

# Preventing unfair terms in vehicle rental agreements

For cars, 4WDs, motor homes and vans



DEPARTMENT  
OF JUSTICE

## Disclaimer

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

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# Preface

This Guide explains how Consumer Affairs Victoria (CAV) applies unfair contract term legislation to vehicle rental agreements.<sup>1</sup> The Guide was first published in 2005. This edition takes account of the introduction of the Australian Consumer Law (ACL).

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

Victoria's unfair contract term legislation was repealed when the ACL was applied in Victoria (and in the other States and Territories) on 1 January 2011, whereupon the ACL version of unfair contract term legislation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

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

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

*Unfair terms in vehicle rental agreements* is based on a sample of contracts that CAV has reviewed. This industry review was initiated in response to a number of complaints CAV received about vehicle rental contracts. A large number of the complaints related to the fairness of terms in those contracts.

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

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

CAV will be actively monitoring compliance with unfair contract term legislation in the vehicle rental industry.

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

You can find this Guide and other CAV publications about unfair consumer contract terms at [consumer.vic.gov.au](http://consumer.vic.gov.au).

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

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# Introduction

Consumer Affairs Victoria (CAV) has written this Guide to explain why it considers that some common terms used in vehicle rental agreements are unfair.

The Guide represents the views of CAV and outlines the basis on which it is likely to take enforcement action. It is, of course, ultimately for the courts<sup>2</sup> to decide if a term is unfair.

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

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

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

## What unfair contract term legislation applies to which contracts?

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

For consumer contracts entered into or renewed between 1 July 2010 and 1 January 2011, when the Australian Consumer Law (ACL) applies in Victoria, the current unfair contract term legislation in the *Fair Trading Act* (nationally aligned provisions) and the *Trade Practices Act* version apply<sup>3</sup>.

For consumer contracts entered into or renewed after 1 January 2011, when the *Fair Trading Act* provisions have been repealed, the ACL version will apply<sup>4</sup>.

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

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

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

## How does unfair contract term legislation work?

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

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

## What is an unfair term?

A term is unfair if:

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

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

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

- presented clearly
- readily available to the consumer

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

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

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

- gives powers to the trader that it would not otherwise or usually have
- protects the trader in a way that puts the consumer at a disadvantage
- alters the position under the ordinary rules of contract or the general law
- shifts risks to the consumer that the trader is better placed to manage.

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

- a term that permits the supplier but not the consumer to avoid or limit performance of the contract
- a term that permits the supplier but not the consumer to terminate the contract
- a term that penalises the consumer but not the supplier for a breach or termination of the contract
- a term that permits the supplier but not the consumer to vary the terms of the contract
- a term that permits the supplier but not the consumer to renew or not renew the contract
- a term that permits the supplier to vary the price without the right of the consumer to terminate the contract
- a term that permits the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract

- a term that permits the supplier unilaterally to determine whether the contract has been breached or to interpret its meaning
- a term that limits the supplier's vicarious liability for its agents
- a term that permits the supplier to assign the contract to the consumer's detriment without the consumer's consent
- a term that limits the consumer's right to sue the supplier
- a term that limits the evidence the consumer can produce in legal proceedings on the contract
- a term that imposes the evidential burden on the consumer in such legal proceedings.

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

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

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

- whether the supplier has all or most of the bargaining power
- whether the contract was prepared by the supplier before any discussion relating to the transaction occurred with the consumer
- whether the consumer was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
- whether the consumer was given an effective opportunity to negotiate the terms of the contract

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

## What is the effect of an unfair term?

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

## What is the process that Consumer Affairs Victoria follows?

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

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

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

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

## Glossary

In this Guide:

- references to 'unfair contract term legislation' mean:
  - the legislation in Part 2-3 of Schedule 2 of the *Trade Practices Act 1974* (until that is replaced by Part 2-3 of Schedule 2 of the *Competition and Consumer Act 2010* on 1 January 2011)
  - that Part as applied in Victoria under the ACL on 1 January 2011
  - the legislation in Part 2B of the *Fair Trading Act 1999* (Vic) until Part 2B is repealed and replaced by the ACL version on 1 January 2011
- references to 'consumer guarantees' in relation to defective goods or services mean:
  - the consumer guarantees set out in Division 1 of Part 3-2 of Schedule 2 of the *Trade Practices Act 1974* (until that is replaced by Division 1 of Part 3-2 of the *Competition and Consumer Act 2010* on 1 January 2011)
  - that Division as applied in Victoria under the ACL on 1 January 2011
  - the implied warranties set out in Part 2A of the *Fair Trading Act 1999* (Vic) until Part 2A is repealed and replaced by the ACL consumer guarantees on 1 January 2011.



# Typical unfair terms in vehicle rental agreements

Vehicle rental operators have a substantial investment in their fleet. CAV recognises that operators need to protect their investment but it does not accept that the only way to do this is by adopting contract terms that are one sided in the operator's favour. The vehicle rental contract terms analysed by CAV lacked reciprocity of rights and obligations between operators and consumers. These terms excluded legal rights of consumers and gave operators wide and sometimes unlimited rights. On the other hand, terms attempted to shift all the risks to consumers and remove them as far as possible from operators, even when the risk was outside the consumer's control.

The following arguments are commonly used to justify such contract terms:

- **Terms intended only to deal with unjustified demands** If a term could be used to defeat legitimate as well as unjustified demands, CAV regards it as unfair. Unfair contract term legislation is concerned with the effect terms can have, not merely the intentions behind them. If the potential effect of a term goes further than intended, it may be possible to make the term fair by strictly and clearly limiting its reach.
- **Terms used will not actually exclude liability** If a term has the same effect as an unfair term, CAV regards it as unfair regardless of its form or mechanism. This applies, for instance to terms which 'deem' things to be the case, whether they really are or not, with the intent of ensuring that no liability arises in the first place.

To assist readers, this Guide takes the structure of a hypothetical vehicle rental agreement. While agreements vary in detail, many follow a similar structure and cover similar substantive matters, for example where the consumer can and cannot drive the rental vehicle, use of the vehicle, maintenance, loss and damage and so on. Under each heading CAV will discuss terms it has analysed in its review of rental agreements and terms it considers are unfair.

## Driver eligibility

Agreements generally set out who is eligible to drive a rental vehicle. Usually this is the person entering the agreement and any other driver authorised by the operator. Some contracts set age limits or driving experience requirements. For example, drivers with less than one or two years experience are prohibited from driving a rental vehicle under particular agreements.

Terms allow authorised drivers to drive a rental vehicle in accordance with the law and within those geographic areas set out in the agreement or negotiated between the parties. Some agreements, however, give operators a blanket power to stop an authorised driver from driving a vehicle without spelling out any grounds. This is unfair.

For example:

*The vehicle must not be used by you or by any authorised driver (unless authorised by us in writing):*

*Followed by (a) – (k)*

*(k) If we have directed you or any authorised driver not to drive the vehicle.*

## Vehicle condition including maintenance, security and safety

A term may be unfair if it places risks on the consumer that the supplier is better able to bear. A risk lies more appropriately with the supplier if it is within the supplier's control, or the consumer could not be expected to be aware of it.

Many vehicle rental agreements require the consumer to acknowledge that the vehicle is in good order, clean and in a roadworthy condition. While a consumer can see whether a vehicle is reasonably clean, the consumer cannot know the mechanical condition or safety (roadworthiness) of the vehicle.

Vehicle rental operators are responsible for a vehicle's maintenance and general up-keep before it is hired including ensuring that a vehicle is roadworthy. Consumers should not be asked to acknowledge matters which they do not know and cannot ascertain.

For example:

*That by accepting the vehicle the renter acknowledges that it is in good order, clean and in a roadworthy condition and is suitable for the purpose or use of or possession by the renter and the renter further acknowledges that there has been no reliance on advice or representations made by the owner.*

*You acknowledge the vehicle is delivered to you in good operating condition and with the seal of the odometer unbroken.*

*The renter acknowledges that the vehicle (which expression includes all tyres, tools, accessories and equipment) is the property of the owner and that it has been received by the renter in good order and running condition.*

Sometimes the acknowledgment is subject to matters set out in a report on existing vehicle damage completed when the contract is entered into. Such pre-rental reports are likely to be useful

if the process is that the consumer and operator jointly inspect and agree on the condition of the vehicle prior to and at the conclusion of the contract. However, the inspection can only reveal existence or absence of panel damage – scratches and dents – and vehicle cleanliness, rather than the mechanical condition of the vehicle. A term will be unfair if the acknowledgment is too widely cast or it purports to bind the consumer to a vehicle damage report unless the term also obliges the operator to ensure the consumer inspects the vehicle exterior condition and signs the report.

*You acknowledge receiving the vehicle from us: (a) in a good and clean condition except as specified in the Vehicle Details and Damage Report; (b) with manufacturer supplied tools, tyres, accessories and equipment, a street directory, keys and any other items specified on the Vehicle Details and Damage Report or in the Rental Agreement; etc.*

Many agreements make provision for the consumer to be reimbursed for the cost of mechanical repairs provided the operator authorised the repairs and the consumer can provide documentation of the work carried out. Some agreements make no mention of responsibility for mechanical repairs while other agreements contain terms which are onerous and unfair. Examples include requirements to check daily the oil and water levels and batteries, limitations on the amount the consumer might spend on repairs even where these costs are reasonably incurred and the operator has given consent to the repair. Some agreements also tie acceptance of liability for repair to the vehicle manufacturer accepting liability under its warranty to the supplier. The consumer has no contract with the manufacturer of the vehicle or any part of the vehicle, nor does the consumer have ongoing responsibility for the vehicle/parts maintenance. A manufacturer could deny liability for a variety of reasons, which have as much to do with the operator as with the consumer. CAV considers such clauses to be unfair.

The following example illustrates the above terms:

- (a) *The customer shall take all reasonable steps to properly maintain the vehicle, including daily checks of the oil, water and batteries;*
- (b) *The customer acknowledges that XX will reimburse for expenditure up to \$AU100 reasonably incurred in rectifying any mechanical failure to the drive train and engine of the vehicle (not including the water system, refrigerator, heating and air-conditioning unit and audio equipment) provided that:*
  - *the customer produce relevant receipts*
  - *the customer has received the prior consent of XX*
  - *the damage is not due to the customer's fault or their breach of this agreement.*
- (a) *subject to the terms of the excess reduction, the customer will pay for the cost of repairing or replacing tyres damaged during the rental period provided that XX will reimburse the customer for expenditure reasonably incurred if:*
  - *the customer produces relevant receipts, and*
  - *the tyre is defective and is returned by the customer to XX for inspection; and*
  - *the manufacturer accepts liability under its warranty.*
- (a) *The customer will be liable for any cost associated with the incorrect use of fuel.*

Some agreements contain a term that the consumer will pay the daily rental rate for the time the vehicle is off-road for repairs. This term shifts the risk of loss to the consumer in circumstances where the operator is better able to bear the loss through its own insurance and where loss may not be due to any fault of the consumer. There is no reciprocal obligation to provide a replacement vehicle.

For example:

- (a) The customer will pay XX the daily rental rate for the period the vehicle is off fleet for accident repairs.

## Where you can and cannot drive the vehicle

There is significant variation in contract terms about where vehicles can and cannot be driven. Some agreements include geographic restrictions, some state that rental vehicles can only be driven on sealed roads. All contracts appear to prohibit off-road use. Many roads in caravan parks are not sealed and operators cannot expect vehicles not to be driven there. These terms are often too wide.

In addition, CAV's concern with these provisions relates to the difficulty consumers have in understanding their obligations where there is a conflict between terms. For example, some agreements enable the consumer and vehicle rental operator to negotiate additional terms. For example, an operator might allow a vehicle hired in one State or Territory to be driven into another State or Territory where this might otherwise be prohibited. The operator might also verbally authorise the consumer to drive on an unsealed road. This lack of clarity is compounded by agreements which state, for example

....In the case of any inconsistency between this agreement and the additional terms, the former prevails to the extent of the inconsistency.

The above term would be unintelligible to most consumers and CAV also considers it unfair. A consumer would expect that any special terms negotiated with the operator would take precedence over or modify standard form clauses. CAV considers it unfair to include within the agreement a standard term which can potentially override what has been negotiated between the consumer and operator.

## Use of the vehicle

Most agreements establish clear and objective prohibitions on the use of rental vehicles, for example that vehicles cannot be used: where the driver is under the influence of drugs or alcohol; to carry passengers for payment; or in contravention of any law. Some prohibit a passenger from carrying a pet or animal.

These provisions may not offend the unfair contract term legislation, though CAV notes that the prohibition on carrying animals would preclude the carrying of a companion animal such as a guide dog. This is considered discriminatory.

## Return of the vehicle

Vehicle rental agreements require consumers to return vehicles to the place and at the time agreed unless an express approval has been given by the operator to extend the rental period. Vehicles are required to be returned in the same condition as at the outset of the rental period, save for fair wear and tear.

In many agreements, 'return of vehicle' clauses also provide for the immediate re-possession of the vehicle in a range of circumstances.

CAV noted a significant number of unfair terms in 'return of vehicle clauses'.

- 1 Many agreements impose a 'one-way fee' if a vehicle is returned to a location different to that shown on the agreement. This creates an imbalance if the consumer cannot determine in advance what the fee is. Contracts which do not disclose all fees are unfair. Where a precise charge cannot be stated, the basis of the charge should be clear and explicit. Moreover it should be reasonable and reflect the actual cost to the vehicle rental company.  
*If you return the vehicle to a location other than that shown on Part A, a "one-way fee" may apply. If a "one-way fee" applies you must pay it*

*at the end of the rental period. [A "one-way fee" may apply even if it is not shown on Part A (the rental agreement)]*

- 2 Consumers are required to return vehicles during normal business hours. Where this does not occur, many agreements impose on-going rental charges or otherwise make the consumer liable for the vehicle until such time as the operator is able to inspect the vehicle. There are several reasons why these terms are unfair.
  - a) 'Normal business hours' vary considerably across Australia. Unless the contract provides clear advice to consumers on the trading hours of depots, it is unreasonable to expect consumers to know the operator's normal business hours. Even if a small depot fails to open in what might be expected to be 'normal business hours', consumers would still be liable for on-going rental charges until the depot next opens for business.
  - b) Once a vehicle has been returned to an operator's depot, the consumer's responsibility for the vehicle and associated rental charges should cease. At this point, the operator is better placed to bear any risks associated with the vehicle's return: for example the operator might arrange for regular security patrols and so on.
  - c) A term which makes the consumer liable for on-going charges even if the operator fails to conduct the final inspection in a prompt manner is also unfair. Terms which require the consumer to continue to pay where services are no longer being provided and the consumer does not have the vehicle under his/her control may be unfair. Example of terms CAV considers unfair:

*If you return the vehicle to a XX location which is not open for business at the time, you may only return the vehicle keys to a box clearly designated for keys return and you will be*

*deemed by XX to have returned the vehicle when that location next opens for business. The rental charges will continue until that location next opens for business. You must pay all additional rental charges.*

*You will be responsible for the vehicle and the hire will continue until we make our final inspection (including where the inspection can not take place for some time eg. You return the vehicle to a location which is unattended).*

- 3 All vehicle rental agreements allow the operator to take immediate possession without prior demand. For example, if, in the opinion of the operator, the consumer has breached a term of the agreement, the vehicle is likely to be damaged or used in an illegal activity or during an industrial dispute.

Some contracts go further and allow the operator to enter any property and take possession of the vehicle. Where this occurs the same agreements require the consumer to indemnify the operator from any claims from any person.

CAV recognises that operators have the right to protect their assets. However, as some terms are currently drawn, operators are not required to have any reasonable basis or objective evidence for re-possessing a vehicle. If an operator is of the opinion that the agreement has been breached, irrespective of how minor the breach might be, the operator can repossess the vehicle. Not only is the consumer left without the vehicle, the consumer might also be liable for all rental charges and other costs associated with the re-possession even where the operator has potentially acted illegally, for example, through trespass. Few agreements provide for any compensation or the hire of another vehicle should the operator have acted negligently or simply "got it wrong".

Examples of unfair terms:

*We may take possession of the vehicle without prior demand if it is illegally parked or if in our opinion it*

*is being used, or has been used, in contravention of any law or a term of this Rental Agreement; or it has apparently been abandoned.*

*XX may request the immediate return of the vehicle or XX may retake the vehicle without notice, if XX suspects that you may have breached a term or condition of the rental agreement; or it is likely that damage to the vehicle, or injury to persons or property may occur; or the vehicle will be involved in an industrial dispute and you must also pay XX any cost it incurs in retaking the vehicle as well as all costs and charges under the rental agreement.*

*For the purposes of paragraph 4(1) and in the event of failure of the renter to comply with the obligations of paragraph 4(1) [4(1) gives the operator the right to terminate the agreement where the consumer is in breach of any terms and conditions] the owner may enter on any property where the vehicle is situated so as to take possession of same and the renter will indemnify him from claims by any person, including the renter resulting from such entry and retaking of the vehicle.*

CAV considers that consumers should have reciprocal contractual rights to terminate the contract on the operator's breach, and to compensation and costs in that event.

## Fuel

Most rental agreements require vehicles to be returned with the same amount of fuel as at the outset of the rental. Where a vehicle is returned with less fuel, and the consumer has not purchased a prepaid fuel option, consumers are required to pay for fuel at the rate specified in the agreement plus a service fee. Some agreements do not indicate the price at which fuel will be charged and this is unfair - it allows the operator to charge a price for fuel which may be far in excess of the market price at any given time. Rental agreements should disclose an actual price per litre, plus the reasonable costs of refuelling.

## Loss and damage

To protect their substantial fleet investment, all vehicle rental operators offer a range of damage reduction options. For a set fee which is usually charged on a daily basis, the consumer can reduce their potential liability for damage to the vehicle in a range of specified circumstances. While some consumers think of these options as insurance, they are not a financial product as defined within the *Corporations Act 2001* (Cth). Notwithstanding their legal status, many consumers find the ability to reduce their potential liability for damage an attractive feature of car rental agreements.

Damage reduction options vary considerably between vehicle operators. For example, the following may or may not be covered depending on the package offered by the operator and the option selected by the consumer:

- the cost of rectifying tyre damage not attributable to normal wear and tear
- the cost of repairing overhead roof damage or underbody damage
- water damage
- single vehicle accident damage
- interior vehicle damage
- windscreen damage
- damage or loss caused through the use of snow-chains or roof racks
- damage caused through the reckless or careless use of a vehicle
- the cost of repairs resulting from the consumer's failure to maintain all fluid and fuel levels
- the cost of repairing damage caused as a result of reversing.

For these options to operate in the interest of both consumers and vehicle rental operators, terms must be clear and unambiguous as to the extent and limitations of the protection offered. Consumers need to be able to determine before entering the contract what the operator means by terms such as 'careless driving'. 'Water

damage' and 'underbody damage' are capable to extending to circumstances that would not be expected by the consumer and are probably not intended by the operator, such as damage caused by severe rain, or damage to the underbody caused in a roll over. Further, where the operator has contributed to the damage, the resultant repair costs should not be attributed to the consumer. For example, if the operator has not repaired a faulty fuel gauge, the consumer should not be liable for a repair bill because of a failure to maintain all fluid levels.

Vehicle rental agreements analysed by CAV give operators the unilateral right to deny consumers protection under any damage reduction option where the consumer has breached the conditions of the contract. This is the case even where the consumer has paid for the cover. Similar to the repossession of the vehicle, the contractual breach may be minor or it may be unrelated to the damage caused. Further, under typical terms, the consumer could also be liable for pre-existing defects or damage.

To compound the situation, contract terms give operators the right to automatically deduct a range of charges (in addition to the rental) to cover damage repairs, towing, storage and other costs. Contracts do not, however, require consumers to be given a notice of demand or evidence of the cost of repairs. Also, contract terms do not provide an opportunity for consumers to dispute the fact of the damage or the extent of the alleged damage. Some contracts go even further and impose a range of penalties if the amount outstanding for damage and associated costs remain unpaid at the conclusion of the rental agreement.

CAV considers that these terms operate in a manner which can be unfair to consumers. It would expect that the contract terms would require operators to provide consumers with detailed information (including substantiated repair costings) about the alleged damage and give them an opportunity to follow up with the operator.



## Operator and consumer liability

Most vehicle rental agreements deny all liability toward consumers except that which by law cannot be excluded. In some instances, contracts reviewed by CAV seek to deny responsibilities imposed by law. Agreements do not generally allow consumers to terminate if the operator breaches a material condition. They do not provide for compensation for a consumer's loss resulting from an operator's breach of the agreement even where the operator has acted negligently. Agreements cannot be said to be appropriately balanced or fair unless both parties (the consumer and vehicle rental operator) are equally bound by their obligations. Agreements should provide reciprocal rights to terminate the agreement and for compensation for loss for consumers in the case of material breach of the agreement by the operator.

Some of the exclusion and limitation clauses which CAV considers especially unfair and in breach of the consumer guarantees (see the Glossary section of the Introduction) are noted below.

## Change of vehicle

According to the unfair contract term legislation, a term will be regarded as unfair if among other things, it permits the operator to unilaterally vary the characteristics of the goods or services to be supplied under the contract. Some agreements enable operators to substitute alternative vehicles without prior notice and without any compensation to the consumer should the substitute vehicle not meet the consumer's needs. For example:

*Should the vehicle booked be unavailable through unforeseen circumstances, XX reserves the right to substitute an alternative vehicle without prior notification and at no extra cost, save for any*

*additional running costs pertaining to the substitute vehicle. This shall not constitute a breach of contract and does not entitle the customer to a refund.*

The above example also seeks to limit the consumer's right to sue the supplier for breach of contract which is also regarded as unfair.

## Retention of prepayments on consumer cancellation

Terms will be considered unfair if they exclude the consumer's basic rights under contract law to the advantage of the supplier. Consumers are entitled to a refund of prepayments made under a contract which does not go ahead, or which ends before they have enjoyed any significant benefit. In some circumstances, consumers are entitled to a refund even where it is the consumer who ends the contract.

Any party to a contract normally has the right to cancel the contract and receive a full refund of any prepayment if the other party breaks the contract in a way that threatens its whole value to them. A term which rules out the refund of prepayment or deposit, in any circumstances, conflicts with this principle and is unfair.

Example of terms which may be considered unfair:

The cancellation fees are:

- If cancelled up to 60 days prior to pick-up: No fee
- If cancelled from 60 to 30 days prior to pick-up: 20% of gross rental.
- If cancelled 29 to 7 days prior to pick-up: 50% of gross rental.
- If cancelled within 6 days prior to pick-up or no show: 100% of gross rental.
- If vehicle is returned early for any reason whatsoever: No refund available.

## Consumer Guarantees

A disclaimer may endeavour to limit or exclude liability for breach of the consumer guarantees (see the Glossary section of the Introduction) by the supplier, such as the guarantees that goods are of 'acceptable quality' and reasonably fit for any specified purpose, and services will be rendered with due care and skill. Terms that exclude or limit the consumer guarantees are illegal and void, and will also be considered unfair.

Several vehicle rental operators were found to use contracts which include the following term:

*The company gives no express or implied warranty as to any matter whatsoever including without limitation the condition of the vehicle and equipment, its merchantability or fitness for any particular purpose.*

Other terms, while not as blatant as the above seek to exclude liability 'so far as the law permits'. These terms are also open to objection because they are unclear to those without legal knowledge. CAV considers these terms may also contravene the provisions of the ACL that prohibit the making of a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy.

Deciding whether a term is fair or unfair requires consideration of a number of factors, including the circumstances in which it is used. This means it is impossible, without expert legal advice, to know what liability may or may not be excluded in any particular situation, and thus what liability is intended to be excluded. Contract terms should provide consumers with clear and unambiguous information about which warranties and rights might be relied on.

The following are examples of terms which seek to exclude liability 'so far as the law permits':

*The company gives no express warranty in relation to the motor vehicle. Certain conditions and warranties are implied by statute whether Commonwealth or State, which cannot be excluded, restricted or modified such as those under the Trade Practices Act 1974. Where the company is permitted to limit its liability under those statutes for breach of an implied condition or warranty the company limits its liability to replacement, repair or resupply of the vehicle. All other warranties, conditions and other obligations which may be otherwise implied are expressly excluded in their entirety. The company is not liable to you and/or the authorised driver for any indirect, special, incidental or consequential damages relating to this agreement.*

*Neither clause XX nor any other provision of the rental agreement is intended to exclude, restrict or modify any non-excludable terms implied by or rights which you may have under the Trade Practices Act 1974 (Cth) or any other State or Territory legislation to the same effect.*

*The owner shall not be liable for any loss or damage suffered by the renter or any person arising out of the use or operation of the vehicle including that caused by negligence or default of the owner but not including defects in the owner's title save and except for either the cost of replacement of the vehicle or the payment to the renter of the cost of retaining a replacement vehicle provided that nothing in this clause shall limit or vary any liability which may arise out of the Trade Practices Act 1974 or the Fair Trading Act 1985 (sic) except to the extent that the liability may be limited or varied.*

## Property damage or loss

Most vehicle rental agreements seek to exclude supplier liability for any loss of or damage to property either stolen from the vehicle or left in the vehicle after its return to the supplier. In some cases the agreements even seek to exclude liability for negligence. The supplier is liable at law for damage or loss caused through its own fault or negligence and any clause which implies



exclusion of liability for loss to property in all circumstances is considered unfair.

Example of clauses excluding liability for damage to or loss of property:

*You release and hold harmless the company (and its agents and employees) from all claims for loss or damages to your personal property, or that of any other person's property left in the vehicle, or which is received, handled or stored by the company at any time before, during or after this rental period, whether due to the company's negligence or otherwise.*

*XX is not liable to any person, and you indemnify XX, for any loss of, or damage to any property stolen from the vehicle or otherwise lost during the rental, or left in the vehicle after its return to XX.*

*At no stage is XX responsible or liable to you for the loss, destruction or damage to any of your property.*

## Loss or damage caused by mechanical breakdown etc

Vehicle rental agreements place certain obligations on consumers to maintain the rental vehicle's engine oils and coolant levels to the manufacturer's specifications. This is appropriate. However, the rental operator is responsible for the vehicle's mechanical servicing. Consumers have no control over or knowledge of the vehicle's mechanical soundness. However, many agreements deny all liability resulting from vehicle breakdown or failure. This is unfair. Consumers could suffer significant economic loss and disruption should a vehicle they have rented breakdown due to the supplier's fault or negligence.

Example of clauses denying liability for breakdown or other vehicle failure:

*For the sake of clarity, save for its obligations under 6a, XX accepts no responsibility or liability for any costs, expenses, damages (including any damages*

*for loss of enjoyment) or any other liabilities resulting from any accident, breakdown or any other failure of the vehicle, irrespective of whether XX was in any way negligent.*

*The owner shall not be under any liability to the renter for any loss or damage or delay through breakdown mechanical defect or accident or by reason of the vehicle being unsuitable for the purpose of the renter.*

*The owner does not accept responsibility for delays in consequence of breakdown or otherwise.*

## Disclaimers covering agents and staff

Vehicle rental operators are responsible for the actions and representations of their employees and agents. However, many contract terms seek to exclude or limit the supplier's liability for the representations and actions of agents and employees. In many cases consumers rely on the advice and actions of agents and employees in finalising vehicle rental agreements. It is unfair if the consumer suffers loss or damage due to the actions or advice of an agent or employee and the contract terms seek to exclude or limit the supplier's liability for the representations and actions of agents and employees.

Examples of clauses denying and limiting liability for the actions of agents and employees:

*This agreement constitutes the entire agreement of the parties and there are no other oral undertakings, warranties or agreements between the parties relating to the subject matter of this agreement.*

*That by accepting the vehicle the renter acknowledges that it is in good order, clean and in a roadworthy condition and is suitable for the purpose or use of or possession by the renter and the renter further acknowledges that there has been no reliance on advice or representations made by the owner.*

## Charges and the payment of charges

Various terms associated with rental charges and their payment are potentially unfair.

- 1 Terms refer to the payment of rental charges and other fees, costs and expenses, either up front or during the contract. Terms which do not specify actual amounts or an objective basis on which these payments will be calculated are unfair. In the case of upfront payments, often all that is needed is to clearly relate the fees and charges referred to in the terms to the amounts set out in the application form or front sheet.
- 2 Many contract terms provide for the unilateral variation of rental charges. CAV regards contract prices as core elements of the contract. Therefore any term that gives the operator the unilateral right to vary the agreed charges after the contract has been entered into will be regarded as unfair. Where fees are set by third parties such as government stamp duty or airport concession fees, the term may still be unfair. For example if the term allows unilateral variation rather than varying the fee based on objective criteria that can be substantiated (such as the third party publishing a changed fee) and is notified to the consumer.

For example:

*Rates and conditions quoted in our brochures and/or documentation are subject to change without notice.*

*An airport concession fee may be charged for hires with pick-up or drop-off from airport locations. An airport pick-up fee of 4% of the total hire cost will apply for hires at Hobart airport. This fee is subject to change.*

CAV appreciates that marketing brochures which contain prices will be subject to

change from time to time. It considers that marketing brochures should clearly indicate all current rates and the period for which rates will be applicable. Once a consumer has entered a contract for the provision of goods and services at a particular price, unilateral variation of either the contract price or goods and services agreed will be regarded as unfair.

- 3 Some contract terms vary the time at which the consumer might be liable for rental charges. While most agreements require immediate payment at the end of the rental period, some terms require payment in advance of the rental or at any time during the rental which the operator designates.

For example:

*You must make payments for the rental when the owner so designates including making payments in advance or at any other time during the rental period.*

- 4 Contracts do not require objective substantiation of charges in addition to the agreed rental charges. All charges associated with a vehicle rental, are payable at the end of the rental period. These include rental charges, charges associated with damage to a vehicle, charges associated with returning the vehicle other than as stipulated on the agreement, fines and a range of administrative fees. Agreements require consumers to authorise operators to charge all moneys payable against the consumer's credit card. Terms do not require operators to substantiate charges and they do not give the consumer the opportunity to discuss or dispute any of the charges imposed.  
*You authorise XX to charge all moneys payable to XX under the rental agreement to your credit card or charge account.*

- 5 Where the consumer fails to pay all charges at the end of the rental, many agreements require the consumer to pay a penalty interest

rate on the outstanding balance from the end of the rental until all charges are paid. Any fees charged for late payment must be reasonable and reflect the operator's costs. These fees should not be expressed as a percentage payment unless the amount can be substantiated as the operator's actual costs. Late payment fees should not be imposed where there is a genuine grievance or the consumer has made a complaint to the operator or a consumer protection authority.

*If you do not pay all charges at the end of the rental period, you must pay interest at 15% pa on the outstanding balance from the end of the rental period to the date all charges are paid in full.*

In contrast to the restrictions placed on the consumer in relation to payment, agreements generally allow vehicle rental operators to pay any refunds to the consumer by such methods and when the operator so chooses. This lack of reciprocity creates an imbalance to the consumer's detriment.

*XX will pay any refund due to you by such method as XX may reasonably choose.*

- 6 Finally, terms which limit or deprive the consumer of access to redress as well as those which disclaim liability may be considered unfair. A legitimate way for a consumer to obtain compensation from a supplier is to exercise the right of set-off. Where a consumer has an arguable claim under the contract against a supplier, the law generally allows the amount of that claim to be deducted from anything the consumer has to pay. Some vehicle rental terms deny this right to set-off. Consumers have no choice but to pay rental charges even where they have incurred costs as a result of a material breach by the operator. To obtain redress, consumers would have to go to court. The costs, delays and uncertainties involved may, in practice, force the consumer to abandon their claim and deprive them of their rights.

## Credit card payments

Vehicle rental agreements analysed by CAV required the consumer to authorise debiting of all rental and associated charges against the consumer's credit card. Most agreements stated that this was to occur at the end of the rental period though, as noted above, some agreements provided for credit card deductions prior to, during and well after the rental period.

CAV's view is that it is unfair for terms to give operators authorisation to make what are essentially open-ended deductions from their credit cards. Contract terms should only require consumers to authorise known dollar deductions from their credit cards. Where unforeseen charges are incurred (for example, accident repairs) contracts should provide that these charges be notified to the consumer and the subject of separate, explicit authorisation by the consumer prior to any debiting against the consumer's credit card.

## Claims and procedures

Most vehicle rental agreements require consumers to promptly notify authorities and rental operators of any accident or incident such as the theft of a vehicle. Agreements allow operators to bring, defend, enforce or settle any legal proceedings against a third party. In taking such action, agreements require consumers to do everything required to assist the operator in making the claim. Agreements are generally silent on who bears the consumer's costs in assisting the operator in conducting any legal action.

CAV considers that where agreements oblige consumers to provide assistance to operators in conducting legal action, it should be on the basis that the operator meets the consumer's reasonable costs in doing so.

## General

Many vehicle rental agreements attach the operator's privacy policy as part of the agreement. The way in which these operate is by providing personal information for the vehicle rental operator, and the consumer consents and agrees to the use of this information for a range of purposes, including for direct marketing purposes.

Agreements do not enable consumers to either expressly agree to or opt out of this use of their personal information. CAV considers that this may be potentially unfair. It considers that if the operator's privacy policy forms a binding part of the contractual arrangements, the consumer should have the opportunity to agree or disagree with the potential uses of their personal information.

# Australian Consumer Law unfair contract term legislation

## Section 23 Unfair terms of consumer contracts

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

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

## Section 24 Meaning of unfair

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

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

## Section 25 Examples of unfair terms

- (1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
  - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
  - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
  - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
  - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
  - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
  - (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
  - (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
  - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
  - (j) a term that permits, or has the effect of permitting, one party to assign the

contract to the detriment of another party without that other party's consent;

- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
  - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
  - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
  - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1) (n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
    - (a) the detriment that a term of that kind would cause to consumers; and
    - (b) the impact on business generally of prescribing that kind of term or effect; and
    - (c) the public interest.

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

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:
  - (a) defines the main subject matter of the contract; or
  - (b) sets the upfront price payable under the contract; or

(c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

(2) The upfront price payable under a consumer contract is the consideration that:

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into;

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

## Section 27 Standard form contracts

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);

(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

## Section 28 Contracts to which this Part does not apply

(1) This Part does not apply to:

(a) a contract of marine salvage or towage; or

(b) a charterparty of a ship; or

(c) a contract for the carriage of goods by ship.

(2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the *Carriage of Goods by Sea Act 1991*.

(3) This Part does not apply to a contract that is the constitution (within the meaning of section 9 of the *Corporations Act 2001*) of a company, managed investment scheme or other kind of body.



[consumer.vic.gov.au](http://consumer.vic.gov.au)



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

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