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*Unfair contract terms in Victoria:
Research into their extent, nature,
cost and implications*
”

Research Paper No. 12 October 2007



“ Preface ”

Victoria is leading the way nationally in ensuring the public is protected from unfair consumer contracts. In a groundbreaking move in 2003, *Victoria's Fair Trading Act 1999* was amended to make unfair consumer contract terms void. Since then the state's consumer protection agency, Consumer Affairs Victoria, has worked with a number of industries to make their consumer contracts fairer.

Consumer Affairs Victoria has recently conducted innovative empirical research into the experience of Victorian consumers who enter into written contracts. This paper reports the results of this research and reveals the negative consequences associated with unfair consumer contract terms such as disputes between consumers and traders, consumer detriment and loss of confidence in the market place.

This paper is one in a series designed to stimulate debate on consumer policy issues.

These papers do not represent government policy and are intended as a basis for discussion only.

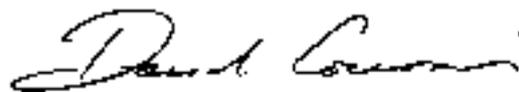
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“ The Fair Trading Act and unfair contract terms ”

1

1.1 Rationale of Part 2B

The primary consumer protection legislation in Victoria is the Fair Trading Act (FTA). Some of its stated purposes are to:

- protect consumers
- promote and encourage fair trading practices and a competitive market
- provide for statutory conditions and warranties in consumer contracts
- provide for unfair terms in consumer contracts to be void, and
- provide for the powers and functions of the Director of Consumer Affairs Victoria, including powers to conciliate disputes and carry out investigations into alleged breaches of the Act.

Part 2 of the FTA prohibits a range of unfair business practices, such as misleading and deceptive conduct, unconscionable conduct and false representations, and is largely modelled on similar provision in the *Trade Practices Act 1974*. However, in addition, Part 2B relates to unfair contract terms in consumer contracts and deals with the substance of contracts.

Part 2B focuses on the substantive fairness of consumer contract terms. It recognises that unfair terms can occur even if a consumer has not been induced to enter into a contract through unfair business practices such as misleading or deceptive conduct, unconscionable conduct, duress or undue influence.

Part 2B is able to deal with circumstances in which suppliers proffer one-sided, onerous, standard-form contracts to consumers on a ‘take it or leave it’ basis. Consumers may not read or understand these contracts which are often long and contain a great deal of legal jargon.

1.2 Definition of an unfair term

Part 2B defines an unfair term as:

“A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer.”

This has been interpreted by Victorian Civil and Administrative Tribunal (VCAT) President Justice Stuart Morris in *Director of Consumer Affairs Victoria v AAPT Ltd*, to mean that there are two types of unfair terms. These include:

- terms that cause such an imbalance that they are unfair even if they were individually negotiated or brought to the consumer's attention, and
- other terms that cause less (but still significant) imbalance. These terms are only fair if they have been individually negotiated or brought to the consumer's attention.

1.3 Assessment of unfair terms

When assessing the fairness of a term, any countervailing favourable terms are considered. However, in *Director of Consumer Affairs Victoria v AAPT*, Justice Morris said that even if a contract contained terms that favoured the consumer, they would not counterbalance the unfair term if the consumer (or, indeed, the supplier's employees administering the contract) was unaware of such terms. This would occur in instances where there were implied terms, or terms that were hidden in the fine print, in a schedule or in another document, or where terms were written in legal jargon.

Consumer Affairs Victoria's approach is to assess whether a term - on its face and in its contractual context - causes a high degree of detrimental imbalance such that it should be regarded as unfair and would be required to be removed or modified. This would be the case even if the term was individually negotiated or brought to the consumer's attention because such action does not operate to remove the unfairness in these circumstances.

1.4 Effect of an unfair term

Consumer Affairs Victoria will require a term that causes a lesser detrimental imbalance to be removed or modified unless the supplier can show that it was negotiated with the consumer or brought to the consumer's attention in a clear, simple and comprehensible way, thus removing the unfairness.

If a term in a consumer contract is assessed as unfair, or is a prescribed unfair term, it will be void, i.e. treated as never having existed. The contract will continue to bind the parties, but only as far as the contract is able to exist without the unfair term or the prescribed unfair term. VCAT can also use an unfair term as the basis for a broader range of remedies under its extensive powers to resolve 'consumer and trader disputes'.

“*Research methodology*”

2

Quantitative and qualitative research was conducted to assess the extent and level of detriment Victorian consumers encounter when entering contracts that have unfair terms.

2.1 Quantitative research

A structured survey was developed by Consumer Affairs Victoria and administered by an independent market research fieldwork agency via computer assisted telephone interview.

Data collection was completed between 21 June and 14 July 2007.

Who was surveyed?

Consumers aged 16 years or above were randomly selected to participate in the survey from a representative sample of the Victorian community.

Respondents who had never entered a contract or agreement (either written or oral) for the supply of personal, domestic or household goods or services were excluded from the survey.

A total of 1,690 surveys were completed, with 1,014 consumers recruited from metropolitan Melbourne and 676 recruited from regional Victoria.

What was measured?

The survey measured the incidence of Victorian consumers who entered into contracts containing terms or conditions that had been assessed as unfair.

The survey addressed a number of issues relating to contracts including:

- consumer recall of contracts with unfair terms or conditions
- the category of goods and services associated with unfair contract terms
- the reasons the consumer considered the contract term or condition unfair
- the behaviour the consumer exhibited when entering a contract
- the action the consumer took to redress the unfair contract term, and
- the outcome of actions taken to change contracts with unfair terms or conditions.

2.2 Qualitative research

Qualitative research was also conducted to provide further insights into the reasons consumers enter into unfair contracts and the detriment that ensues from these arrangements.

Who was surveyed?

A total of 20 in-depth interviews were conducted with a range of consumers. Fifteen of these were conducted in person with residents of metropolitan Melbourne, while five were conducted via telephone with regional Victorians.

Where possible and when relevant, other members of a respondent's household were included in the discussions. This ensured other viewpoints and experiences were captured.

All research participants were recruited from a list of respondents to the quantitative survey who agreed to participate in further research on the topic. Interviews were undertaken between 28 August and 13 September 2007, and took between 30 and 90 minutes to complete. The sample of respondents captured in the 20 in-depth interviews included a wide variety of consumers who ranged in age, gender and socio-economic background.

What was measured?

The research addressed:

- the types of contracts containing unfair terms which consumers entered
- the circumstances that led to the complaint about an unfair term
- the steps taken to address the unfair contract term
- the triggers and barriers the consumer experienced when dealing with an unfair contract term, and
- the emotional, social and economic detriment caused by the unfair contract term.

“Types of consumer contracts”

3

Consumers were asked in the quantitative research (survey) to identify the types of contracts they had entered for the supply of personal, domestic or household goods or services. Unprompted, approximately half the respondents could not recall any contracts they had entered. The most common contract type identified by consumers before prompting was a mobile phone contract. Twenty-six per cent of respondents nominated that they had entered a mobile phone contract.

Once prompted, respondents were able to recall a range of contracts they had entered. These included utility contracts (82 per cent), landline phone contracts (74 per cent), insurance contracts (72 per cent), mobile phone contracts (63 per cent) and internet service contracts (60 per cent).

These findings indicate that consumers do not necessarily make the link between signing up for the supply of a product or service and entering a contract. This presents potential risks for consumers as they do not consciously recognise when they have entered a contract for a specific service.

Table 1: Contracts – by industry type

	1st Mentions	Other Mentions	Prompted	Total
Mobile phone	26%	5%	33%	63%
Banking/Finance/Credit/Mortgage	16%	6%	37%	58%
Landline phone	12%	3%	58%	74%
Utilities - gas, electricity	12%	5%	65%	82%
Internet service provider	12%	5%	44%	60%
Transport including repairs, purchase or hire of motor vehicles	6%	2%	28%	36%
Pay TV	5%	1%	17%	22%
Purchase or hire of electronics/electrical goods	4%	1%	20%	26%
Purchase or hire of other household goods	4%	1%	16%	21%
Renting or using the service of an estate agent	3%	1%	24%	28%
Insurance	3%	3%	66%	72%
Recreation/Leisure service i.e. gym/fitness centre	3%	1%	20%	24%
Buying, selling or letting a property	3%	1%	20%	24%
Building and renovations, repairs and maintenance of your home	3%	1%	10%	14%
Online purchases	1%	–	23%	24%
Travel services i.e. airline tickets, accommodation, tours	1%	–	43%	44%
Other	2%	1%	1%	5%
None	24%	49%	2%	–

BASE: All Respondents n=1690Q. (a) Can you tell me the types of services or purchases you have personally entered an ongoing contract for? (b) Any Others? (c) Have you personally entered an ongoing contract for any of the following services?

“*Incidence of unfair contract terms*”

4

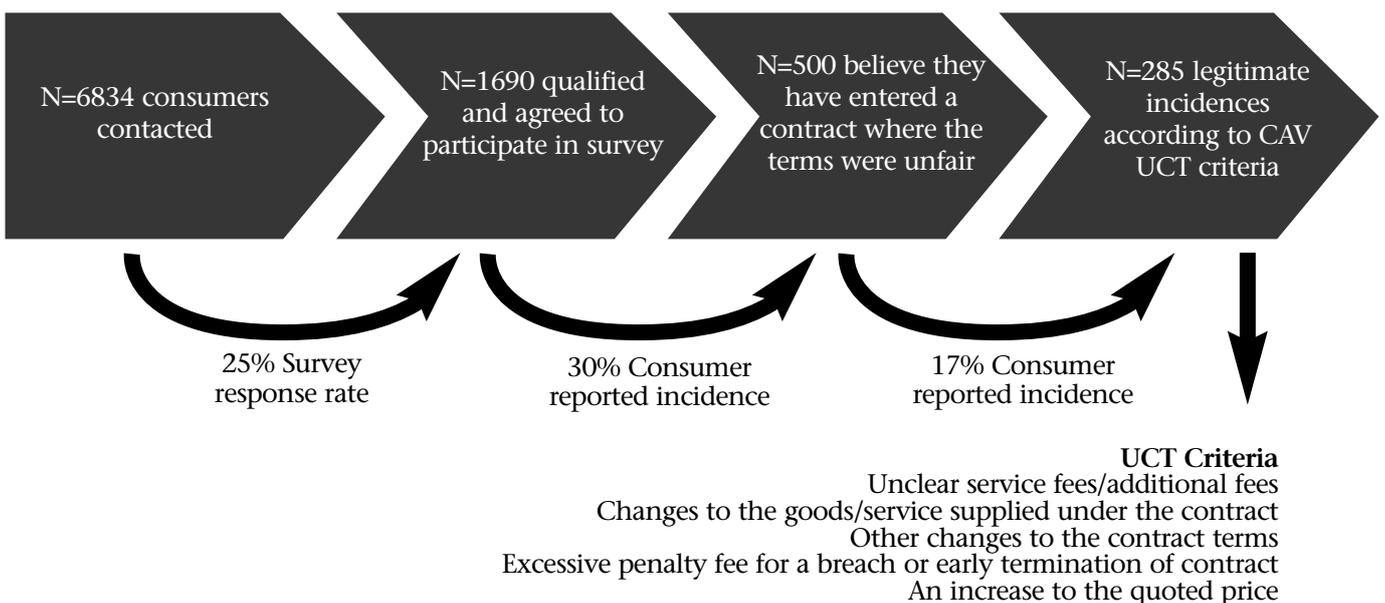
Of the 1690 consumers surveyed, 30 per cent believed they had entered a contract containing unfair terms or conditions. These unfair contract terms were coded into the categories listed below.

- Excessive penalty fee for a breach or early termination of contract.
- Changes to the types of goods/services supplied under the contract.
- Cheque or direct debit dishonour fee.
- Unclear service fees/additional fees.
- Other changes to the contract terms.
- Poor customer service or after sales service.
- Fee for missed payment on card.
- Fee for exceeding card limit.
- Goods/service not considered to be value for money.
- Increase in the quoted contract price.

The survey data was filtered to isolate respondents who reported contract terms that were in line with the Consumer Affairs Victoria criteria for unfair contract terms drawn from Part 2B. These criteria included unclear service fees/additional fees, changes to the types of goods/services supplied under the contract, other changes to the contract terms, excessive penalties for breach or early termination of contract and/or increases to the quoted contract price. Other forms of unfairness excluded by the filter relate to the supplier’s processes or the quality of goods or services. These are addressed by other provisions in the FTA.

Based on these criteria, the incidence of unfair contract terms among the survey sample was 17 per cent.

Graph 1: Incidence of unfair contract terms



Further qualitative research suggests that the incidence level reported in the survey is likely to be conservative. This is evidenced by the fact that respondents generally believed that they had no power to challenge an unfair term because it was part of a legally binding document.

“They (the service provider) wouldn’t have done it if they didn’t have the legal right. They would have covered all their bases before they sent all the letters out saying that the calls were no longer free.” [Research respondent]

Consumers who encountered an unfair contract term tended to view it as ‘a bit of bad luck’. They indicated that although they contacted the relevant service provider, they did so to complain about rather than challenge the unfair contract term.

“I felt as if it was unfair, that I had been caught out in an unlucky situation.” [Research respondent]

Some consumers reported feeling ‘caught out’. They felt that they were to blame for not being aware of the detail contained in the contract.

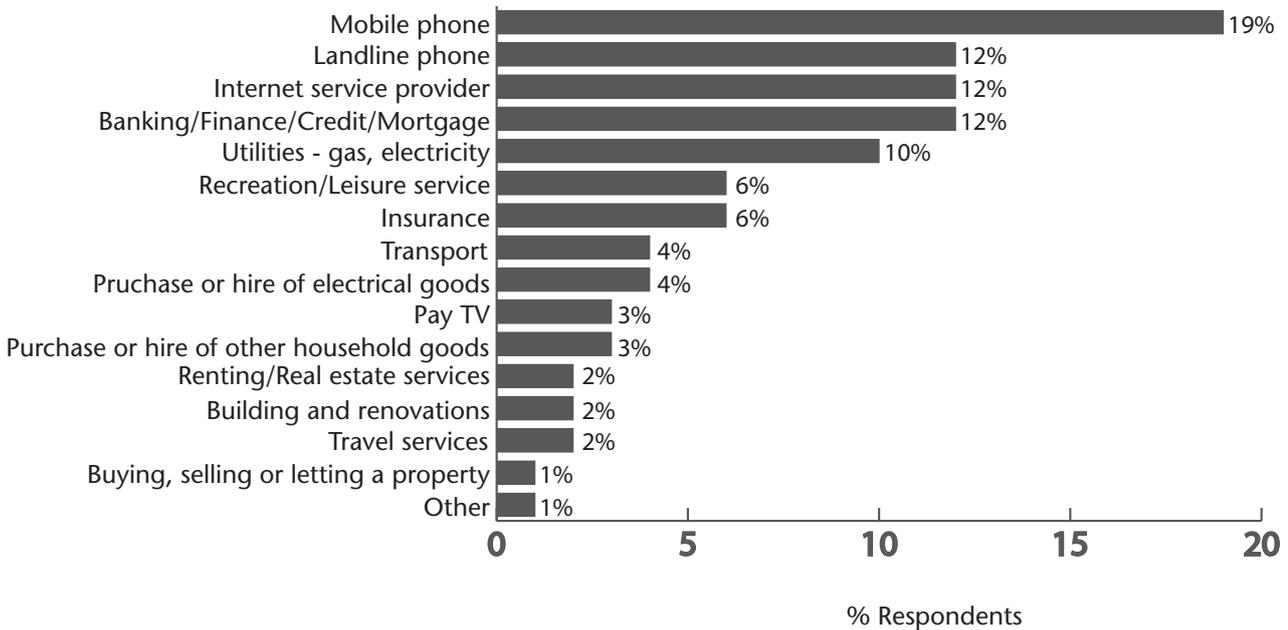
“ Industries with reported unfair contract terms ”

5

Mobile phone contracts had the highest reported incidence of unfair contract terms, with 19 per cent of those who reported an unfair contract term stating that it was contained in a mobile phone contract.

Other industries with reported unfair contract terms were landline phone providers (12 per cent), internet service providers (12 per cent), banking, credit or finance (12 per cent), utility providers (10 per cent), recreation/leisure services (6 per cent) and insurance (6 per cent).

Graph 2: Type of product or service with unfair contract term



BASE: n=285

Q. Can you tell me the type of product or service this contract was for?

CASE STUDY

Shane signed up with a mobile phone company that promised unlimited calls between mobiles on its network. He did so because a number of his friends used the same provider and he thought he would save money. He even convinced some of his other friends and family members to join so he would enjoy bigger savings.

Before signing for two years, Shane read the agreement. He thought it looked like a pretty standard mobile phone contract so he signed it.

Halfway through the contract period, Shane received a letter from the service provider informing him that he would no longer have access to unlimited free calls between mobile phones on the same network.

Shane was annoyed because the company had changed the terms of his contract before it had expired. He telephoned the customer service centre to find out why the change was occurring and was told that the provider was entitled to change the conditions of the contract as long as the customer was informed in writing.

Shane was extremely angry as the change to the contract would cost him about an extra \$80 a month. He also felt guilty that he had talked others into signing up with the company. However, he figured that the company was acting within its legal rights. He believed that as he had signed a two-year contract, he was powerless to take action. He therefore continued with the service provider and paid \$1000 in extra calls over the remaining 12 months of his contract.

“ Identification of an unfair contract term ”

6

Survey participants were asked to describe the sorts of unfair contract terms they had encountered. The most commonly reported category of unfair contract term was unclear service fees. Sixty-three per cent of respondents reported that they were in a contract that imposed unclear service fees or additional fees.

Other unfair contract terms reported in the survey included changes to contract terms (19 per cent), changes to the goods/services supplied under the contract (17 per cent), excessive penalties for breach or early termination of the contract (17 per cent) and an increase in the quoted contract price (6 per cent).

In addition to unfair contract terms, the survey revealed other potential breaches of the FTA. These included the non-delivery or a delay in the delivery of goods, products or services not living up to advertised claims and contracts that were too long or too difficult to cancel.

The qualitative research also revealed that additional costs and charges were the primary reason for consumers stating that they had experienced an unfair contract term.

CASE STUDY

Angela found a coupon in her local paper for a free trial workout at a local gym. The offer appealed to her as she wanted to get fit and lose weight. Angela decided to take advantage of the trial before deciding whether to join the gym.

When Angela arrived at the gym for the trial, she was told that she was not allowed to use the equipment while unsupervised because she would not be covered by the gym's insurance. Instead, one of the consultants convinced her to take out a 12-month membership that would give her access to all of the gym's facilities and group exercise classes.

Angela signed a contract after glancing through the three or four pages of terms and conditions. She also provided the gym with her bank account details so that her fees of \$19.90 a fortnight could be paid by direct debit.

For five months, Angela went to the gym at least four times a week. She felt she was getting good value out of her membership. However, as she became busier, she was able to go less frequently. About six or seven months after taking out the membership, she found that she was not going to the gym at all. As she had signed a 12-month contract, she decided to pay the fortnightly fees until the membership expired. It did not occur to her to cancel her membership and she was not aware she had the option of paying an early termination fee.

After the 12-month period had lapsed, Angela was very surprised to find that the gym was still debiting her bank account fortnightly. She rang the gym and was told she needed to contact her bank in order to stop the payments. However, the bank informed her that in fact she needed a written request from the gym to stop the payments.

When she saw the gym manager, Angela was told that she needed to provide 30 days notice in writing requesting her membership be cancelled. She was also required to complete a specific form that would be faxed to her bank.

Angela was furious and felt powerless and cheated. She had taken out a 12-month membership and could not believe one of the conditions to which she had agreed gave the gym the legal right to access her bank account twice before her contract would be cancelled.

Further analysis of the survey data indicated that unclear service fees/additional fees were prevalent in banking, credit and finance contracts (79 per cent) and contracts for internet service providers (71 per cent) compared with the total incidence of unclear or additional fees (63 per cent).

Changes to goods and services supplied under the contract were more likely to occur in contracts for landline phones (23 per cent) and mobile phones (21 per cent) than contracts for internet service providers (11 per cent) and banking and finance (9 per cent).

Table 2: Reason contract was considered unfair

	Total	Mobile phone	Landline phone	Internet service provider	Banking/ Finance/ Credit
Unclear service fees/additional fees	63%	62%	66%	71%	79%
Other changes to the contract terms	19%	21%	17%	17%	21%
Excessive penalty fee for a breach or early termination of contract	17%	19%	9%	17%	15%
Changes to the goods/services supplied under contract	17%	21%	23%	11%	9%
An increase to the quoted price	6%	2%	9%	6%	–

BASE: n=285

Q. Thinking about the contract, can you tell me why you considered the contract terms and conditions to be unfair?

CASE STUDY

Patricia and Ken decided the time had come for them to change from a dial-up internet service to a broadband service. They used the internet to plan their caravanning holidays and wanted to access information more quickly.

They had recently noticed advertisements for a company that was offering a special deal. As part of the deal, customers would receive a free broadband router when they signed up for the company's service. Soon after noticing the ads, a sales representative from the company advertising the deal knocked on Patricia and Ken's door and talked to them about it. The sales representative told them about a plan that allowed unlimited access in 'off-peak' hours for \$29.95 per month.

Patricia and Ken asked if they could take some time to read the contract before they signed up. The salesperson agreed to leave the contract with them and said he would call back to make the final arrangements.

Although Patricia and Ken read the contract, they did not get around to sending it back. When the customer service representative rang to confirm a time for a technician to come to their home to install a new broadband router and set up their new internet connection, they agreed, believing they were bound by the written contract.

Patricia and Ken enjoyed their new broadband connection and the speed with which it allowed them to download information. However, they were shocked when they received their first bill for more than the \$29.95 they were expecting. When they contacted the company about the bill, they were told there were additional charges for using the service before midday or after midnight, which were the designated 'off-peak hours'.

Patricia felt annoyed that she had not been told how restrictive the hours of free access would be and she decided to cancel the contract. She made numerous calls to the company over a period of about a month in a bid to cancel the contract. However, she was continually referred to other representatives in different divisions. Patricia was eventually put through to a manager in the company's Adelaide office who told her that he was unable to help her as she had signed a two-year contract. It was only when she informed the manager that she had not actually signed a contract that he agreed to cancel her internet service.

“Consumers’ attitudes towards contracts”

7

The research revealed that the way consumers perceived contracts played a large role in determining their response to unfair contract terms.

The qualitative research showed that consumers overwhelmingly believed contracts were legally binding. It revealed that consumers who signed a contract felt compelled to abide by all its terms and conditions regardless of whether they were fair and reasonable.

“If you sign a contract then that is that, you are bound by everything that is in it. No question.” [Research respondent]

“There was nothing I could do. I had agreed to it when I signed the contract.” [Research respondent]

Contracts were also seen as a necessary evil. Respondents felt contracts were difficult to avoid if life was to be enjoyed. Indeed, many believed that it was impossible to live in the modern world without entering contracts.

“But there are no other choices sometimes. You can’t enjoy the finer things in life without being in a contract.” [Research respondent]

Contracts were also seen as having been designed to protect service providers rather than their customers.

“I expect contracts would have stood up over time and things are loaded in their [the supplier’s] favour.” [Research respondent]

“They trap people into contracts they can’t get out of and then they feel they are binding and have to pay these fees to get out of it.” [Research respondent]

Consumers involved in the qualitative research indicated that they believed all contracts were similar. They therefore felt that they did not need to read a contract thoroughly as they had seen the information before.

“To me it seemed like a pretty standard phone contract and I had had phone contracts before so I wasn’t worried.” [Research respondent]

Consumers also indicated that contracts were written and presented in such a way as to actively deter them from reading them thoroughly. Legal jargon and detail contained in the fine print were key factors in stopping consumers reading contracts carefully.

“I hate contracts. A lot of the time they don’t make sense to the average person. They are not straightforward on purpose to make it confusing and to put you off reading them.” [Research respondent]

Contracts agreed to via telephone were generally seen as less binding and detailed than those signed in person.

“I do think there is a big difference between getting a piece of paper and agreeing to stuff on the phone.” [Research respondent]

“They told me that technically I was in a contract, but I had just rung them up on the phone, so I wasn’t really aware of it.” [Research respondent]

A few consumers said entering contracts made them feel secure. However, this was not a common view as most had a casual attitude towards storing contracts, admitting that they had discarded them or had forgotten where they had put them.

“ Are consumers reading contracts? ”

8

The evaluation process respondents undertook prior to purchasing goods or services and the extent to which they read contracts prior to signing them varied considerably. Surprisingly, consideration of the contract was not dependent on the time invested in the pre-purchase process, the potential value of the contract or the number of suppliers considered. Instead, consumers' propensity to read contracts was influenced by:

- their inclination towards wariness and attention to detail, and
“I always read them...” [Research respondent]
- previous negative experiences with unfair contracts or the experiences of friends and family members.
“I have been bitten in the past by things. Now, when I get a brochure I read all the fine print.” [Research respondent]

When evaluating contracts, many consumers relied heavily on sales people to provide an unbiased assessment of both positive and negative contract conditions.

“I trusted that the retailer would tell me the right thing, but when I added it up, it was \$1,000 more than just buying the laptop outright.” [Research respondent]

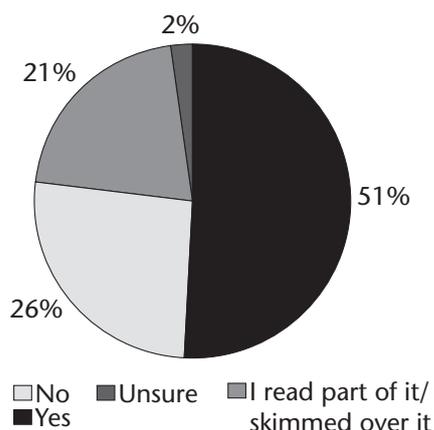
“The contract was pretty much explained to me, they sort of explain everything to you and you think that you know it.” [Research respondent]

Some participants spoke of feeling rushed or pressured into signing contracts. They felt that the situation was not conducive to them reading the contract, either due to the environment (i.e. a busy shopping centre or doorstep) or the rushed 'take advantage of this limited offer' nature of the sale. However, these consumers also conceded that in all likelihood they would not have read their contracts thoroughly anyway.

The quantitative research also revealed whether or not consumers who encountered an unfair contract term had read the terms and conditions before entering the contract. Almost three in every four respondents (72 per cent) who reported encountering an unfair contract term, indicated that they had read all or part of the contract before entering the agreement. Of these, two in every three (64 per cent) also asked questions about the terms and conditions prior to signing the contract.

Graph 3: Reading of contracts

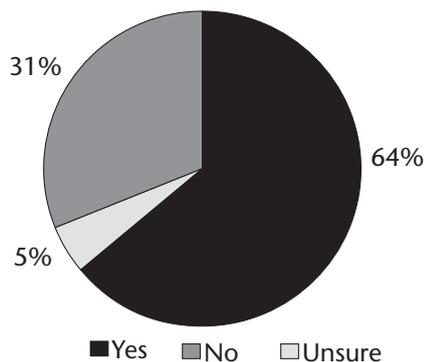
Read the contract terms and conditions prior to signing/purchasing



BASE: n=285

Q. Did you read the terms and conditions in the contract before you signed/purchased?

Asked questions about contract terms and conditions prior to signing/ purchasing



BASE: n=204

Q. Did you ask any questions about the terms and conditions in the contract before you signed/purchased?

CASE STUDY

Murray and Dianne booked a four-week holiday in Canada that included a cruise and other tours.

A few weeks before they were due to leave, Murray undertook some research on travel insurance policies. He and Dianne decided to purchase a policy advertised in a magazine sent to members of the motorcycle association for over 50-year-olds to which they belonged.

Murray read the policy thoroughly before signing it.

Unfortunately, three days before the couple were to fly to Canada, Dianne's 87-year-old mother had a stroke. After being told by doctors that she was not expected to last the week, Dianne and Murray cancelled their holiday. Dianne's mother died four days later.

Murray read their insurance policy again to ensure they were covered for cancellation fees and lost deposits. He noted that a clause excluded claims for pre-existing conditions. However, he felt empowered by the policy and was sure that his claim would be successful. He and Dianne rebooked and paid for their holiday, expecting their insurance claim would be successful.

However, the couple were shocked when they received a letter from the insurance company rejecting their claim and pointing out the defined terms section of the policy that specified relatives were only those aged under 85-years-old.

Murray was confused. Although he had pored over the contract, he had not seen that particular clause.

The rejection of Murray and Dianne's claim meant that they were out of pocket about \$14,000.

Murray contacted the Insurance Ombudsman's Service after his claim was rejected. Representatives from the service advised him to follow up with the insurance company before seeking help from other sources.

Murray invested a significant amount of time investigating his claim. He now believes that the policy was inherently misleading and designed to make it difficult for consumers to make a claim.

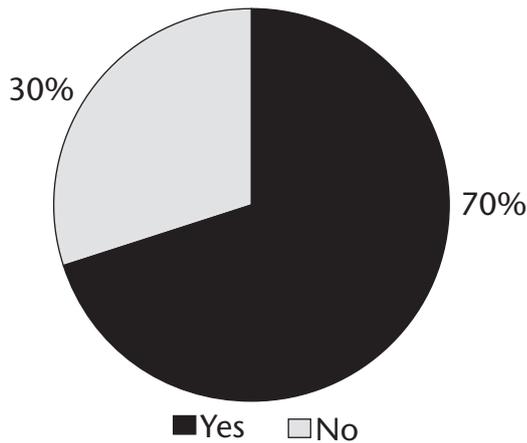
The majority (72 per cent) of consumers stated that they read all or part of the contract. Consumers entering banking, credit or finance contracts were more likely to read all or part of the contract (85 per cent) than those entering landline phones contracts (46 per cent).

The research also indicated that approximately two-thirds (64 per cent) of consumers asked questions about terms and conditions before entering a contract. This was most common for those entering contracts with internet service providers (71 per cent).

“Action taken to address unfair contract terms”

The research also explored the type of action consumers took after identifying unfair contract terms. Of those who entered a contract with an unfair term or condition, 70 per cent attempted to take action. Consumers who encountered an unfair term in a landline phone contract were the most likely to take action (83 per cent).

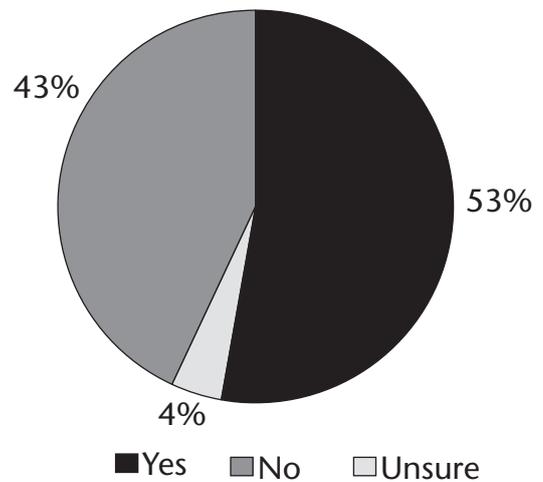
Graph 4: Consumers who attempted to take action after problem identified



BASE: n=285
 Q. Did you attempt to take any action when you identified a problem with the contract?

When taking action, more than half the respondents (53 per cent) referred back to the terms and conditions in their contracts. They did this either independently or at the suggestion of the trader. Consumers who experienced an unfair term in a banking, finance or credit contract were those most likely (65 per cent) to refer back to the terms and conditions in the contract.

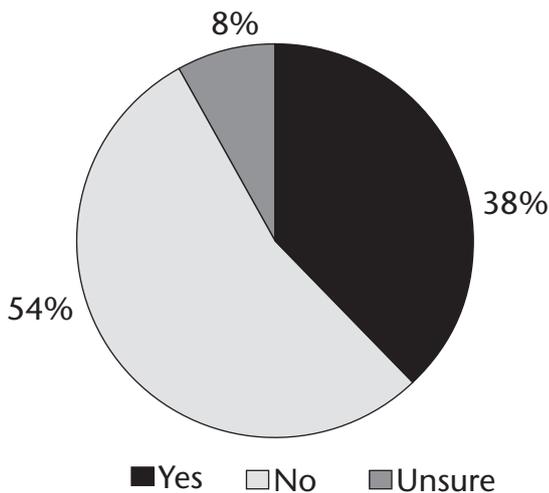
Graph 5: Consumers who referred to a contract after identifying an unfair term



BASE: n=285
 Q. Did you or the supplier refer back to the terms and conditions when you identified a problem with the contract?

Of the 65 per cent who referred back to the contract terms and conditions, more than one in three (38 per cent) believed there was a term or condition in the contract that prevented them from taking any further action. Consumers who purchased internet services were the group most likely (60 per cent) to believe that they were unable to take further action.

Graph 6: Consumers who believed terms and conditions prevented them from taking further action



BASE: n=150

Q. Was there anything in the terms and conditions that put you off or made you think you could not take further action to resolve the problem?

The first action taken by those consumers in the qualitative research who encountered an unfair term was to contact the relevant company. However, this contact was made primarily to clarify the issue or complaint, rather than to focus on the relevant contract term.

Company representatives, who were relied upon to provide direction and interpretation, had a strong influence on any subsequent actions taken by the consumers.

“They just said it was in the fine print. They recommended I see a financial adviser if I needed help to pay the bill.” [Research respondent]

Those consumers who sought redress were generally prepared to follow the relevant company’s complaint handling procedures.

“I knew I was going to have to sit on the phone and be hand-balled from one department to another.” [Research respondent]

9.1 Triggers for dealing with unfair contract terms

Consumers who took action to address an unfair contract term or the detriment it caused were motivated by disagreement with the service provider’s interpretation of the specific term or condition. It was in these situations that consumers felt empowered by the clause contained in the contract.

“I felt empowered by the contract; I never gave it a thought that it would be rejected. I was confident because I had read the contract.” [Research respondent]

Consumers were also more likely to contest an unfair contract term if significant financial cost (upwards of \$1,000) was involved.

Disatisfaction with a product or service was more likely to be seen by consumers as a valid reason to terminate a contract or reject changes or charges than an unfair contract term.

9.2 Barriers preventing consumers from dealing with unfair contract terms

Barriers preventing consumers from dealing with unfair contract terms considerably outnumbered the triggers.

The way consumers perceived contracts was the most significant barrier to them addressing unfair terms. Consumers who participated in this research generally indicated a belief that contracts were binding. They felt that nothing could be done about an unfair contract term if they had signed a contract.

“They wouldn’t have done it if they didn’t have the legal right. They would have covered all their bases before they sent all the letters out saying that the calls were no longer free.” [Research respondent]

Another reason consumers gave for not dealing with unfair contract terms was time and effort. Taking action was not seen to be worthwhile if the financial detriment was not significant. Consumers also generally believed that suppliers made it difficult for them by making call centre queues long and voice activated menus difficult to navigate.

“Most people give up and don’t take it any further. You have busy lives, busy days and there are lots of things on your plate. You would have to take time off to deal with it, and it would end up being just one more thing on your plate.” [Research respondent]

“I suppose I had a choice of paying extra and forgetting about it or spending time and money worrying and fighting. It came down to a value judgement. Maybe if it was going to cost me more I would have followed it up.” [Research respondent]

“Causing problems would be too much of a headache and we have too much on our plate and too much to do in life to go back so you just end up paying it out.” [Research respondent]

Consumers indicated that a lack of knowledge about avenues through which they could pursue their complaints was another barrier preventing them from dealing with unfair contract terms. Most research participants indicated that the only action they could take was to lodge a complaint with the supplier. Often this approach created further barriers for the consumer. These included:

- the threat of legal action and the problems that would ensue
“They told us you have no choice, you have to pay or we will take legal action against you. I was so angry, but there were also so many other things that were happening at the time.” [Research respondent]
- the threat of the account being referred to debt collectors – this was of particular concern to vulnerable and disadvantaged consumers who did not want the situation to negatively impact on their credit ratings, and
- doubts about likelihood of success.
“I did think about ringing the Ombudsman but they pointed out this clause and I didn’t think I had a leg to stand on. I really felt defeated before I began.” [Research respondent]

Another barrier preventing many consumers from taking action was the fact that they had not kept copies of the relevant contracts.

“I didn’t know where the paperwork was so I couldn’t look up the clause. It was my own fault for not keeping the paperwork. I really need to be more efficient at keeping these things.” [Research respondent]

9.3 Consumers' views of their rights

Those who participated in the qualitative research were asked to explain what the term 'consumer rights' meant. Participants most commonly cited the adage 'buyer beware' in response.

"It's all really about buyer beware, meaning be careful and look out for yourself as people will try to rip you off." [Research respondent]

Those interviewed indicated a belief that consumers were entitled to goods and services that met their expectations.

"You have a right to get what you paid for and if they don't you should be able to take them back." [Research respondent]

"Don't know a lot but assume that if you buy something and you are not happy with it that you should be able to return it." [Research respondent]

At the same time, most participants felt consumers needed to be responsible for their purchases, even if they believed the terms of the contract were unfair.

"If you have used it you should have to pay for it. You need to be responsible." [Research respondent]

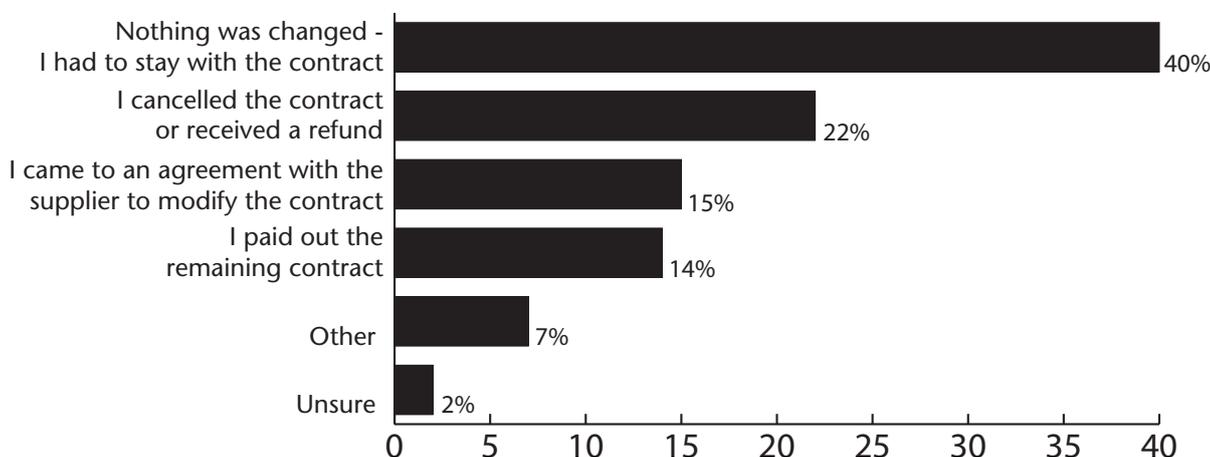
These attitudes affected the way consumers reacted when they encountered unfair contract terms.

“
The outcome of discussions about unfair contract terms
 ”

Consumers were also asked about the outcome of their discussions with suppliers about unfair contract terms. Fewer than one quarter of respondents in the quantitative research who reported encountering an unfair contract term (22 per cent) were able to cancel their contract or receive a refund. A further 15 per cent were able to reach an agreement with the supplier to modify the contract. However, the majority (63 per cent) had to continue to abide by the contract terms and conditions (40 per cent), pay out the remainder of the contract (14 per cent) or were unsure what the outcome of discussions about the unfair contract term would be (9 per cent).

Further analysis of the data revealed that consumers with higher educational levels were slightly more likely to come to an agreement with the service provider regarding the unfair contract term than those with lower levels of education.

Table 3: Outcome of discussions about unfair contract term



BASE: n=285

Q. Which of the following best describes what action was taken once you realised there was a problem with the contract?

“ Assessing the detriment of unfair contract terms ”

11

Consumers interviewed in the qualitative research identified a number of negative emotional, economic and social implications they had experienced as a result of encountering an unfair contract term.

11.1 Emotional detriment

Respondents identified feeling guilty about signing the contract and their subsequent interaction with the service provider's staff.

“I felt guilty. It was all my fault. We didn't have a holiday, we lost a lot of money and now I can't go away at all.” [Research respondent]

Consumers also indicated that they had felt frustrated, angry and stressed. They also said they had felt trapped, isolated, helpless and lacking in confidence.

“I need a laptop but I am controlled by it and that is what happens when you don't have the money to buy it. I am locked in and I can't wait for it to end but the second they end you just sign up again.” [Research respondent]

In order to assess quantitatively the detriment consumers encountered when faced with an unfair contract term, survey participants were asked to rate how the unfair contract term impacted on their emotional wellbeing from a scale of one = none at all to 10 = a great deal. Consumers reported feeling highly annoyed (mean 8), frustrated (7.8 out of 10) and disappointed (mean 7.6). Interestingly, consumers believed that the unfair contract term impacted significantly on their confidence when entering future contracts (mean 6.9). This finding was also supported by the qualitative research. Consumers also reported feeling stressed (mean 6.4).

Table 4: Impact of unfair contract term on consumers

	Total	Mobile phone	Landline phone	Internet service provider	Banking/ Finance/ Credit/ Mortgage
BASE	n=285	N=53	n=35	n=35	n=34
Annoyance	8.0	8.6	8.6	7.7	8.6
Frustration	7.8	8.3	7.7	7.6	8.8
Disappointment	7.6	8.0	8.0	7.8	8.2
Confidence in entering future contracts	6.9	7.1	6.7	7.4	7.4
Stress	6.4	6.6	6.9	5.9	6.7

11.2 Economic detriment

Financial detriment experienced by consumers ranged from \$30 to tens of thousands of dollars. Consumers often reported feeling as though they had been cheated and ripped off.

There was also strong evidence in the research that excessive penalty fees and charges could exacerbate the already precarious financial situations of vulnerable consumers. For example, a consumer who had ignored a \$160 bill for the early termination of a utilities contract was then charged \$280 before being referred to a debt collector.

“One hundred and sixty dollars is not a small amount as I was a job seeker at the time so it made it harder to pay and there is no discount for Health Care Card holders or payment plan offered. It was out of my means so I just ignored it. It went on to a debt collector and ended up being \$280.” [Research respondent]

Another participant chose to open an account with a smaller bank to take advantage of its lower fees. However, he found that as the bank had very few of its own ATMs, he often had to use other banks’ facilities at a cost of \$2. The accumulation of these \$2 fees meant his account was overdrawn when direct debits were activated.

“Sometimes I just need to know my balance so I can work out if I have got enough money to be able to make a withdrawal. And even this costs me \$2... If my account is overdrawn I get a \$45 charge plus interest... For me, \$45 is a tank of petrol.” [Research respondent]

“I know I need to be responsible when it comes to direct debits and I really do try to be. But it is obscene that you have to pay \$45 when the direct debit itself was only \$25. When they put interest on top of that you get hit three or four times and it is hard to catch up.” [Research respondent]

11.3 Social detriment

A consistent finding in the qualitative research was the lack of trust consumers had in companies and their sales representatives after they encountered an unfair contract term.

“It has made me feel like we can’t trust anyone. If anyone calls I put down the phone, I just don’t have time anymore for sales people.” [Research respondent]

Consumers also lost faith in their own judgement.

Some consumers reported feelings of social isolation as a result of reduced access to communications services after the cancellation of related contracts. Experience with unfair contract terms also resulted in subsequent poor credit ratings for some consumers.

“ Conclusion: Looking towards the future ”

Consumer Affairs Victoria’s research paints a clear picture. Many Consumers do not read contracts, which are often long and complicated, before they sign on the dotted line. Even those consumers who read contracts carefully are likely to misunderstand them or overlook important terms and conditions. This means that consumers do not have the skills to make educated choices about suppliers. It also means that they may find themselves bound by enforceable contractual changes that may have negative consequences. As a result, competition in the market is impaired.

Not all forms of unfairness met by consumers can be or are resolved by typical FTA protections that deal with misleading and deceptive conduct or implied warranties. This paper shows that consumers are liable to be deterred from pursuing complaints once suppliers refer them to contract terms or conditions that appear to be legally binding.

The evidence contained in this paper suggests that the number of complaints about unfair terms lodged with Consumer Affairs Victoria is the tip of the iceberg. It reveals that many consumers do not complain or, if they do, they lodge a complaint with a supplier rather than Consumer Affairs Victoria. The research shows that this may be because consumers do not know legislation to protect them from unfair contract terms exists. This is evidenced by the fact that in the main, consumers who do complain report the substance of the complaint (i.e. a change to type of goods or services or two extra direct debits), rather than the relevant contract term (i.e. unilateral variation permitting change to unlimited calls or requirement to cancel in specified way and time).

This paper reveals that consumers are incurring both financial and emotional costs after encountering unfair contract terms. In addition, there is evidence of a flow-on effect – consumers who come across unfair terms become suspicious of written contracts or drop out of the market.

This research also suggests that consumers are encountering unfair terms in a range of industry contracts. However, it reveals that not every contract produced in an industry sector contains perceived unfair terms. Part 2B of the FTA is able to tackle this as it provides the scope to assess terms in particular contracts in a targeted way.

There is obvious scope for educating individual consumers about the contracts they sign and the applicability of consumer protection legislation. However, this research suggests that Part 2B of the FTA represents an important tool to enable consumer protection agencies to take proactive, comprehensive and strategic approaches to unfair contract terms in industry sectors. This protects all consumers in that market, not only the ones with extra resilience.

“ *Consumer Affairs Victoria research and discussion papers* ”

- 1 *Consumer Education in Schools: Background Report*
November 2003
- 2 *What do we Mean by 'Vulnerable' and
'Disadvantaged' Consumers?* March 2004
- 3 *Information Provision and Education Strategies*
March 2006
- 4 *Social Marketing and Consumer Policy* March 2006
- 5 *Designing Quality Rating Schemes for Service Providers*
March 2006
- 6 *Regulating the Cost of Credit* March 2006
- 7 *Consumer Advocacy in Victoria* March 2006
- 8 *Choosing between general and industry-specific
regulation* November 2006
- 9 *Using licensing to protect consumers' interests,*
November 2006
- 10 *Consumer Detriment in Victoria: a survey of its
nature, costs and implications* October 2006
- 11 *Stopping Rogue Traders* November 2006
- 12 *Unfair Contract Terms in Victoria: Research into their
extent, nature, cost and implications* October 2007

Notes

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