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

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

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

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

What unfair contract term legislation applies to which contracts?

For consumer contracts entered into between 9 October 2003 and 30 June 2010, the original unfair contract term legislation in the *UCTA* 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 *UCTA* (nationally aligned provisions) and the *UCTA* version apply².

For consumer contracts entered into or renewed after 1 January 2011, when the *UCTA* provisions have been repealed, the ACL version will apply³.

How does unfair contract term legislation work?

The legislation empowers consumers and the Director of Consumer Affairs Victoria to seek from the court an order to void or voidable

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

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 the term if the consumer is



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 *Trade Practices
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 *Trade Practices
Act 1974* (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 *Trade Practices 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
Trade Practices Act 1974 (Vic) until Part 2A is repealed
and replaced by the ACL consumer guarantees on
1 January 2011.

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

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

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

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

Melbourne 2007 World Swimming Championships

The 2007 World Swimming Championships Corporation approached CAV in mid-2006 to discuss its proposed Condit~~2~~V

Industries subject to contract reviews since 2004

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

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

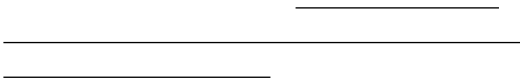
A guide to the sort of terms that will often be unfair can be found in section 25(1) of the ACL. In *Asda Stores Ltd v. Leisure Protection Board*, Justice Morris found the following terms in mobile phone contracts to be unfair, several of which match indicative terms in section 25(1):

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

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

Penalty clauses

Terms that require consumers who breach the contract or terminate early to pay an



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

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

Terms preventing deductions and setoffs

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

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

- there is no reciprocal obligation under the contract, or

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

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

- We may from time to time and without notice or liability to you suspend any of the Services (and at our discretion disconnect the relevant SIM cards from the Network) in any of the following circumstances:
 - (a) during any technical failure, modification or maintenance of the Network (but in that event we will procure resumption of the Services as soon as reasonably practicable)
- Notwithstanding any suspension of the Services under this clause you shall remain liable for all charges due hereunder throughout the period of suspension (including without limitation all monthly access fees, and regardless of whether or not any SIM card has been disconnected from the Network) unless we in our sole discretion determine otherwise. (AAPT case).
- The company reserves the right to have the final say on warranty claims. (Carpet/curtain retailer terms and conditions).
 - We will make every effort to complete the work on time but we cannot be held responsible for delays due to circumstances beyond our control. In this case, we will complete the work as soon as reasonably possible. (Carpet/curtain retailer terms and conditions: without a right for the consumer to terminate the contract where the delay has taken the completion time beyond the contract date, this term effectively allows the supplier to complete the contract in its own time.)
 - In the event that the retailer is unable to supply part of the order and the retailer accepts cancellation of the part, cancellation applies to such part only. (Carpet/curtain retailer terms and conditions: this term allows the supplier to avoid the normal consequences of its breach, as failure to

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

evidence being led to prove what is true.)

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

Generally unfair terms (section 24 ACL)

- We reserve the right to suspend provision of Services to you, where charges owing to us or any amount owing under this clause remain outstanding after 60 days, unless we have received written notice from you disputing those charges in good faith. If we suspend or terminate the Services for unpaid charges or any other reason, subsequent reconnection may incur a reconnection fee. (AAPT case unfair requirement to pay reconnection fee for reason not connected to consumer's act or omission)
- We may terminate this Agreement immediately by notice to you if:
(c)

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

- (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

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 anotherhat a

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