> see <a href="#">Exclusive Network Coverage</a> in report.
General Terms for Consumer Customers	4.1	4.12 - 4.15	32X(d)	<b>Informed Consent:</b> Monthly fees and termination fees <u>cannot</u> be altered during a fixed term contract without customer's consent. The method of obtaining consent is not specified. This is problematic because it permits the supplier to obtain consent for a unilateral variation from the customer that is not express but rather implied. For example, the contract permits the monthly access fee to be increased in circumstances where the customer is notified 30 days beforehand (pursuant to cl. 4.12(a)) by a bill message or direct mail (pursuant to cl. 4.15). Telstra can under the contract obtain implied consent in these circumstances if the customer continues to use the service and does not cancel the contract under cl 4.12(b) of contract. The problem however is that the customer may not provide informed consent because the customer does not need to be notified of the right to cancel the contract when there has been a detrimental unilateral variation (see cl 4.12(b) where it is stated that customers will be <i>allowed</i> to cancel but does not mention that they will be notified of this cancellation right). Without the customer's informed consent, a unilateral variation is unfair. See <a href="#">Notice of Cancellation Right</a> and <a href="#">Informed Consent</a> in report.
General Terms for Consumer Customers	4.2	4.12 - 4.15	32X(d)	<b>Informed Consent:</b> Consent for unilateral variation may not be informed and thus unfair. See <a href="#">Notice of Cancellation Right</a> and <a href="#">Informed Consent</a> in report.
General Terms for Consumer Customers	4.3	4.4	32X(d)	<b>Detriment (Unilateral Variation):</b> This clause should also (in addition to cl. 4.4) provide the customer the right to cancel the contact when the customer demonstrates that the unilateral variation is to the detriment of the customer even though the supplier reasonably considered that the unilateral variation would be beneficial or have a neutral impact. This would make it consistent with the second part of the test for an unfair term in section 32W. This requires detriment to the consumer as an objective fact and <u>not</u> what the supplier considers to be detrimental. See <a href="#">Detriment</a> in report.



General Terms for Consumer Customers	4.4	N/A	32X(d)	Fixed term, <b>minor detrimental variations</b> require notice in newspaper and individual notice. If the customer can demonstrate more than minor detriment impact then they have an option to terminate the contract. The term minor detrimental impact is taken from section 6.3(t) of ACIF Contracts Code and will probably not offend s 32W because the <i>FTA</i> definition for fairness requires imbalance in rights to customer's detriment. The problem here is that there is no requirement on the supplier to inform the customer that they have a right to cancel the contract for a unilateral variation that has a more than minor detrimental impact (the term only stipulates that the customer will be allowed to cancel the contract). Moreover, the publication in a national newspaper of a minor detrimental impact does not provide adequate notice of the variation to the consumer (particularly if it turns out to be a more than minor detrimental impact). Individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. See <a href="#">Individual Notice</a> , <a href="#">Notice of Cancellation Right</a> , <a href="#">Informed Consent</a> and <a href="#">Minor Detrimental Impact</a> in report.
General Terms for Consumer Customers	4.5	N/A	32X(d)	<b>Tax Imposed Charges:</b> The publication in a national newspaper of a change/imposition of a tax charge does not provide adequate notice of the variation to the consumer (particularly if it turns out to be of great detriment to the consumer). In this clause individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. As the contract is drafted, the consumer could potentially find out about a price increase 16 weeks after the increase and consequently receive an unexpected high bill or not be aware that they have been incurring additional charges during that time. See <a href="#">Tax Imposed Charges</a> in report.
General Terms for Consumer Customers	4.6	N/A	32X(d) & s163	<b>International Calls/Roaming:</b> See <a href="#">International Calls/Roaming</a> in report. It is arguable whether this clause states the variable nature of the prices clearly. This clause should be drawn to the customer's attention given the potential detrimental impact it may have if the consumer is not adequately informed of the variable nature of international services/roaming.
General Terms for Consumer Customers	4.7	N/A	FAIR TERM	<b>THIS TERM IS FAIR:</b> See <a href="#">Charges for Ancillary Services</a> in report.
General Terms for Consumer Customers	4.8	N/A	32X(f)	<b>Ancillary Services:</b> The problem here is that there is no requirement on the supplier to inform the customer that they have a right to cancel the contract for a unilateral variation of a charge for ancillary services when no reasonable alternative is offered (the term only stipulates that the customer will be allowed to cancel the contract). Moreover, the publication in a national newspaper of a unilateral variation does not provide adequate notice of the variation to the consumer. Individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. See <a href="#">Notice of Cancellation Right</a> , <a href="#">Individual Notice</a> and <a href="#">Charges for Ancillary Services</a> in report.
General Terms for Consumer Customers	4.9	N/A	32X(f)	<b>Content/Premium Services:</b> See <a href="#">Content &amp; Premium Services</a> in report.

General Terms for Consumer Customers	4.10(b)	N/A	32X(d)	This clause permits the supplier to unilaterally vary the terms of the agreement for <b>technical reasons</b> without giving the customer the right to cancel the contract whilst not incurring an early termination fee. The CLC is of the view that the supplier should be permitted to unilaterally vary the agreement for legitimate reasons such as security and fraud and for technical reasons such as network issues. The problem however with this clause is that 'technical reasons' is a vague term and undefined in this contract thus leaving the <i>potential</i> for the supplier to unilaterally vary the agreement for illegitimate reasons whilst not providing the customer with the right to exit the contract (without incurring an early termination fee). The term technical reasons should be defined or examples should be provided so as to eliminate this problem. See <a href="#">Legitimate Reasons to Vary</a> in report.
General Terms for Consumer Customers	4.12	4.14	32X(d)	The customer does not need to be notified of the right to cancel the contract when there has been a detrimental unilateral variation. Clause 4.12(b) states that customers will be <i>allowed</i> to cancel but does not mention that they will be notified of this cancellation right. Without the customer being informed of a cancellation right at the time the unilateral variation is being communicated to the customer, the unilateral variation will be unfair. Clause 4.14 provides that a contract will be cancelled on fair terms if the supplier has "offered" the customer the right to terminate. This when read in conjunction with clause 4.12 is interpreted as meaning that the supplier does not have to notify the customer of their cancellation right (See <a href="#">Notice of Cancellation Right</a> and <a href="#">Informed Consent</a> in report). In addition, suppliers providing exclusive content/premium services must be looked at closely – See <a href="#">Content &amp; Premium Services</a> in report.
General Terms for Consumer Customers	4.14(b)	N/A	32X(d)	The term has the potential to cause detriment to a consumer and be unfair. <b>Potential Lock-in:</b> the customers could potentially be locked into the contract once a detrimental unilateral variation has been made by the supplier by requiring the customer to pay outstanding installation and equipment charges/costs upon termination rather than pay these costs/charges as per the original terms agreed upon (e.g. monthly payments for 12 or 24 months). See <a href="#">Outstanding Equipment Charges</a> , <a href="#">Supplier Specific Equipment</a> and <a href="#">Content &amp; Premium Services</a> in report.
General Terms for Consumer Customers	4.15	N/A	FAIR TERM	<b>THIS TERM IS FAIR:</b> The telecommunications industry considers that notifying the customer of unilateral variations in this manner is fair (see e.g. 6.2(j)(i) and definition of Notice in Writing in 4.2 of the ACIF Contracts Code). See <a href="#">Individual Notice</a> in report.
General Terms for Consumer Customers	5	N/A	32X(d)	<b>Exclusive network coverage:</b> see <a href="#">Exclusive Network Coverage</a> in report.
General Terms for Consumer Customers	5.1	N/A	32X(d)	The method of obtaining consent for a unilateral variation is not specified. See <a href="#">Informed Consent</a> in report. See also <a href="#">Notice of Cancellation Right</a> in report.

General Terms for Consumer Customers	5.3	N/A	32X(d)	Minor detrimental variations require notice in newspaper and individual notice. Individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. Better notice of this type of unilateral variation is needed so as to protect consumers that actually suffer detriment that is greater than minor from the unilateral variation (notice is based on the supplier's assessment of the likely detrimental impact and not the actual detriment that has resulted). See <a href="#">Individual Notice</a> , <a href="#">Minor Detrimental Impact</a> and <a href="#">Informed Consent</a> in report.
General Terms for Consumer Customers	5.4	N/A	32X(h)	The problem however with this clause is that 'technical reasons' is a vague term and undefined in this contract and permits the supplier to unilaterally determine its meaning. See <a href="#">Legitimate Reasons to Vary</a> in report
General Terms for Consumer Customers	5.5	N/A	32X(d)	The publication in a national newspaper of a change/imposition of a tax charge does not provide adequate notice of the variation to the consumer (particularly if it turns out to be of great detriment to the consumer). Individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. As the contract is drafted, the consumer could potentially find out about a price increase 16 weeks after the increase and consequently receive an unexpected high bill or not be aware that they have been incurring additional charges during that time. See <a href="#">Individual Notice</a> , <a href="#">Tax Imposed Charges</a> and <a href="#">Informed Consent</a> in report.
General Terms for Consumer Customers	5.6	N/A	FAIR TERM	<b>THIS TERM IS FAIR:</b> See <a href="#">International Calls/Roaming</a> in report.
General Terms for Consumer Customers	5.7	N/A	32X(d)	The publication in a national newspaper of a unilateral variation does not provide adequate notice of the variation to the consumer. Individual notice is fine but this can occur up to 16 weeks after the variation which can result in 16 weeks of detriment to the customer. (See comments regarding <a href="#">clause 4.7</a> & <a href="#">clause 4.8</a> ). See <a href="#">Individual Notice</a> , and <a href="#">Notice of Cancellation Right</a> in report.
General Terms for Consumer Customers	5.8	N/A	32X(d)	This term needs careful consideration because at first glance it appears to be fair but upon closer consideration the term can potentially be unfair. Customers that clause 5.8 applies to are not subject to an early termination fee or are acquiring the service on a month by month basis and thus are unlikely to suffer detriment when there has been a unilateral variation to the price of content/premium services and they have been notified at least 10 days beforehand via text message. They are unlikely to suffer detriment because they can elect to not use the service after the unilateral variation and cancel the service without incurring additional charges as a consequence. However, the term is potentially unfair when dealing with content/premium services that are exclusively offered by a supplier or if they are the primary reason that a customer is with the supplier. For example if a customer selected a plan of a supplier for the sole purpose of the exclusive content provided by that supplier and is receiving the service on a month by month basis and receives 10 days notice of a price increase, then this will not be adequate if this occurs early in the month. 10 days notice is not adequate because the

				<p>customer will be liable for the monthly network access fee of the plan even though there has been a unilateral variation and the customer no longer wishes to use the service during that month. What would be fair is if the customer is given 30 days notice to avoid this situation or receive a refund for the monthly access fee on a pro rata basis where the days left on the month after the unilateral variation took affect are refunded if the customer no longer wishes to use the service as a result of the unilateral variation.</p> <p><b>Exclusive content/premium services:</b> The more important issue with this term is the supplier's ability to lock-in customers using excusive content/premium services - see <a href="#">Content &amp; Premium Services</a> in report.</p>
General Terms for Consumer Customers	5.9	N/A	32X(d)	<p>30 days notice of a unilateral variation is fine for a casual customer who is unlikely to suffer any detriment because they are either acquiring the service on a month by month basis or will not incur an early termination fee for cancelling the contract. Suppliers provided exclusive content/premium services must however be looked at closely – see <a href="#">Content &amp; Premium Services</a> in report.</p>
General Terms for Consumer Customers	5.10	N/A	FAIR TERM	<p><b>THIS TERM IS FAIR:</b> The term minor detrimental impact is taken from section 6.3(t) of ACIF Contracts Code and does not appear to be inconsistent with the definition of an unfair term under section 32W of <i>FTA</i> (see <a href="#">Minor Detrimental Impact</a> in report). Being notified for a detrimental unilateral variation for a service you have used or have been billed for in the last 6 months is a good of example of which customers to notify of unilateral variations (see e.g. 6.3(r)(ii) of ACIF Contracts Code).</p>
General Terms for Consumer Customers	5.11	N/A	FAIR TERM	<p><b>THIS TERM IS FAIR:</b> The telecommunications industry considers that notifying the customer of unilateral variations in this manner is fair (see e.g. 6.2(j)(i) and definition of Notice in Writing in 4.2 of the ACIF Contracts Code). See <a href="#">Individual Notice</a> in report.</p>
General Terms for Consumer Customers	7.1	8.2 & 8.5 & 8.9	32X(a), 32X(c) & s163(3)(c)	<p><b>Unequal cancellation rights:</b> Customer can terminate with notice but may be subject to an early termination fee for fixed term contracts. This is unfair because under clause 8.2 of the contract the supplier can terminate the contract at any time. This allows the supplier to avoid performing the contract at any time and penalises the customer but not the supplier for a termination.</p> <p>The termination fee for fixed term contracts is set out in application form or disclosed to customer when applying for service. There are concerns regarding adequate notice of the early termination fee to the consumer thus making it a potential hidden cost. To ensure that an early termination fee is not hidden the clause that mentions it should be highlighted to the consumer as it is an important and potentially detrimental term (even if the actual termination charge is in the application form). As a matter of good practice, the early termination fee should also be listed in the Telstra general customer terms in addition to the application form as it is an important term. The CLC was unable to find a copy of the application form online at the Telstra site (<a href="http://www.telstra.com.au">www.telstra.com.au</a>) in order to view the early termination fees. See <a href="#">Early</a></p>

				<a href="#">Termination Fees Generally</a> in report.
General Terms for Consumer Customers	7.2	N/A	32X(c) & s163(3)(c)	If customer terminates before service is provided, provider can charge any "reasonable costs" incurred. Costs appear to be discretionary or uncertain and thus hidden. In addition, the clause does not take into account any cooling off period that the consumer may have or any other right the customer may have to cancel the contract and not incur costs such as a right to cancel the contract for misleading and deceptive conduct. The term 'reasonable costs' suggests that the costs that can be charged to the customer must be reasonable and thus not excessive but does not prevent Telstra from requiring the customer to pay these costs in unreasonable circumstances such as when there is a cooling off period or there has been misleading and deceptive conduct.
General Terms for Consumer Customers	7.3(b)	N/A	32X(c) & 32X(a)	Customer's right to terminate (without incurring early termination fee) if provider is in material breach and fails to remedy in 14 days. Requiring the consumer to give the supplier 14 days notice to remedy a material breach is unfair because in some circumstances the consumer will have a right to terminate the agreement immediately (e.g. s 75A <i>Trade Practices Act 1974</i> (Cth)). In addition, requiring the consumer to continue to pay for a monthly network access fee whilst the supplier is in material breach of up to 14 days is unfair. Furthermore, requiring a consumer to pay an early termination fee for immediately cancelling a service for a material breach and not providing the supplier 14 days to remedy the breach is unfair. See <a href="#">Consumer Cancellation Right</a> in report.
General Terms for Consumer Customers	7.5	N/A	32X(c), 32X(k)	<b>Off-setting customer's refund with supplier's charges:</b> The deduction from the customer's refund of any amounts owed to the supplier such as charges incurred are unfair if the amount in question is a disputed amount. The term can deter/hinder/prevent the customer from recovering any disputed amounts due to the cost/inconvenience of doing so. The supplier is in a better position to bear the risk of not recovering any disputed amounts rather than the consumer. <b>Early Termination Fee Upon Cancellation:</b> Requiring a consumer to pay an early termination fee for cancelling a service under this clause is unfair. Customers should not be charged a cancellation fee if the supplier is in material breach, has become bankrupt or insolvent, the provision of the service becomes illegal or the law requires the customer to cancel. See <a href="#">Consumer Cancellation Right</a> in report.
General Terms for Consumer Customers	8.1	N/A	32X(a)	<b>No refund:</b> A customer should be offered a refund for unused credits/charges (see e.g. section 6.2(f) ACIF Contracts Code). Customers included as casual customers are ones that are on a fixed term contract but do not have to pay an early termination fee. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report. <b>Informed consent:</b> The method of obtaining consent is not specified. This is problematic because it permits the supplier to obtain consent for a cancellation from the customer that is not express but rather implied. This may lead to a situation where the customer's consent

				obtained is not informed. Without the customer's informed consent, a cancellation under this clause is unfair. See <a href="#">Informed Consent</a> in report.
General Terms for Consumer Customers	8.2	<a href="#">7.1</a>	32X(c)	<b>Unequal cancellation rights:</b> (See comments regarding <a href="#">clause 7.1</a> ) <b>No refund:</b> A customer should be offered a refund for unused credits/charges (see e.g. section 6.2(f) ACIF Contracts Code). See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
General Terms for Consumer Customers	8.3	N/A	32x(h)	Provider's right to terminate on customer's material breach. Customer is given 14 days to remedy except where breach cannot be remedied (such as fraud). Good practice to give notice.
General Terms for Consumer Customers	8.4(a)	7	32X(c)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time. This is unfair particularly when the customer can only cancel for a material breach (without incurring an early termination fee) or at other times upon payment of a termination fee (see clause 7). See <a href="#">Trivial/Minor Breach</a> in report.
General Terms for Consumer Customers	8.4(c)	N/A	s163(3)(c)	<b>Hidden Term:</b> Breach of the Telstra FairPlay Policy is a material breach under the contract but is not contained in the Telstra general terms and not cross-referenced to where it can be found (clause 9 of Our Customer Terms - Telstra Mobile Section). This is a hidden term/obligation regarding early termination. Termination clauses are important and potentially detrimental to consumers and must be clearly expressed and brought to their attention.
General Terms for Consumer Customers	8.5	7.3	32X(c)	<b>Unequal Cancellation rights:</b> Customer has to pay an early termination fee for material breach but supplier is not penalised under clause 7.3 for material breach. See <a href="#">Consumer Cancellation Right</a> in report.
General Terms for Consumer Customers	8.7	7	32X(a), 32X(b) & 32X(c)	<b>Unfair cancellation rights:</b> Cancelling the contract for factors that are genuinely out of the supplier's control is arguably fair. It is arguable in this instance because the consumer does not have an equal right to cancellation but is rather subject in many instances to an early termination fee. However, it is unfair for the supplier to have a right to cancel the contract in circumstances where the supplier may be at fault such as an emergency (not defined) (see clause 8.7(d)) or equipment failure/industrial strike (see clause 8.7(e)). See <a href="#">Legitimate Reasons to Vary</a> in report
General Terms for Consumer Customers	8.8(a)	8.9 & 7	32X(a), 32X(b) & 32X(c)	<b>Unfair cancellation right:</b> This clause permits the supplier to cancel the contract even if it is the suppliers fault. In addition, it allows the supplier to cancel the contract when neither the supplier nor the customer is at fault <u>but</u> the customer is still liable for an early termination fee.
General Terms for Consumer Customers	8.8(b)	8.9 & 7	32X(a), 32X(b) & 32X(c)	<b>Cancellation right for consumer's bankruptcy/insolvency:</b> See <a href="#">Consumer Bankruptcy/Insolvency</a> in report. The clause becomes more unfair despite the customer having an equal cancellation right for bankruptcy (see clause 7.4(a)) because the customer is subject to an early termination when the service is cancelled for the customer's bankruptcy

				(see clause 8.9).
General Terms for Consumer Customers	8.8(d & e)	8.9 & 7	32X(h)	Cancellation of the customers service for excessive or unusual use (clause 8.8(d)) or for being an unacceptably high credit risk (clause 8.8(e)) is objected to because it provides the supplier with the right to cancel the contract based on the supplier's unilateral interpretation (and discretion) of "excessive or unusual use" and "unacceptably high credit risk". Some factors are listed regarding what the supplier will consider when determine who poses an unacceptably high credit risk. However, the supplier still has discretion in determining when to terminate the contract. The CLC understands that these are legitimate reasons why a supplier may wish to terminate a contract as it can prevent the customer from being subject to unauthorised usage charges and the supplier from incurring bad debts but the circumstances when the supplier can terminate the contract need to be clearly defined an certain. For example, the supplier can stipulate that excessive use is x number of hours of mobile calls within 1 day. There must not be discretion on the part of the supplier in determining when to terminate the contract.
General Terms for Consumer Customers	8.9	<a href="#">7.1</a> & 8.2	32X(c)	Early termination fee is unfair because the customer is penalised for early termination of the contract but the supplier is not. (see also comments regarding <a href="#">clause 7.1</a> )
General Terms for Consumer Customers	8.10	7.1	32X(a) & 32X(c)	<b>Unequal Termination Rights:</b> This clause permits the supplier to terminate the contract even if the maintenance work is caused by the supplier's fault or negligence or is matter that is within the supplier's control. If the customer terminates the agreement however an early termination fee applies (see clause 7.1). If the customer breaches the agreement the service is cancelled by the supplier the customer will have to pay an early termination fee (see clause 8.5). The contract penalises the consumer but not the supplier for a breach/termination of the agreement.
General Terms for Consumer Customers	8.11	N/A	32X(c)	<b>Off-setting customer's refund with supplier's charges:</b> (see comments regarding <a href="#">clause 7.5</a> )
General Terms for Consumer Customers	8.12	N/A	32X(c) & 32X(h)	Requirement that customer uses service mainly for personal use. If provider believes customer is using service mainly for business purposes they can cancel on 30 days notice and charge an early termination fee. Customers should be given an opportunity to show that they are not using the service for business purposes. Without this opportunity, the supplier is able to unilaterally determine whether the contract has been breached or interpret its meaning. In addition, the clause penalises the customer but not the supplier for a breach or termination of the contract.
<b>Our Customer Terms - Telstra Mobile Section</b>	3.6	N/A	32X(c)	This clause permits the supplier to charge the consumer an activation fee in circumstances where the cancellation was the supplier's fault. This penalises the consumer but not the supplier for a breach or termination of the contract. It is also unfair to charge an activation fee in these circumstances when the consumer is penalised for an early termination or material

				breach by having to pay an early termination fee (see e.g. clause 8.5 of “General Terms for Consumer Contracts”).
Our Customer Terms - Telstra Mobile Section	9.10-9.14	9.15 & 8.4(c) of General Terms for Consumer Contracts	32x(h)	<b>Discretionary cancellation rights:</b> Telstra Fairplay policy - personal use. The clause potentially permits the supplier to unilaterally determine whether the contract has been breach or unilaterally determine whether there has been excessive/unreasonable use. The contract must detail in full and precisely the circumstances that constitute excessive/unreasonable use. The contract stipulates what the supplier considers to be excessive/unreasonable use but does not limit it to these circumstances thus allowing for the supplier to include other circumstances in its discretion. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Our Customer Terms - Telstra Mobile Section	10.3	7.1 of General Terms for Consumer Contracts	32X(c)	This charge should not apply if there has been a material breach by the supplier or a unilateral variation by the supplier or other reason giving the customer the right to terminate the agreement due the supplier’s fault. This penalises the customer for the supplier’s breach or termination. See also clause 7.1 of General Terms for Consumer Contracts where if the customer terminates the agreement an early termination fee applies. Clause 10.3 demonstrates the unequal cancellation rights where supplier is not penalised for a breach/termination and the customer is including in circumstances where the supplier has failed to provide the service.
<b>Pricing Plans - Pre Paid Pricing Plans</b>	2	N/A	32X(d)	<b>Exclusive network coverage:</b> see <a href="#">Exclusive Network Coverage</a> in report.
Pricing Plans - Pre Paid Pricing Plans	2.1	<a href="#">4.1</a> General Terms for Consumer Customers	32X(d) & s163	<b>Informed Consent:</b> (see comments regarding <a href="#">clause 4.1</a> of General Terms for Consumer Customers)
Pricing Plans - Pre Paid Pricing Plans	2.3	N/A	32X(d)	Supplier is assessing/guessing whether the variation is likely to be detrimental upon the customer or only of minor detriment. The customer needs adequate notice of the unilateral variation in order to determine whether the unilateral variation is in fact detrimental or only of minor detriment. See <a href="#">Minor Detrimental Impact</a> , <a href="#">Detriment</a> and <a href="#">Individual Notice</a> in report.
Pricing Plans - Pre Paid Pricing Plans	2.4	4.10(b) General Terms for Consumer Customers)	32X(d)	The term technical reasons need to be defined (see comments regarding <a href="#">clause 4.10(b)</a> of General Terms for Consumer Customers). In addition, the consumer must be given individual notice of a detrimental unilateral variation even if it is urgent. An urgent change may justify notifying the consumer 3 days before or soon after the unilateral variation takes effect but does not justify no providing the customer with adequate notice. For example, “public notice” of a unilateral variation that is detrimental is not satisfactory because the customer may not be adequately informed of the change in order to obtain a refund of unused credits. Public notice can include a notice in a newspaper. See <a href="#">Legitimate Reasons to Vary</a> , <a href="#">Individual Notice</a> and <a href="#">Informed Consent</a> in report.



Pricing Plans - Pre Paid Pricing Plans	2.5	<a href="#">4.5</a> General Terms for Consumer Customers	32X(d)	<b>Method of notice:</b> The publication in a national newspaper of a change/imposition of a tax charge does not provide adequate notice of the variation to the consumer (particularly if it turns out to be of great detriment to the consumer). Adequate notice of any detrimental change is required to make it fair even if it is imposed by law. See <a href="#">Individual Notice</a> in report. <b>Time of notice:</b> The consumer should be given reasonable notice of a tax imposed price increase so as to have the opportunity to deal with price increases. See <a href="#">Tax Imposed Charges</a> in report.
Pricing Plans - Pre Paid Pricing Plans	2.6	<a href="#">4.6</a> General Terms for Consumer Customers	32X(d) & s163	Clause should be highlighted to consumer indicating variable nature of pricing (see comments regarding <a href="#">clause 4.6</a> of General Terms for Consumer Customers). In addition, notice in a national newspaper of a detrimental change is not adequate. Individual notice is required. See <a href="#">Individual Notice</a> in report.
Pricing Plans - Pre Paid Pricing Plans	2.7	<a href="#">4.8</a> General Terms for Consumer Customers	32X(g) & s163	The publication in a national newspaper of a unilateral variation does not provide adequate notice of the variation to the consumer. See also comments regarding <a href="#">clause 4.8</a> of General Terms for Consumer Customers.
Pricing Plans - Pre Paid Pricing Plans	2.8	<a href="#">5.8</a> General Terms for Consumer Customers	32X(a) 32X(d) & s163	<b>Refund for unused credits:</b> the customer should have a right to receive a refund for unused credits after the unilateral variation has taken effect or be allowed to use the credits upon the original terms agreed upon until the time the credit was originally agreed to be expired. By not allowing the customer this right, there is potential detriment as the customer is <u>forced</u> to use credits originally purchased on one set of terms on a different set of terms. See <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.  <b>Exclusive content/premium services:</b> This term is potentially unfair where the supplier provides exclusive content/premium services and the customer purchased an upgraded handset for the purpose of accessing the supplier's content. Moreover, the supplier can take advantage of its position by forcing customers to accept price increases even though they can elect not to use the service. At a minimum this clause needs to be drawn to the customer's attention as it is potentially very detrimental. See comments regarding <a href="#">clause 5.8</a> of General Terms for Consumer Customers. See <a href="#">Content &amp; Premium Services</a> in report.
Pricing Plans - Pre Paid Pricing Plans	2.9	N/A	32X(d)	<b>Refund for unused credits:</b> the customer should have a right to receive a refund for unused credits after the unilateral variation has taken effect or be allowed to use the credits upon the original terms agreed upon until the time the credit was originally agreed to be expired. By not allowing the customer this right, there is potential detriment as the customer is <u>forced</u> to use credits originally purchased on one set of terms on a different set of terms. See <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.

Pricing Plans - Pre Paid Pricing Plans	3.15	N/A	32X(a) & 32X(c)	The supplier should not be permitted to avoid performance regarding a customer's unused credit. Moreover, this clause penalises the customer but not the supplier for a breach/termination. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
Pricing Plans - Pre Paid Pricing Plans	3.16	8.1(b) of General Terms for Consumer Customers	32X(a)	This clause is unfair because it requires the customer to be locked into the contract until the expiry date of the customer's credit (or when the credits have been used) while the supplier has a right to cancel the service at any time so long as the customer is given 30 days notice (see clause 8.1(b) of General Terms for Consumer Customers). If the supplier has a right to cancel the service at any time then the consumer should have an equal right not to have to use the service and thus obtain a refund <b>at any time</b> of unused credits.
Pricing Plans - Pre Paid Pricing Plans	3.29	N/A	32X(c)	<b>Unlocking fees:</b> Varies depending on date of purchase and whether unlocking occurs within two years of registration. Varies from \$27.50 to \$125. Locking a customer's handset to a particular supplier's network and requiring the customer to pay an unlocking fee is objected to as it is an unreasonable obligation imposed upon the customer. In addition, it potentially locks a customer into using a particular supplier's service so as not to incur the unlocking fee. Furthermore, the unlocking fee is unfair as it punishes the customer for breaching/terminating the contract whilst the supplier can terminate the service at any time without incurring any penalty (see e.g. clause 8 of General Terms for Consumer Customers). See <a href="#">Handset Unlocking Fees</a> in report.
Pricing Plans - Pre Paid Pricing Plans	3.30	N/A	32X(c) & s163	This is potentially a very detrimental term as it may penalise the customer upon cancellation of the contract. Although the supplier may have a legitimate reason for such a clause, this potentially burdensome clause should be highlighted to the consumer.
Pricing Plans - Pre Paid Pricing Plans	5.4-5.6 & 5.10	N/A	32X(a)	This clause is unfair because it requires the customer to be locked into the contract until the expiry date of the customer's credit (or when the credits have been used) while the supplier has a right to cancel the service at any time so long as the customer is given 30 days notice (see clause 8.1(b) of General Terms for Consumer Customers). If the supplier has a right to cancel the service at any time then the consumer should have an equal right not to have to use the service and thus obtain a refund <b>at any time</b> of unused credits.
Pricing Plans - Pre Paid Pricing Plans	5.17	<a href="#">3.29</a>	32X(c)	<b>Unlocking fees:</b> see comments regarding <a href="#">clause 3.29</a> . See <a href="#">Handset Unlocking Fees</a> in report.
Pricing Plans - Pre Paid Pricing Plans	5.19	N/A	32X(c)	This clause permits the supplier to disconnect a customer's service for a trivial/minor breach. See <a href="#">Trivial/Minor Breach</a> in report.
<b>Our current and recent consumer pricing plans</b>	5.13	N/A	32x(c)	The clause permits the supplier to charge a \$50 administration fee in its discretion when the customer changes plans. This allows the supplier to potentially penalise the customer for exit a particular plan early. Suppliers are allowed to charge for legitimate administrative costs involved when a customer ends a plan. The purpose of such charges is for the supplier to recoup costs involved in ending the plan and <u>not</u> to penalise the customer or profit from the

				charge when the customer ends a plan. In allowing the supplier to charge this fee in its discretion, the potential is there for penalty to be imposed or profit to be made.
Our current and recent consumer pricing plans	5.14	N/A	32X(c) & s163	The termination fee is set out in application form. There are concerns regarding adequate notice of the early termination fee to the consumer thus making it a potential hidden cost. To ensure that an early termination fee is not hidden the clause that mentions it should be highlighted to the consumer as it is an important and potentially detrimental term (even if the actual termination charge is in the application form). As a matter of good practice, the early termination fee should also be listed in the Telstra agreement in addition to the application form as it is an important term. The CLC was unable to find a copy of the application form online at the Telstra site ( <a href="http://www.telstra.com.au">www.telstra.com.au</a> ) in order to view the early termination fees. See discussion of early termination fees in report - <a href="#">Early Termination Fees Generally</a> .
Entire contract	N/A	N/A	s163	Contract documents total 485 pages. The length of the contract which includes many terms that are not relevant to a customer makes it difficult for a customer to read and understand the terms that are binding and potentially detrimental. The contract is thus not clearly expressed as required under section 163 of the <i>FTA</i> .
General Terms for Consumer Customers	3.12	N/A	s163	Refers to ACA standards (out of date link). The cross-reference is incorrect and thus the term is not clearly expressed.

# OPTUS

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
Entire contract			163	Contract is 641 pages long.
Consumer Terms	2.8		32X(d), (g), 163	<b>Variation of agreement</b> gives customer a right to cancel the service, as long as they pay fees owed and outstanding equipment charges in a lump sum. Notice will be given of any more than minor detrimental changes directly or by newspaper. For fixed term agreements the provider can make some changes, such as international fees, content/premium services. Clause is compliant with the ACIF Contracts Code but not necessarily fair under the <i>FTA</i> : see: <a href="#">International Calls/Roaming</a> and <a href="#">Content &amp; Premium Services</a> in report. Clause is 5 pages long with up to four levels of subclauses and is very difficult for consumers to understand as material is repeated in slightly different form. Additionally clause allows for lump sum for outstanding equipment charge: see <a href="#">Outstanding Equipment Charges</a> and <a href="#">Supplier Specific Equipment</a> in report.
Consumer Terms	2.9		32X(d)	<b>Unequal variation rights:</b> Consumer cannot vary agreement without provider's consent, except where expressly allowed under agreement. Unequal rights as supplier does not need consumer's consent to vary.
Consumer Terms	5.3		32X(h)	<b>Permitted uses of service:</b> Provider may give notice requesting consumer to comply with this clause and take reasonable steps to ensure compliance after unilaterally determining that the permitted uses clause has been breached. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Consumer Terms	8.2		32X(c)	Cancellation fees are set on standard pricing table and do not form part of the contract.
Consumer Terms	11.1	2.8	32x(c), 163	<b>Customer's cancellation right:</b> Consumer's right to cancel on 30 days notice for ongoing customers. This right exists for all customers where the provider has made a material breach. Fixed term customers may also cancel under 2.8 where the provider has made a variation to the contract. Unless read very closely it appears to

				give all customers, including fixed term customers, a general right of cancellation on 30 days notice under 11.1(a)(i). See <a href="#">Consumer Cancellation Right</a> in report.
Consumer Terms	11.2		32x(c)	Provider's right of cancellation for non-fixed term (casual/pre-paid) contract, with 30 days notice. Compliant with ACIF Contracts Code and unlikely to be unfair because the customer can terminate (on notice) a casual contract.
Consumer Terms	11.3		32X(a), 32X(c)	Provider's right to cancel for all agreements (fixed length and non-fixed length) where fraud, material breach, unpaid amounts owing to any Optus Group company, breach of fair use policy, suffer an insolvency event or dissolution of partnership. These are examples of termination by the supplier immediately but without having to comply with the 30 day notice period and in many instances upon making a unilateral determination as to the breach. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Consumer Terms	11.6	2.8, 11.3	32X(c)	Cancellation fee payable when service is cancelled (cancellation fees can still be charged even if cancellation occurred as a consumer response to unilateral variation or at the supplier's will). Prepaid fees are non-refundable. See <a href="#">Early Termination Fees Generally</a> , <a href="#">Unused Prepaid Credits &amp; Early Termination</a> , <a href="#">Unilateral variation &amp; Early Termination Fees</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.
Consumer Terms	16.1		32x(h)	<b>Definitions Section:</b> "cancellation fee" is a termination charge payable on any cancellation of the service - not only on "cancel the service for convenience". Unfair as it should exclude fees in certain circumstances such as supplier's breach or unilateral variation. See <a href="#">Consumer Cancellation Right</a> in report. 'Unusually High Use' is defined as usage which "exceeds the general average usage" of similar customers. Would seem to be unfair as exceeding average usage is regarded as a material breach. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Optus Digital Mobile Service, Service Description	4	2.8 Consumer terms	32x(c)	Cancellation fees. Fee is reduced depending on how much of the contract minimum term has expired. The fee is excluded when the cancellation is in response to a unilateral variation made by the supplier in a fixed-length contract - see 2.8 Consumer terms discussed above but the examples provided as to minor detrimental impact (as per the requirements of the ACIF Contracts Code) are contentious from a consumer perspective for instance changing content or small increases in content charges will not necessarily be of minor detrimental impact. See <a href="#">Early Termination Fees Generally</a> , <a href="#">Minor Detrimental Impact</a> and <a href="#">Content &amp; Premium Services</a> in report.
Optus Digital Mobile Service	2.4(b)		32X(a)	Supplier can terminate for breach of 'use of service' terms in this and other documents (Fair Go Policy or the SFOA) and can charge a termination/cancellation fee in these circumstances.

Optus Digital Mobile Service	7.2	2.8 Consumer terms	32X(c)	Fee to port a number to another carrier. This fee can act as a barrier to the consumer's right to terminate as a consequence of supplier's variation because whilst the termination rights provided for in 2.8 exclude fees and charges for cancellation other than usage charges or access fees or installation or equipment charges it is arguable that porting charges fall outside charges to be incurred as a consequence of termination and may well be charged even if a consumer exercises a valid termination right.
Standard Pricing Table Section 1 - General Information and Charges	3.1(e)	2.8 and 11.6 Consumer Terms	32X(c)	<b>Forfeiture of unused credits upon cancellation</b> - this is not subject to 2.8 which governs termination rights on unilateral variation. See <a href="#">Early Termination Fees Generally</a> in report.
Standard Pricing Table Section 2 - Current Offer Pricing Plans for Consumer Customers	2.7	2.8, 3.4, 4.6, 5.12, 6.7, 7.12, 8.5, 9.3, 10.8, 11.4, 12.5, 13.5, 14.6, 15.4, 16.4, 17.4, 18.10, 19.4, 20.8, 21.7, 22.7, 23.5, 24.5	32X(c)	<b>Early Cancellation Fees</b> - excluded from application when the cancellation occurs as a result of notice of a right of cancellation being provided as a per the requirements of the Determination - publishing in a national newspaper if the change is detrimental - satisfies current Determination; per ACIF Contracts Code clause 6.2(j) concerning notice in writing and right to terminate - satisfies Code; per close 6.2(t) Code is potentially satisfied but see comments above in relation to the examples (but see <a href="#">Notice of Cancellation Right</a> and <a href="#">Informed Consent</a> in report). Further a query as to how the consumer can satisfy the provider that the change has caused a detriment (see <a href="#">Detriment</a> in report). Excluding considerations of the Code - under the FTA these rights of termination are not sufficient to prevent the terms from being unfair because there is a significant imbalance in that the consumer is not able to limit or avoid the contract in any circumstances without incurring these early termination fees. Additionally even in those circumstances where a termination right is provided for it must be taken up within 42 days and the increased charges must be paid if the service is used after 21 days of the notice and equipment and installation charges must be paid which is particularly relevant for mobile phones as relatively expensive handsets are generally bundled into the usage charges (see <a href="#">Outstanding Equipment Charges</a> at paragraph 46 and <a href="#">Supplier Specific Equipment</a> in report). Finally there are numerous exceptions to termination rights being provided notwithstanding unilateral variation that is detrimental for instance - international services or roaming, or a tax imposed by law (which ought not necessarily be passed onto the consumer and certainly there is no basis for doing so without giving suitable notice and a termination right), increase price of content or premium service. (see <a href="#">International Calls/Roaming</a> , <a href="#">Tax Imposed Charges</a> and <a href="#">Content &amp; Premium Services</a> in report). These cancellation fees (early termination fees) can be as high as \$1,200 for a cancellation that occurs at any time in the first 12 months, the fees are then pro-rata reduced from 80% of the first 12 month fee at 13 months until the end of the 2 year term. This must be regarded as a lock-in term

				(see <a href="#">Early Termination Fees Generally</a> in report). The various fees appear at numerous different parts of the contract as per the related terms column.
Standard Pricing Table Section 2 - Current Offer Pricing Plans for Consumer Customer	2.8	4.7, 5.14, 6.8, 7.13, 8.6, 12.6, 13.6, 14.7, 15.5, 16.6, 17.5, 18.11, 19.5, 20.9, 21.8, 22.8, 23.6, 24.6	32X(d)	Plan Change Fees - if a consumer changes the type of plan they are on they are subject to fees. This is clearly unfair and relevant to consideration of unilateral variation as it reflects an imbalance in the parties' rights and obligations to the detriment of the customer. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Standard Pricing Table Section 3 - Pricing Plans only Available as a Special for Consumer Customers	22.4	29.3, 44.2, 47.6, 51.5, 53.2, 54.2, 55.2, 76.2, 76.4	32X(c)	Early Cancellation Fees. Balance of equipment charges become payable as a lump sum on cancellation, as well as a cancellation fee. see <a href="#">Outstanding Equipment Charges</a> , <a href="#">Supplier Specific Equipment</a> and <a href="#">Early Termination Fees Generally</a> in report
Standard Pricing Table Section 3 - Pricing Plans only Available as a Special for Consumer Customers	29.4	38.4, 51.6, 55.3,	32X(d)	Plan Change Fees. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Mobile Fair Go Policy			32x(h)	Fair use policy. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.

# AAPT

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
General and Home Phone Terms	1.2	Entire Agreement	s163	<b>Unilateral Interpretation:</b> any uncertainty in terms will be interpreted in favour of the consumer. Good practice. However the phrase “reasonable in all the circumstances to do so...” is not clear and should be deleted and/or replaced. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report
General and Home Phone Terms	1.3		s163	<b>Entire Consumer Contact:</b> the terms contained in individual plans and offers were not reviewed. A problem for consumers is that they usually have to consider several different documents in order to determine all of the applicable terms and conditions to the good/service in question. It would be good industry practice if suppliers included all the applicable terms and conditions of a contract in one document which was provided to the consumer at the time of entering into the contract. The contract should contain the entire agreement, be as short as possible and not contain irrelevant terms. Moreover, the document should highlight important and potentially burdensome terms which could occur for example by way of summary at the beginning of a contract/section (see e.g. beginning of AAPT General Terms).
General and Home Phone Terms	1.5		s163	<b>Hidden Termination Clauses:</b> The supplier is permitted to terminate the service pursuant to terms in a particular plan or offer in addition to termination as per the General Terms and Mobile Terms. As the entire agreement is not in one document (see comments regarding <a href="#">clause 1.3</a> General and Home Phone Terms) but instead in several documents, this clause potentially allows the supplier to rely on hidden termination clauses to end the consumer contract/service.
General and Home Phone Terms	2	<a href="#">12.4</a> General and Home Phone Terms	32X(d)	<b>Informed Consent (Hidden Consumer Cancellation Right):</b> Changes to SFOA to customer's detriment, provides for 30 days notice and gives the customer a right to terminate without penalty within 42 days. These requirements are found in section 6.2(j) and are generally considered fair by consumer and industry representatives in the telecommunications industry. However, for the cancellation right triggered by the unilateral variation to be fair, it must be communicated to the consumer in the notice informing the consumer of the unilateral variation. This clause does not require the supplier to inform the customer of the cancellation



				right and thus is a hidden cancellation right. In addition, the consumer will be taken to have consented to the supplier's unilateral variation if the contract is not ended within the 42 day period but the consent cannot be considered to be informed because the consumer has not adequately been informed of the cancellation right. This argument is supported by the fact that suppliers have previously as industry practice imposed unilateral variations on consumers without any right of cancellation offered and also imposing an early termination fee under all circumstances if the contract was ended early. In addition, suppliers are currently not offering a cancellation right for particular types of unilateral variations (see e.g. clauses 12.4-12.5 dealing with unilateral variations in relation to international calls/roaming and third party content services). For the consumer to understand when there is a right to cancel the contract (without incurring an early termination fee) for a unilateral variation, the cancellation right must be communicated to the consumer together with notice of the unilateral variation. Otherwise, consumers will not know when a unilateral variation is binding and when it is not <i>according to the agreement</i> . See <a href="#">Notice of Cancellation Right</a> and <a href="#">Individual Notice</a> in report.
General and Home Phone Terms	2.3		32X(d)	<b>Informed Consent (consent in writing):</b> The supplier could potentially obtain the consumer's consent verbally or in a manner that is implied. As this unilateral variation relates to a fundamental term of the contract (clause 2.2), the supplier should only obtain the consumer's express consent to vary clause 2.2 which must be in writing. See <a href="#">Informed Consent</a> in report.
General and Home Phone Terms	8	12.2 General and Home Phone Terms	32X(c), 32X(k)	<b>Unreasonable obligation on termination:</b> pursuant to clause 8.1, the supplier can potentially impose unreasonable payment period for the final bill following termination of the contract. See also section 6.2(n) of ACIF Contracts Code. The supplier should specify a reasonable payment period for the final bill. <b>Termination fee:</b> the supplier pursuant to clause 8.1 may impose a termination fee in the final bill. The consumer may be penalised for terminating the contract but the supplier can at all times terminate the agreement without incurring a penalty (see e.g. clause 33.1 of General and Home Phone Terms). See <a href="#">Early Termination Fees Generally</a> in report. <b>Obliging customer to pay bill:</b> Upon termination, the supplier requires pursuant to clause 8.2 the consumer to pay the additional bill. This is potentially unfair when dealing with disputed fees/charges. The term can deter/hinder/prevent the customer from recovering any disputed amounts due to the cost/inconvenience of doing so. The supplier is in a better position to bear the risk of not recovering any disputed amounts rather than the consumer. But see clause 12.2 where disputed <i>charges</i> do not need to be paid until resolved. This clause should refer to clause 12.2 to avoid any doubt in how the clause operates and ensure that the term is fair.

General and Home Phone Terms	10.2	<a href="#">clause 1.5</a>	32X(c)	<b>Hidden Termination Clauses</b> : Customer may be obliged to comply in relation to particular services with terms and conditions regarding “reasonable usage”. These terms may permit the supplier to cancel the contract if they are breached and thus are potentially hidden obligations imposed on the consumer. See comments regarding <a href="#">clause 1.5</a> of General and Home Phone Terms).
General and Home Phone Terms	11	Entire Agreement	FAIR TERM	<b>THIS TERM IS FAIR:</b> consumer and industry representatives in the telecommunications industry generally are of the view it is reasonable for the supplier to ask for security when the consumer is a credit risk (see e.g. sections 6.3(m) together with 6.2(b)(v) of the ACIF Contracts Code). Accordingly, it is reasonable for the supplier to terminate the contract when the consumer refuses to provide the security requested. In addition, the supplier has highlighted this term to the consumer as it is potentially burdensome. This supplier has generally highlighted important and potentially burdensome terms throughout the agreement which is good practice.
General and Home Phone Terms	11.3	12.2 General and Home Phone Terms	32X(c), 32X(k)	<b>Off-setting customer’s security refund with supplier’s charges:</b> The deduction from the customer’s security refund of any amounts owed to the supplier such as charges incurred is unfair if the amount in question is a disputed amount. The term can deter/hinder/prevent the customer from recovering any disputed amounts due to the cost/inconvenience of doing so. The supplier is in a better position to bear the risk of not recovering any disputed amounts rather than the consumer. But see clause 12.2 where disputed <i>charges</i> do not need to be paid until resolved. This clause should refer to clause 12.2 to avoid any doubt in how the clause operates and ensure that the term is fair.
General and Home Phone Terms	12.4, 12.5	<a href="#">2.2</a> General and Home Phone Terms	32X(d)	<b>Price increase from third party:</b> pursuant to clause 12.4 the supplier may increase charges based on third party suppliers. This will occur pursuant to clause 2.2 of General and Home Phone Terms. See comments regarding <a href="#">clause 2.2</a> . <b>International Calls/Roaming:</b> the supplier does not offer a cancellation right to the consumer for a unilateral variation regarding international calls/roaming. This clause is not unfair. See <a href="#">International Calls/Roaming</a> in report.
General and Home Phone Terms	12.4, 12.5		32X(g)	<b>CONTENT Variation Clause:</b> no cancellation right provided for unilateral variation regarding content services. In addition, there is no requirement to provide consumer notice of any unilateral variation regarding content (see e.g. section 6.3(r)(ii) of ACIF Contracts Code). The consumer is also not given a right to elect to not use content service without attracting additional charges (see e.g. section 6.3(r)(iii) of ACIF Contracts Code). See <a href="#">Content &amp; Premium Services</a> in report

General and Home Phone Terms	13.3, 14.2		32X(d)	<b>Informed Consent (Hidden Consumer Cancellation Right):</b> Cancellation right is available to consumer for newly introduced administrative fee pursuant to clause 2.2. This is good practice but to ensure that the newly introduced administrative fee (unilateral variation) is fair, the cancellation right must be communicated to the consumer in the notice informing the consumer of the unilateral variation. See comments regarding <a href="#">clause 2.2</a>
General and Home Phone Terms	17.2	17.1	32X(c), s163	<b>No refund Upon termination:</b> the supplier will not provide cash or a cheque for "Service Entitlements" if the service terminated. Although a refund appears to be available for unused credits upon termination pursuant to clause 17.1, it appears that potentially unused credits can constitute Service Entitlements. If that is the case then effectively this allows the supplier to not provide the consumer a refund for unused credits when the contract is terminated. This penalises the consumer but not the supplier for a breach/termination of the agreement. In any even, the clause is not clear as to how it would operate and needs to be clarified. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
General and Home Phone Terms	22.1		FAIR TERM	<b>THIS TERM IS FAIR:</b> Customer to use only equipment compliant with ACMA standards. Good as it places compliance issues within ACMA's standards, not choice of the provider. See <a href="#">Authorised Equipment</a> in report.
General and Home Phone Terms	20, 22.2	31.1(b) General and Home Phone Terms	32X(h)	<b>Unilateral determination of meaning/consumer breach:</b> what is considered to be interference with the network/service is not defined and unclear. If a consumer breaches this clause then potentially this could be considered a material breach of the SFOA and the supplier can terminate the contract pursuant to clause 31.1(b). The way the clause is drafted it potentially may allow the supplier to unilaterally determine what constitutes interference and thus unilaterally determine when the contract has been breached or interpret its meaning. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
General and Home Phone Terms	29		32X(h)	<b>Unilateral determination of meaning:</b> this clause permits the supplier to unilaterally interpret what constitutes excessive and unusual use. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
General and Home Phone Terms	30		32X(c)	<b>Unreasonable obligations:</b> this clause requires the customer to comply with obligations that are unreasonable, are not needed in order for the supplier to provide the service and can result in the customer's contract being pursuant to clause 31.1(b) (material breach). It is reasonable for a supplier to require a consumer to not commit a <b>crime</b> by using the supplier's service but anything in addition to that is excessive and unreasonable as the supplier does not need these rights and can lead to the customer's contract being cancelled unnecessarily (e.g. terminate to contract for the consumer defaming someone or breaching some other civil law such as copyright or breach of confidence. See also clause 31.1 (g)

				& (h) where the supplier can terminate the contract for illegal conduct.
General and Home Phone Terms	31.1(a)		s163	<b>Hidden Termination Clauses:</b> this clause stipulates that the supplier can terminate the contract under provisions that permit the supplier to do so in the SFOA. Clause 31 of the contract deals with terminating the consumer's service. Accordingly, it should outline all the circumstances in this clause where the consumer's contract can be terminated. At the very least, this clause should specifically refer to the other sections of the SFOA that permit the supplier to terminate the contract/service. This clause potentially may result in cancellation clauses being hidden from the consumer as they may not have been adequately brought to the consumer's attention. Cancellation clauses are important and potentially burdensome clauses and need to the consumer's attention.
General and Home Phone Terms	31.1(c)		32X(a), 32X(h)	<b>Unfair Termination Right:</b> Cancelling the contract for factors that are genuinely out of the supplier's control is arguably fair. It is arguable in this instance because the consumer does not have an equal right to cancellation but is rather subject in many instances to an early termination fee. Terminating the contract for operational reasons such as to maintain, repair or restore the service or any part of the network is potentially unfair. This for example could permit the supplier to terminate the contract/service as a result of the supplier's negligence to maintain the network/service and where there has been no fault on the part of the consumer. In addition, the circumstances when the supplier can terminate the contract/service are not clear because the operational reasons that justify termination are not defined. This permits the supplier to <b>unilaterally interpret the meaning of the contract</b> and when it can be terminated. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
General and Home Phone Terms	31.1(e)		32X(a), 32X(h)	<b>Unfair cancellation rights:</b> Cancelling the contract for factors that are genuinely out of the supplier's control is arguably fair. It is arguable in this instance because the consumer does not have an equal right to cancellation but is rather subject in many instances to an early termination fee. However, it is unfair for the supplier to have a right to cancel the contract in circumstances where the supplier may be at fault such as an emergency (not defined). In addition, without defining what constitutes an "emergency" the supplier can <b>unilaterally interpret the meaning of the contract</b> and when it can be terminated. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
General and Home Phone Terms	31.1(l)	33.7 General and Home Phone	32X(c)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time (failure to pay debts as they become due and payable). This is unfair

		Terms		<p>particularly when the customer has to pay an early termination fee when the contract is terminated early (see clause 33.7 of General and Home Phone Terms). See <a href="#">Trivial/Minor Breach</a> in report.</p> <p><b>Cancellation right for consumer's bankruptcy/insolvency:</b> This has been a contentious issue within the telecommunications industry where suppliers have argued that they need to protect themselves from bad debts and consumers have argued that telecommunications services are important to individuals and although someone may be bankrupt they still should have a right to use a mobile phone so long as they continue to pay their bills. It is the CLC's view that the supplier should not have the right to terminate a bankrupt customer's service unless there are reasonable grounds for believing that the customer cannot pay future bills. Bankruptcy/insolvency alone however is not a reasonable ground (see e.g. section 6.3(b) ACIF Contracts Code). The clause becomes more unfair because the customer is subject to an early termination when the service is cancelled for the customer's bankruptcy (see clause 33.7 of General and Home Phone Terms). See <a href="#">Consumer Bankruptcy/Insolvency</a> in report.</p>
General and Home Phone Terms	31.1(m)		32X(h)	<p><b>Unilateral interpretation of CREDIT RISK:</b> Cancellation of the customer's service for 'unusual high volume or spend' is objected to because it provides the supplier with the right to cancel the contract based on the supplier's unilateral interpretation (and discretion). The clause stipulates that the supplier will consider the consumer's previous activity for that service. However, the supplier still has discretion in determining when to terminate the contract. The CLC understands that these are legitimate reasons why a supplier may wish to terminate a contract as it can prevent the customer from being subject to unauthorised usage charges and the supplier from incurring bad debts but the circumstances when the supplier can terminate the contract need to be clearly defined and certain. For example, the supplier can stipulate that an increase in volume and spending by X per cent will permit the supplier to terminate the contract/service (after contacting the consumer to enquire about the increased volume/spending). There must not be any discretion on the part of the supplier in determining when to terminate the contract. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.</p>
General and Home Phone Terms	31.2	33.7 General and Home Phone Terms	32X(c)	<p><b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time (failure to pay debts as they become due and payable). This is unfair particularly when the customer has to pay an early termination fee when the contract is terminated early (see clause 33.7 of General and Home Phone Terms). A notice requesting payment will be issued and termination can occur when payment has not been made by the date specified in the notice. The supplier is however able to impose an unreasonable payment period in the notice (e.g. if you</p>

				do not pay you bill immediately we will cancel your service). See <a href="#">Trivial/Minor Breach</a> in report.
General and Home Phone Terms	33.6	2.2, 33.9 of General and Home Phone Terms	32X(c)	<p><b>No refund for equipment/installation costs:</b> the supplier is not required to provide the consumer with a refund for payments made for equipment/installation costs when the contract has been cancelled for a unilateral variation under clause 2.2. If the consumer cannot use the equipment with another supplier then upon termination for a detrimental unilateral variation, the consumer should have the right to a refund for installation/equipment costs. Without a refund, a consumer could potentially be locked into the contract because the consumer would not want to lose the payments already made towards equipment/installation. See <a href="#">Outstanding Equipment Charges</a> and <a href="#">Supplier Specific Equipment</a> in report.</p> <p><b>Payment of equipment/installation costs upon supplier's material breach:</b> Currently, if there has been a material breach of the contract by the supplier, the consumer has to pay for outstanding equipment costs even if the equipment cannot be used with another supplier (see clause 33.9 of General and Home Phone Terms). No refund for equipment/installation costs is available in these circumstances. See <a href="#">Consumer Cancellation Right</a> in report.</p>
General and Home Phone Terms	33.7		32X(c), s163	<p><b>Early Termination Fee (network access charges):</b> If the consumer breaches the contract or ends it early, then the consumer is required to pay for network access charges for the remaining months of the minimum term. The supplier does not use the term early termination fee to describe this charge which may mislead consumers as the term is used in the contract to cover other charges. Nevertheless, this is an early termination fee and penalises the consumer but not the supplier for breaching/terminating the contract. It also appears to be a penalty clause as it allows the supplier to recover loss of profits (i.e. monthly access fees would be minimum profit supplier would have made on contract). See <a href="#">Early Termination Fees Generally</a> in report.</p> <p><b>Early termination fee (administrative costs):</b> the clause describes the early termination fee as "administrative costs". The supplier is only permitted to recover from the consumer reasonable costs (not loss of profits) upon early termination. The administrative costs the supplier refers should be carefully examined so as not to be disguised as administrative costs when in fact they are penalty fees. It is the CLC's view that the onus on the supplier to establish that the termination fee imposed is in fact reasonable costs being recovered by the supplier and not a claim of loss of profits (penalty fee).The supplier is in the position where it only has access to and can provide such information. In addition, the CLC does not have access to the termination fees which are contained in separate documents. A rule</p>

				<p>that has been applied previously in identifying penalty fees is that if an early termination fee is fixed regardless of the time the termination occurs, then it is likely that it is a penalty fee. The reason for this is that during a fixed term contract (e.g. 24 months) the level of costs that the supplier will have recouped will reduce during the course of the agreement. For example, after 23 months of a 24 month contract the supplier has probably recouped all the costs of providing the service to the customer. Indeed, large profits have probably been made in that time. However, if a customer terminates the 24 month contract after 1 month, then the costs to be recouped will be higher. It should also be remembered that supplier's do not usually include equipment/installation costs in their early termination fees. Therefore, their costs to be recouped are minimised. See <a href="#">Early Termination Fees Generally</a> in report.</p> <p><b>Clause not clearly expressed:</b> the clause relies on the terminology of terminating the contract with and without <i>cause</i>. This terminology will be difficult for consumers to understand and should not be used. The meaning of the clause is confusing as a result of this terminology.</p>
General and Home Phone Terms	33.8	33.1, 33.9	32X(C), s163	<p><b>Unreasonable obligation on termination:</b> the supplier can potentially impose unreasonable payment period for the final bill following termination of the contract. See also section 6.2(n) of ACIF Contracts Code.</p> <p><b>Potential lock-in (outstanding equipment costs):</b> This clause can result in the customer being potentially locked into the contract because although the consumer has a right to end the contract at any time pursuant to clause 33.1, the consumer may not exercise that right because of a high final bill containing outstanding equipment costs. For example, the consumer may not cancel a 24 month contract early on because the outstanding mobile handset payments may be high. Clause 33.9 does not allow the consumer to pay for equipment costs pursuant to the original instalment plan when the contract is terminated pursuant to clause 33.1. See <a href="#">Outstanding Equipment Charges</a> in report</p> <p><b>Clause not clearly expressed:</b> the clause relies on the terminology of terminating the contract with and without <i>cause</i>. This terminology will be difficult for consumers to understand and should not be used. The meaning of the clause is confusing as a result of this terminology.</p>
General and Home Phone Terms	33.9	33.8	32X(c)	<p><b>Penalising the consumer for breach/termination (outstanding equipment costs):</b> The supplier permits the consumer to pay the outstanding equipment costs in accordance with the existing instalment plan <i>unless</i> the consumer breached the SFOA or ended the contract early where the supplier is not at fault. If the consumer breaches the agreement or ends the contract early where the supplier is not at fault then the outstanding equipment costs have to be paid by the due date on the final bill pursuant to clause 33.8. In addition, if the consumer</p>

				qualifies for and takes up the option of paying for the outstanding equipment costs according to the existing instalment plan, the costs may have to be paid within 30 days if the consumer fails to pay an instalment on time. This clause penalises the consumer but not the supplier for a breach/termination of the contract. See <a href="#">Outstanding Equipment Charges</a> in report
General and Home Phone Terms	31, 32, 33 & 2.2		s163	<b>Unclear Termination Clauses:</b> clauses 31, 32, 33 and 2.2 are drafted in a way that require close and careful analysis in order to determine when the consumer/supplier can terminate the agreement and what the consequences of termination will be. These clauses need to all be read in conjunction so as to determine the rights and obligations of the consumer/supplier. They are not clearly expressed and consumers may find it difficult to understand their rights and obligations under the agreement.
Mobile Terms	3.1	2.2	32X(d), 32X(f), & 32X(g)	<b>General Unilateral Variation Clause:</b> this clause states indicates that the supplier has a general right to unilaterally vary national and mobile calls, WAP, SMS, GPRS and MMS and any other value added service in accordance with the consumer's mobile service plan. There is no mention of any right to cancel the contract where there has been a unilateral variation to the consumer's detriment. It is <b>not clear</b> has this clause will operate in conjunction with clause 2.2 of the General and Home Phone Terms and any unilateral variation clause contained in a mobile service plan when there are inconsistencies regarding the consumer's cancellation right. Even if there are not any inconsistencies, consumers may find it difficult to determine what cancellation rights they have if clauses in three separate documents have to be read together. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Mobile Terms	3.4		FAIR TERM	<b>THIS TERM IS FAIR:</b> the supplier can unilaterally vary <b>international roaming</b> charges and not offer a cancellation right to the consumer. This clause is not unfair. See <a href="#">International Calls/Roaming</a> in report.
Mobile Terms	4.4	9 of Mobile Porting Terms and Conditions	s163	<b>Hidden Cancellation Term:</b> The clause stipulates when and how the consumer can cancel the contract. This term is important and potentially burdensome and should be highlighted to the consumer.
Mobile Terms	13.7, 14	2.2 & 17 of General and Home Phone Terms	32X(c), 32X(d)	<b>Unused prepaid credits:</b> the contract (General and Home Phone Terms and Mobile Terms) appears to be silent on the issue of unused prepaid credits upon termination. Accordingly, it appears that the supplier does not give the consumer the right to obtain a refund for unused prepaid credits upon cancellation of the contract including in circumstances where the supplier has made a detrimental unilateral variation or has breached the contract. This penalises the consumer but not the supplier upon breach/termination of the contract. See <a href="#">Unused Prepaid</a>



				<a href="#">Credits &amp; Early Termination</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.
Schedule of Charges	Entire document		NOT REVIEWED	<b>Bundled Plans:</b> the AAPT Schedule of Charges only includes three bundled plans (Mobile Choice; 50c Mobile Bonus; and Go 15 Plus). Regular mobile service plans are not included in the Schedule of Charges and consumer needs to contact AAPT to obtain information regarding charges/plans. Bundled plans are beyond the scope of this compliance review.
Standard Form of Agreement	Entire document		s163	Different sets of terms for general and home phone, mobile, internet, website and other (along with summaries for each) are contained in one long document and not enough is done to differentiate the different documents. Summaries are generally well written.

# VODAFONE

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	2.4(b)-(e) (Value Bundle/Not Fixed Term)		32X(c) & 32X(a)	<b>Forfeiture of unused credits upon change of plan by customer:</b> The supplier should not be allowed to keep the customer's unused credits without providing the service. By requiring the customer to forfeit unused prepaid credits, the supplier is able to avoid performing the contract. The consumer does not have an equal right where the service can be used for free in circumstances where the supplier makes a unilateral variation. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	2.6(i) (Value Bundle/Not Fixed Term)	Sections 13 & 14 of Fair Use Policy (contained in section 5 of the SFOA)	32X(h) & s 163	<b>Discretionary cancellation rights:</b> The clause potentially permits the supplier to unilaterally determine whether the contract has been breached or unilaterally determine whether there has been excessive/unreasonable use. The contract must detail in full and precisely the circumstances that constitute excessive/unreasonable use. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report. <b>Not clearly expressed:</b> the SFOA is divided into sections (e.g. section 5 contains Fair Use Policy and each term is referred to as a section thus making it very difficult and confusing for a consumer to determine what the suppliers is cross referencing to when referring to another "section" of the contract.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	2.8 (Value Bundle/Not Fixed Term)	12.6	32X(d)	<b>Individual notice required:</b> (regarding cancellation right): The Telecommunications (SFOA) Determination 2003 provides for customers to be informed of unilateral variations via public notices such as newspaper advertisements. This does not adequately inform a customer. Individual notice via a letter or text message is fine but must include in the notice sufficient details of the detrimental change (e.g. there will be a price increase, for more details go to ...). In addition, in the CLC's view the individual notice informing the customer of the unilateral variation must also include or make reference to any cancellation right the customer may have in circumstances where the customer has not been adequately informed of their right to cancel the contract at any time. Although this plan allows the customer to exit the contract at any time (see clause 12.6), the customer may not be aware of this right if it has not been brought to the customer's attention in a sufficient manner. If the customer is not aware of the cancellation right and is only informed of a unilateral variation, then

				the customer may feel locked into the contract have feel forced to accept detrimental unilateral variations. See <a href="#">Notice of Cancellation Right</a> and <a href="#">Individual Notice</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	3.5(b) (Value Bundle/Not Fixed Term)	value bundle/fixed term, 36,5 (b) non-value bundle/non fixed term, 53.5(b) non value bundle/fixed term	32X(g)	The clause (5 bullet point) states that changes to content/content providers do not constitute a variation of agreement and are permitted. See <a href="#">Content &amp; Premium Services</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	4.4 (Value Bundle/Not Fixed Term)	22.4 value bundle/fixed term, 37.4 non-value bundle/non fixed term, 54.4 non value bundle/fixed term	FAIR TERM	<b>THIS TERM IS FAIR:</b> No unlocking free imposed on consumer. This is a good example of a fair term as past industry practice has involved suppliers generally imposing an unfair unlocking fee upon customers.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	5.2 (Value Bundle/Not Fixed Term)	23.2 value bundle/fixed term, 38.2 non-value bundle/non fixed term, 55.2 non value bundle/fixed term	32X(c) & 32X(h)	<b>Unreasonable obligations:</b> Clause 5.2(a) requires the customer to comply with obligations that are unreasonable, are not needed in order for the supplier to provide the service and can result in the customer's contract being cancelled for a trivial or minor breach (e.g. only use the service in accordance with Vodafone's agreement or in a manner approved by the supplier; to co-operate with Vodafone and give any information requested; follow Vodafone's reasonable instructions; comply with all laws and regulations; only use service according to agreement or in a manner approved by provider etc) <b>Discretionary cancellation rights:</b> Clause 5.2(b) potentially permits the supplier to unilaterally determine whether the contract has been breached or unilaterally determine its meaning: "...use of the service for a purpose, or in a way, which: "is improper, immoral or fraudulent". See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.

Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	5.3 (Value Bundle/Not Fixed Term)	23.3 value bundle/fixed term, 38.3 non-value bundle/non fixed term, 55.3 non value bundle/fixed term	32X(c)	<b>Unreasonable obligations:</b> Clause 5.3(a) requires the customer to comply with obligations that are unreasonable, are not needed in order for the supplier to provide the service and can result in the customer's contract being cancelled for a trivial or minor breach (e.g. customer must not send or make available material which is "indecent, obscene, pornographic, offensive, racist, menacing, ... confidential"; must not defame someone, contravenes any laws (including civil laws). It is reasonable for a supplier to require a consumer to not commit a <b>crime</b> by using the supplier's service but anything in addition to that is excessive and unreasonable as the supplier does not need these rights and can lead to the customer's contract being cancelled unnecessarily.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	6 (Value Bundle/Not Fixed Term)	24 value bundle/fixed term, 39 non-value bundle/non fixed term, 56 non value bundle/fixed term	32X(g)	<b>No notice of unilateral variation and no cancellation right:</b> This term permits the supplier to unilaterally vary the characteristics of the service to the detriment of the customer. The supplier does not need to inform the consumer of the unilateral variation and does not allow the customer to terminate the agreement when the unilateral variation takes effect (and obtained a refund for any unused credits). Although the customer may be on a monthly contract and can stop using the service when the month ends, the customer should be given a right to terminate the agreement and receive a refund for unused credits if the unilateral variation takes effect before the customer has had a chance to stop using the service (e.g. unilateral variation occurs during the month). See <a href="#">Notice of Cancellation Right</a> and <a href="#">Individual Notice</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	7.7 (Value Bundle/Not Fixed Term)	value bundle/fixed term, non-value bundle/non fixed term, non value bundle/fixed term	32X(f)	<b>Individual notice required:</b> see comments regarding <a href="#">clause 2.8</a> . <b>Unused prepaid credits:</b> A customer may recharge (obtain further credits) before existing credits have been used up or expired. In such circumstances, the customer should be allowed to use existing pre-paid credits on the terms that were originally agreed upon even if the customer obtains further credits (recharges). Once existing credits have been used, the customer can then use the newly obtained credits on the varied terms. If the supplier does not want to provide the customer with this option then the customer should be given the right to obtain a refund for any unused credits after the variation has taken effect. This will ensure that the customer is not forced to accept unilaterally varied terms. See <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	12.4(a)-(c) (Value Bundle/Not Fixed Term)	28.3 value bundle/fixed term, 45.4 non-value bundle/non fixed term, 61.3 non	32X(h)	<b>Discretionary cancellation rights:</b> Clause title of 12.4(a) indicates immediate termination at providers " <u>absolute discretion</u> ". The clause permits the supplier to unilaterally determine whether the contract has been breached or to interpret its meaning. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report. <b>Cancellation right for non payment of charges:</b> (see clause 12.4(b))unfair as it allows the supplier to cancel the service where the consumer has not paid for disputed charges. See <a href="#">Trivial/Minor Breach</a> in report.

		value bundle/fixed term		<p><b>Cancellation for trivial/minor breach:</b> (see clause 12.4(b) the clause allows the supplier to cancel the contract for a minor/trivial breach of the contract by the customer. The customer may be given 7 days to correct the breach if it can be corrected. A minor/trivial breach may not be able to be corrected and even if it can, the supplier still should not have a right to cancel the service for the customer's refusal to correct a minor breach. See <a href="#">Trivial/Minor Breach</a> in report.</p> <p><b>Cancellation right for consumer's bankruptcy/insolvency:</b> See <a href="#">Consumer Bankruptcy/Insolvency</a> in report.</p> <p><b>Unfair Cancellation rights:</b> (see clause 12.4(c)) clause permits the supplier to terminate agreement for customer's "unlawful activity". This includes civil breaches of the law and thus is unfair as it requires the customer to comply with obligations that are unreasonable and are not needed in order for the supplier to provide the service.</p> <p><b>Discretionary cancellation rights:</b> Supplier can terminate agreement for "unusual, unreasonable, excessive..." use of the service by the consumer. The clause permits the supplier to unilaterally determine whether the contract has been breached or to interpret its meaning. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	12.6 (Value Bundle/Not Fixed Term)	28.5 value bundle/fixed term, 45.6 non-value bundle/non fixed term, 61.5 non value bundle/fixed term	32X(c)	<p><b>Misleading termination clause:</b> This clause misleads the consumer to think that this is the only cancellation right that is available and that it can only be exercised pursuant to the requirements stipulated in this clause (e.g. upon payment of charges). For example, from this clause a consumer may be misled into thinking that the contract cannot be terminated for material breach of the supplier and may also think that the supplier's charges must be paid if termination occurs when the supplier has failed to provide the service. See <a href="#">Consumer Cancellation Right</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	14 (Value Bundle/Not Fixed Term)		32X(c)	<p><b>No refund of Pre-paid:</b> this clause stipulates that the supplier will not refund but instead keep the customer's pre-paid credits when there has been a breach of the contract by the customer. This penalises the customer but not the supplier for a breach of the agreement. The supplier does not have to provide anything to the consumer if the supplier breaches the contract. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	15 (Value Bundle/Not Fixed Term)	31 (Value Bundle/Fixed Term), 64 non value bundle/fixed	32X(c), s163	<p><b>Unreasonable obligation on termination:</b> the supplier can potentially impose unreasonable payment period for the final bill following termination of the contract. See also section 6.2(n) of ACIF Contracts Code.</p> <p><b>Return of SIM card:</b> The requirement of having the customer return the SIM card upon termination of the agreement is not unfair per se. This clause is unfair because</p>

		term,		<p>the requirement to return the SIM card or pay a replacement fee is not adequately brought to the customer's attention. This is a potentially burdensome term and customers normally would not expect to have to return a SIM card to the supplier when the contract ends. The term needs to be highlighted and brought to the customer's attention. See <a href="#">Return of Sim Card</a> in report.</p> <p><b>Hidden SIM Card replacement fee:</b> the SIM card replacement fee is not listed and the customer is not referred to where to obtain information on the replacement fee. Accordingly, it is a hidden fee.</p> <p><b>Off-setting customer's refund with supplier's charges:</b> The deduction from the customer's refund of any amounts owed to the supplier such as charges incurred are unfair if the amount in question is a disputed amount. The term can deter/hinder/prevent the customer from recovering any disputed amounts due to the cost/inconvenience of doing so. The supplier is in a better position to bear the risk of not recovering any disputed amounts rather than the consumer.</p> <p><b>No refund upon termination:</b> The customer is not provided with a refund upon termination of any credit on a Prepay Account. A customer should be offered a refund for unused credits/charges (see e.g. section 6.2(f) ACIF Contracts Code). This penalises the customer but not the supplier upon termination. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	18.1 (Value Bundle/Not Fixed Term)	34 (Value Bundle/Fixed Term)	32X(d), 32X(g) & 32X(h)	<p><b>Discretionary/Hidden Notice Requirement upon Unilateral Variation:</b> This clause permits the supplier to determine when to provide notice to the customer of a unilateral variation. It is unfair for the supplier to have a right to unilaterally vary an agreement and not outline when the consumer has a right to know about the unilateral variation. The consumer's rights are unclear and the supplier can unilaterally interpret when it is required to notify the supplier. This is a hidden obligation. The supplier should outline in detail when and how the consumer would be notified of a unilateral variation. See <a href="#">Detriment</a> and <a href="#">Individual Notice</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	20.1(g) (Value Bundle/Fixed Term)		32X(c)	<p><b>Early Termination Fee:</b> The "Early Termination Payment" is a penalty clause for Super Cap Contracts. \$39.50 (which is 50% of plan fees) per month. See <a href="#">Early Termination Fees Generally</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	20.3(l) (Value Bundle/Fixed Term)		32X(c)	<p><b>Early Termination Fee:</b> The "Early Termination Payment" is a penalty clause for Business Cap Contracts. 50% of upfront monthly fee per month. See <a href="#">Early Termination Fees Generally</a> in report.</p>

Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	20.4 (Value Bundle/Fixed Term)		32X(c), (h)	<p><b>No refund of unused credits:</b> clause 20.4(b) requires the customer's unused credits to be forfeited when changing plans. This penalises the customer for terminating the contract/service early. There is no equal penalty applied to the supplier for ending a service/contract early. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.</p> <p><b>Penalty fee for changing plans:</b> clause 20.4(d) requires a customer to pay a fee for Moving to a lower plan and thus penalises the customer but not the supplier for a termination of service/contract. The fee is based on the remaining months but payable on the next bill. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.</p> <p><b>Early Termination Fee:</b> The "Early Termination Payment" is a penalty clause. See <a href="#">Early Termination Fees Generally</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	20.5 (Value Bundle/Fixed Term)	34 value bundle/fixed term, 51 non-value bundle/non fixed term, 58.7 & 58.11 non value bundle/fixed term, 67 non value bundle/fixed term	32X(f), (g)	<p><b>Individual notice required:</b> (regarding cancellation right): The Telecommunications (SFOA) Determination 2003 provides for customers to be informed of unilateral variations via public notices such as newspaper advertisements. This does not adequately inform a customer. Individual notice via a letter or text message is fine but must include in the notice sufficient details of the detrimental change (e.g. there will be a price increase, for more details go to ...). The individual notice informing the customer of the unilateral variation must also include or make reference to any cancellation right the customer has. This is especially important in this case as the clause concerns fixed term contracts. See e.g. section 6.2(j) of the ACIF Contracts Code. See <a href="#">Individual Notice</a> in report.</p> <p><b>Time of unilateral variation notice:</b> consumer and industry representatives are generally of the view that 21 days prior notice from date the unilateral variation will take affect is a reasonable notice period of a unilateral variation (see e.g. 6.2(j)(i) of the ACIF Contracts Code). This clause does not specify the notice period other than stipulating that it will occur prior to the unilateral variation. This permits the supplier to provide an unreasonably short notice period which is unfair as the consumer can suffer detriment as a result.</p> <p><b>Period cancellation right is available:</b> consumer and industry representatives are generally of the view that 42 days from the date the notice of the unilateral variation is provided is a reasonable period for consumers to terminate their contracts (see e.g. 6.2(j)(ii) of the ACIF Contracts Code). This clause does not stipulate a time period for consumers to cancel their contracts for a unilateral variation. It is the CLC's view that the supplier should when notified a consumer of a unilateral variation also include in that notice details of the cancellation right including the period in which a consumer has to terminate the contract. Without such details, consumers will assume that they have to be bound by a unilateral variation having regard to previous industry practices. See <a href="#">Notice of Cancellation Right</a> in report.</p> <p><b>Equipment/installation costs upon termination:</b> the customers could potentially</p>

				<p>be locked into the contract once a detrimental unilateral variation has been made by the supplier by requiring the customer to pay outstanding installation and equipment charges/costs upon termination rather than pay these costs/charges as per the original terms agreed upon (e.g. monthly payments for 12 or 24 months). See <a href="#">Outstanding Equipment Charges</a> and <a href="#">Supplier Specific Equipment</a> in report.</p> <p><b>Proof of detriment:</b> Under clause 20.5(d), where the customer can <i>demonstrate</i> the variation has made a "reasonable detrimental impact" they have the right to terminate without fees or charges, including early termination payments except for balance of existing bill and equipment costs. This is unfair as the customer has to demonstrate that they have actually suffered detriment from the unilateral variation before terminating the agreement. The consumer has to be able to terminate the agreement before suffering detriment. The customer should thus be allowed to terminate the agreement when it has been demonstrated that there is likely to be a detrimental impact from the change. See <a href="#">Detriment</a> in report.</p> <p><b>"Reasonable" detrimental impact:</b> the term reasonable is <u>inconsistent</u> with the test under section 32W of an unfair term and should be deleted. In addition it is hard to see how a consumer can suffer unreasonable detriment. There are degrees of detriment that a consumer can suffer but all detriment will be legitimate/reasonable. See <a href="#">Minor Detrimental Impact</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	21.5 (Value Bundle/Fixed Term)		32X(g)	<p><b>CONTENT Variation Clause:</b> Provider may vary content and content providers and such changes do not constitute variation of agreement. This term applies to fixed term contracts which will result in a consumer suffering a greater degree of detriment than if it were for a contract with no fixed term. See <a href="#">Content &amp; Premium Services</a> in report.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	25.7 (Value Bundle/Fixed Term)	see <a href="#">clause 20.5</a> , clause 58.7 fixed term non value bundle	32X(f)	<p><b>Minor Detrimental Impact:</b> The term minor detrimental impact is taken from section 6.3(t) of ACIF Contracts Code and does not appear to be inconsistent with the definition of an unfair term under section 32W of <i>FTA</i>. The problem here is that the supplier does not have to inform the consumer of a unilateral variation that will result in a minor detrimental impact. This is important because the supplier is assessing/guessing whether the variation is likely to be detrimental upon the customer or only of minor detriment. The customer needs adequate notice of the unilateral variation in order to determine whether the unilateral variation is in fact detrimental or only of minor detriment. This is consistent with the test under section 32W where the circumstances of the consumer in question are looked at. See <a href="#">Minor Detrimental Impact</a> in report.</p> <p><b>Equipment/installation costs upon termination:</b> see comments under this heading regarding <a href="#">clause 20.5</a>.</p> <p><b>Proof of detriment:</b> see comments under this heading regarding <a href="#">clause 20.5</a>.</p> <p><b>"Reasonable" detrimental impact:</b> see comments under this heading regarding</p>



				<a href="#">clause 20.5.</a>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	25.9 (Value Bundle/Fixed Term)	value bundle/fixed term, non-value bundle/non fixed term, 58.9 non value bundle/fixed term	32X(f)	<b>CONTENT Variation Clause:</b> This clause applies to fixed term contracts and there is no cancellation right provided for unilateral variation. In addition, the notice period of the unilateral variation is not prescribed. See <a href="#">Content &amp; Premium Services</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	25.10 (Value Bundle/Fixed Term)			<b>Individual notice required:</b> see comments under this heading regarding <a href="#">clause 20.5</a> <b>Time of unilateral variation notice:</b> see comments under this heading regarding <a href="#">clause 20.5</a> <b>Period cancellation right is available:</b> see comments under this heading regarding <a href="#">clause 20.5</a>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	26.8(c) (Value Bundle/Fixed Term)		32X(c)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time. See <a href="#">Trivial/Minor Breach</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	27 (Value Bundle/Fixed Term)	44, 28, 20.5, 24.10, 27.4	s163	Term of contract and early termination fees. End of contract at expiry of term or when terminated by either party under cl 44 which refers back to cl 28. Early termination payments are payable where termination by the customer or provider (refers to cl 27.4 which does not exist) which is subject to cl 20.5 (changes to features of plan - unsure why cross referenced) and 24.10 (does not exist). Extremely confusing drafting which requires the customer to cross reference back and forth across sections and even then the meaning is unclear.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	28.4 & 28.5(Value Bundle/Fixed Term)		32X(a) & 32X(c)	<b>Early Termination Fee:</b> Clause 28.4 permits the supplier to terminate the agreement for any reason without being penalised. However the consumer must pay an early termination fee for terminating the agreement early. See <a href="#">Early Termination Fees Generally</a> in report. <b>Unreasonable notice period of termination:</b> a general 14 days notice period for cancelling a contact is too short a may result in consumer s suffering detriment from such as short notice period. See also section 6.2(f)(ii) of the ACIF Contracts Code

				<p>where a general 30 day notice period has been prescribed as a minimum for terminating a <i>casual/prepaid contract</i> (no general supplier right of cancellation is permitted for fixed term contract).</p> <p><b>Misleading termination clause:</b> clause 28.5 is a misleading termination clause. See comments regarding <a href="#">clause 12.6</a>.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	58.8 (not value bundle/fixed term)			<b>International Calls/Roaming:</b> See <a href="#">International Calls/Roaming</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	60.2 (not value bundle/fixed term)		32X(c)	<b>Early termination fee:</b> On termination by either party (except where the provider terminates pursuant to 61.4) the customer must pay the monthly fees for the balance of the term. See <a href="#">Early Termination Fees Generally</a> in report.
Standard agreement for the supply of the Vodafone Mobile Telecommunications Service	Section 5, Fair Use Policy		32X(d), 32X(h)	<p><b>Unilateral variation of Fair Use Policy:</b> Supplier has right to unilaterally vary fair use policy (see clause 2 of Fair Use Policy). This is unfair, particularly as the supplier can terminate the contract for the customer's breach of the Fair Use Policy (see e.g. 2.6(i) (Value Bundle/Not Fixed Term)). See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.</p> <p><b>Unilateral interpretation/determination of breach:</b> The fair use policy attempts to define excessive and unreasonable use but fails to do so with enough accuracy. The way the policy is drafted, requires the supplier to determine when the consumer has breached the contract and leaves the consumer in a position where the consumer's rights and obligations are not clearly defined. This is to the consumer's detriment. To avoid this, the supplier should define with great detail and accuracy what constitutes excessive and unreasonable use and not allow for any unilateral interpretation of the contract. There is still room for the supplier (terms are defined). Where there is a breach, provider may contact customer to discuss changing usage and if excessive or unreasonable use continues may charge excess rates, suspend or limit services and terminate the agreement in accordance to cl 12.4(b) (which relates only to Value bundle/non fixed term contracts). Compliant as it is reasonably certain. Good practice in that it requires the provider to contact the customer before taking detrimental action. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a>.</p>
Standard agreement for the supply of the Vodafone Mobile Telecommunications	Entire contract		163	Entire SFOA is 300 pages long. Key terms including potentially burdensome terms are buried, not brought to the customer's attention and thus hidden. It is not immediately clear which terms relate to which prepaid and postpaid, especially because there are terms that are identical across different plans. Even the index

Service				<p>does not draw a clear distinction between the two sets of clauses. There are also a number of dead links in cross references. Table of contents does not match actual clauses. Effectively a compilation of four different sets of contact terms for four different plans (value pack/non fixed term, value pack/fixed term, non-value pack/non fixed, non-value pack/fixed) are repeated with much duplication which makes the contract confusing and also makes it easy to miss the differences between each. The document is too large and complex for a consumer to be able to easily determine the applicable right and obligations under his/her agreement.</p>
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# VIRGIN

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
"Boring but Necessary" Summary			s163	Concise, 2 A4 pages folded. Example of good practice.
Standard Form of Agreement	entire document		s163	Document is 9 pages long and generally well drafted.
Standard Form of Agreement	2(a)		s163	<b>Return of SIM card:</b> The requirement of having the customer return the SIM card including upon termination of the agreement is not unfair per se. This clause is potentially unfair because the requirement to return the SIM card or pay a replacement fee is not adequately brought to the customer's attention. This is a potentially burdensome term and customers normally would not expect to have to return a SIM card to the supplier when the contract ends. The term needs to be highlighted and brought to the customer's attention. See <a href="#">Return of Sim Card</a> in report.
Standard Form of Agreement	3(c)(ii),(iii), (v) and (vi)	11	32X(c)	<b>Unreasonable obligations:</b> Clauses 3(c)(ii),(iii), (v) and (vi) requires the customer to comply with obligations that are unreasonable, are not needed in order for the supplier to provide the service and can result in the customer's contract being cancelled for a trivial or minor breach (e.g. customer must not send or make available material which is indecent, offensive, confidential, defamatory or which contravenes any laws (including civil laws); customer is required to comply with the supplier's requests for information or reasonable instructions). It is reasonable for a supplier to require a consumer to not commit a <b>crime</b> by using the supplier's service but anything in addition to that is excessive and unreasonable as the supplier does not need these excessive rights and can lead to the customer's contract being cancelled unnecessarily (pursuant to clause 11).

Standard Form of Agreement	3(c)(iv)		32X(d)	<b>Authorised Equipment:</b> for comments regarding clause 3(c)(iv). See <a href="#">Authorised Equipment</a> in report.
Standard Form of Agreement	3(c)(vii)	11	32X(h)	<b>Unilateral determination of meaning/ breach:</b> clause 3(c)(vii) prohibits jeopardizing the network and could result in the contract being terminated when this occurs pursuant to clause 11. What is considered jeopardizing the network is not defined and unclear. The way the clause is drafted it potentially may allow the supplier to unilaterally determine what constitutes jeopardizing the network and thus unilaterally determine when the contract has been breached or interpret its meaning. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> .
Standard Form of Agreement	3(c)(x)	11	32X(d), s163	<b>Unilateral Introduction/Amendment of Fair use policy:</b> clause 3(c)(x) requires complying with a fair use policy that may be displayed on Virgin website. This potentially allows the supplier to introduce a fair use policy at any time or amend it at any time (without notifying the consumer when this occurs) to the detriment of the consumer. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. <b>Hidden Fair Use Policy:</b> having the fair use policy on the website and not in the agreement (and also not notify the consumer when fair use policy is introduced/amended) allows the supplier to impose hidden obligations upon the consumer. If these hidden obligations are breached, the supplier could potentially terminate the contract pursuant to clause 11.
Standard Form of Agreement	3(e)		32X(a), 32X(g)	<b>Unilateral variation of goods/service:</b> Provider may refuse service or provide limits at any time without notice. This allows the supplier to change what goods/services it will provide the consumer from what was originally agreed upon. In addition it permits the supplier to avoid or limit performance of the contract. The clause is made more unfair by the fact that the supplier does not have to notify the consumer when the service is going to be refused or a credit limit going to be imposed. See <a href="#">Individual Notice</a> , <a href="#">Notice of Cancellation Right</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Standard Form of Agreement	4(a)	18(a)	32X(f), 32X(d), s163	<b>Unilateral Variation of Prices:</b> Charges are available at stores and on website and may be changed from time to time. If change is to the customer's detriment, notice will be given under cl18(a). No option to terminate. See <a href="#">Individual Notice</a> , <a href="#">Notice of Cancellation Right</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. <b>Hidden Charges:</b> having price list on the website and not in the agreement allows the supplier to impose hidden charges upon the consumer.
Standard Form of Agreement	4(d)			<b>International Calls/Roaming:</b> See <a href="#">International Calls/Roaming</a> in report.

Standard Form of Agreement	4(e)		32X(d)	<b>Tax Imposed Charges:</b> The consumer is not given notice of a tax imposed price increase. See <a href="#">Tax Imposed Charges</a> in report.
Standard Form of Agreement	4(g)(ii)		32X(d)	<b>Unilateral Variation:</b> the supplier is permitted to “impose conditions from time to time...”. The consumer is not given a right to terminate the agreement for a detrimental variation (without incurring additional charges/early termination fee). See <a href="#">Individual Notice</a> , <a href="#">Notice of Cancellation Right</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report
Standard Form of Agreement	4(h)(iii)		32X(c), 32X(d)	<b>No refund upon termination/unilateral variation:</b> the supplier will not provide a refund or credit on another service for the consumer’s unused credits. This appears to include any circumstance upon which the consumer may terminate the agreement including where the supplier has materially breached or unilaterally varied the agreement. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report.
Standard Form of Agreement	4(h)(iv)	4(h)(iii), <a href="#">18(a)</a>	32X(g)	<b>Credit Limit Unilaterally Imposed:</b> the supplier can impose a credit limit upon prepaid customers. Although prepaid customers can exit the contract at any time and not incur an early termination fee, this term is unfair because pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. In addition, the consumer may not be adequately informed of credit limit imposed unilaterally (see comments regarding <a href="#">clause 18(a)</a> ).
Standard Form of Agreement	4(h)(vi)	4(h)(iii), <a href="#">18(a)</a>	32X(g)	<b>Expiry of Prepaid Credits (unilateral variation):</b> the phrase “...unless specified otherwise...” implies that the supplier can unilaterally vary the expiry period of the prepaid credits. Although prepaid customers can exit the contract at any time and not incur an early termination fee, this term is unfair because pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. In addition, the consumer may not be adequately informed of any unilaterally variation to the credit expiry period (see comments regarding <a href="#">clause 18(a)</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report).
Standard Form of Agreement	4(i)(ii)	4(h)(iii), <a href="#">18(a)</a>	32X(g)	<b>Credit Limit Unilaterally Imposed:</b> the supplier can impose a credit limit upon postpaid customers. This permits the supplier to vary the characteristics of the goods/services at its discretion and not permit the consumer to terminate the contract without incurring an early termination fee (see clauses 5(d) and 11(c)(ii)). See: <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. In addition, pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. Finally, the consumer may not be adequately informed of credit limit imposed unilaterally (see comments regarding <a href="#">clause 18(a)</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report).

Standard Form of Agreement	4(i)(iii)	4(h)(iii), <a href="#">18(a)</a>	32X(g)	<b>Billing Unilateral Variation:</b> the clause appears to provide the supplier with absolute discretion regarding billing postpaid customers. This permits the supplier to vary the characteristics of the goods/services at its discretion and not permit the consumer to terminate the contract without incurring an early termination fee (see clauses 5(d) and 11(c)(ii)). See: <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. In addition, pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. Finally, the consumer may not be adequately informed of any change to billing (see comments regarding <a href="#">clause 18(a)</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report).
Standard Form of Agreement	4(i)(iv)		32X(c), 32(d), 32X(f), 32X(h)	<b>Payment Period Unilaterally Varied:</b> Supplier can require customer to pay by an earlier date at the supplier's "reasonable request". Reasonable is not defined which allows the supplier to unilaterally vary the terms or interpret the meaning of this term. See: <a href="#">Unilateral variation &amp; Early Termination Fees</a> and <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report. <b>Late payment penalties:</b> supplier can require the consumer to pay a dishonour fee, late payment fee or interest for paying a bill late. This penalises the customer but not the supplier for a breach of the contract. <b>Discretionary fees:</b> the supplier has discretion as to when to impose the late payment fees and what amounts they may be.
Standard Form of Agreement	4(i)(v)	11(b)	32X(c) 32(d), 32X(f), 32X(h)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time (failure to pay debts as they become due and payable). This is unfair particularly when the customer has to pay an early termination fee when the contract is terminated early (see clauses 5(d) and 11(c)(ii)). See <a href="#">Trivial/Minor Breach</a> in report. <b>Late payment penalty fees:</b> supplier can pass charges incurred onto consumer for direct debit failure. These are <b>discretionary fees</b> and uncertain and penalise the consumer for breaching the agreement.
Standard Form of Agreement	4(i)(vi), 4(i)(vii), 4(i)(vii),	4(h)(iii), <a href="#">18(a)</a>	32X(c) 32(d), 32X(f), 32X(g), 32X(h)	<b>Discretionary fees:</b> the supplier has discretion as to when to impose costs regarding overdue amounts and what amounts they may be (see clause 4(i)(vii)). <b>Postpaid payment option (unilateral variation):</b> the supplier has absolute discretion regarding postpaid payment option (see clause 4(i)(vii)). This permits the supplier to vary the characteristics of the goods/services at its discretion and not permit the consumer to terminate the contract without incurring an early termination fee (see clauses 5(d) and 11(c)(ii)). See: <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. In addition, pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. Finally, the consumer may not be adequately informed of any change to postpaid payment option (see comments regarding <a href="#">clause 18(a)</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report).

				<p><b>Prepaid charges/security deposit unilaterally Imposed:</b> the supplier pursuant to clause 4(i)(vii), can at its absolute discretion request charges of postpaid customers to be paid upfront. This permits the supplier to vary the characteristics of the goods/services at its discretion and not permit the consumer to terminate the contract without incurring an early termination fee (see clauses 5(d) and 11(c)(ii)). In addition, pursuant to clause 4(h)(iii) the consumer cannot obtain a refund of unused credits when exiting the contract. Finally, the consumer may not be adequately informed of credit limit imposed unilaterally (see comments regarding <a href="#">clause 18(a)</a> and <a href="#">Unused Credits &amp; Unilateral Variation</a> in report).</p>
Standard Form of Agreement	5(b)-(d)		32X(c), s163	<p><b>Early Termination/Penalty Fees:</b> where customer decides to change terms (including upgrading of phone) or cancel account, the customer is <i>immediately</i> liable for remaining monthly instalments on handset. No option to continue to pay in monthly terms. Early termination fee applies if cancellation occurs in first six months of fixed term. The clause penalises the customer for terminating the contract and potentially locks in the customer by requiring paying fees to exit the contract and to do so immediately (<b>unreasonable payment period</b>). The fees that apply upon termination appear to go further than the supplier recovering its reasonable costs and seem to cover loss of profits which is prohibited. See <a href="#">Early Termination Fees Generally</a> in report.</p> <p><b>Unclear termination clauses:</b> Drafting is overly complex and difficult to interpret. One of the problem is that it is not clear which termination charges apply to the handset and which to the service and how much.</p> <p><b>Hidden Early Termination Charge:</b> having the termination charge (also referred to as 'Premature Evacuation Fee') on the website or advertising material and not in the agreement allows the supplier to impose hidden fees upon the consumer.</p>
Standard Form of Agreement	5(f)	11	32X(c), 163	<p><b>Unclear Clause:</b> Clause is poorly drafted and does not make sense</p> <p><b>Unlocking fees:</b> Locking a customer's handset to a particular supplier's network and requiring the customer to pay an unlocking fee is objected to as it is an unreasonable obligation imposed upon the customer. In addition, it potentially locks a customer into using a particular supplier's service so as not to incur the unlocking fee. Furthermore, the unlocking fee is unfair as it penalises the customer for breaching/terminating the contract whilst the supplier can terminate the service at any time without incurring any penalty (see e.g. clause 11). See <a href="#">Handset Unlocking Fees</a> in report.</p> <p><b>Hidden unlocking fees:</b> having unlocking fees on the website and not in the agreement allows the supplier to impose hidden fees upon the consumer.</p> <p><b>Refusal to unlock phone:</b> the supplier can refuse to unlock the consumer's phone from the network when the consumer has breached the contract. This penalises the consumer but not the supplier for breaching the contract.</p>



Standard Form of Agreement	6(f)		32X(f)	<b>Discretionary fees:</b> the supplier has discretion as to when to impose charges regarding disputes/investigations and porting and what amounts those charges may be. The consumer cannot terminate the agreement as a result of any fee imposed by the supplier pursuant to this clause. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Standard Form of Agreement	7(a)(ii)	7(b)	32X(c), 32X(d), 32X(f)	<b>Discretionary Fee:</b> the supplier has discretion as to when to impose a port out fee and what the amount of that fee will be. See also clause 7(b) where there is also a discretionary port out fee.
Standard Form of Agreement	7(b)		32X(c)	<b>Unused Credits:</b> customer is not provided a refund of unused credits when the contract is terminated. This penalises the customer but not the supplier upon termination of the contract. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
Standard Form of Agreement	10(a)(i)	5(b)-(d), 11(c)(ii)	32X(a) & 32X(c)	<b>Unequal Termination Rights:</b> This clause permits the supplier to terminate the service to upgrade the network or for maintenance work even if this is due to the supplier's fault or negligence or is matter that is within the supplier's control. If the customer terminates the agreement however an early termination fee applies (see clauses 5(b)-(d)). In addition, pursuant to clause 11(c)(ii) the customer is required to pay termination charges (eg remaining monthly payments) when the contract ends upon the customer's breach. The contract penalises the consumer but not the supplier for a breach/termination of the agreement. See <a href="#">Early Termination Fees Generally</a> in report.
Standard Form of Agreement	10(a)(ii)	11(c)(ii)	32X(c)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the service for a trivial or minor breach. This is unfair particularly when the customer can be required to pay termination charges when the contract ends (see 11(c)(ii)). See <a href="#">Trivial/Minor Breach</a> in report.
Standard Form of Agreement	10(a)(iii)	11(c)(ii)	32X(c), 32X(h), s163	<b>Unfair cancellation right:</b> this term allows the supplier to terminate the service when the consumer damages the network or puts it at risk. This needs to be better defined as it allows the supplier to unilaterally interpret when the contract has been breach. In addition, the term potentially allows the supplier to terminate the service when the consumer damages the network or puts it at risk where this is caused by the supplier's fault or negligence. This is particular unfair when you take into account clause 11(c)(ii) where the customer is required to pay termination charges (eg remaining monthly payments) when the contract ends upon the customer's breach. The contract penalises the consumer but not the supplier for a breach/termination of the agreement. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report. <b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the service for the customer providing false or misleading information. This allows the supplier to terminate the service for a trivial or minor breach – eg accidentally providing

				inaccurate information that is not important. This is unfair particularly when the customer can be required to pay termination charges when the contract ends (see 11(c)(ii)). See <a href="#">Trivial/Minor Breach</a> in report.
Standard Form of Agreement	10(a)(iv)	11(c)(ii)	32X(c), s163	<b>Penalising the consumer but not the supplier:</b> if the consumer does not use the service for 180 days the service can get cancelled and the customer can be required to pay termination charges pursuant to clause 11(c)(ii) (eg remaining monthly payments). <b>Hidden Termination Clause:</b> the clause should be highlighted to the consumer as it is an important and potentially burdensome clause.
Standard Form of Agreement	10(a)(v)		32X(c)	<b>Trivial/Minor Breach:</b> This clause permits the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time or slightly going over their credit limit for the first time (eg by \$1). This is unfair particularly when the customer has to pay an early termination fee when the contract is terminated early (see clauses 5(d) and 11(c)(ii)). See <a href="#">Trivial/Minor Breach</a> in report.
Standard Form of Agreement	10(a)(vi)	11(c)(ii)	s163	<b>Hidden Termination Clause:</b> cross-referencing to an industry code to outline the termination rights of the supplier makes these rights hidden to the consumer. This is particularly unfair when you consider that termination clauses are important & potentially burdensome clauses per se and the consumer may be required to pay termination charges when the contract ends (see eg clause 11(c)(ii)).
Standard Form of Agreement	10(b)		s163, 32X(c)	<b>Hidden termination charge:</b> the reconnection charge is not specified. In addition the charge could penalise the consumer but not the supplier for breach/termination of agreement.
Standard Form of Agreement	10(f)	10(a)-(b)	32X(c)	<b>Detriment:</b> the comments made regarding clauses 10(a) and 10(b) regarding unfairness should also take into account that pursuant to clause 10(f) the consumer can lose his/her phone number. This is the potential detriment that can be suffered by consumers from the service being disconnected unfairly pursuant to clause 10(a) and 10(b).
Standard Form of Agreement	11(a)		s163	<b>Unclear Cancellation Right:</b> the notice period/method is not specified in this clause but rather refers to what is required by law. Most consumers will not know what the law requires thus making this termination clause unclear to the consumer.
Standard Form of Agreement	11(b)(i)-(iii)	5(d), 11(c)(ii)	32X(c)	<b>Trivial/Minor Breach:</b> Clauses 11(b)(i), 11(b)(ii) and 11(b)(iii) permit the supplier to terminate the contract for a trivial or minor breach such as a long standing customer paying a bill late for the first time. This is unfair particularly when the customer has to pay an early termination fee when the contract is terminated early (see clauses 5(d) and 11(c)(ii)). In addition, pursuant to clause 11(a), the supplier can terminate the agreement at any time and not incur a penalty. See <a href="#">Trivial/Minor Breach</a> in report.

Standard Form of Agreement	11(b)(iv)	11(c)(i)(ii)	32X(a), 32X(b) & 32X(c)	<b>Cancellation right for consumer's bankruptcy/insolvency:</b> This has been a contentious issue within the telecommunications industry where suppliers have argued that they need to protect themselves from bad debts and consumers have argued that telecommunications services are important to individuals and although someone may be bankrupt they still should have a right to use a mobile phone so long as they continue to pay their bills. It is the CLC's view that the supplier should not have the right to terminate a bankrupt customer's service unless there are reasonable grounds for believing that the customer cannot pay future bills. Bankruptcy alone however is not a reasonable ground (see e.g. section 6.3(b) ACIF Contracts Code). The clause becomes more unfair because the customer is subject to an early termination when the service is cancelled for the customer's bankruptcy (see clause 11(c)(i)(ii)). See <a href="#">Consumer Bankruptcy/Insolvency</a> in report.
Standard Form of Agreement	11(b)(v)	11(c)	32X(a), 32X(b) & 32X(c)	<b>Unfair cancellation rights:</b> Canceling the contract for factors that are genuinely out of the supplier's control may be fair. However the network provider not making the network available covers many circumstances where it would be within the supplier's control (eg the supplier's network access agreement with the Network provider is not renewed or is cancelled). What is particularly unfair with this clause is that pursuant to clause 11(c) the consumer will still be liable to pay for termination charges and forfeit remaining credits even though the contract is cancelled pursuant to this clause.
Standard Form of Agreement	11(b)(vi)		32X(a), 32X(b)	<b>Unfair Cancellation Right:</b> this clause permits the supplier to terminate the contract and impose termination charges (see clause 11(c)(i)(ii)) in circumstances where it is within the supplier's control or as a result of the supplier's fault. In addition, it is not clear why the supplier needs to cancel the contract if the customer can be given a new number.
Standard Form of Agreement	11(c)(i)		32X(c)	<b>Forfeiture of unused credits:</b> upon cancellation, the customer loses outstanding credits. This penalizes the consumer but not the supplier upon termination. See <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.
Standard Form of Agreement	11(c)(ii)	11(a)	32X(c), s163	<b>Penalty Clause:</b> this clause penalizes the customer for a termination/breach but the supplier can terminate the clause at any time without incurring a penalty (see clause 11(a)). The clause is also drafted in an unclear manner as it is difficult to identify the fees payable upon termination but they seem to be quite significant as they seem to include a termination fee plus outstanding monthly access fees. See <a href="#">Early Termination Fees Generally</a> in report.
Standard Form of Agreement	17(a)		32X(h)	<b>Unilaterally interpret "credit risk":</b> the supplier is permitted to unilaterally interpret when the customer is a credit risk and can terminate the agreement based on the unilateral interpretation. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.

Standard Form of Agreement	17(b)		32X(c) & 32X(k)	This clause penalizes the consumer but not the supplier for a breach. In addition, if the consumer has disputed a fee or charge, this clause would limit the consumer from seeking redress.
Standard Form of Agreement	18(a)		32X(d), (g)	<b>Unilateral Variation:</b> Provider may change the terms at any time, if this is to the customer's detriment the provider will give notice. The consumer is not given an option to terminate the contract for a detrimental variation. See <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report. This clause also permits the supplier to provide public notice rather than individual notice of a detrimental variation – this potentially could result in the consumer not being adequately informed of the unilateral variation. See, <a href="#">Individual Notice</a> discussed in paragraph 16 <a href="#">Notice to Prepaid/Casual Customer</a> at paragraph 23 and <a href="#">Time of Notice</a> , at paragraph 20 of report.

# THREE

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
Summary of Terms for Postpaid Services (Summary SFOA)	2.1		163	States that during a minimum term, the customer can end the agreement only in accordance with customer terms but does not reference which terms.
Summary of Terms for Postpaid Services (Summary SFOA)	3.1		163, may make penalties hidden	<b>Customer's right of termination</b> sets put 3 separate categories: if provider seriously breaches the agreement; makes a variation; "or if you chose to do so". Does not cross reference relevant terms that apply to each situation, nor does it mention the fact that conditions elsewhere in the contract attach on the customer's right to terminate (including penalty fees).
Summary of Terms for Postpaid Services (Summary SFOA)	4		32(c)	When agreement ends the customer must pay all charges due which can include payments, cancellation fees and an unlocking fee. There is no distinction made between agreements which end because of customer fault, provider fault, provider variation or at the expiry of the contract term. See <a href="#">Early Termination Fees Generally</a> , <a href="#">Unilateral variation &amp; Early Termination Fees</a> and <a href="#">Handset Unlocking Fees</a> in report.
Summary of Terms for Postpaid Services (Summary SFOA)	5		32X(d)	Clause 3 of SFOA sets out variation rights of supplier, some of which are unfair.
Summary of Terms for Postpaid Services (Summary SFOA)	8.5		32X(f)	Reserving right to introduce billing fees in the future.
Summary of Terms for Postpaid Services (Summary SFOA)	8.9		163	Binds customer to a Fair Use Policy which is buried in the website and difficult to find. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> and <a href="#">Part D</a> in report.
<b>Customer Terms for Postpaid Services (SFOA)</b>	2.1	3.5, 3.6, 10	32X(b), 163	Customer may end an agreement during the minimum term and refers customer to relevant sections, clause does not spell out penalties for early termination which appear elsewhere in contract.

Customer Terms for Postpaid Services (SFOA)	3.1		32X(c) 32X(g)	<b>(Supplier's variation rights) International call and roaming</b> rates vary from time to time. Asks customer to confirm rates before calling. Adheres to Code recommendations but unfair because the terms are not drawn to the customers attention, are not in the summary SFOA and potentially put the consumer at risk of unknown detriment by not providing for notice or exit rights. See <a href="#">International Calls/Roaming</a> in report.
Customer Terms for Postpaid Services (SFOA)	3.2		32X(c)	<b>(Supplier's variation rights):</b> Charges for optional services (including <b>content</b> ) may be variable or only valid for a limited period of time. Provider will give reasonable notice of increases in charge so customer can elect to cease subscribing for that particular element. No right to terminate, even if that option/content is a significant reason for customer's choice of this provider and thereby customer will suffer detriment as a result of this change. See <a href="#">Content &amp; Premium Services</a> in report.
Customer Terms for Postpaid Services (SFOA)	3.3		32X(c), 32X(g)	<b>(Supplier's variation rights):</b> Variation of fees based on government charges or <b>taxes</b> . Unfair - no undertaking to give notice thereby in breach of Code requirements and no right of termination. Refer to further analysis in report - government charges or taxes. See <a href="#">Tax Imposed Charges</a> in report.
Customer Terms for Postpaid Services (SFOA)	3.4		32X(c)	<b>(Supplier's variation rights):</b> Variation of <b>content charges</b> where third party content provider varies the price. Gives customer notice and right to cease subscribing but the notice and right to cease is conditioned on being within the minimum term and having used the service in the past six months. No right of termination is provided. Notice should be provided of price increases regardless of whether it is a fixed term contract. See <a href="#">Content &amp; Premium Services</a> , <a href="#">Individual Notice</a> and <a href="#">Notice of Cancellation Right</a> in report.
Customer Terms for Postpaid Services (SFOA)	3.5	11	32X(d)	<b>(Supplier's variation rights):</b> Third party carriage including roaming services, allows provider to vary where contract with third party has varied. See <a href="#">International Calls/Roaming</a> in report. Provides for notice and right to terminate under conditions in term 11 (see discussion on 11 - all remaining installments on handset installment plan become payable).
Customer Terms for Postpaid Services (SFOA)	3.6	11	32X(c), (f)	<b>(Supplier's variation rights):</b> Variation of prices. Provides for notice if more than a minor detriment and right to terminate if not a fixed term contract. Refers to clause 11 for Termination charges (see discussion on clause 11 - installments on handset or other devices are immediately payable).
Customer Terms for Postpaid Services (SFOA)	4.6		32X(d)	Variation of services because content varies. No notice provided as to these variations and no right to termination. See <a href="#">Content &amp; Premium Services</a> and <a href="#">Minor Detrimental Impact</a> in report.

Customer Terms for Postpaid Services (SFOA)	4.11	3.1 and 3.5	32X(d)	Variation of prices when roaming. Does not provide for notice or termination right. See <a href="#">International Calls/Roaming</a> in report.
Customer Terms for Postpaid Services (SFOA)	5.1		32X(a)	Customers may only use handsets and devices approved by the provider. No indication of what may occur if a supported device is withdrawn from support during the period of the contract. See <a href="#">Supplier Specific Equipment</a> .
Customer Terms for Postpaid Services (SFOA)	5.2	11 and 10.1(iii) 10.1(b) 10.2(b) and 3.5 3.6	32X(c)	Unlocking only permitted via Three and unlocking fees payable in certain circumstances. Elsewhere contract provides for unlocking fees whenever contract has been terminated at customers choice, or at the end of a month to month contract, or because of customers conduct - includes a long list of triggers for termination and imposition of a locking fee. Note that unlocking fee is NOT payable on customer's termination due to unilateral variation. However, contract requires much cross-referencing to determine exact circumstance of imposition of fees. Clearly the customer is penalised for ending or breaching a contract by the imposition of these unlocking fees notwithstanding the exclusion from operation in relation to unilateral variation by the supplier. See <a href="#">Handset Unlocking Fees</a> in report.
Customer Terms for Postpaid Services (SFOA)	6		32X(h)	"Your Obligations". A list of 19 obligations (and an additional 11 prohibitions under 6.16) without indicating what the consequences of breaches are. Should cross reference sections 9, 10 and 11. Does not specify degree of breaches thereby allowing the provider to unilaterally determine when the contract has been breached. Consequences of breach include legal action with a requirement that the customer be responsible for supplier's costs and expenses plus interest. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Customer Terms for Postpaid Services (SFOA)	6.6		32X(f)	Reserving right to introduce billing fees in the future.
Customer Terms for Postpaid Services (SFOA)	6.15		32X(h)	List of 11 prohibitions on conduct. Does not indicate consequences nor does it distinguish between seriousness of incidents, allowing the provider to unilaterally determine if contract has been breached. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Customer Terms for Postpaid Services (SFOA)	6.18		163	Binds customer to a Fair Use Policy which is buried in the website and difficult to find. See <a href="#">Part D</a> of report.
Customer Terms for Postpaid Services (SFOA)	9		32X(h)	Suspension of services for unpaid charges or if customer has "breached an important term of our agreement or a number of less important terms". Does not specify degree/seriousness of breaches - or which terms are important - allowing the

				provider to unilaterally determine when the contract has been breached. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Customer Terms for Postpaid Services (SFOA)	10	3.5, 3.6, 6.7, 11.2	32X(c), (h)	<b>Customer right of termination of agreement.</b> If provider is in breach or varies the contract, this term provides customer right of termination but no right to penalties. Provider has a right to termination because of customer conduct, including breach of "an important term" or "a number of less important terms". Does not specify seriousness/degree of breaches which would allow the provider to unilaterally determine when the contract has been breached (including other accounts with this provider). Further, penalties are payable on termination and no distinction is made in this clause as to the reason for the termination. See <a href="#">Early Termination Fees Generally</a> , <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> and <a href="#">Trivial/Minor Breach</a> in report.
Customer Terms for Postpaid Services (SFOA)	11	5.2	32X(c)	<b>Effect of agreement ending (unequal obligations):</b> If this is because of provider fault customer is obliged to pay remaining handset installments and has no right to penalty fees. If the customer is at fault or elects to terminate, they must pay charges, remainder of handset installments, an unlocking fee and a cancellation fee (if termination occurs within the minimum term period). See report - unlocking fees and discussion on schedule of fees. See <a href="#">Early Termination Fees Generally</a> , <a href="#">Handset Unlocking Fees</a> , <a href="#">Outstanding Equipment Charges</a> and <a href="#">Supplier Specific Equipment</a> in report.
<b>Cancellation fees for Caps (monthly installment option) and Bonus Plus Plans.</b>			32X(c), 163	Possibly includes a typographical error. States that if cancellation occurs "within 1-12 months" the customer is liable for RRP of the handset minus what has been already paid but if the customer cancels "with 13-24 months" they must pay a penalty amount for each month remaining on the handset contract. Seems to indicate that when cancellations occur in the first 12 months the customer does not have to pay monthly penalties which seems contrary to the documents intention. Note however, that customer does have to pay the entire remaining cost of the handset at once. Does not do enough to distinguish between unpaid handset purchase amounts and penalty fees. Is valid from 6th September, but does not indicate which year. See <a href="#">Part D</a> of report.
<b>Customer Terms for 3 Prepaid Services</b>	3.6		32X(d)	Provider given right to unilaterally vary the contract - change or withdraw services due to changes to Content. No rights for termination or notice provided to the consumer. See <a href="#">Content &amp; Premium Services</a> in report.
Customer Terms for 3 Prepaid Services	3.11	Price Guide - not available online	32X(f)	Unilateral variation of price permitted and no termination or notice rights for customer. As well as breaching the FTA the term is not compliant with the ACIF Contracts Code on two counts. First the Code requires that prices may be variable for "international" roaming, the definition of "Roaming" here specifically includes



				national roaming. Second the Code requires that the variable nature of the international roaming charge is to be clearly stated, here the contract term stating the variable nature of the charge is contained in the SFOA - which the customer is not given, the customer's attention does not appear to be drawn to the charge, nor is it included in the summary of the SFOA. Clause suggests that customer refer to price guide. See <a href="#">International Calls/Roaming</a> in report.
Customer Terms for 3 Prepaid Services	5.6		32X(f)	Reserving right to introduce payment fees in the future. Clause provides for "sufficient notice" to be provided - this is not defined and no termination rights are provided. See <a href="#">Individual Notice</a> , <a href="#">Time of Notice</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Customer Terms for 3 Prepaid Services	5.12-5.13	8	32X(h)	Conditions of use. No indication of consequences of breaches, for instance when suspension or termination of service will occur, thereby allowing the provider to unilaterally determine breach and with no guidance given to customer as to degree or seriousness of terms notwithstanding broad and punitive terms for a "breach". See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Customer Terms for 3 Prepaid Services	8		32X(h)	Suspension of services if customer has "breached an important term of our agreement or a number of less important terms". Does not specify seriousness of breaches which would allow the provider to unilaterally determine when the contract has been breached. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Customer Terms for 3 Prepaid Services	9.4		32X(h)	Termination of services and imposition of cancellation fee if customer has "breached an important term" or under other conditions. Does not specify seriousness of breaches nor define "important terms" - no indication therefore provided as to the circumstances in which the provider will be able to unilaterally determine when the contract has been breached. If customer wants to use their handset with another network they may have to pay an unlocking fee. See discussion of unlocking fees generally. See <a href="#">Handset Unlocking Fees</a> in report.

# ORANGE

Part 2B, Fair Trading 1999 (VIC) Compliance Review (2006) - Mobile Phone Consumer Contracts

## Unilateral Variation & Early Termination Clauses

Contractual Document	Primary Term(s)	Related Term(s)	FTA 1999 (VIC) Section	Explanation
<b>Orange terms and conditions &amp; customer policies (SFOA for Orange Prepaid services)</b>	3	13	32X(d)	Provider has right to vary any of the terms including price. Reasonable notice of the change where there is detriment to the customer, reasonable notice is not defined but this clause says reasonable notice will be "usually by publishing in the Australian Newspaper" or as per clause 13 - including on website, or to you directly via phone or email or mail. No option to terminate. See <a href="#">Individual Notice</a> , <a href="#">Time of Notice</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Orange terms and conditions & customer policies (SFOA for Orange Prepaid services)	4.7		32X(a) and 32X(g)	Provider may change or withdraw part of service and content. No notice to customer or option to terminate where detriment is provided. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.
Orange terms and conditions & customer policies (SFOA for Orange Prepaid services)	6.12-6.19		32X(h)	Service subject to responsible use and fair use
Orange terms and conditions & customer policies (SFOA for Orange Prepaid services)	9		32X(a) and 32X(h)	Allows for the supplier to suspend the service without the notice for failure to comply with any term.
Orange terms and conditions & customer policies (SFOA for Orange Prepaid services)	10		32X(h)	Unilateral termination of agreement if customer does not use service for at least 12 months (assumes loss of prepaid credits) or does not comply with obligations. <a href="#">Unused Prepaid Credits &amp; Early Termination</a> in report.

Orange terms and conditions & customer policies (SFOA for Orange Prepaid services)	14.4		32X(d)	Provider may replace any term of the agreement which is not legally enforceable with a similar term that is. No provision for notice to the customer.
<b>Customer terms for orange services</b>	agreement title		163	Applies to postpaid service but this is not clear from the description of the document. Customer can easily become confused between the two contracts
Customer terms for orange services	2.1	10	32X(c)	Cancellation fee if customer terminates within minimum term. See <a href="#">Early Termination Fees Generally</a> and <a href="#">Consumer Cancellation Right</a> in report.
Customer terms for orange services	3	13	32X(d)	Provider has right to vary any of the terms including price. Reasonable notice of the change where there is detriment to the customer, reasonable notice is not defined but this clause says reasonable notice will be "usually by publishing in the Australian Newspaper" or as per clause 13 - including on website, or to you directly via phone or email or mail. No option to terminate. See <a href="#">Individual Notice</a> , <a href="#">Time of Notice</a> and <a href="#">Unilateral variation &amp; Early Termination Fees</a> in report.
Customer terms for orange services	4.6		32X(g)	Provider may change or withdraw part of service; supplier's unilateral variation right is not limited to content. No notice provided to customer and no right to terminate. See <a href="#">Content &amp; Premium Services</a> in report.
Customer terms for orange services	4.9		32X(f)	Prices may vary when roaming - no notice to customer and no right to terminate. Also fails to adhere to ACIF Code as roaming exception is only for international roaming. See <a href="#">International Calls/Roaming</a> in report.
Customer terms for orange services	5.8		32X(c)	If agreement is terminated (even if provider is at fault) provider may immediately issue a bill for all remaining handset installments. See <a href="#">Outstanding Equipment Charges</a> and <a href="#">Supplier Specific Equipment</a> in report.
Customer terms for orange services	6.6		32X(d)	Provider reserves right to introduce fee - "sufficient notice" which is not defined will be provided to the consumer but no right to terminate.
Customer terms for orange services	6.7		32X(h)	Customer to pay outstanding charges including late fees if service has been terminated or suspended.
Customer terms for orange services	6.15-6.22		32X(h)	Reasonable use of the service. See <a href="#">Unilateral Interpretation of Contract Breach/Meaning</a> in report.

Customer terms for orange services	10.1		32X(c)	Customer may end contract during minimum term but must pay an early termination fee - contract does not indicate how much the fee is or where customer can find out. Significantly term does not distinguish between termination as a consequence of supplier's variation and termination as a consequence of customer's breach. See report - early termination fees. See <a href="#">Early Termination Fees Generally</a> and <a href="#">Consumer Cancellation Right</a> in report.
Customer terms for orange services	10.2		32X(h)	Provider may end contract on 30 days notice (if no minimum) but will not do so during the term of a handset installment plan. Agreement ends immediately on customer breach or because of other circumstances such as bankruptcy. See <a href="#">Consumer Bankruptcy/Insolvency</a> in report.
Customer terms for orange services	13	3		Notices may be provided by website, published in newspaper, or communicate by phone, mail or email. No indication of what method of notice when advising neither as to variation of terms nor as to duration of notice period. (Note that this is for postpaid contracts with specific obligations under ACIF Consumer Code - for notice in writing). See <a href="#">Individual Notice</a> and <a href="#">Notice of Cancellation Right</a> in report.
Customer terms for orange services	14.4		32X(d)	Provider may replace any term of the agreement which is not legally enforceable with a similar term that is. No provision for notice to the customer.
Customer terms for orange services	14.5		32X(j)	Provider may assign obligations without notice to customer. This is unfair because no corresponding right is given to customer.

# Appendix II: CLC Submission on ACMA Draft SFOA Determination



COMMUNICATIONS LAW CENTRE

INCORPORATING  NetLaw

27 January 2006

ACMA  
Level 44 Melbourne Central Tower  
360 Elizabeth Street  
Melbourne Vic 3000

By Email: [Kathleen.silleri@acma.gov.au](mailto:Kathleen.silleri@acma.gov.au)

Dear Kath,

***Telecommunications (Standard Form of Agreement Information) Amendment Determination 2005***

Thank you for the opportunity to provide comments in relation to the final form of the Amendment Determination as per John Neil's letter of 12 January 2006. In making these final comments we are mindful of the views of the CLC previously expressed to ACMA by letter dated 10 June 2005 and by conference on 26 August 2005, some of which we have also repeated below.

- The Consumer Contracts Code Committee had regard to the definition of "Notice in Writing" that appears in the Premium Services Determination when drafting the Code and were of the understanding that the Determination would be reviewed following certification of the Code.
- An alternative to amending the Determination is to leave the matter to clause 6.1.2 of the Contracts Code (significant imbalance in the parties rights and obligations arising under the contract to the detriment of the Consumer); *Fair Trading Act 1999(Vic)* and other state based consumer protection laws; the *Trade Practices Act* and the general law. However a solution via the Determination was anticipated during the Code process and has consistency advantages that silence from ACMA does not.
- Consumers have repeatedly indicated to ACMA that notification of price increases via newspaper advertisements is insufficient and that a move away from such methods in the Code was regarded as an improvement for consumers.
- The Draft Determination, which does not provide any guidance as to reasonable notice either by way of suggestions as to the form of notice or suggestions as to the period of notice is a disappointing result for consumers, particularly when so much time has been devoted to debating the issue.

Yours sincerely,

Elizabeth Beal  
Director

LEVEL 1, 283 QUEEN STREET, MELBOURNE VIC 3000, PO BOX 14428, MELBOURNE VIC 8001  
TEL: 03 9600 3841 FAX: 03 9670 7902 EMAIL: MELBOURNE@COMSLAW.ORG.AU

AFFILIATED WITH VICTORIA UNIVERSITY

[WWW.COMSLAW.ORG.AU](http://WWW.COMSLAW.ORG.AU)

ABN: 89 003 623 630

[WWW.OZNETLAW.NET](http://WWW.OZNETLAW.NET)



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