

EXECUTIVE SUMMARY AND UPDATE

Telco “Fine Print” Project

By Dr Jeannie Marie Paterson, Melbourne Law School and Jonathan Gadir, ACCAN

ABSTRACT

A review of consumer contract terms for telecommunications services undertaken for the Australian Communications Consumer Action Network (ACCAN) in early 2013 found that non-compliance with the Australian Consumer Law (ACL) substantive fairness requirements was widespread, particularly among smaller suppliers. The majority of problems with the contracts of major suppliers were a result of sloppy drafting. However there remain some areas of disagreement between ACCAN and the industry, particularly on the extent of variation powers that are considered fair. Many of the problem provisions identified in the report have been modified in recent months following positive consultations between suppliers and the ACCC and also subsequently with ACCAN. However there are unfair terms that remain in place. Consumer contracts containing unfair terms undermine the basic idea of contract because their enforcement depends entirely on whether an individual consumer has the knowledge and capability to assert their rights.

Overview

The report by the Australian Competition and Consumer Commission (ACCC), Unfair Contract Terms – Industry Review (March 2013)¹, provides a summary of a review by the ACCC of the contracts used in a number of industries including the telecommunications industry. In this review process, the ACCC identified terms that did not comply with unfair contract term laws and broader consumer protection laws. These concerns were supported by the findings of ACCAN’s *Telco “Fine Print” Project* which identified unfair and other non-compliant terms both similar to and going beyond those highlighted by the ACCC.

¹ <http://www.accc.gov.au/publications/unfair-contract-terms>

The Fine Print project commissioned by ACCAN involved the review of 42 standard form consumer contracts from ten suppliers for a range of different telecommunications products, including fixed line phone, mobile (pre and post-paid), internet and entertainment bundles, in order to assess compliance with the Australian Consumer Law (ACL) and the Telecommunications Consumer Protections (TCP) Code. The consumer contracts were all found on the web sites of the relevant suppliers in January and February 2013. Most of the contracts reviewed, ranging across all of the suppliers surveyed, contained terms that did not comply with the substantive fairness requirements in the ACL.

The review found the large suppliers (Telstra, Optus, and Vodafone) to be the most compliant, with the main problem areas being lack of clarity, poor wording and complex, difficult to navigate documents. Some of the second-tier and smaller suppliers demonstrated substantial levels of non-compliance with both the TCP Code and the ACL, with some being consistently aggressive in their treatment of consumers' rights.

The report proposed actions as follows:

- encouraging suppliers to improve navigability of consumer contracts online;
- requiring suppliers to set out clearly the limits on contractual discretionary powers, in particular the circumstances in which powers to vary a contract can be exercised and the standard for assessing excessive or unreasonable use by consumers;
- reviewing the imposition of late payment and default /exception fees to ensure that these are not unfair penalties;
- encouraging suppliers to provide clear and accurate information about the mandatory consumer guarantee regime in the ACL and their relationships with the suppliers' rights and obligations under the contract;
- ensuring that descriptions of service, limitation and exclusion clauses and indemnity clauses in telecommunications contracts acknowledge the impact of the consumer guarantees in the ACL and do not wrongly represent that the contractual terms prevail over the consumer guarantees in the ACL.
- ensuring any limitations on business use are fair and balanced.

Although many of the non-compliant terms may appear to deal with relatively minor matters, there is real potential for these terms to impact harshly on consumers and to disappoint consumers' legitimate expectations of fair treatment by telecommunications suppliers. The ACCC has now moved from a compliance investigation to an enforcement approach to ensure industry compliance with the unfair terms provisions of the ACL.² This move is to be welcomed. Whilst in most circumstances that a consumer considers to be unfair, a complaint to the supplier will yield a 'one-off' concession, sustained regulatory scrutiny is required to ensure that telecommunications consumers are accorded a genuine level of protection under the TCP Code and the ACL.

² Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013).

Contractual discretionary powers

Unilateral variation clauses

All of the standard form consumer contracts reviewed gave suppliers very broad rights to vary the terms of the contract and the conditions under which their products were provided without the consent of consumers.³ For example, under most contracts:

- suppliers were entitled to change any terms of the contract, including monthly access fees, minimum monthly fees, termination and default fees, call or data rates, download limits and features of the service;
- changes could be made at any time, including immediately after a consumer entered into the contract;
- there were no limits on the circumstances in which changes could be made;
- there were no limits on the degree or the significance of the changes that could be made;
- there were no requirements for a corresponding increase in cost to the supplier associated with the changes; and
- there were no requirements that changes be a proportionate response to the circumstances that prompted the change.

Different views have been expressed on the validity of such clauses but they are clearly of concern for consumers. Further clarification by regulators and/or a judicial decision would be useful in this space.

Suppliers' rights to terminate

Almost all contracts reviewed gave suppliers a broad right to terminate the contract with consumers in a range of specified circumstances. It is legitimate for a trader to seek a contractual right to terminate the contract in response to events such as breaches by the consumer that may have an adverse impact on its business. However, a termination provision that represents a disproportionate response to risks faced by the trader will not be "reasonably necessary" in order to protect the legitimate interests of the trader, and may therefore be considered unfair under the ACL.⁴

³ See also the discussion of variation terms in electronic contracts generally in Dale Clapperton and Stephen Coronos, 'Unfair terms in 'clickwrap' and other electronic contracts' (2007) 35 ABLR 152.

⁴ Under the ACL 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

Right to terminate in response to any breach of contract (including trivial breaches)

Some contracts gave suppliers a right to terminate in response to any breach of the contract. For example, one contract provided:

“We may terminate the Service Terms immediately if:

- a) you have breached any provision of the Service Terms; ...”⁵

Terms in a standard form consumer contract that allow suppliers to terminate or suspend performance for a minor or trivial breach by consumers are likely to be unfair under the ACL.⁶ This is because the contracts confer a broad discretion to terminate that goes beyond what is necessary to protect the legitimate interests of the supplier. At common law, a right to terminate a contract in response to a breach will arise only in response to significant events, such as a breach of a condition, a serious breach of an intermediate term or a repudiation of the contract by the consumer.⁷ Terms that allow a supplier to terminate in response to trivial or minor events detract from these common law rights and impose an undue restriction on the rights of consumers.

Consumer rights to terminate

Some of the standard form consumer contracts surveyed did not set out any circumstances in which consumers could terminate the contract. Other contracts recognised that consumers might terminate before the contract term expired but did not expressly acknowledge the circumstances in which consumers could terminate without penalty.

The common law of contract would provide consumers with a right to terminate the contract in the event of a serious breach or repudiation by the supplier, even if such a right is not specified in the contract. The ACL will also provide termination rights for consumers in certain circumstances. However, consumers may not be aware of these rights. They should be spelled out in the contract.

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

⁵ Kogan, *Mobile General Terms and Conditions* 7.2.

⁶ Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 15; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 11.

Overly broad termination clauses were found to be unfair under Pt 2B of the FTA in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 (Unreported, Morris P, 2 August 2006), [53]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [175] (Unreported, Harbison V-P, 24 October 2004).

⁷ Paterson J, Robertson A and Duke A, *Principles of Contract Law* (3rd ed, Lawbook Co, 2008) Chap 21.

Entire agreement clauses

The contracts of a number of providers contained 'entire agreement' clauses. The effect of these clauses was to provide that the written contract prepared by the supplier represented the 'entire agreement' of the parties, with the implication that no other rights apply.

It is unfair for suppliers to attempt to avoid liability for statements that were made to induce consumers to enter into the contract in the first place. In deciding whether to enter into a particular contract for goods or services, consumers often rely on what was said or represented by the supplier. Entire agreement clauses may also reduce the incentive for suppliers to take care to ensure that the representations made by their employees and agents are accurate.

Explaining the ACL, limitation and exclusion clauses

There were multiple approaches taken in the contracts surveyed to explaining the consumer guarantee regime under the ACL. Some suppliers did not acknowledge the ACL at all. Others referred to consumer protection legislation but in an inconsistent fashion. Still others used out of date terminology to describe consumers' rights, referring to 'implied terms' rather than consumer guarantees, or referring to the *Trade Practices Act 1974* rather than the current legislation which is the *Competition and Consumer Act 2010*, which contains the ACL.

This misuse of terminology does not assist consumers and in some cases may mislead them. It gives no confidence that the suppliers will accurately explain their rights in face-to-face or telephone dealings with consumers. Pleasingly two supplier contracts provided very good summaries of consumers' rights under the ACL and made clear that the consumer guarantees prevailed over the suppliers' own contract terms. For example, consider the extract from an Optus contract:

Our liability to you

We have responsibilities and obligations under the law, including under:

i the Telecommunications Legislation,

ii the Competition and Consumer Act, including the Australian Consumer Law,

iii applicable laws, regulations and codes.

Nothing in the agreement removes or limits any rights that you have under existing laws or regulations.

Your statutory rights as a consumer...

Consumer guarantees apply regardless of any express warranties to which you may be entitled under this agreement.

We guarantee that:

[Sets out a thorough summary of the consumer guarantees in the ACL and the remedies for a failure to comply with these guarantees.] ...⁸

⁸ Optus, *Standard Form of Agreement* 13.2.

However, it is of great concern that most contracts reviewed did not explain clearly the nature of the consumer guarantees and/or their relationship with the supplier's own contractual rights and obligations. This meant that the contracts risked misleading consumers because they contained broad exclusions of liability but failed to acknowledge in any way that these limitations could not exclude the consumer guarantees in the ACL.

Case study of poor practice

One of the worst providers in relation to non-compliant contract terms was Netspeed operated by ByteCard Pty Ltd. Shortly after the completion of the research and following a referral by ACCAN to the ACCC, the ACCC announced court action against Netspeed – the first court proceedings under the new unfair terms provisions of the ACL.⁹

The original consumer contact to ACCAN was from a consumer whose contract had been suddenly terminated without warning after making a complaint in relation to the service. The relevant contract provision relied upon by Netspeed stated:

“NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.”¹⁰

It also purported to have consumers indemnify Netspeed against all liability:

“The User agrees to indemnify and hold NetSpeed, its affiliates, its licensors, its contractors or their respective employees harmless against any and all liability, loss claim, judgment or damage. This indemnity includes, but is not limited to an indemnity against all actions, claims and demands (including the cost of defending or settling any actions, claims or demands) which may be instituted against us, as well as all expenses, penalties or fines (including those imposed by any regulatory body or under statute).”

⁹ <http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-bytecard-pty-limited-for-unfair-contract-terms>

¹⁰ Netspeed *General Terms and Conditions* 1.7.

The Netspeed contract also gave the supplier an unlimited right to terminate at any time. It provided:

“With the exception of obligations under the Broadband Guarantee Program, Netspeed reserves the right to terminate any account at any time with or without cause or reason. ...”¹¹

In July 2013 the Federal Court, by consent, declared these provisions to be void as unfair contract terms.¹²

However, the ACCC did not pursue arguments on other provisions which remain in the contract and which are arguably unlawful. For example, the Netspeed contract contained the following term attempting to limit liability without any acknowledgment of the consumer guarantees in the ACL:

“NetSpeed makes no warranties of any kind, whether express or implied, for the services it provides. NetSpeed also disclaims any warranty of merchantability or fitness for a particular purpose. NetSpeed will not be responsible for any direct, indirect or consequential damages, which may result from the use of its services including loss of data resulting from delays, non-delivery or interruption in service. While we take great care with information that you deposit with us we cannot and do not guarantee that all such information will reach its intended destination (including electronic mail) inside or outside our network.”¹³

There is a further ‘entire agreement’ clause:

“These Terms and Conditions supersede all previous representations, understandings or agreements and shall prevail notwithstanding any variance with terms and conditions of any order submitted.”¹⁴

Our view is that such entire agreement clauses will almost certainly be void as unfair under the ACL.¹⁵ The ACCC chose not to pursue these clauses in part because their litigation

¹¹ Netspeed *General Terms and Conditions* 6.5.

¹² <http://www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair>

¹³ Netspeed, *General Terms and Conditions* 8.1.

¹⁴ Netspeed *General Terms and Conditions* 10.1

¹⁵ Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2008) 61; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2011) p 22; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 13.

Entire agreement clauses were found to be unfair under the UTCCR in *Office of Fair Trading v MB Designs (Scotland) Ltd* [2005] SLT 691, [45] and under the former Pt 2B of the FTA (Vic) in *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [163].

strategy was focused on clauses where it could be shown there had been real harm or detriment to a consumer (i.e. to the original consumer complainant to ACCAN).

ACCAN's engagement with industry

ACCAN undertook to discuss the specific concerns raised in the report with each provider concerned and several providers responded in writing to unfavourable findings related to their contracts.

The main providers

Telstra: Pleasingly Telstra has expressed willingness to make multiple changes to wording of terms to better remove obsolete and inconsistent terminology; to ensure that the Telstra contracts convey accurately that consumer guarantees prevail over Telstra's voluntary warranties; and explicitly mentioning the ACL in terms which currently make no mention of it.

Optus: There was agreement to change a contract term that referred to out of date legislation. Optus argued that their service descriptions and Standard Terms documents needed to be read in conjunction with certain other documents which mentioned the ACL and therefore they were compliant with all legal requirements to mention the ACL.

Vodafone: Several provisions were clarified including one of their Standard Terms in order to make it clear that Vodafone doesn't seek to impose a penalty on customers who may use a service purchased for personal use for a business purpose.

All the providers whose contracts had variation powers identified in the report as being excessively broad disagreed with this assessment.

Telstra argued that it:

“Must have the right to unilaterally vary the terms. If any term is varied in a materially detrimental way, prior notice is given to the customer who may choose to exit the contract before the change takes place. If the customer is on a fixed-term contract they may exit the contract on fair terms. Telstra considers that this process protects customers from being materially adversely affected and therefore is not unfair.”

Optus similarly disagreed with the Report's view, arguing that the ACCC has recognised that contract terms of this nature will be appropriate to protect the legitimate interest of businesses and allow for flexibility in changing markets, provided that there are:

- (i) sufficient balancing provisions in place if a consumer disagrees with the change; and
- (ii) appropriate notice provisions and mechanisms which allow a consumer to exit the contract where the change is detrimental to the consumer.

Optus reported that it "provides its customers with ample notice and the opportunity to cancel their contract without penalty or cease an add-on service for changes that are detrimental. Customers only pay for what they have used."

In addition, all the main providers insisted that their fees and charges did reflect the true cost (or was an underestimate) of customer relocation, late payment or payment dishonour.

Smaller players

The smaller providers whose contracts were the most problematic were difficult to engage with. ACCAN did not succeed in establishing substantive contact with Aldimobile (Medion), Boost, Dodo or Kogan. It was particularly concerning that a person identifying themselves as a Financial Controller from a smaller provider gave a cursory response to the report which indicated a complete lack of comprehension regarding what consumer contracts were:

"All our services that we provide within Telco are pre-paid therefore we don't lock any of our customers to a contract. Thank you for your consideration anyway."¹⁶

Conclusion

Does it really matter about the level of non-compliance with the consumer protection regime in standard form contracts? The value of maintaining a good reputation in the market often provides an incentive for telecommunications suppliers to give fair treatment to those consumers who do experience problems. Generally, complaints from consumers about particular terms made after the contract is entered into are dealt with in a pragmatic way by the supplier on a one-off basis. Consumers are in any event unlikely to litigate over claims that are relatively small in monetary terms.

However there are systemic considerations that are cause for concern. The incidence of unfair terms may impact most harshly on disadvantaged consumers. Such consumers may be less able to absorb the costs of harsh terms when they have a real effect; less able to complain; and less able to pursue a claim against a provider or to switch to a different provider should the terms of their original contract prove onerous.

¹⁶ Email to ACCAN, 17 May 2013

More generally, in our view the high level of non-compliant terms reflects badly on respect for the rule of law in the telecommunications market. The disregard for an important legislative regime also undermines the sanctity of contract. Contracts are meant to be binding agreements that create rights and obligations. This is not achieved if the contracts being used contain unfair terms that undermine the basic idea of a contract and whose enforcement depends entirely on whether an individual consumer is sufficiently knowledgeable and capable of asserting their rights.

To boost compliance in consumer contracts, ACCAN wishes to see more enforcement action of the type undertaken by the ACCC against NetSpeed. Apart from penalising companies that are not fulfilling their legal obligations and setting an example for the rest of the industry, we would like to see enforcement action that assists in clarifying the meaning of the law in key areas such as unilateral variation powers where views currently differ.

THE FINE PRINT PROJECT: LOOKING FOR FAIR TERMS IN TELECOMMUNICATIONS CONTRACTS

Dr Jeannie Paterson, Melbourne Law School

DISCLAIMER:

The views and opinions expressed in this report are solely those of the author and do not necessarily reflect the opinion of ACCAN.

This report is based on contract terms as they existed in January/February 2013.

Many contract terms have since been changed as a result of consultation with ACCAN and regulators. As this report is based on a point-in-time snapshot of contract terms, any analysis and opinion expressed in the report is based on the contract terms publicly available at the time the research was conducted.

The Fine Print Project: Looking for Fair Terms in Telecommunications Contracts

Authored by Jeannie Paterson

Published in 2013

The operation of the Australian Communications Consumer Action Network is made possible by funding provided by the Commonwealth of Australia under section 593 of the Telecommunications Act 1997. This funding is recovered from charges on telecommunications carriers.

University of Melbourne
Website: www.unimelb.edu.au

Australian Communications Consumer Action Network

Website: www.accan.org.au

Email: info@accan.org.au

Telephone: 02 9288 4000

TTY: 02 9281 5322

ISBN: 978-1-921974-19-9



This work is copyright, licensed under the Creative Commons Attribution 3.0 Australia Licence. You are free to cite, copy, communicate and adapt this work, so long as you attribute the author and “University of Melbourne, supported by funding from the Australian Communications Consumer Action Network”. To view a copy of this license, visit <http://creativecommons.org/licenses/by/3.0/au/>

This work can be cited as: Paterson, J. 2013, *The Fine Print Project: Looking for Fair Terms in Telecommunications Contracts*, Australian Communications Consumer Action Network, Sydney.

CONTENTS

THE FINE PRINT PROJECT: LOOKING FOR FAIR TERMS IN TELCO CONTRACTS	14
EXECUTIVE SUMMARY.....	14
<i>Key findings</i>	<i>14</i>
<i>Recommendations.....</i>	<i>14</i>
ABBREVIATIONS:.....	16
THE FINE PRINT PROJECT REPORT: LOOKING FOR FAIR TERMS IN TELCO CONTRACTS.....	17
1 INTRODUCTION.....	17
1.1 <i>Background.....</i>	<i>17</i>
1.2 <i>The Project.....</i>	<i>17</i>
1.3 <i>Summary of findings</i>	<i>18</i>
2 THE REGULATORY REGIME.....	19
2.1 <i>Why are consumer protection laws needed?.....</i>	<i>19</i>
2.2 <i>The TCP Code - procedural fairness.....</i>	<i>19</i>
2.3 <i>ACL – substantive fairness</i>	<i>20</i>
3 THE CONTRACT REVIEW	21
3.1 <i>TCP Code: procedural fairness</i>	<i>21</i>
3.1.1 <i>General disclosure requirements under the TCP Code.....</i>	<i>21</i>
3.1.2 <i>Disclosure requirements under the TCP Code - warranties and the consumer guarantees in the ACL....</i>	<i>21</i>
3.1.3 <i>Accessibility under the TCP Code - contract terms.....</i>	<i>23</i>
3.1.4 <i>Transparency under the ACL and the TCP Code</i>	<i>23</i>
3.2 <i>ACL: substantive fairness.....</i>	<i>25</i>
3.2.1 <i>The prohibition on unfair contract terms under the ACL</i>	<i>25</i>
3.2.2 <i>Consumer guarantees under the ACL.....</i>	<i>39</i>
3.2.3 <i>Consumer guarantees under the ACL and terms limiting liability</i>	<i>43</i>
3.2.4 <i>Distinguishing between consumer and business customers?.....</i>	<i>48</i>
4 CONCLUSION	50
4.1 <i>Overview</i>	<i>50</i>
4.2 <i>Recommendations.....</i>	<i>51</i>
APPENDIX 1: PRODUCT LIST	52
APPENDIX 2: REPORT ON INDIVIDUAL PROVIDER’S CONTRACTS	59
TELSTRA.....	59
OPTUS	76
ALDI MOBILE	83
BOOST MOBILE	87
DODO.....	90
IINET	96
KOGAN MOBILE.....	103
NETSPEED.....	110
TPG	117
VODAFONE.....	125

THE FINE PRINT PROJECT: LOOKING FOR FAIR TERMS IN TELCO CONTRACTS

EXECUTIVE SUMMARY

The Fine Print Project involved the review of telecommunications contracts from a number of different suppliers and for a range of different products in order to assess compliance with the regulatory regimes in the *Telecommunications Consumer Protections Industry Code* (“TCP Code”) and the *Australian Consumer Law* (“ACL”) promoting both ‘procedural’ and ‘substantive’ fairness in consumer contracts.

Key findings

Almost all of the contracts reviewed complied with requirements in the TCP Code aimed at ensuring a fair contracting process. Most contracts were accessible and transparent in that they were presented in a form that enabled them easily to be navigated, read and understood by consumers, although there was room for improvement in some regards. Information about voluntary warranties and the consumer guarantees under the ACL was lacking in many cases.

Most of the contracts reviewed contained terms that did not comply with the substantive fairness requirements in the ACL. Almost all of the contracts reviewed contained a number of terms that were likely to be void as unfair terms or as excluding liability under the consumer guarantees in the ACL. A significant number of the contracts reviewed contained terms that were likely to mislead consumers as to their statutory rights under the ACL. A few of the contracts reviewed were substantially non-compliant and showed almost no recognition of the consumer protection regime in the ACL or the TCP Code.

Common issues of concern identified by the project included: unduly broad discretion given to suppliers over important aspects of contract performance, relatively high default fees and a consistent failure to properly acknowledge the rights granted to consumers in the consumer guarantee regime in the ACL.

Recommendations

A recent report by the Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013), indicates that the Commission is concerned about the prevalence of unfair terms in consumer contracts in some industries, including the telecommunications industry. The review of contract terms under the Fine Print Project suggests that the level of non-compliance with the TCP Code and the ACL in telecommunications contracts is widespread and significant.

Actions that warrant particular attention are as follows:

- encouraging suppliers to utilise digital technology to ensure that consumers can more easily navigate consumer contracts;
- requiring suppliers to set out clearly the limits on contractual discretionary powers, in particular the circumstances in which powers to vary a contract can be exercised and the standard for assessing excessive or unreasonable use by consumers;

- reviewing the imposition of late payment and default /exception fees to ensure that these are not unfair penalties;
- encouraging suppliers to provide clear and accurate information about the mandatory consumer guarantee regime in the ACL and their relationships with the suppliers' rights and obligations under the contract; and
- ensuring that descriptions of service, limitation and exclusion clauses and indemnity clauses in telecommunications contracts acknowledge the impact of the consumer guarantees in the ACL and do not wrongly represent that the contractual terms prevail over the consumer guarantees in the ACL.
- ensuring any limitations on business use are fair and balanced.

Although many of the non-compliant terms may appear to deal with relatively minor matters, there is real potential for these terms to impact harshly on consumers and to disappoint consumers' legitimate expectations of fair treatment by telecommunications suppliers. The ACCC has indicated that it will move from compliance to an enforcement approach to ensure industry compliance with the unfair terms provisions of the ACL.¹⁷ Such a move is to be welcomed. Sustained regulatory scrutiny is required to ensure that telecommunications consumers are accorded a genuine level of protection under the TCP Code and the ACL.

¹⁷ Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 2.

ABBREVIATIONS:

ACCC: Australian Competition and Consumer Commission

ACL: *Australian Consumer Law*, found in the *Competition and Consumer Act 2010* (Cth)

TCP: *Telecommunications Consumer Protection Industry Code*

TPA: *Trade Practices Act 1974* (Cth), now renamed and amended by the *Competition and Consumer Act 2010* (Cth)

THE FINE PRINT PROJECT REPORT: LOOKING FOR FAIR TERMS IN TELCO CONTRACTS¹⁸

1 INTRODUCTION

1.1 Background

Consumer protection for consumers of telecommunications products is provided through the combined force of the *Telecommunications Consumer Protection Industry Code* (“TCP Code”) and the *Australian Consumer Law* (“ACL”). Consumers’ enjoyment of telecommunications products will be affected by the ‘fine print’ terms in the standard form contracts that govern their relationship with the supplier of those products. Both the TCP Code and the ACL promote both ‘procedural fairness’ and ‘substantive fairness’ in the fine print terms of those contracts.

The TCP Code promotes fairness in the process of making a contract by requiring consumers to be provided with salient information about the products they are purchasing and given access to the contracts for those products. The TCP Code and the ACL also promote procedural fairness through transparency requirements that require contract terms to be clearly presented and expressed in plain language.

The ACL promotes ‘substantive fairness’ through measures that ensure the very content of consumer contracts is consistent with the legitimate expectations of consumers for fair and reasonable treatment. The ACL does this through a prohibition on unfair contract terms and through providing non-excludable consumer guarantees requiring goods or services to meet reasonable standards of quality.

1.2 The Project

The Fine Print Project involved the review of telecommunications contracts from a number of different suppliers and for a range of different products in order to assess compliance with the regulatory regimes in the TCP Code and the ACL governing contract terms.¹⁹ The suppliers covered in the review were: Telstra, Optus, Aldi Mobile, Boost Mobile, Dodo, iiNet, Kogan Mobile, Netspeed, TPG and Vodafone.²⁰ The products reviewed included fixed line phone, mobile pre and post-paid, internet and entertainment bundles.

A summary of the findings of the project is set out below. Part 2 outlines the relevant consumer protection regime and Part 3 presents in more detail the major findings as to compliance with this regime.²¹ This report concludes in Part 4 with recommendations for future action to promote better outcomes for consumers in the fine print terms of telecommunications contracts.

¹⁸ Dr Jeannie Marie Paterson, Melbourne Law School.

¹⁹ The list of contracts reviewed is found in Appendix 1.

²⁰ The Virgin contracts were the same as for Optus and were not reviewed.

²¹ A ‘report card’ on the contracts of each individual supplier reviewed is provided in Appendix 2.

1.3 Summary of findings

The recent report by the Australian Competition and Consumer Commission (ACCC), *Unfair Contract Terms – Industry Review* (2013), provides a summary of a recent review by the ACCC of the contracts used in a number of industries including the telecommunications industry. In this review process, the ACCC identified terms that did not comply with unfair contract term laws and broader consumer protection laws. These concerns are supported by the findings of the Fine Print Project review, which identified unfair and other non-compliant terms both similar to and going beyond those highlighted by the ACCC.

Most of the contracts reviewed in the Fine Print Project contained terms that did not comply with the requirements in the TCP Code and the ACL. The contracts included a number of terms that are likely to be void as unfair terms under the ACL or as excluding liability under the consumer guarantees in the ACL. Some terms would be also misleading contrary to the ACL. Although many of these terms may appear to deal with minor matters, over the course of contract performance they may disadvantage consumers and prove contrary to the reasonable expectations of consumers for fair and reasonable treatment.

Common issues of concern identified in the Fine Print Project were as follows:

- most suppliers could have made better use of digital technology to allow consumers to more easily access and navigate their contract terms;
- many suppliers retained a broad discretion to make changes to the terms of their consumer contracts. Most such terms were accompanied by a requirement to give consumers notice of adverse changes and also the right to terminate in response to such changes. It is argued in this report that, to ensure a fair balance between the interests of suppliers and consumers, the circumstances in which changes can be made should also be set out in the contract;
- many contracts granted suppliers a broad discretion to assess what amounted to excessive or unreasonable use of the service by consumers. These terms had the potential to impact harshly on consumers and also to create undue uncertainty for consumers who could not accurately assess their rights under the contract. Such terms were highly likely to be unfair under the ACL;
- some suppliers charged high default fees for late or dishonoured payments. Whether these fees are unfair or whether they are valid as a genuine pre-estimate of the supplier's likely loss occasioned by the breach warrants further investigation;
- many contracts provided insufficient information on and acknowledgement of the protection provided to consumers by the consumer guarantees in the ACL. The approach taken by some suppliers to dealing with this issue was likely to confuse and, in some cases, mislead consumers about their statutory rights;
- many contracts purported to limit the liability of suppliers to consumers for faults and disruptions to the service and for dropouts in mobile phone coverage in a manner that was inconsistent with the consumer guarantees and the unfair contract terms provisions in the ACL. Such terms were probably void and misleading under the ACL;
- some contracts contained unduly narrow restrictions on business use of the product.

2 THE REGULATORY REGIME

2.1 Why are consumer protection laws needed?

Consumer contracts for telecommunications products are usually ‘standard form contracts’²², which means that they have been prepared by suppliers and presented to consumers on a ‘take it or leave it basis’. Under the common law of contract, consumers will be bound by the terms of standard form contracts provided they have in some way manifested their consent to those terms.²³ In telecommunications contracts this manifestation of consent will usually be found in a consumer’s act of signing a paper document,²⁴ agreeing verbally through a telephone conversation²⁵ or clicking ‘I agree’ in an online contract.²⁶ For the terms of a contract to be binding on a consumer through these means, the terms must have been available to the consumer before the contract is made.²⁷ There is no common law requirement for timely disclosure, which means that consumers need not have been provided with a realistic opportunity to compare and assess the terms. Nor is there a requirement that consumers have actually read or understood those terms. The common law does not regulate the substantive fairness of the terms of consumer contracts. This position at common law, which gives consumers little protection against unfair contracting processes and unfair contract terms, has been changed by the regulatory regime under the TCP Code and the ACL.

2.2 The TCP Code - procedural fairness

The TCP Code was registered by the ACMA on 1 September 2012.²⁸ It is ‘designed to ensure good service and fair outcomes for all Consumers of Telecommunications Products in Australia’.²⁹ The TCP Code covers a range of matters, including advertising and billing as well as information disclosure and transparency.

One important aspect of the TCP Code is found in requirements aimed at ensuring what is sometimes referred to as ‘procedural fairness’. That means the provisions aim to ensure that the process of making a contract is fair.

The TCP Code promotes a fair contract making process through three related requirements:

²² This is acknowledged in the *Telecommunications Act 1997* (Cth) s 479.

²³ See e.g. *L’Estrange v F Graucob Ltd* [1934] 2 KB 394; *Toll (FGCT) Pty v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165.

²⁴ *Toll (FGCT) Pty v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165.

²⁵ Cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

²⁶ *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768; (2006) 170 FCR 450.

²⁷ See e.g. *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768; (2006) 170 FCR 450.

²⁸ Pursuant to the *Telecommunications Act 1997* (Cth) s 117.

²⁹ TCP Code 1.

- **disclosure** - ensuring that consumers are provided with the salient information likely to affect their decisions to enter into particular contracts;
- **accessibility** - enabling consumers to easily find the contracts for particular products; and
- **transparency** – requiring that contracts be made available in a form that is easy for consumers to navigate, read and understand.

These requirements should allow consumers to more easily compare different products and to make better choices in entering into telecommunications contracts.

2.3 ACL – substantive fairness

The ACL, in schedule 2 of the *Competition and Consumer Act 2010 (Cth) (CCA)*³⁰, is a comprehensive consumer protection regime applying in all Australian jurisdictions. It regulates a range of matters, including prohibitions on unfair terms and the provision of mandatory consumer guarantees.

Studies have shown that consumers often do not read the fine print of their contracts or, if they do read the terms, often find it difficult to predict the impact of those terms on their future use of the product.³¹ Moreover, because of the prevalence of standard form contracts many consumers lack the opportunity to negotiate changes to terms they do not like.³² Given these limitations on the ability of consumers themselves to monitor and control the substance of boilerplate or fine print terms in standard form contracts, the ACL contains provisions promoting what sometimes called ‘substantive fairness’ in contract terms.

Unfair contract terms

Part 2-3 of the ACL, and also the TCP Code³³ promote substantive fairness by rendering void unfair contract terms in standard form consumer contracts.³⁴ The regime ensures that consumers are not subject to imbalanced terms that they had no opportunity to negotiate.³⁵

³⁰ The CCA was, until 2010, called the *Trade Practices Act 1974 (Cth)*; see the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)*, sch 5, items 1 – 2.

³¹ See further National Education and Information Advisory Taskforce, *National Baseline Study on Warranties and Refunds* (2009) Research Paper No 2.

³² See further J M Paterson, ‘The Australian Unfair Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts’ (2009) 33 *Melbourne University Review* 934 and ‘The New Consumer Guarantee Law’ (2011) 35 *Melbourne University Law Review* 252.

³³ TCP Code r 4.5.3.

³⁴ The ACL does not apply to terms that are ‘required, or expressly permitted, by a law of the Commonwealth, a State or a Territory’ or that define ‘the main subject matter of the contract’ or set ‘the upfront price payable under the contract’: ACL s 26(1).

Unfair Terms and Consumer Guarantees

Part 3-2 of the ACL contains a regime of consumer guarantees, with associated remedies in Part 5-4.³⁶ These guarantees ensure that goods and services supplied to consumers meet basic quality standards, regardless of any attempts by suppliers to exclude or limit their contractual liability.³⁷

A more detailed description of the requirements of both the TCP Code and the ACL consumer protection regimes relevant to the fine print terms of telecommunications contracts is included below as part of the contract review.

3 THE CONTRACT REVIEW

3.1 TCP Code: procedural fairness

3.1.1 General disclosure requirements under the TCP Code

The TCP Code requires suppliers of telecommunications products to provide consumers with a summary of specified information in the form of a 'Critical Information Summary' (CIS).³⁸ The CIS will outline the salient features of the transaction, such as the price of the products, and also some features which might otherwise escape the attention of consumers, for example, 'the inclusions, exclusions and any important conditions, limitations, restrictions or qualifications for that Offer, where applicable'³⁹ and 'the maximum Charge payable for early termination of the Offer'.⁴⁰ The project did not involve reviewing the CIS of different suppliers

3.1.2 Disclosure requirements under the TCP Code - warranties and the consumer guarantees in the ACL

The TCP Code also requires suppliers to make available information about the telecommunications products offered by them that is relevant to the ability of

³⁵ See further J M Paterson, *Unfair Contract Terms in Australia* (Thomson, 2012).

³⁶ The ACL provides for the supply of gas, electricity and telecommunication services to be exempted from the consumer guarantees by regulation but thus far no such regulations have been made: ACL s 65.

³⁷ See further J M Paterson and K Tokeley, 'Consumer Guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013).

³⁸ TCP Code r 4.1.2 – 4.1.3.

³⁹ TCP Code r 4.1.2(a)(i)(E).

⁴⁰ TCP Code r 4.1.2(a)(i)(C).

consumers to compare different products.⁴¹

Significantly, for the Fine Print Project, this information must include:

“the details of warranties that apply to Telecommunications Goods, including references to Consumers’ entitlements under the Competition and Consumer Act [i.e. the ACL].”⁴²

Accordingly, suppliers must on their website, provide information about their own voluntary warranties, manufacturers’ warranties for goods that the supplier might sell and on the consumer guarantees under the ACL.

The information provides important assistance to consumers. The voluntary warranties provided by suppliers may influence consumers’ choice of product. Many consumers are not aware of their rights under the consumer guarantees into ACL and may need to be told about these rights if they are to utilise them.⁴³ When things go wrong it is useful for the consumer to have a way to easily find out about their rights to redress or remedy. The first place many consumers are likely to turn to is the website of their supplier. Some consumers will not have kept their contract documentation and so it is desirable for them to have an immediate accessible alternative source of information.

Interestingly, there is no requirement for consumers to be told about the consumer guarantees under the ACL that apply to telecommunications services. A supplier who refers only to the consumer guarantees applying to goods in its website information must take care not to mislead consumers into assuming that there are no guarantees applying to services.

Summary

Many suppliers did not provide information on their webpage about their own voluntary warranties or the consumer guarantees in the ACL. In some cases, this information could be found in the supplier's contractual documents. The code requires the information also to be on the website. Information included in the supplier's contracts would not appear to be sufficient.

Where the required information was provided, the quality of the information varied.

Analysis

Was the information provided?

√ At the time of review, information about the voluntary warranties applying to goods and the consumer guarantees under the ACL was only able to be located on the webpages of Telstra, Vodafone, Dodo and iiNet.

✗ Information on the websites of the other suppliers surveyed could not be located.

Was good quality information provided about any voluntary warranties?

✗ Dodo provided only a telephone number for warranty and consumer guarantee claims. Telstra provided only minimal information about their voluntary warranties, the claim process and the consumer guarantees. Customers who

⁴¹ TCP Code r 4.1.3.

⁴² TCP Code r 4.1.3 (f).

⁴³ National Education and Information Advisory Taskforce, *National Baseline Study on Warranties and Refunds* (2009) Research Paper No 2, p 53.

wanted more information would have to look it up for themselves.

- √ iiNet and Vodafone provided good information both on how to claim and the terms of the voluntary warranties. Vodafone's "Repair, exchange and refunds policy" is particularly good, setting out the claim process in clear and simple steps.

Was good quality information provided about the consumer guarantees?

The information provided by Telstra, iiNet and Vodafone contained only a brief reference to and explanation of the consumer guarantees in the ACL. This information is placed in the middle of the other information about the suppliers' voluntary warranties. It would be useful for it to be highlighted and a hypertext link provided to the ACCC website.

3.1.3 Accessibility under the TCP Code - contract terms

The TCP Code requires suppliers' standard form consumer contracts to be easily accessible to consumers. A Supplier 'must make its Standard Form Customer Contracts available on its website in a place that is easy for Consumers to find them'.⁴⁴ All of the terms must either be contained in this standard form consumer contract or 'clearly incorporated by reference'.⁴⁵

It is important for the terms of suppliers' standard form contracts to be accessible to consumer before the contract is made. This allows consumers to compare the contract terms offered by different suppliers and with different products. Accessible information about contract terms is also important after the contract is made because it allows consumers to assess their contractual rights in the event that something goes wrong in the course of contract performance. To this end, the TCP Code requires suppliers to retain information on their websites about contract terms that are no longer current.⁴⁶

Summary

- χ The contracts for Boost Mobile, Netspeed and TPG were available on line but were not able to be downloaded.

- √ Most contracts reviewed for the Fine Print Project could be accessed and downloaded from the suppliers' webpage.

3.1.4 Transparency under the ACL and the TCP Code

The concept of transparency refers to the need for standard form contract terms to be written and displayed in a form that is relatively straightforward for consumers to navigate, read and understand. Transparency is required by the TCP Code and is also a factor to consider in assessing whether a term is unfair under the ACL.⁴⁷

Summary

Most contracts surveyed complied with the transparency requirements under the TCP Code and the ACL in terms of clear presentation and the use of plain

⁴⁴ TCP Code r 4.5.1.

⁴⁵ TCP Code r 4.5.2(b).

⁴⁶ TCP Code r 4.5.1(c).

⁴⁷ ACL s 24(3).

language. The navigability of all contracts could be improved.

Analysis

Easily navigated

The TCP Code requires contracts to be displayed on the supplier's website in a manner that is easy for consumers to navigate.⁴⁸

✗ The contracts of Aldi Mobile, Boost Mobile, Kogan Mobile, Netspeed, TPG and Vodafone did not even contain an index of terms.

✓ The contracts of Optus, Telstra and iiNet assisted consumers to easily navigate the contract by providing an index of terms and in that index a hypertext link to the relevant sections of the contract.

All suppliers could have done more to improve the navigability of their contracts. For example, suppliers might have included links between defined terms and the use of those terms in the contracts. No suppliers included hypertext links between documents regulating the same products. In the digital age, it is somewhat disappointing that suppliers do not make better use of this technology to allow consumers to easily navigate the often numerous contractual documents governing their products.

Clear presentation

The TCP Code requires contractual information to be clearly presented.⁴⁹

✓ Most of the contracts reviewed satisfied this requirement by being written in a reasonably sized font, using white space and including headings.

Plain language

The TCP Code requires the terms of standard form consumer contracts to be expressed in plain language.⁵⁰

✓ Most of the contracts reviewed, were expressed in relatively simple language.

✗ The contracts of Kogan Mobile and Netspeed used less consumer friendly language and formatting.

For example, consider the following Kogan Mobile contract term:

“In the event that we suspend the Service, the Service will be automatically terminated 7 days subsequent to the suspension date if the account has not been reconnected prior to this date.”⁵¹

Relationship between documents

✗ One of the most difficult hurdles for consumers seeking to obtain and understand the contract terms governing their services was the number of documents that had to be located, opened, read and reconciled.

For example, a number of suppliers, particularly those offering multiple products, such as Telstra, Optus, iiNet and TPG, spread their terms across a number of contract documents.

⁴⁸ TCP Code r 4.5.1.

⁴⁹ TCP Code r 4.1.1(b); 4.5.2(b).

⁵⁰ TCP Code r 4.5.2(a).

⁵¹ *Kogan Mobile General Terms and Conditions* 3.4.

In some cases suppliers' contractual documents dealt repeatedly but in slightly different terms with the same issues.

For example, the Telstra general consumer terms and the Telstra BigPond terms set out different time periods that would be allowed to remedy a breach before the contract could be terminated. They also set out different late payment fees.

In other cases, the Telstra documents used different language to deal with the same issue.

For example, as discussed further below, various Telstra documents used different language to describe the effect of the consumer guarantees in the ACL. Some documents referred to 'consumer protection laws', some to the 'Competition and Consumer Act', some to guarantees applying to goods and services, some only to goods and some documents referred to compensation for loss and some only to a remedy of repair in cases of a failure to comply with the consumer guarantees in the ACL.

Consumers may not appreciate that the documents are referring to the same set of rights in the same legislation.

The provision of contract summaries did not resolve these problems because the summaries did not cover all terms. For example, the summaries did not deal with default fees.

3.2 ACL: substantive fairness

3.2.1 The prohibition on unfair contract terms under the ACL

Part 2-3 contains a prohibition on unfair terms in standard form consumer contracts. Under the ACL, a term will be unfair if:⁵²

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

The ACL sets out a list of 'examples of the kind of terms of a consumer contract that may be unfair'. Terms that have been a common source of concern to courts, tribunals and regulators include:⁵³

- terms that preclude pre-contractual representations by suppliers from forming part of the contract;
- terms that allow the supplier to change the terms of the contract

⁵² ACL s 24(1).

⁵³ See further Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011).

without obtaining consent from the consumer;

- terms that deal with termination and suspension of the service;
- terms imposing fees for early termination and for late or dishonoured payment.

The TCP Code similarly identifies a number of categories of terms in telecommunications contracts that suppliers should take care to ensure are not unfair. These categories relate to: suspension of service, penalty for breach, extension of contract period and unilateral variation.⁵⁴

The recent review by the ACCC of contract terms in a range of industries identified the following types of terms as being of concern in the telecommunications industry:⁵⁵

- “Contract terms that allow the business to change the contract without consent from the consumer;
- terms that unfairly restrict the consumer’s right to terminate the contract;
- terms that suspend or terminate the services being provided to the consumer under the contract;
- terms that make the consumer liable for things that would ordinarily be outside of their control;
- terms that prevent the consumer from relying on representations made by the business or its agents; and
- terms seeking to limit consumer guarantee rights”.

Summary

A number of potentially unfair terms were identified in the contracts reviewed. Common terms likely to be unfair included:

- ‘entire agreement clauses’: terms stating that the written contract represented the ‘entire agreement’ between the parties and which disclaimed responsibility for any statements made by the supplier and not found in the contract;
- ‘unilateral variation clauses’: terms granting the supplier a broad discretion to change the terms of the contract;
- discretionary ‘excessive use’ policies: terms giving the supplier a largely unconstrained discretion to determine what amounted to excessive levels of use of the service by consumers;
- unbalanced termination clauses: terms giving the supplier unduly broad rights to terminate the contract and/or giving only limited rights to

⁵⁴ TCP Code r 4.5.3(a) to (d).

⁵⁵ Australian Competition and Consumer Commission, *Unfair Contract terms: Industry Report* (2013) 1.

terminate to consumers; and

- ‘assignment clauses’: terms allowing the supplier to assign its rights and obligations under the contract without consent by consumers.

In addition, the fairness of late payment and dishonour fees charged by most suppliers warrants further investigation.

Analysis

Entire agreement clauses

χ The contracts of Kogan Mobile, Netspeed and iiNet contained ‘entire agreement’ clauses. The effect of these clauses was to provide that the written contract prepared by the supplier represented the ‘entire agreement’ of the parties, with the implication that no other rights apply.

The aim of such clauses is to exclude liability that might otherwise accrue to the supplier for any representations or statements made by the supplier in the course of negotiations and later relied on to their detriment by consumers.

For example, the Netspeed contract provided:

“These Terms and Conditions supersede all previous representations, understandings or agreements and shall prevail notwithstanding any variance with terms and conditions of any order submitted.”⁵⁶

Entire agreement clauses of this type will almost certainly be void as unfair under the ACL.⁵⁷ It is unfair for suppliers to attempt to avoid liability for statements that were made to induce consumers to enter into the contract in the first place. In deciding whether to enter into a particular contract for goods or services, consumers often rely on what was said or represented by the supplier. Entire agreement clauses may also reduce the incentive for suppliers to take care to ensure that the representations made by their employees and agents are accurate.

√ Suppliers may have a legitimate interest in explaining to consumers that the written contract is the primary source of their legal rights. This is acceptable provided the supplier does not attempt to disclaim responsibility for conduct that might otherwise have legal effect.

For example, the issue was effectively, and fairly, dealt with in the following Telstra term:

“Your service is supplied on the terms expressly set out and subject to non-excludable rights under consumer protection laws. Other

⁵⁶ *Netspeed General Terms and Conditions* 10.1

⁵⁷ Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2008) 61; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2011) p 22; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 13.

Entire agreement clauses were found to be unfair under the UTCCR in *Office of Fair Trading v MB Designs (Scotland) Ltd* [2005] SLT 691, [45] and under the former Pt 2B of the FTA (Vic) in *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [163].

representations or statements we make to you, whether in person, over the phone or in advertising or other materials you received, are not part of these terms. However, you may have other legal rights in relation to those representations.”⁵⁸

Unilateral variation clauses

χ All of the contracts reviewed gave the supplier very broad rights to vary the terms of the contract without the consent of consumers.

For example, under most contracts:

- the supplier was entitled to change any terms of the contract, including monthly access fees, minimum monthly fees, termination and default fees, call or data rates, download limits and features of the service;⁵⁹
- changes could be made at any time, including immediately after a consumer entered into the contract;
- there were no limits on the circumstances in which changes could be made;
- there were no limits on the degree or the significance of the changes that could be made;
- there were no requirements for a corresponding increase in cost to the supplier associated with the changes; and
- there were no requirements for changes to the contract are a proportionate response to the circumstances that prompted the change.

Broad or unfettered unilateral variation clauses will be vulnerable to challenge as unfair terms under the ACL.⁶⁰ Certainly, in the telecommunications industry, a supplier may have good commercial reasons for seeking a broad variation power to allow it to respond to changes affecting its own performance of the contract, such as changes in its costs, regulatory changes or changes introduced by third party suppliers.⁶¹

⁵⁸ Telstra *Our customer terms – BigPond service section - Part A – General terms for BigPond services* 8.1.

⁵⁹ The Dodo general terms limit the power of Dodo to make changes to these types of matters.

⁶⁰ See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 17, 19; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 6.

Unilateral variation clauses were found to be unfair under Pt 2B of the FTA in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50]; *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482, [30]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs* [2008] VCAT 2092 (Unreported, Harbison V-P, 24 October 2004), [126]–[149]; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [235] – [238]. Compare *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [125].

⁶¹ The possibility of changes to telecommunications contracts is recognised in the *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11, made

Nonetheless, under the ACL, broad discretionary powers must be a proportionate response to the risk that is being addressed. In most cases, an absolute right to change the contract agreed to by the parties will not be a proportionate response to risks affecting the supplier's continued performance of the contract.

*Director of Consumer Affairs Victoria v AAPT Ltd*⁶² concerned a term providing that “[w]e may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation”.

In defending the clause, AAPT pointed to the fact that it was merely reselling services supplied by Telstra, Optus and Vodafone. AAPT pointed out that under the terms of AAPT’s contracts with these various respective traders, it could be made subject to new terms at relatively short notice, and that it may then need to amend its own contracts to reflect these newly imposed terms. President Morris held that this did not justify the imposition of a term as broad as cl 1.3 “which permits AAPT to vary any term of the Agreement, at any time, for any cause”.⁶³ To ensure the fairness of a unilateral variation clause, the contract should provide some protection for the interests of consumers affected by changes to the contract.⁶⁴ There are at least three ways in which such protection may be provided. These are through:

- providing consumers with a right to notice of significant changes;⁶⁵
- allowing consumers a right to terminate in response to adverse changes; and
- limits on the discretion of the supplier to make changes.

No protection for consumers

χ

The Netspeed contract did not grant consumers even a clear right to notice of changes to the contract and service terms:

“NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to

pursuant to the *Telecommunications Act 1997* (Cth). The determination is expressed to be subject to the provisions of the TPA, now the ACL.

⁶² [2006] VCAT 1493, [50].

⁶³ [2006] VCAT 1493, [50].

⁶⁴ See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 17, 19.

⁶⁵ Notice to consumers of variations to the contract likely to adversely effect consumers is also required under the *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11.

check this online.”⁶⁶

This type of term is almost certainly void as an unfair contract term because it is highly imbalanced against the interests of consumers.

No clear right to terminate in response to adverse changes

χ The Kogan Mobile and Netspeed contracts did not grant consumers a clear right to terminate the contract if adversely affected by changes.

For example, the Kogan Mobile contract provided:

“We reserve the right to modify fees and charges for Services and products we provide at any time by notice to you. You will be notified via email not less than 14 days prior to any such changes. Your continued use of the Service after such notice will constitute acceptance of the variation. ...”⁶⁷

This type of term is also almost certainly void as an unfair term because it gives consumers no clear right to respond to onerous changes.

Obligations to provide notice and a right to terminate in response to adverse or detrimental changes

√ The contracts of the other suppliers – Telstra, Optus, Dodo, iiNet - followed a ‘tiered’ approach to protecting the interests of consumers following changes to the contract terms. Consumers would receive notice of changes. The type of notice provided depended on the effect of the change on consumers. Consumers were given a right to terminate the contract in response to specified categories of changes that would have an adverse effect on them.

While these types of measures go some way to protecting the interests of consumers, it is suggested that, they are not completely successful in this regard.

A need for limits on the scope of the discretion?

There is a good argument that an unfettered discretionary power to change the terms of a contract is unfair, even if consumers are given notice and termination rights.⁶⁸ Contracts are about commitment. It would, accordingly, seem reasonable to suggest that if suppliers want to include in their contracts a unilateral right to vary the terms and conditions of supply, they should also specify in their contracts the circumstances in which changes can be made and include measures to ensure that any changes are a proportionate response to any changes in those circumstances. Otherwise consumers are potentially subject to the whim of the supplier as to the terms and conditions under which they will provide the service.

A right for consumers to terminate their contract with the supplier if they are

⁶⁶ Netspeed *General Terms and Conditions* 1.7.

⁶⁷ Kogan Mobile *General Terms and Conditions* 2.7.

⁶⁸ See also Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 17, 19; Office of Fair Trading (UK), *Unfair Contract Terms Guidance* (2008) 55.

Note that in a later publication the ACCC does not highlight limits on discretion as an important form of protection for consumers: see Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 7.

affected by adverse changes does not adequately protect consumers. It leaves consumers in the vulnerable position of having to approve the change or forfeit performance of the contract.

No compensation for sunk costs

Most contracts provide that customers who terminate in response to an adverse change in the terms and conditions of supply will not have to pay outstanding fees for equipment they can no longer use.

For example, the Telstra contract provided:

“For the purpose of this clause your service will be cancelled on “Fair Terms” if we have offered you the right to terminate the contract without incurring fees or charges other than:

- usage and network and call charges incurred up to the date of termination; and
- installation fees and cost of equipment we have provided to you that you have not paid us for (as long as the equipment can be used in connection with services supplied by another supplier).⁶⁹

This type of term does not fully compensate for the supplier having an unfettered discretion to make changes. Consumers affected by changes will already have invested time in selecting and connecting to a particular service. Consumers may have incurred costs associated with purchasing equipment specific to the supplier and/or for installation of the services. These are ‘sunk costs’ that are not recouped when the contract is terminated and may again be incurred if the consumer moves to another supplier. Consumers may have incurred an ‘opportunity cost’ in choosing to contract with one supplier as opposed to some other supplier who, at the time of contracting, might have had competitive offers that are no longer available.

These types of factors provide a disincentive against consumers terminating the contract even in the face of detrimental changes to the product terms and conditions. A better level of protection is provided by provisions in the contract that define the scope of the suppliers’ rights to make changes.

What happens at the end of a fixed term agreement?

√ All suppliers followed an approach that after the end of a fixed term contract the arrangement was rolled into a monthly contract able to be terminated with notice by the consumer. It would be useful for consumers to be given a reminder that they need to make a choice about whether to continue with their service before the end of the contract period. Other than this, the ‘opt out’ process is probably the one most consumers would prefer. Few customers are likely to want their service to be cut off at the end of their fixed term contract merely because they forgot to ‘opt in’ to renew.

Suppliers’ rights to terminate

Almost all contracts reviewed gave suppliers a broad right to terminate the contract with consumers in a range of specified circumstances.

⁶⁹ Telstra *Our Customer Terms General Terms for Consumer Customers* 4.14.

It is legitimate for a trader to seek a contractual right to terminate the contract in response to events such as breaches by the consumer that may have an adverse impact on its business. However, a termination provision that presents a disproportionate response to risks faced by the trader will not be “reasonably necessary in order to protect the legitimate interests” of the trader under the ACL.⁷⁰

This concern with proportionality was apparent in *Director of Consumer Affairs Victoria v AAPT Ltd.*⁷¹ In this case, the contract provided a right for the trader immediately to terminate the contract where the consumer had breached the contract, or changed its address or contact details without notifying the trader. President Morris found that these terms were unfair within the meaning of Pt 2B of the FTA (Vic). The terms were “broadly drawn, and ... one sided in their operation”.⁷² President Morris stated:⁷³

“A customer may have breached the Agreement in a manner which is inconsequential, yet faces the prospect of having the service terminated. Further, if the customer changes his or her address (which will not necessarily be the address for the receipt of billing information), this will also provide a ground to AAPT to terminate the Agreement.”

Unlimited discretion to terminate

χ The Netspeed contract gave the supplier an unlimited right to terminate at any time. It provided:

“With the exception of obligations under the Broadband Guarantee Program, Netspeed reserves the right to terminate any account at any time with or without cause or reason. ...”⁷⁴

This type of term will almost certainly be unfair and void under the ACL. A supplier who undertakes contractual obligations should not have an unfettered right to terminate at any time. This clause goes beyond what is needed to protect the supplier’s interests and gives no protection to the interests of consumers.

Right to terminate in response to any breach of contract (including trivial breaches)

χ The Netspeed and Kogan contracts gave the suppliers a right to terminate in response to any breach of the contract.

For example, the Kogan Mobile contract provided:

“We may terminate the Service Terms immediately if:

a) you have breached any provision of the Service Terms; ...”⁷⁵

⁷⁰ See above [7.115].

⁷¹ [2006] VCAT 1493.

⁷² [2006] VCAT 1493, [53].

⁷³ [2006] VCAT 1493, [53].

⁷⁴ Netspeed *General Terms and Conditions* 6.5.

⁷⁵ Kogan *Mobile General Terms and Conditions* 7.2.

Terms in a standard form consumer contract that allow suppliers to terminate or suspend performance for a minor or trivial breach by consumers are likely to be unfair under the ACL.⁷⁶ This is because the contracts confer a broad discretion to terminate that goes beyond what is necessary to protect the legitimate interests of the supplier. At common law, a right to terminate a contract in response to a breach will arise only in response to significant events, such as a breach of a condition, a serious breach of an intermediate term or a repudiation of the contract by the consumer.⁷⁷ Terms that allow a supplier to terminate in response to trivial or minor events detract from these common law rights and impose an undue restriction on the rights of consumers.

Termination in response to material breach and other disruptive events

√ The contracts of Telstra, Optus, Dodo, iiNet gave the suppliers a right to terminate only in response to a material breach of the contracts and, moreover, gave consumers an opportunity to remedy the breach before the contract could be terminated. Other serious events affecting the consumers' ability to perform the contract also gave rise to a right to terminate.

For example, a Telstra contract provided:

“We can cancel your service at any time if:

- (a) you are in material breach of Our Customer Terms; and**
- (b) we have told you in writing of your breach and you have failed to remedy it within 14 days of us telling you (or such longer period as we tell you or as set out in another section of Our Customer Terms); or**
- (c) the breach is something which cannot be remedied (in which case we can cancel the service immediately by telling you).”⁷⁸**

These clauses balanced the interests of both parties and provided a fair approach to termination by the supplier.⁷⁹

Consumers' rights to terminate

⁷⁶ Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 15; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 15; Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 11.

Overly broad termination clauses were found to be unfair under Pt 2B of the FTA in *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 (Unreported, Morris P, 2 August 2006), [53]; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [175] (Unreported, Harbison V-P, 24 October 2004).

⁷⁷ Paterson J, Robertson A and Duke A, *Principles of Contract Law* (3rd ed, Lawbook Co, 2008) Chap 21.

⁷⁸ Telstra, *Our Customer Terms General Terms for Consumer Customers* 8.3.

⁷⁹ Cf *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT 2092, [174].

Contract terms may be unfair if they do not also acknowledge the rights of consumers to terminate the contract without penalty if the supplier has repudiated or engaged in a serious breach of the contract, and also where there is a failure to comply with the consumer guarantees in the ACL that is a serious failure.⁸⁰

No express consumer rights to terminate

χ The Aldi Mobile, Boost Mobile and Kogan Mobile contracts did not set out any circumstances in which consumers could terminate the contract.

No express consumer rights to terminate without penalty

The Netspeed and TPG contracts recognised that consumers might terminate before the contract term expired but did not expressly acknowledge the circumstances in which consumers could terminate without penalty.

The common law of contract would provide consumers with a right to terminate the contract in the event of a serious breach or repudiation by the supplier, even if such a right is not specified in the contract. The ACL will also provide termination rights for consumers in certain circumstances. However, consumers may not be aware of these rights. They should be spelled out in the contract.

Reciprocal consumer and supplier rights to terminate

√ A number of contracts – Telstra, Optus, Dodo, iiNet - gave consumers reciprocal rights of termination, allowing them to terminate in the same types of scenarios that suppliers can terminate. These clauses fairly protected the interests of consumers.

Acceptable use policies

Most contracts surveyed included ‘acceptable’ or ‘fair’ use policies. Many gave suppliers a right to terminate the contract in the event of excessive or unreasonable use by consumers.

Suppliers are entitled to define the conditions under which they will provide a service. However, consumers should be given clear guidelines about the types of use that may result in their service being suspended or terminated. Many suppliers retained a broad discretion to assess the matter for themselves and gave only general or vague guidance to consumers on what might amount to excessive or unreasonable levels of use.

Supplier has absolute discretion

χ The acceptable use policies of Kogan Mobile, iiNet, Vodafone and TPG gave the supplier very broad discretion to determine whether a consumer’s use of the service was unreasonable or excessive.

For example, the Kogan Mobile Acceptable Use Policy provided:

“INAPPROPRIATE USE OF RESOURCES

5.1. The Service is provided for personal use for the benefit of residential users and is not for commercial use or for use as a permanent connection.

You must not:

⁸⁰ Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 9.

...

g) use the Service in a way that is excessive or unreasonable (as reasonably determined by us, having regard to the limits that we consider reasonable for an individual that is using the Service for residential purposes only);

...

5.2. We consider your use of a Service to be unreasonable if a Service remains connected continuously for an unreasonable amount of time, or download or upload an unreasonable volume of data, given the purposes for which the Service is provided to you and the usage patterns of other users.”⁸¹

Terms of this type are probably unfair and void.⁸² Such terms fail to give any meaningful guidance to consumers on what amounts to unreasonable or excessive use. Consumers are not given any useful guidance to access what is ‘unreasonable’. They are unlikely to be in a position to compare the usage patterns of other consumers.

Some examples of excessive or unreasonable use

The acceptable use policies of in the contracts of Aldi and Telstra gave some examples of what would amount to be excessive or unreasonable use.

For example, the Aldi Mobile contract provided that excessive use would be:

“for example, staying connected continuously for several days, or downloading gigabytes of data in a short period.”⁸³

These examples are helpful to consumers. However, they are only examples. The supplier is still able to decide that other types of usage, not identified clearly to consumers, are also unreasonable. As such the clauses may still be found unfair contrary to the ACL.

Precise definition

√ The best approach was found where, at least for some products, the Telstra, Optus and TPG contracts defined the actual quantum of usage that will be unreasonable.

Early termination fees

All of the contracts reviewed charged consumers who terminated their contracts before the end of a fixed term, an early termination fee.

The amount of the early termination fee differed between suppliers and also between products.

For example, under the Telstra contracts, the early termination fee for a mobile

⁸¹ Kogan Mobile, *Acceptable Use Policy - Delivering best value for the 99% 5*.

⁸² See Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 11.

⁸³ Aldi, *Mobile Acceptable Use Policy 5*.

phone plan was almost the full cost of the plan, calculated by reference to the monthly cost and the time remaining on the contract.

The TPG and Dodo contracts set a maximum amount that was payable as an early termination fee. This was considerably less than the contract price.

Different views have been expressed as to what amounts to a fair early termination fee for the purposes of the ACL. One view is that suppliers should only recover the costs directly associated with early termination.⁸⁴

Another view draws an analogy with agreed damages clauses to suggest that “fair” early termination fees can allow suppliers to recover the full amount owing for the remainder of the contract term, provided the fee is discounted by any other benefits accruing to the trader on termination, as well as reasonable administrative costs associated with early termination. On this approach all of the various approaches to imposing early termination fees in the contracts surveyed would be valid.

Default fees

Most of the contracts reviewed charged a default fee for late payments and for dishonoured payments. The size of these fees varied between the suppliers.

	Late payment	Default (cheque)	Default (credit card)
Telstra	\$15 where the amount owing is \$100 or more.	\$15	\$10
Telstra BigPond	\$5.00 if the amount outstanding is \$65.00 or more but less than \$130.00; \$11.00 if the amount outstanding is \$130.00 or more but less than \$200.00; or \$15.00 if the amount outstanding is \$200.00 or more.	As above	As above
Optus	\$15 for late amounts between \$50 and \$100, and \$15 ‘plus 2% above the prime lending rate charged to us by the ANZ Bank calculated daily on the unpaid amount’ for late payments over \$100.	\$22	\$22

⁸⁴ Consumer Affairs Victoria, *Options for Fair Early Termination Fees in Consumer Contracts* (2010).

Aldi	N/A		
Boost Mobile	N/A		
Dodo	Right to claim but amount not specified	Right to claim but amount not specified	Right to claim but amount not specified

iiNet	3% per annum calculated on the daily balance of the unpaid amount.	Not currently charged	Not currently charged
Kogan Mobile	N/A		Right to claim but amount not specified.
Netspeed	2% per month or \$11.50, whichever is greatest.	Not specified	Not specified
TPG	N/A	\$16.50	\$10
Vodafone	\$10	\$16.50	\$16.50

Whether such fees are unfair under the ACL fees warrants further investigation. A default fee that is akin to a penalty under the common law is likely to be unfair.⁸⁵ Under the common law a sum payable on breach of a contract will be a penalty where the sum is “extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach, rather than a genuine pre-estimate of the loss likely to be caused by a breach of the contract”.⁸⁶ This is on the ground that a trader should not recover more than its own reasonable costs associated with a breach or default under the contract.

There is no indication in the contracts reviewed of the purpose served by default fees.⁸⁷ Are they a way of recouping costs to the supplier that have been incurred by the late or dishonoured payment, such as administrative costs, the cost of borrowing

⁸⁵ Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 16; Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2008) 41.

⁸⁶ *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79; *Ringrow Pty Ltd v BP Australia Pty Ltd.* (2005) 224 CLR 656.

⁸⁷ The law firm Maurice Blackburn has suggested that the cost to banks of exception fees is probably only about \$2 per transaction: Press Release 12 may 2010.

to cover income foregone through the late payments? What are these costs? Are the fees a way of ‘encouraging consumers to pay on time? Are they a way for the provider to raise additional revenue?

It is therefore difficult to determine whether the default fees are legitimate, as a genuine pre-estimate of the costs to the suppliers occasioned by the default, or whether they are imposed as penalties for breach and therefore unfair terms under the ACL.⁸⁸

Relocation

Dodo charged an early termination fee if consumers seek to relocate a service such as phone or internet.

Telstra, Optus, iiNet, Netspeed and TPG all charged a fee for relocating a service, such as phone or Internet. Optus, Netspeed and TPG required the minimum term for the service to recommence on its relocation.

Given customers pay a fee for the relocation service, it is difficult to see why a new minimum term should also be required.

Controls over content

The contracts surveyed imposed broad ranging controls over the content that could be used on internet services. The contracts also reserved to the supplier the right to remove or ban offensive material. Clearly suppliers have an interest in ensuring that information displayed through their service does not breach anti-discrimination or hate speech laws. Perhaps in the interests of free speech, the suppliers’ discretion to remove content should be limited to what is unlawful rather extending to material considered offensive. However, the controls over content granted to suppliers are not so expansive or one sided as to be unfair.

Assignment

χ A number of the contracts surveyed – Kogan Mobile, Optus, iiNet and TPG - allowed the supplier to assign its rights and obligations under the contract without the consent of the consumer.⁸⁹

Assignment clauses of this kind may be unfair contrary to the ACL⁹⁰ if they do not ensure that consumers are protected against detriment or prejudice.⁹¹

For example, the Kogan Mobile contract provided:

“We may assign any of our rights or obligations under the Service Terms”.⁹²

This term is probably unfair contrary to the ACL because it gives no consideration to the interests of consumers in being required to deal with a new supplier following assignment.

⁸⁸ Office of Fair Trading, *Calculating Fair Default Charges in Credit Card Contracts: A Statement of the OFT’s Position* (2006) 5.

⁸⁹ ACL s 25(1)(j); ASIC Act s 12BH(1)(j).

⁹⁰ For example, *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [260] (assignment clause found unfair under the former Pt 2B of the FTA (Vic)).

⁹¹ Office of Fair Trading, *Unfair Contract Terms Guidance* (2008) 66; Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.

⁹² *Kogan Mobile General Terms and Conditions* 12.2.

Other contracts included measures to ensure that consumers had some safeguard from detriment should the supplier assign its contractual obligations.

√

- the Optus contract safeguarded the interests of consumers by only allowing obligations to be transferred to an Optus group company;
- iiNet could only assign its obligations to suppliers who would supply the service on materially the same terms and conditions as under the original arrangement; and
- TPG could only assign its obligations under the agreement without permission or notice if it considered there would be no detriment to customers;

Exclusive jurisdiction

The Kogan Mobile contract committed the parties to the exclusive jurisdiction of the courts of Victoria.

Terms requiring consumers to sue in a particular jurisdiction are likely to be unfair contrary to the ACL.⁹³ Exclusive jurisdiction clauses can be said to cause a significant imbalance in the rights and obligations of the parties under the contract because it will usually be the consumer who will suffer the cost and inconvenience of suing in another jurisdiction.⁹⁴

3.2.2 Consumer guarantees under the ACL

Part 3-2 of the ACL provides a range of ‘consumer guarantees’ that apply to the supply of goods and services to consumers. Telecommunications consumers may acquire both goods (handsets, modems etc) and services (telephone, mobile or internet etc) from their supplier. The guarantees ensure that consumers are assured of minimum standards of quality in the products they acquire.

The consumer guarantees applying to the supply of goods include guarantees that:

- the goods will be of acceptable quality;⁹⁵
- the goods are fit for any disclosed purpose;⁹⁶
- in the case of a sale of goods by description, that the goods match their description;⁹⁷
- spare parts and repair will be reasonably available for a reasonable period after the goods are supplied reasonably available;⁹⁸ and

⁹³ *Oceano Grupo Editorial SA v Rocio Murciano Quintero* [2000] ECR 1-4941; *Standard Bank London Ltd v Apostolakis (No 2)* [2002] CLC 939; *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [210].

⁹⁴ Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.

⁹⁵ ACL s 54.

⁹⁶ ACL s 55.

⁹⁷ ACL s 56.

- there will be compliance with express warranties.⁹⁹

The consumer guarantees applying to services include guarantees that:

- the services will be rendered with due care and skill;¹⁰⁰
- the services, and any product resulting from the services, will be fit for a purpose¹⁰¹ or to achieve a result¹⁰² that the consumer made known to the supplier; and
- the services will be supplied within a reasonable time.¹⁰³

Summary

Overall most contracts reviewed did not explain clearly the nature of the consumer guarantees and/or their relationship with the supplier's own contractual rights and obligations.

Analysis

Regulation 90 wording for express warranties

Where a supplier gives an express warranty against defects in respect to goods or services provided by it, then *Competition and Consumer Regulations 2010* (Cth) reg 90 requires certain specified information to be given to consumers.

This information must include details of who is giving the warranty, the period for which the warranty applies and how to claim under the warranty.¹⁰⁴ In addition, the written document providing a warranty against defects must expressly advise consumers of the existence of the consumer guarantees under the ACL as follows:¹⁰⁵

“Our goods come with guarantees that cannot be excluded under the *Australian Consumer Law*. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.”

If a supplier does not provide the prescribed information, or does not provide it in the prescribed form, the supplier may be subject to a civil pecuniary penalty¹⁰⁶ and may also be guilty of a criminal offence.¹⁰⁷

√ Almost all contracts that contained an express warranty included the required

⁹⁸ ACL s 58.

⁹⁹ ACL s 59.

¹⁰⁰ ACL s 60.

¹⁰¹ ACL s 61(1).

¹⁰² ACL s 61(2).

¹⁰³ ACL s 62.

¹⁰⁴ *Competition and Consumer Regulations 2010* (Cth) reg 90.

¹⁰⁵ *Competition and Consumer Regulations 2010* (Cth) reg 90(2).

¹⁰⁶ ACL s 224.

¹⁰⁷ ACL s 151.

wording from *Competition and Consumer Regulations 2010* (Cth) reg 90.

Other information about the consumer guarantees in the ACL:

Even where not actually required by the ACL, it can be useful for suppliers to include in their contracts good quality, accurate information about the consumer guarantees in the ACL. This information will assist consumers in understanding their rights under the legislation. In particular it assists consumers in understanding that the consumer guarantees prevail over suppliers' contract terms and cannot be excluded by the contract terms.

Accurate information about the consumer guarantees in the ACL also assists suppliers in complying with the ACL. Accurate contractual information about the consumer guarantees makes it more likely that terms dealing with the suppliers' contractual liability will be valid, as opposed to being interpreted as misleading or void attempts to avoid liability under the legislation.

No information

χ The Aldi and Netspeed contracts did not acknowledge the existence of the ACL.

Some but inconsistent information

Telstra's contracts acknowledged that rights were granted to consumers under the 'consumer protection laws'. Telstra's contracts provided consumers with little information about the consumer guarantees or consumer rights under these guarantees. Consumers were not directed to a place where they could find such information.

Telstra's contracts may even have increased the difficulties for consumers in ascertaining their rights under the ACL because they did not take a consistent approach to the issue.

For example: in respect to any one product, different information about Telstra's voluntary warranties and the consumer guarantees in the ACL was provided in at least four different documents: 'Things you need to know', 'Important warranty information', 'Our customer terms'; the terms applying to specific products.

Two of those relevant documents, 'Things you need to know' and 'Important warranty information', referred specifically to the ACL. They did not provide a summary of rights. Nor do they provide a link to the ACCC website that would explain the nature of those rights.

One document, 'Important warranty information', referred only to the consumer guarantees applying to goods.

Telstra's contract terms merely referred to rights under 'consumer protection laws' rather than to the ACL. Consumers are unlikely to know which consumer protection laws are applicable and the major piece of legislation, the Australian Consumer Law, which applies in all Australian jurisdictions, should be specifically identified.

Out of date terminology

Some of the contracts surveyed - Telstra in some places, Netspeed, TPG and Kogan Mobile - used out of date terminology to describe consumers' rights under the ACL. For example, some of the documents of these suppliers referred to 'implied terms' and/or to 'warranties' protecting consumers, which was the case under the previous

legislation, the *Trade Practices Act 1974* or indeed to the *Trade Practices Act 1974* rather than the ACL. The current legislation, the ACL, provides 'consumer guarantees' that apply as statutory rights, not as implied terms.

This misuse of terminology does not assist consumers and in some cases may mislead them. It gives no confidence that the suppliers will accurately explain their rights in face-to-face or telephone dealings with consumers.

Good information

√ The Optus and Vodafone contracts provided very good summaries of consumers' rights under the ACL and made clear that the consumer guarantees prevailed over the suppliers' own contract terms.

For example, the Optus contract contained the following information:

“Our liability to you

We have responsibilities and obligations under the law, including under:

- i the Telecommunications Legislation,*
- ii the Competition and Consumer Act, including the Australian Consumer Law,*
- iii applicable laws, regulations and codes.*

Nothing in the agreement removes or limits any rights that you have under existing laws or regulations.

Your statutory rights as a consumer

Under the Australian Consumer Law, if you enter into an agreement to purchase goods or services from us which cost less than \$40,000 or are normally acquired for personal, domestic or household use and, in the case of goods, the goods are not re-supplied by you, certain consumer guarantees apply to those goods and services in relation to acts or omissions that occur on or after 1 January 2011 (consumer guarantees).

Consumer guarantees apply regardless of any express warranties to which you may be entitled under this agreement.

We guarantee that:

[Sets out a thorough summary of the consumer guarantees in the ACL and the remedies for a failure to comply with these guarantees.]

...¹⁰⁸

3.2.3 Consumer guarantees under the ACL and terms limiting liability

In most cases, the consumer guarantees in the ACL are mandatory and cannot be excluded by contract.¹⁰⁹ This means that attempts by suppliers to limit or exclude their liability arising under the consumer guarantees will usually be void.¹¹⁰

For example, under the ACL suppliers cannot exclude liability for failing to use due care and skill or limit their obligations to give refunds or redress for goods that are not of acceptable quality.

The consumer guarantees will prevail over any voluntary or extended warranty given by suppliers.¹¹¹

¹⁰⁸ Optus, *Standard Form of Agreement* 13.2.

¹⁰⁹ ACL s 64.

¹¹⁰ Some opportunity for limitations on liability is provided in ACL s 64A(3), but this only applies where the goods or services are not of a kind ordinarily used for personal, domestic or household use or consumption.

For example, the consumer guarantees may provide a right to redress for consumers even in circumstances where the voluntary warranty period has expired or does not apply.

The ACL also prohibits a person from making a false or misleading representation ‘concerning the existence, exclusion or effect of’ any consumer guarantee.¹¹²

For example, this prohibition may be breached by a supplier who, in attempting to limit or exclude its liability under the contract, fails to clearly acknowledge the consumer guarantees in the ACL or to make clear that the rights under these guarantees ‘trump’ anything in the supplier’s contract.

A supplier who is found to have made a misleading representation about the existence or effect of a consumer guarantee under the ACL may be liable to pay a pecuniary penalty under the Act.¹¹³

Summary

Most of the contracts surveyed contained exclusion clauses that would be void and/or misleading under the ACL.

Analysis

Attempts to exclude or limit liability that do not acknowledge the ACL

χ The Aldi, Netspeed and TPG contracts contained limitation or exclusion clauses that did not acknowledge the non-excludable consumer guarantees under the ACL.

For example, the Netspeed contract contained the following term:

“NetSpeed makes no warranties of any kind, whether express or implied, for the services it provides. NetSpeed also disclaims any warranty of merchantability or fitness for a particular purpose. NetSpeed will not be responsible for any direct, indirect or consequential damages, which may result from the use of its services including loss of data resulting from delays, non-delivery or interruption in service. While we take great care with information that you deposit with us we cannot and do not guarantee that all such information will reach its intended destination (including electronic mail) inside or outside our network.”¹¹⁴

The TPG mobile contract provided:

“You use the service at your own risk and we take no responsibility for any data downloaded and/or the content stored on your computer or mobile phone. You agree not to make any claim against us, our suppliers, employees, contractors or assignees for any loss, damages or expenses relating to, or arising from, the use of the service.”¹¹⁵

Terms of this kind are void as attempting to exclude liability under the ACL. The

¹¹¹ ACL s 64.

¹¹² ACL s 29(1)(m).

¹¹³ ACL s 224.

¹¹⁴ Netspeed, *General Terms and Conditions* 8.1.

¹¹⁵ TPG, *Mobile Service Description and Terms* 18.1.

terms are also misleading contrary to the ACL because they incorrectly represent that the supplier can limit or exclude any liability that may arise in connection with the supply of its services.¹¹⁶

Force majeure

χ ‘Force majeure’ is a legal term applying to events outside the control of a supplier. A number of suppliers - Telstra, Kogan Mobile and iiNet - sought to disclaim liability for force majeure events. Terms of this type should be qualified by an express acknowledgment that the supplier cannot exclude liability under the ACL. For example, the iiNet contract provided:

“we are not liable for failing to comply with any of our obligations under our CRA if a Force Majeure Event occurs which prevents us from performing those obligations.”¹¹⁷

Suppliers may in some cases be liable for these types of events where there is also a failure to comply with a consumer guarantee under the ACL. For example, a lightning strike is outside the control of a supplier. Nonetheless, a supplier may be liable under the ACL for damage caused by a lightning strike if it failed to use due care and skill in safeguarding its equipment against foreseeable events such as a lightning strike.

Service interruption

In addition to excluding or limiting liability for certain losses, all of the contracts surveyed sought to ensure that the suppliers’ obligations to provide the service were narrowly defined. All contracts to explain that the supplier could not guarantee a continuous or fault free service.

This approach is reasonable given the number of variables, many beyond the control of the supplier, which may affect the provision of telecommunications services.

However, such terms should contain an express acknowledgment that they are subject to the consumer guarantees in the ACL and, preferably, also explain that the service provided comes with consumer guarantees of due care and skill and fitness for purpose.

χ Kogan Mobile, TPG, Netspeed, Vodafone and, in some places, iiNet, did not acknowledge that their service quality descriptions were subject to non-excludable obligations under the ACL.

For example, the TPG contract provided:

“While we will endeavour to make Mobile services available to customers 24 hours a day, 7 days a week, Mobile services are not fault free and we cannot guarantee uninterrupted service, or the speed, performance or quality of the service. There are many factors outside of our control which affect Mobile services, such as the performance of third party suppliers and equipment, Force

¹¹⁶ Information about the consumer guarantees or the ACL that is contained in another document in a different place is not sufficient to save an otherwise void exclusion clause expressed in broad and absolute terms.

¹¹⁷ iiNet *Our Customer Relationship Agreement Section A 15.9*.

Majeure events, electromagnetic interference, network congestion, and performance of your equipment. We accept no liability for interruptions to your Mobile service or for any resulting damage or loss suffered by you or any third party.”¹¹⁸

This type of unqualified limitation is likely to be void and misleading under the ACL. A valid limitation would expressly acknowledge consumers’ rights under the ACL.

√ For example, consider, the Dodo contract, which clearly acknowledged the continuing existence of consumers’ rights under the ACL and, moreover, referred consumers back to the term that explained those rights.

“We will use reasonable care and skill in providing the Services. Given the nature of telecommunications systems, including Our reliance on systems, Equipment and services that We do not own or control, We cannot promise that Our Services will be continuous and fault free. This does not affect Your rights under the statutory warranties as described in clause 6.2.”¹¹⁹

Coverage

A number of suppliers – Aldi, iiNet Optus, Kogan Mobile - sought to disclaim responsibility for problems with the coverage of their service.

χ Terms of this kind have the potential to impact harshly on consumers and may be void under the ACL.

For example, an Optus contract provided:

“In areas that the *service* is available, it is technically impracticable for *us* to guarantee that: the *service* is available in each place within an area where there is coverage, ‘drop-outs’ will not occur during a call, and there will be no congestion on *our network*.”¹²⁰

For example, consider a consumer who enters into a mobile phone contract. The consumer lives in Tasmania, outside Launceston. The Optus coverage map indicates that the service is available in that part of Tasmania. In fact, the service does not work reliably on the purchaser’s property, which is in the foothills of a mountain range. On a plain reading of the term above, the consumer will be bound by the contract with no remedy or right to terminate without penalty.

To comply with the ACL, these types of terms, limiting the supplier’s liability for coverage defects, should expressly acknowledge that they are subject to the rights provided to the consumer by the consumer guarantees in the ACL.

For example, the consumer guarantees in the ACL require services provided to a consumer to be fit for any purpose made known by the consumer to the supplier, expressly or by implication. If the supplier cannot provide a service that is fit for that purpose, then the consumer is entitled to a remedy, which may be a right to terminate the service without penalty should it not prove suitable.

¹¹⁸ TPG, *Mobile service description and terms* 5.1.

¹¹⁹ Dodo, *Standard Form of Agreement – Consumer Services* 7.1

¹²⁰ Optus, *Digital Mobile Service Description* 2.3.

In some cases reliable coverage in a particular area will be a purpose made known to the supplier, either expressly or by implication. In the above example, it can be argued that the consumer's need for coverage in an area outside Launceston was made known by the consumer's very act of telling the supplier their residential address.

Requiring customers only to use the service in areas with coverage

χ The Vodafone contract required consumers to agree:

“only to use the Service in the Mobile Coverage Area.”¹²¹

It is legitimate for a supplier to limit its service obligations to the extent it is able to provide coverage. It is onerous and unfair to expect consumers themselves to monitor the issue and to only use their phones within the coverage area. Coverage outside metropolitan areas varies considerably even across small distances.

Exclusion and limitation clause qualified only by references to ‘consumer protection law’

χ Telstra's limitations of liability were stated to be subject to any ‘non-excludable rights under consumer protection laws’.

This type of term will not be void as an attempt to exclude the consumer guarantees. It acknowledges the possibility of liability under consumer law. There is a reasonably strong argument that such terms are misleading and/or unfair contrary to the ACL.¹²²

In *Trade Practices Commission v Radio World Pty Ltd*¹²³ a retailer displayed the following sign on its premises:

“Notice to Customers

All purchases made in this store are subject to these conditions and no variations will be allowed

(except to the extent that the Trade Practices Act imposes any condition, warranty, guarantee, right or remedy which cannot be modified or excluded).

Any goods or items bought here will not be exchanged. No moneys will be refunded under any circumstances. Any goods that are faulty will be repaired under the terms and conditions set out by the manufacturers' warranty.

Management: Radio World Pty Ltd.”

¹²¹ Vodafone *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers Commencing or Renewing on or after 1 January 2011* 2.5.3.

¹²² See Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Businesses* (2011) 17; Office of Fair Trading (UK), *Unfair Contract Terms Guidance* (2008) 15.

¹²³ [1989] FCA 353.

The Trade Practice Commission, now the ACCC, sought an injunction prohibiting the display of the sign, and Neave J granted the injunction. Her Honour held that in displaying the sign the retailer engaged in misleading conduct contrary to provisions in the *TPA* equivalent to ss 18 and 29(1)(m). Neave J accepted the arguments of the Trade Practices Commission that:¹²⁴

“The insertion of the words in parenthesis was not sufficient... to remove the misleading character of the representations which the other statements made. Counsel pointed to the positive and absolute terms in which those other statements were made, contrasting the language used with the language used in referring to the Act. The latter language would not ... have conveyed to a consumer, even an astute or intelligent consumer, any appreciation of the protection afforded to him by the Act.”

As noted above, the limitation clauses in the Telstra contracts were expressed to be subject to any ‘consumer protection laws’. The clauses suffer the same defects as discussed by Neave J.

The Telstra contract did not contain any explanation of the scope or impact of the ACL. Without explicit reference to the ACL in the contract, it is difficult for consumers to assess their rights. Not all consumers are trained in the law. If consumers don’t know about their rights under statute, then a mere reference to ‘consumer protection law’, or even to the ACL, in an otherwise broad exclusion clause would do little to assist them. Consumers are likely to be misled into thinking that their rights to redress are more limited than in fact is the case. Such terms may be unfair under the ACL for similar reasons.

The Telstra website contained some information about the ACL in its summary documents. This information would not save otherwise void or misleading contract terms because the documents in which the information is contained does not form part of the contract and is not located in the same place as the relevant contract terms.

3.2.4 Distinguishing between consumer and business customers?

A number of the suppliers surveyed distinguished between consumer and (small) business customers. This separation of customer groups may occur for a number of reasons, including the following:

- consumer customers are subject to more onerous regulatory requirements, in particular regarding disclosure under the TCP Code and substantive fairness under the ACL;
- business customers may have higher usage needs; and
- business customers are likely to suffer greater ‘consequential’ losses in the

¹²⁴ [1989] FCA 353, [23].

event of failures in their service.

Who is a consumer?

It is important for suppliers who distinguish between business and consumer customers to recognise that even business customers may still be protected as ‘consumers’ by the provisions in the ACL and TCP Code.

In particular, the definition of a consumer for the purposes of the consumer guarantees in the ACL is extremely broad and is not premised on how a customer actually uses the goods or services.

The threshold test for a consumer for the purposes of the consumer guarantees is based on the price of the goods or services (under \$40,000), and then to whether the goods or services were of a kind ordinarily acquired for personal domestic or household use of consumption (i.e. an objective test).¹²⁵

Under this approach, a person who acquires goods or services for their business will still be a consumer protected by the consumer guarantees in the ACL.

Suppliers who define consumers more narrowly in their consumer contracts will not breach the ACL provided that they acknowledge the possible application of the consumer guarantee regime to their small business contracts.

All the suppliers who distinguish between consumer and business customers do this in their small business contracts.

χ One supplier failed to make the connection between business uses and possible ACL liability in its consumer contract.

The Dodo standard form of agreement is provided to customers for personal use. Dodo excluded liability for losses incurred in connection with the conduct of a business:

“As Your Service is provided to You for personal, domestic or household use, We do not accept liability for losses that result from the use of Your Service in connection with the conduct of a business.”¹²⁶

Not acknowledging the possible application of the ACL to business uses renders this type of terms misleading and void. A customer who used the service in connection with the conduct of a business in breach of this clause may still be protected by the consumer guarantees in the ACL if the service cost less than \$40 000.

Excluding business uses

The suppliers surveyed who distinguished between consumer and business customers directed in their contracts that their consumer services should not be used for business purposes.

χ The Dodo and Vodafone contracts were particularly strident and precluded use of the service for any business purpose.¹²⁷

¹²⁵ ACL s 3(2).

¹²⁶ Dodo, *Standard Form of Agreement* 6.1.

¹²⁷ Dodo, *Standard Form of Agreement* 10.24; *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers Commencing or Renewing on or after 1 January 2011* Section 2 7.2.

Such terms are likely to be unfair. Occasional use of a consumer service for business purposes should not constitute a breach of contract or a reason for disadvantaging a predominantly consumer customer.

Even where a consumer purchases a product primarily for personal purposes, it is possible that s/he may occasionally use that service for business purposes. Indeed, in the digital age, an overlap between business and private usage seems inevitable.

Consider, for example:

- a plumber who answers an emergency call on his or her personal mobile;
- an lawyer who occasionally uses the home computer to look up information; or
- a ‘mummy blogger’ who accepts a one-off fee for allowing the launch of a new baby product to be advertised on her blog.

These customers all satisfy the regulatory and common sense definitions of a consumer. Yet their conduct would breach of a contractual restriction on using the service for *any* business use.

Contract terms precluding customers from using the service for *any* business purpose may be unfair terms under the ACL, particularly where the supplier can terminate the contract in response to such usage. Such terms are disproportionate to the risk to the supplier and the usage by the consumer.

√ A fairer approach would be to preclude customers from using services provided for personal use *predominantly* or *primarily* for business purposes.

For example, the Telstra consumer terms apply to customers using services ‘ordinarily’ acquired for personal, domestic or household use and who are actually using the service for this ‘primary purpose’. A consumer who uses Telstra products for business purposes should contract under the business terms.

The reference to the *primary* purpose of the service gives a degree of flexibility to a customer who uses the service predominantly for personal use but occasionally for business use.

4 CONCLUSION

4.1 Overview

The review of telecommunications contracts under the Fine Print Project found significant levels of non-compliance with the relevant consumer protection regimes in telecommunications contracts. Most contracts surveyed contained terms that did not comply with the consumer protection provisions in the TCP Code and the ACL that are supposed to promote both procedural and substantive fairness in the terms of standard form consumers contracts. Some contracts showed almost no recognition of the applicable consumer protection rules.

Overall the high level of non-compliance with what is quite a straightforward consumer protection regime suggests that the ‘fine print’ terms in consumer contracts have been a neglected aspect of compliance culture in the telecommunications industry. Moreover, the failure of many contracts to comply with the TCP Code and the ACL must raise

doubts about the quality of advice given by suppliers to consumers about their contractual rights and responsibilities in face-to-face or telephone conversations.

The recent report by the ACCC, *Unfair Contract Terms – Industry Review* (2013), raised concerns about the prevalence of terms that were unfair or otherwise did not comply with the ACL in some industries, including the telecommunications industry. The Fine Print Project, which focused only on telecommunications contracts, identified a range of non-compliant terms that included and also went beyond those identified by the ACCC. It is to be hoped that publicity given to the ACCC review, and indeed to this report, may improve the situation.

4.2 Recommendations

There were a number of issues that arose repeatedly in the contracts reviewed. It is suggested that the level of compliance with the TCP Code and the ACL could be improved, and the interests of consumers better served, through the following actions:

- encouraging suppliers to utilise digital technology to ensure that consumers can more easily access and navigate consumer contracts;
- requiring suppliers to set out clearly the limits on contractual discretionary powers, in particular the circumstances in which powers to vary a contract can be exercised and the standard for assessing excessive or unreasonable use by consumers;
- reviewing the imposition of late payment and default /exception fees to ensure that these are not unfair penalties;
- encouraging suppliers to provide clear and accurate information about the mandatory consumer guarantee regime in the ACL and their relationship with the suppliers' rights and obligations under the contract;
- ensuring that descriptions of service, limitation and exclusion clauses and indemnity clauses in telecommunications contracts acknowledge the impact of the consumer guarantees in the ACL and do not wrongly represent that the contractual terms prevail over the consumer guarantees in the ACL;
- ensuring any limitations on business use are fair and balanced; and
- consumer advocates and regulators should continue review the terms of telecommunications contracts to monitor ongoing compliance with the TCP Code and the ACL.

The ACCC is has stated that it is now moving from a compliance to an enforcement response to promote compliance with the regime in the ACL.¹²⁸ Such measures may be necessary ensure a better level of compliance with the consumer protection regimes promoting both procedural and substantive fairness in the terms of telecommunications contracts.

¹²⁸ Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 2.

APPENDIX 1: PRODUCT LIST

Company	Product	Marketing Name	Applicable Terms
1. Telstra	General consumer terms		Our Customer Terms – General Terms for Consumer Customers Things You Need to Know about Telstra Services Important Warranty Information
2. Telstra	Mobile Plan (handset included)	Everyday Connect \$80	Our Customer Terms – General Terms for Consumer Customers Our customer terms – Telstra mobile section - Part A - General Our customer terms – Telstra Mobile Section – Part B - Our current consumer pricing plans Special service terms
3. Telstra	Mobile Pre-Paid	Telstra Pre-Paid ‘Simplicity’	Our Customer Terms – General Terms for Consumer Customers Our customer terms – Telstra mobile section - Part A - General Our customer terms – Telstra Mobile Section – Part B - Our current consumer pricing plans Special service terms
4. Telstra	Home phone	Homeline reach	Our Customer Terms – General Terms for Consumer Customers Our customer terms - Basic telephone service section - Part A - General Our customer terms basic telephone service section Part B – Homeline plan Special service terms

Company	Product	Marketing Name	Applicable Terms
5. Telstra	Broadband	Bigpond Elite ADSL	<p>Our Customer Terms – General Terms for Consumer Customers</p> <p>BigPond services summary</p> <p>Our customer terms – BigPond service section - Part A – General terms for BigPond services</p> <p>Our customer terms – BigPond service section - Part C - ADSL</p> <p>Special service terms</p>
6. Telstra	Fixed-line/Internet Bundle	T-Bundle Connector Everyday with ADSL	<p>Our Customer Terms – General Terms for Consumer Customers</p> <p>Home phone terms as above</p> <p>Broadband terms as above</p> <p>Our customer terms – Home bundles section - Part A - General terms</p> <p>Our customer terms – home bundles section - Part B – current bundles</p> <p>Our customer terms – home bundles section Part D – special offers</p>
7. Telstra	Entertainment Bundle	Tbox Entertainer with ADSL, and Foxtel	<p>Our Customer Terms – General Terms for Consumer Customers</p> <p>Fixed line/internet bundle terms</p> <p>Foxtel on T – box terms</p>
8. Telstra	General business terms		<p>Our Customer Terms - General Terms for Business</p> <p>Important warranty information</p> <p>(Business terms summary)</p>

Company	Product	Marketing Name	Applicable Terms
9. Optus	General consumer terms		Standard form of agreement
10. Optus	Mobile Plan (handset included)	Optus Plan iPhone 5 \$50	Standard form of agreement Summary of digital mobile service Digital Mobile Service Description Digital Mobile Service Standard Pricing Terms: Tables - sections 1 to 3 Mobile Equipment Payment Plan – Appendix D Mobile Fair Go Policy – Appendix W Mobile Value Added Service Features – Appendix Y Appendix I – Part A (Optus yes rewards) Special service appendices
11. Optus	Mobile Pre-Paid	Prepaid Social \$50	Standard form of agreement Summary of pre-paid mobile service Prepaid mobile service description Pre-Paid Mobile Standard Pricing Table Mobile Fair Go Policy – Appendix W Mobile Value Added Service Features – Appendix Y Special service appendices
12. Optus	Fixed line		Standard form of agreement Summary of local service Local service description Local service call types Local service enhanced calling features Local

Company	Product	Marketing Name	Applicable Terms
13. Optus	Broadband	Naked Broadband	Standard form of agreement Summary of DSL service terms DSL Internet service description DSL internet service standard pricing table Acceptable Use Agreement – Appendix H
14. Optus	Fixed Line/Internet Bundle	\$110 Phone and Broadband Bundle With Optus TV and Fetch (300 GB)	Standard form of agreement Fixed line terms Internet terms Optus TV with Fetch Summary Optus TV with Fetch service description Optus TV Fetch pricing
15. Optus	Entertainment Bundle: Optus TV Featuring Foxtel	Entertainment Package	Standard form of agreement Optus Digital Television Summary Optus Digital Television Terms
16. Optus	Cloud storage	Smart safe	End user licence agreement
17. Optus	General small business terms		Small business standard agreement
Company	Product	Marketing Name	Applicable Terms - last reviewed 15 March 2013
18. Aldi Mobile	Prepaid mobile		Prepaid mobile terms and conditions
19. Boost Mobile	Prepaid SIM	UnLtd \$40 standard SIM	Terms of Use
20. Boost Mobile	Hand set	Jump Smart Black	Terms of use
21. Dodo	General consumer terms		Standard Form of Agreement – Consumer Services Dodo Warranty Claims
22. Dodo	Mobile plan	Nokia \$49 Chit chat Mobile plan	Standard Form of Agreement – Consumer Services

Company	Product	Marketing Name	Applicable Terms - last reviewed 15 March 2013
23. Dodo	Home phone		Standard Form of Agreement – Consumer Services
24. Dodo	ADSL		Standard Form of Agreement – Consumer Services
25. Dodo	General business terms		Dodo standard form of agreement – business services
Company	Product	Marketing Name	Applicable Terms
26. iiNet	iiNet general consumer terms		Our Customer Relationship Agreement Customer Service Guarantee Customer service waiver (VOIP services) General Equipment Warranty Mass disruptions information Fair use policy (residential)
27. iiNet	Mobile Plan with Handset	‘\$40 mobile plan’ Samsung Galaxy ‘Note’ \$33/m	Our Customer Relationship Agreement Note: Mobile service and Handsets only available to customers who have a Broadband and also Mobile SIM Plan with iiNet already.
28. iiNet	Fixed phone	Home line	Our Customer Relationship Agreement Note: must be bundled with broadband
29. iiNet	ADSL Broadband	ADSL Broadband plans Home – 2 \$49.95 200GB	Our Customer Relationship Agreement
30. iiNet	Entertainment bundle	‘Fetch TV Entertainment	Our Customer Relationship Agreement
31. iiNet	General small business terms		Our Customer Relationship Agreement Fair use policy (business)
32. Kogan Mobile	Prepaid mobile		Kogan mobile general terms and conditions Pre-paid terms and conditions
33. Netspeed	General consumer terms		Netspeed General Terms and Conditions

Company	Product	Marketing Name	Applicable Terms - last reviewed 15 March 2013
34. TPG	TPG general consumer terms		Standard terms and conditions
35. TPG	Mobile Plan no Handset (SIM only)	Super Value 'Medium'	Standard terms and conditions Mobile Service Description and Terms Mobile plan brochure Mobile fair go policy Direct Debit Billing Terms
36. TPG	Fixed Line/ Broadband	'Unlimited ADSL2 with Home Phone Bundle' \$69 (plus optional modem/router)	Standard terms and conditions Service Description and Terms - ADSL2+ with TPG Home Phone bundle, ADSL2+ with Landline Rental bundle & Naked ADSL2+
37. TPG	General Small Business terms		Standard terms and conditions
Company	Product	Marketing Name	Applicable Terms
38. Virgin mobile	Virgin general consumer terms		Same general terms as Optus – not reviewed
39. Vodafone	Vodafone general consumer terms		Summary of standard terms for Vodafone mobile telecommunications services Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011 Sections 1 and 2: Dictionary and terms and conditions Section 3: Description of service features and charges Section 4: Fair use policy Section 5: Terms and conditions for mobile payment plan Vodafone network guarantee Vodafone Repair Exchange and Refunds Policy Vodafone Repair Warranty

40. Vodafone	Mobile Plan (handset included)	iPhone 5 \$50 plan plus \$10 for phone 24 month plan	Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011 Post-paid terms and conditions from Oct 2012
41. Vodafone	Mobile Pre-Paid	Vodafone prepaid Flexi cap \$49	Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011 Prepaid Terms and conditions
42. Vodafone	General small business terms	Standard form of agreement	As for consumers

APPENDIX 2: REPORT ON INDIVIDUAL PROVIDER’S CONTRACTS

TELSTRA			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	Technically compliant but not providing clear or useful information to consumers.	<p>Important warranty information</p> <p>“In certain circumstances, Telstra provides voluntary warranties in Our Customer Terms that it will repair or replace certain of its goods and services, where they are defective, ... Each of the circumstances in which Telstra offers such a voluntary warranty is set out in the relevant section of Our Customer Terms.”</p> <p>Hotline number provided.</p>	This document detailed information on Telstra’s voluntary warranties for goods or services.
		<p>Important warranty information</p> <p>“If you are a consumer as defined in the Australian Consumer Law, our goods come with guarantees that cannot be excluded under that Law ...”</p> <p>No further information about or link to the ACL.</p>	<p>This is the wording about the consumer guarantees in the ACL required under the <i>Competition and Consumer Regulations 2010</i> (Cth) reg 90.</p> <p>The placement of the wording in the middle of general warranty information may make it difficult for consumers to appreciate that the consumer guarantees prevail over Telstra’s voluntary warranties and apply to all goods and services supplied to a consumer.</p>

		<p>Important warranty information</p> <p>“The benefits under any of Telstra’s voluntary warranties are in addition to other rights you may have at law.”</p>	<p>The document does not refer to the consumer guarantees under the ACL applying to services. This makes it difficult for customers to appreciate the full scope of the protection under the ACL.</p> <p>The general reference to ‘other rights you may have at law’ does not assist consumers in this regard.</p>
	Technically compliant but not consistent with other information provided to customers	<p>Things you need to know about Telstra services</p> <p>“Subject to the rights you have under the Competition and Consumer Act 2010, you’re responsible for maintaining and repairing your equipment, ...”</p>	<p>This document describes the consumer guarantees in different language to that used in the <i>Important Warranty Information</i> and in some of the contract documents. This is confusing to customers.</p>
	Inaccurate	<p>BigPond Services Summary</p> <p>“Conditions, warranties and guarantees</p> <p>Consumer protection laws imply conditions and warranties into consumer contracts for the supply of goods or services that cannot be excluded. If such are implied into OCT and we breach them, we accept liability for the breach. If lawful to do so, our liability is limited to resupplying, repairing or replacing the goods or service.”</p>	<p>Out of date terminology – the ACL does not imply terms but provides statutory rights called consumer guarantees. This is probably not misleading but it detracts from transparency. The language is inconsistent with other Telstra documents.</p>

All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Our Customer Terms General Terms for Consumer Customers</i>	These general terms are supplemented by product specific terms, special feature terms and pricing terms. Different terms apply to business customers.
Easily accessed (rule 4.5.1)	Yes, except for Foxtel terms		Almost all Telstra contracts could be downloaded from the webpage. The exception was the Foxtel on TBox terms, which were not listed with the other contract terms and were not able to be downloaded.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Yes		The Telstra contracts contain links allowing Customers easily to move from the index to the relevant section. Navigation would be assisted by hypertext links for defined terms. Navigation would also be assisted by internal links for related documents.
Clear presentation? (4.5.1)	Yes		Telstra contracts were clearly presented with headings and reasonably generous spacing.
Plain language? (Rule 4.5.2)	Yes		Telstra contracts were expressed in clear and simple language directed to the customer.
Relationship between documents	Difficult		The real transparency issue for consumers is in the large number of documents that they may have to access, read and then reconcile in order to understand any particular product.
	Different terms dealing with the same	<i>Our Customer Terms General Terms for</i>	In addition, some of the contractual documents contain terms dealing with the same

	issue in different documents	Consumer Customers “1.5 If anything in these Consumer General Terms is inconsistent with something in a particular section of Our Customer Terms, then the particular section applies instead of the Consumer General Terms to the extent of the inconsistency.”	issues but in different terms. Customers then had to work out which of these terms apply to them and what they mean. For example, the general Telstra terms, home-phone and the BigPond terms, allowed different times to remedy a material breach and different late payment fees. The inconsistency provision in the general terms is unlikely assist consumers without legal training.
	Different terminology in different documents		The various Telstra documents use different language to describe the effect of the consumer guarantees in the ACL. Consumers may not appreciate that the documents were referring to the same set of rights in the same legislation.
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause	Technically compliant but not easy to understand	Our Customer Terms General Terms for Consumer Customers “9.1 Your service is supplied: (a) on the terms and conditions expressly set out in the application form you used to apply for your service (or that was disclosed to you when you applied for your service) and in Our Customer Terms; and	Much less elegant and consumer friendly than the below clause

		<p>(b) subject to non-excludable rights under consumer protection laws.</p> <p>No other terms or rights apply.”</p>	
	Yes	<p><i>Our customer terms – BigPond service section - Part A – General terms for BigPond services</i></p> <p>8.1 Your service is supplied on the terms expressly set out and subject to non-excludable rights under consumer protection laws. Other representations or statements we make to you, whether in person, over the phone or in advertising or other materials you received, are not part of these terms. However, you may have other legal rights in relation to those representations.’</p>	Nicely done – though would be assisted by an express reference to the ACL so that consumers can identify the main applicable legislation.
Variation powers	Arguably unfair	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“4 Changing our customer terms – fixed length contract customers”</p> <p>Telstra is granted a right to change the terms of its contracts with Customers.</p> <p>The right to make changes is ‘tiered’. This means that the more substantial the change, the greater</p>	<p>The contract provides some protection to consumers against onerous or detrimental changes, namely a right to notice and in some cases to terminate the contract. There remains a real question as to whether these steps go far enough.</p> <p>The suppliers right to make charges is not qualified in any way. As a result, the supplier could make changes for legitimate reasons, for example, relating to changes in its own cost base or the regulatory regime. Or it could make</p>

		<p>the steps Telstra must take to notify Customers of the change and, in some cases involving more changes that do or orate likely to have more than a minor detrimental impact on the customer (4.13) on Customers, Customers may terminate the contract in response to the change.¹²⁹</p> <p>A similar pattern follows for casual customers (clause 5)</p>	changes for purely opportunistic reasons.
	More needed to ensure fairness	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“4.14 For the purpose of this clause ... your service will be cancelled on “Fair Terms” if we have offered you the right to terminate the contract without incurring fees or charges other than:</p> <p>usage and network and call charges incurred up to the date of termination; and</p> <p>installation fees and cost of equipment we have provided to you that you have not paid us for (as long as the equipment can be used in connection with services supplied by another supplier).”</p>	The clause does not deal with customers who have already paid for installation or equipment that cannot be reused.
What happens at	Yes	Customers on fixed term	A fair balance between the

¹²⁹ The right to terminate in response to detrimental changes does not apply to some categories of change, such as those imposed by law or resulting from a tax.

the end of a fixed term agreement?		contracts must notify Telstra 30 days before the end of the agreement if they do not want to continue.	interests of both parties.
Supplier's right to terminate	Yes	<i>Our Customer Terms General Terms for Consumer Customers</i> 8 In the case of material breach, the right to terminate is subject to the party in breach being given 14 days to remedy that breach.	The termination powers in Telstra's contracts are fair and balanced in their approach.
Customer's right to terminate	Yes	<i>Our Customer Terms General Terms for Consumer Customers</i> 7 Both supplier and customer are given broadly parallel rights to terminate, in particular in response to a material breach.	
Suspension		<i>Our Customer Terms General Terms for Consumer Customers</i> Similar to for termination.	
Early termination fee	Yes	<i>Our Customer Terms General Terms for Consumer Customers</i> "7.1 Customers who terminate the contract before the end of a fixed term will be required to pay an early termination fee under the relevant service section of the contract." The fee is disclosed in the CIS and also set out in the relevant pricing section of	As Telstra is not putting itself in a better position than it would be in if the contract was performed, the early termination fee is unlikely to be unfair.

		<p>the contract.</p> <p>The early termination fee varies between products.</p> <p>In the case of a mobile phone it is almost the full cost of the plan, pro-rated according to the term remaining. Some discount appears to be given for early termination.</p> <p>In the case of ADSL or a bundle it is a smaller proportion of the total minimum fee, which reduced according to the amount of time owing on the contract.</p>	
--	--	--	--

<p>Excessive use</p>	<p>Could do better</p>	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“8.8 We can also cancel, suspend or restrict your service by telling you with as much warning as we reasonably can if:</p> <p>...</p> <p>there is excessive or unusual use of the service; or ...”</p> <p>“excessive or unusual use of a service in these Consumer General Terms means where there is a high volume of usage outside of normal usage patterns or other usage which suggests irregular network access (for example, where a call remains connected for an unusually long period of time, where an unusual pattern of short calls is made in a short period of time, or where an unusually large volume of calls are made, particularly to premium-rate or international services).”</p>	<p>The examples are useful but consumers would benefit from greater certainty as to what constitutes excessive use of the service.</p>
	<p>Yes</p>	<p><i>Telstra Mobile Terms Section A</i></p> <p>10 - This clause defines the circumstances that will amount to unreasonable use for some services and Telstra undertakes to write to customers to discuss any such unreasonable use.</p>	

Late payment fee	Further investigation warranted	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>6.28 Telstra charges late payment fees of \$15 where the amount owing is \$100 or more.</p>	The fairness of such fees warrants further investigation. It is unclear whether such fees represent a reasonable estimate of the costs of late payment. If not the fees are likely to be unfair.
	Further investigation warranted	<p><i>Our customer terms – BigPond service section - Part A – General terms for BigPond services</i></p> <p>A different range of fees is payable for late payment for BigPond services: “5.11 ... (a) \$5.00 if the amount outstanding on your bill after the due date is \$65.00 or more but less than \$130.00; (b) \$11.00 if the amount outstanding on your bill is \$130.00 or more but less than \$200.00; or (c) \$15.00 if the amount outstanding on your bill is \$200.00 or more.”</p>	
Dishonour fee	Further investigation warranted	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>6.30 Telstra charges a dishonour fee of \$15 for cheques and \$10 for direct debit.</p>	
Relocation	Yes	<p><i>Our customer terms - Basic telephone service section - Part A - General</i></p> <p>3.24 Telstra charges a connection charge for a home phone when moving.</p>	

	Yes	<p><i>Our customer terms - Basic telephone service section - Part A - General</i></p> <p>3.25 Telstra charges a relocation fee of \$69 when moving a home phone and BigPond service.</p>	
Consumer Guarantees (ACL pt 3-2)			
Information about Consumer Guarantees in the contract	Technically compliant but could do better	<p><i>Our customer terms – Telstra mobile section - Part A - General</i></p> <p>“5 HANDSET WARRANTIES 5.1 Our handsets come with statutory guarantees and other rights that cannot be excluded under consumer protection laws. Remedies are available for a breach of such guarantees or rights, including repairs or replacements and in some circumstances refunds. You can ask us to suspend your service while your handset is being repaired or replaced, where you have not received a loan handset from us.”</p>	This term acknowledges the consumer guarantees but it would be better if it specifically referred to the ACL.
	No	<p><i>Our customer terms – Telstra mobile section - Part A - General</i></p> <p>“If your handset is returned to us for and we reasonably determine that it complies with statutory guarantees and non-excludable rights under consumer protection laws, then any remedy (such as repair or</p>	Whether a handset complies with the consumer guarantees under the ACL is a question of law. It is not a matter left to the supplier’s determination, reasonable or otherwise.

		replacement) will be at your cost and you will need to pay the monthly spend for your service.”	
	Yes	<p><i>Our customer terms - Basic telephone service section - Part A - General</i></p> <p>“Our liability to you</p> <p>If we supply you with rental equipment with our brand on it, and you suffer loss or damage because it is not of acceptable quality, or it otherwise breaches any non-excludable statutory guarantees, implied conditions or warranties under consumer protection laws, we will compensate you for that loss or damage where the rental equipment is of a kind ordinarily acquired for personal, domestic or household use or the amount paid for the rental equipment is less than \$40,000.”</p> <p>See also 11.30.</p>	This is a better explanation of the rights of customers than in the mobile phone contracts. It still did not refer to specifically to the ACL.
	Inaccurate	<p><i>Our customer terms - Basic telephone service section - Part A - General</i></p> <p>“Replacing faulty rental equipment</p> <p>11.28 If your rental equipment is faulty ...</p> <p>This is subject to and in addition to any rights you</p>	The correct reference is to the ACL, which applies at Commonwealth, State and Territory level.

		have under the Competition and Consumer Act 2010.”	
	No	<p><i>Our customer terms – BigPond service section – Part A – General terms for BigPond services</i></p> <p>“13.5 Clauses 13.5 to 13.9 only apply to you if you are a Cable, ADSL or Wireless Broadband customer. If you get equipment from us or any new BigPond branded equipment from our authorised dealers in addition to any non-excludable rights you have under consumer protection laws, we voluntarily warrant:</p> <p>...”</p>	This is a voluntary warranty and so should be specifically accompanied by the wording required under <i>Competition and Consumer Regulations 2010</i> (Cth) reg 90, explaining the consumer guarantees under the ACL.
Exclusions and limitations consistent with the ACL	Probably misleading	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“9.3 Concerning our liability to you:</p> <p>(a) except as set out in the paragraphs below, we accept our liability to you for breach of contract or negligence under the principles applied by the courts and for breach of any non-excludable rights under consumer protection laws; ...”</p>	<p>This term, wrongly, suggests that Telstra’s liability under consumer protection laws does not apply to the extent set out in the paragraphs below. Liability under the consumer guarantees in the ACL cannot be excluded. The clause should make clear that the paragraphs below cannot detract from the rights of consumers under the Australian Consumer Law.</p> <p>Consumers would also be assisted by a specific reference to the ACL rather than a generic reference to consumer protection laws.</p>
	Probably misleading	<i>Our Customer Terms General Terms for</i>	The ACL consumer guarantees may apply to business uses. The mere reference to ‘any

		<p>Consumer Customers</p> <p>“(b) as your service is provided to you for the primary purpose of personal, domestic or household use, we do not accept liability to you for losses that result from the use of your service in connection with the conduct of a business. However, we will accept that liability if it cannot be excluded under any legislation. If that liability cannot be excluded but can be limited under any legislation, we limit our liability to resupplying, repairing or replacing the relevant goods or services (or payment of the cost of resupply, repair or replacement) where it is fair and reasonable to do so;”</p>	<p>legislation’ that provides non-excludable rights does not assist customers to identify their rights in this context.</p> <p>Consumers’ confusion will be increased by the inconsistent terminology. Earlier parts of the clause refer to consumer protection laws.</p>
	Arguably void and misleading	<p>Our Customer Terms General Terms for Consumer Customers</p> <p>“(e) We are not liable for any loss caused by us failing to comply with our obligations in relation to your service where that is caused by events outside our reasonable control (such as a failure in equipment that is not owned or operated by us, an industrial strike or an act of God).”</p>	<p>This clause is not expressed to be subject to the ACL. Even a loss caused by events outside the reasonable control of the supplier could involve a failure to comply with the consumer guarantees in the ACL.</p>
		<p>A different version of the above clause is also found in the BigPond terms (clause 8.2)</p>	

	Probably misleading	<p><i>Foxtel on T – box terms</i></p> <p>“Our liability to you</p> <p>...</p> <p>Concerning our liability to you, except as set out in the paragraphs below:</p> <p>...</p> <p>We will accept liability if it cannot be excluded under any legislation. If that liability cannot be excluded but can be limited under any legislation, we limit our liability to resupplying, repairing or replacing the relevant goods or services (or payment of the cost of resupply, repair or replacement) where it is fair and reasonable to do so;</p> <p>...”</p>	There is no express specific reference to the ACL in this document or even to consumer protection law.
Service/coverage	Yes	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“Our aim of providing continuous and fault-free services</p> <p>3.1 We will use due care and skill in providing our services and will provide our service in accordance with Our Customer Terms. “</p>	It is good that this statement acknowledges the obligation to use due care and skill.

	Possibly misleading	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“There may also be other non-excludable statutory guarantees, implied conditions or warranties under consumer protection laws that cannot be excluded which may apply to services we supply.”</p>	<p>As already discussed a specific reference to the ACL, as a source of mandatory consumer guarantees would be useful.</p> <p>Moreover, it is not the case that there MAY be other guarantees that apply under the ACL. There ARE other guarantees that apply to the supply of services, for example fitness for a disclosed purpose and compliance with any express warranties.</p>
	Possibly misleading	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“However, given the nature of telecommunications systems (including our services’ reliance on systems and services that we do not own or control), we cannot promise that our services will be continuous or fault- free.”</p> <p>See similarly the Telstra Foxtel on Tbox terms.</p>	<p>The provision may be misleading or even void, because it, incorrectly, suggests that the ‘nature of telecommunications systems’ prevails over these guarantees. In some cases a disrupted service may amount to a failure to comply with the consumer guarantees.</p> <p>The description of service should make this position clear, by stating something along the lines of “subject to our obligations under the ACL, we cannot promise ...”.</p>
	Yes	<p><i>Our customer terms – BigPond service section - Part A – General terms for BigPond services</i></p> <p>4.1 Subject to clause 4.2 below, there are certain things that, despite our best efforts, we cannot guarantee or provide in relation to the service. These things include those set out in this clause 4. These terms do not affect your rights under consumer protection laws.</p>	<p>This term contains a better acknowledgment of the dominance of the consumer terms than those discussed above.</p>

		4.2 We will use due care and skill in ...	
Who is protected?	Yes	<p><i>Our Customer Terms General Terms for Consumer Customers</i></p> <p>“1.2 You will be a consumer customer (and these Consumer General Terms will apply to you) if:</p> <p>(a) Your service is of a kind ordinarily acquired for personal, domestic or household use; and</p> <p>(b) You are using your service for the primary purpose of personal, domestic or household use.”</p>	<p>The protection of the consumer guarantees under the ACL contains a wider definition of “consumer” than the Telstra consumer contract. The consumer guarantees apply to the supply of goods or services under \$40,000 regardless of ordinary or actual use. (This is recognised in the Telstra home phone contract.)</p> <p>Telstra’s use of a narrower definition is not unfair. Telstra can choose who it contracts with and on what terms. Telstra’s definition of a consumer does not offend the ACL. This is because Telstra does not disclaim the application of the consumer guarantees in the ACL to small business customers but merely requires them to choose a business product and to contract under the business terms. Telstra limits its liability for losses associated with business purposes but acknowledges that it can only do this where permitted by legislation. The real issue here is the one already alluded to above. This is whether customers are given sufficient information about the ACL to be able to assess what their rights are under the relevant contracts</p>

OPTUS			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No		
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Optus standard form of agreement</i>	These general terms are supplemented by product specific terms, special feature terms and pricing terms. Different Customer terms apply to small business customers.
Easily accessed (rule 4.5.1)	Yes, other than for Smart safe		All Optus contracts could be downloaded from the web page. The terms for Optus Smart safe where located in a different page and more difficult to find.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Yes		The Optus contracts contain links allowing customers to move from the index to the relevant section. Navigation would be assisted by hypertext links for defined terms.

Clear presentation? (4.5.1)	Yes		Optus contracts were clearly presented with headings and reasonably generous spacing. By contrast, the summary documents are too closely packed with text and is difficult to read.
Plain language? (Rule 4.5.2)	Yes		Optus contracts were expressed in relatively simple language directed to the customer
Relationship between documents	Difficult		As with Telstra, the difficult issue for consumers lies in matching up all the relevant documents applying to the service.
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause	Yes	<i>Optus standard form of agreement</i>	No entire agreement clause
Variation powers	Arguably unfair	<i>Optus standard form of agreement</i> 2A Optus is granted a right to change its contract terms subject to a tiered structure of rights and obligations similar to that used by Telstra. Except in case of specified changes, if the change ‘impacts’ on the customer, Optus must give notice and the customer has a right to terminate the contract.	The same concerns arise as with the Telstra clause. There are no fetters on the largely unlimited discretion of Optus to make changes.
What happens at the end of a fixed term contract	Yes	<i>Optus standard form of agreement</i> 2.7 standard roll over	As with Telstra

Supplier's right to terminate?	Yes	<i>Optus standard form of agreement</i> 11 Cancelling the service	Reasonably balanced. Generous period of 30 days given to remedy a breach before termination occurs.
Customer's right to terminate?	Yes	<i>Optus standard form of agreement</i> 11.1 Similar rights to terminate are given to the customer	
Suspension	Yes	<i>Optus standard form of agreement</i>	Similar to termination
Excessive use		<i>Mobile fair go policy</i>	Defines excessive use
Early termination fee	Yes	<i>Optus standard form of agreement</i> and <i>various pricing tables</i> Optus charges an early termination fee for fixed term contracts. The fee is a fixed amount (significantly less than the total cost of the contract) and is reduced according to the number of months that have already run.	A lower early termination fee than under the Telstra contracts.
Late payment fee	Needs further investigation	<i>Pricing tables</i> Optus charges: “a late payment fee of \$15 for late amounts between \$50 and \$100 and \$15 ‘plus 2% above the prime lending rate charged to us by the ANZ Bank calculated daily on the unpaid amount’ for late payments over \$100”	
Dishonour fee	Needs further investigation	<i>Pricing tables</i> \$22	

Relocation	Potentially unfair	<p>Pricing tables</p> <p>Optus will charge a fee for relocating a service. This amount is \$49 for a 12 month broadband contract. A new minimum term will commence on the relocation of some services.</p> <p>Eg see clause 7 Digital TV Terms; clause 9 DSL terms; clause 9 local service description.</p>	If consumers are being charged a fee to cover the costs of relocation to Optus, why should their minimum term recommence?
Control	Yes	<p>Optus standard form of agreement</p> <p>5.3 Optus imposes standard limits on the use of offensive material</p>	
Assignment	Yes	<p>Optus standard form of agreement</p> <p>14 Optus can assign its rights. It can assign its obligations within the Optus Group.</p> <p><i>“We may transfer some or all of our obligations under the agreement to any Optus group company that is able to perform those obligations.</i></p> <p><i>We may perform any of our obligations under the agreement by arranging for them to be performed by another person, including a supplier or another Optus group company. We will still be responsible for the performance of the obligations.”</i></p>	Some protection for consumers.

Consumer Guarantees (ACL pt 3-2)			
Information about Consumer Guarantees in the contract	Yes	<i>Optus standard form of agreement</i> “13.2 <i>Our liability to you</i> ... ”	Provides customers with a very good summary of their rights under the consumer guarantees and for other careless or negligent conduct. Clear acknowledgement that consumer guarantees prevail over any other rights.
Exclusions and limitations consistent with consumer guarantees	Yes	<i>Optus standard form of agreement</i> “13.2 Subject to <i>your statutory rights as a consumer</i> , we are not liable to <i>you</i> for any <i>consequential losses you</i> suffer or for any costs, expenses, <i>loss</i> or charges that <i>you</i> incur.”	
	No	<i>Optus Internet DSL Service Description</i> “Warranties 8.4 In addition to <i>your statutory rights as a consumer</i> , we provide the <i>warranty period</i> with equipment <i>we</i> supply to <i>you</i> at no extra cost. The <i>warranty period</i> does not apply where <i>you</i> have supplied <i>your own DSL modem</i> or other equipment”.	Should include the wording required under the <i>Competition and Consumer Regulations 2010</i> (Cth) reg 90.

	Inaccurate	<p>Digital TV terms</p> <p>“Our liability to you</p> <p>11.2 We have responsibilities and obligations under the law, including under:</p> <p>the <i>Telecommunications Legislation</i>,</p> <p>the <i>Trade Practices Act</i>,</p> <p>applicable laws, regulations and codes.</p> <p>Nothing in the <i>agreement</i> removes or limits any rights that <i>you</i> have under existing laws or regulations.”</p>	Good acknowledgment of primacy of consumer law but refers to the previous legislation (TPA) not the ACL.
Coverage	Yes	<p>Optus standard form of agreement</p> <p>“5.2 Quality of the <i>service</i></p> <p>We will provide the <i>service</i> to <i>you</i> with due care and skill. In the event of unexpected faults we will use reasonable endeavours to ensure the <i>service</i> is restored as soon as possible.”</p>	Good acknowledgement of responsibilities.
	No	<p>The Optus contracts for mobile service (both pre and post-paid) disclaim responsibility for drops outs and congestion.</p> <p>Digital Mobile Service Description</p> <p>“2.3 Coverage</p> <p>The <i>service</i> is not available in all areas of Australia. You may obtain coverage maps showing where the <i>service</i> is available in Australia from us or from our website: www.optus.com.au</p>	<p>The provision should be expressed to be subject to the customers’ rights under the ACL. The primacy of the ACL is made clear in the general terms but is not picked up here.</p> <p>Even accepting the technical limitations on the coverage, the service remains subject to the consumer guarantees in the ACL.</p> <p>In addition, as a matter of fairness, if the coverage map shows that coverage is available and in fact it is not,</p>

		<p>In areas that the <i>service</i> is available, it is technically impracticable for <i>us</i> to guarantee that:</p> <p>the <i>service</i> is available in each place within an area where there is coverage, 'drop-outs' will not occur during a call, and there will be no congestion on our network."</p>	<p>consumers should have a right to terminate the contract without penalty.</p>
<p>Who is protected?</p>	<p>Could do better</p> <p>Possibly unfair</p>	<p><i>Optus standard form of agreement</i></p> <p>The Optus consumer terms apply to a 'person who acquires and uses the service for personal, domestic or household use only'.</p>	<p>This is a narrower definition of consumer than under the ACL. However, Optus clearly acknowledges the possible application of the consumer guarantees to those customers contracting under its business terms.</p> <p>It would be better if the clause referred to a person using the service <u>predominantly</u> for personal domestic or household use. Otherwise the impression might be given that merely one use of the service for business purposes will breach the agreement. If the service were restricted in this narrow way it would be unreasonable.</p>

ALDI MOBILE			
Legal obligation	Compliant?	Document/ clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No	Not located	
All contract terms?			
Available? (Rule 4.5.2)	Confusing	<p><i>Prepaid mobile terms and conditions</i></p> <p>“The agreement is made up of:</p> <ol style="list-style-type: none"> 1) Your Application 2) Pricing Tables and plan description 3) Terms of Service 4) General Terms and Conditions 5) Additional Services Terms (if applicable) 6) Dictionary 7) The policies 8) Appendices (if applicable)” 	Despite the reference in this clause to a range of terms, only the service specific prepaid terms were available online. At points these prepaid terms refer to the general terms. This is confusing to customers.
Easily accessed (rule 4.5.1)	Yes		

Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Could do better		PDF but no index or hypertext links
Clear presentation? (4.5.1)	Could do better		Somewhat legalistic looking format
Plain language? (Rule 4.5.2)	Yes		Moderately clear
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause		Not included	
Variation powers		Not included	
What happens at the end of a fixed term agreement?	Yes	<i>Prepaid mobile terms and conditions</i> At the end of the commitment period the contract is rolled over, and customers may then terminate at any time.	
Supplier's power to terminate	Could be improved	<i>Prepaid mobile terms and conditions</i> "1.4.2 If you breach clause 1.4.1 above, in addition to and without limiting our other rights under the agreement, immediately suspend or disconnect the service. We will notify you if we do this." And also 12	The supplier's rights to terminate are limited to specified events. It would be better if the power to terminate was limited to serious breaches and a right to remedy was provided.
Customers power to terminate	Could be improved		It would be better if the customers' rights to terminate were expressly set out in contract.

Excessive use	Could do better	Acceptable use policy 5.1 Inappropriate use is based on usage patterns of other users with some examples given.	Consumers need clear guidelines. Examples are not sufficient given the consequences of breach.
Early termination		Not included	
Exception fees		Not included	
Consumer guarantees (ACL Pt 3-2)			
Information about consumer guarantees in the contract		Not provided.	
Exclusions and limitations consistent with consumer guarantees	Void and misleading	<i>Prepaid mobile terms and conditions</i> 13.1 limitations on the liability of Aldi for third party services.	Should acknowledge the role of the consumer guarantees under the ACL.
Coverage	Arguably unfair	<i>Prepaid mobile terms and conditions</i> 1.3 Coverage “1.3.1 The service is not available in all areas of Australia. You may obtain actual coverage maps showing where the service is available in Australia from us or from our website: www.ALDImobile.com.au . You are responsible for inquiring whether coverage is available in the area in which you would normally use the service.”	Given the supplier knows more about coverage than customers, the supplier should prompt customers to inquire about coverage and/or should not hold customers to the contract in cases where there provides to be no coverage at least in the area where they reside or work.
	Void and probably misleading	“1.3.2 In areas that the service is available, it is technically impracticable for us to guarantee that: the service is available in each place within an area where	This clause should acknowledge the supplier’s service obligations under the ACL.

		<p>there is coverage,</p> <p>‘drop-outs’ will not occur during a call, and</p> <p>there will be no congestion.”</p>	
Who is protected	Should be clarified	<p>1.1 and 1.4</p> <p>“1.4.1 In addition to any other obligations you may have under the Service Terms including your obligations under the Acceptable Use Policy, you must not:</p> <p>d) use the service for business purposes”.</p>	<p>This clause would be more balanced if it precluded use for <i>predominantly</i> business purposes. One off or irregular use for business purposes by customers should not amount to a breach of contract.</p>

BOOST MOBILE			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No		No specific warranty or guarantee information.
All contract terms?			
Available? (Rule 4.5.2)	No	Terms of use	Appear to cover website use. CIS refers to terms but they cannot be found at that address.
Easily accessed (rule 4.5.1)	No		Not able to be downloaded
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	No		Not clearly titled No index No numbering
Clear presentation? (4.5.1)	Yes		
Plain language? (Rule 4.5.2)	Yes		
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause		Not included	
Variation powers		Not included	

What happens at the end of a fixed term agreement?		Not included	
Termination powers		Not included	
Suspension		Not included	
Excessive use	Yes, though could do better	<i>Terms of use</i> 5.2 Boost Mobile reserves the right to disconnect the service in cases of unreasonable use. Some examples of unreasonable use are given.	Consumers require clear guidelines on this important issue.
Early termination fee		Not included	
Late payment fee		Not included	
Relocation		Not included	
Assignment		Not included	
Consumer guarantees			
Contractual information about consumer guarantees	Yes	<i>Terms of use</i>	Contains the <i>Competition and Consumer Regulations 2010</i> (Cth) reg 90 statement about customers' rights under the consumer guarantees in the ACL.
Exclusions and limitations consistent with consumer guarantees	Yes	<i>Terms of use</i>	The exclusion clause recognises that it is subject to applicable law, which in case of the ACL is set out above the clause.
Coverage		<i>Terms of use</i> Not dealt with. Website advises customers to check coverage.	Ascertaining whether the service provides coverage in their area should not be the sole responsibility of consumers. Consumers should be prompted to consider the issue when making the contract and have a right to terminate if coverage is not available in their major place of use.

Applicable law	Possibly unfair	<i>Terms of use</i> ‘You agree to submit to the non-exclusive jurisdiction of the courts of [NSW].	It is unfair to require customers outside of NSW to proceed in the courts of NSW. This clause states that the jurisdiction of the NSW courts is non-exclusive. It is unclear whether this is enough to save the clause?

DODO			
Legal obligation	Compliant?	Document/ clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	Technically compliant but could do more to inform customers.	<i>Warranty claims</i> “If you wish to make or discuss a claim in relation to the product you have purchased or to discuss your rights pursuant to customer guarantees under Australian Consumer Law, please contact Dodo on 1300 582 840 or by email at warranty@dodo.com.au .”	More information on the consumer guarantees in the ACL would be useful or a link to the ACL/ACCC website.
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Standard Form of Agreement – Consumer Services</i>	
Easily accessed (rule 4.5.1)	Yes		The Dodo terms were contained in one document that could be downloaded as a PDF.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Could be improved		There is an index but no hypertext. Each section is renumbered which reduces ease of navigation.
Clear presentation? (4.5.1)	Yes		The Dodo contract was clearly presented.
Plain language? (Rule 4.5.2)	Yes		Dodo contract was expressed in relatively simple language.

Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause		Not included	
Variation powers	Could be better	<p>For fixed terms contracts, Dodo has no right to change certain specified fees.</p> <p><i>Standard Form of Agreement – Consumer Services</i></p> <p>“11.1 Your monthly access fee, minimum monthly fee, or any early termination fee applies for the term of Your fixed contract term and We cannot change these without Your informed consent.”</p> <p>Dodo’s rights to change other terms are similar to those of other suppliers. If the change will have more than a minor impact on consumers, Dodo must give notice and allow customers to terminate.</p>	<p>There are some limits on Dodo’s discretion to make changes, which is to be applauded.</p> <p>It is possible that Dodo could still do more to define the scope of its discretion to make changes.</p>
What happens at the end of a fixed term agreement?		<p><i>Standard Form of Agreement – Consumer Services</i></p> <p>2.5 – 2.6 At the end of a fixed term the service will continue on a month-to-month basis.</p>	

Supplier's right to terminate?	Yes	<i>Standard Form of Agreement – Consumer Services</i> 10 Similar to other suppliers. Dodo provides consumers with 14 days to remedy a breach before the contract can be terminated.	
Customer's right to terminate?		<i>Standard Form of Agreement – Consumer Services</i> 10 customers can cancel without penalty in specified circumstances, including where material breach by supplier.	
Suspension		As above	
Excessive use		Not included.	
Early termination fee?	Yes	<i>Standard Form of Agreement – Consumer Services</i> 10.3 Dodo imposes an early termination fee. For mobiles and broadband the fee was effectively capped at \$400 or the remaining fees on the plan.	
Late payment fee?	Further investigation warranted	<i>Standard Form of Agreement – Consumer Services</i> “8.18 Administrative Charges may apply to Services supplied by Us: ... d. Late payment charge: Where You have not successfully made payment within at least 14 days after payment is due, a Charge may apply; and	I could not locate any information on the amount of these fees.

		<p>...</p> <p>8.19 The amount for Our administrative Charges can be found on Our website at www.dodo.com.au. “</p> <p>See also 8.11</p>	
Default fee?	Further investigation warranted	<p>“8.18 Administrative Charges may apply to Services supplied by Us:</p> <p>c. Direct debit declined charge: If a direct debit transaction is not processed successfully, except where caused by Our error or the error of Our supplier, a charge declined transaction will apply;”</p> <p>See also 8.12</p>	
Relocation	Possibly unfair	<p><i>Standard Form of Agreement – Consumer Services</i></p> <p>10.21</p>	Adjustments made to account for early termination.
Control	Yes	No specific provisions other than to disclaim responsibly for quarantining unacceptable conduct.	
Assignment		No provision	
Consumer guarantees (ACL Pt 3-2)			
Information about consumer guarantees in the contract?	Inaccurate information provided.	<p><i>Standard Form of Agreement – Consumer Services</i></p> <p>“6.2 Our goods come with unconditional warranties under consumer protection legislation, including that they will be reasonably fit for their purpose and match any description or sample, and</p>	The Dodo contract shows an attempt to acknowledge customers' rights under the ACL. However, the information provided is inaccurate in a number of respects. The specific legislation is not identified. The correct terminology is 'consumer guarantees' not 'warranties'. The description does not refer to the need for

		<p>Our Services come with unconditional warranties that they will be rendered with due care and skill and be reasonably fit for their purpose. Subject to clause 6.1(c), You are entitled, at Your option, to a refund, repair or replacement of the goods or Service for a breach, and to compensation for any other loss.”</p> <p>See also the <i>Standard form of agreement for mobile services</i>, clause 4.</p>	<p>Dodo to comply with all of the significant consumer guarantees, in particular the guarantees of acceptable quality or compliance with express warranties.</p> <p>It would also be useful for consumers to be given a link to the ACL website so as to be able fully to assess their rights.</p>
<p>Exclusions and limitations consistent with consumer guarantees?</p>	<p>Probably void and misleading</p>	<p><i>Standard Form of Agreement – Consumer Services</i></p> <p>For example: “6.1 We are not liable for any loss to the extent that it is caused by You, for example through Your negligence or breach of contract;”</p>	<p>Dodo will still be liable under the consumer guarantees in the ACL, even if the customer is in breach of the contract. See for example the discussion of use for business purposes below.</p>
<p>Service/ coverage</p>	<p>Yes</p>	<p><i>Standard Form of Agreement – Consumer Services</i></p> <p>“7.1 We will use reasonable care and skill in providing the Services. Given the nature of telecommunications systems, including Our reliance on systems, Equipment and services that We do not own or control, We cannot promise that Our Services will be continuous and fault free. This does not affect Your rights under the statutory warranties as described in clause 6.2.”</p>	<p>This clause correctly acknowledges that Dodo’s service obligations are subject to obligations imposed by the ACL.</p> <p>It should be noted that the ACL imposes consumer ‘guarantees’ not ‘warranties’.</p>
<p>Who is protected?</p>	<p>Void and misleading</p>	<p><i>Standard Form of Agreement – Consumer</i></p>	<p>The clause should expressly state that it is subject to customers'</p>

		<p>Services</p> <p>“6.1 (a) As Your Service is provided to You for personal, domestic or household use, We do not accept liability for losses that result from the use of Your Service in connection with the conduct of a business.”</p>	<p>rights under the consumer guarantees in the ACL.</p> <p>Some business uses will still be covered by the consumer guarantees and liability under these guarantees cannot be excluded, even in business contracts.</p>
	Should be redrafted	<p>Standard Form of Agreement – Consumer Services</p> <p>“10.24 We will provide the Service to You on the condition that Your use of the Service is for personal, household or domestic purposes. If We reasonably believe or You notify Us that You are using the Service for any business purposes, We can ask You to cancel the Service and contract with Us for the supply of a suitable business service. If You do not agree to cancel the Service and contract with Us for the supply of a suitable business service, We can cancel Your Service by giving You 30 days written notice and charge You any applicable early termination fee.”</p>	<p>On a literal interpretation of this clause, Dodo has a right to cancel the contract if the service is used for <i>any</i> business purposes. That means even a one off or highly irregular use of the service by a customer for business purposes would give rise to a right for Dodo to move the customer to a business plan or to terminate the contract.</p> <p>The power to terminate should more fairly be limited to use of the service <i>primarily</i> for business purposes. (cf Telstra customer terms 8.12)</p>

IINET			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	Yes	<i>Warranty Information</i>	<p>iiNet provides consumers with information about how to claim under its voluntary warranties and about the actual warranty periods and limitations.</p> <p>iiNet acknowledges that its voluntary warranties are “in addition” to consumers’ rights under the ACL.</p> <p>The information includes the wording required under <i>Competition and Consumer Regulations 2010</i> (Cth) reg 90.</p> <p>The information would be improved by a summary of ACL consumer guarantees or link to ACL website.</p>
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Our Customer Relationship Agreement</i>	This document contains all terms. The format is general terms and then service specific terms.
Easily accessed (rule 4.5.1)	Yes		The iiNet contract could be downloaded from the web page.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Yes		The iiNet contract contained hypertext links and an index.
Clear presentation? (4.5.1)	Yes		The iiNet contract was clearly presented.

Plain language? (Rule 4.5.2)	Yes		The iiNet contract was expressed in simple and understandable language.
Relationship between documents	Could be easier		As with a number of other contracts reviewed, iiNet customers need to navigate a number of different document sections. They are contained in one document but there are no internal links. A customer may need to read two or three different sections to determine their rights, for example relating to termination of the contract.
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause	Unfair	<i>Our Customer Relationship Agreement Section A</i> “19.8 This CRA contains the entire agreement between the parties and supersedes all prior agreements and understandings between the parties in connection with it.”	This is an unfair attempt to preclude any oral agreements between the parties. It detracts from consumer’ common law rights. It is highly likely to be void under the ACL.
Acknowledgment clause	No	<i>Our Customer Relationship Agreement Section A</i> “19.9 You acknowledge that: (a) advice from our staff is given in good faith and with the best of intention, however we do not represent that our staff are experts in the operation of your computer hardware or	This term acknowledges the role of consumer guarantees. However, there are other forms of liability that may arise under the general law and the ACL that are affected by this clause. In particular, the term purports to prevent customers from relying on otherwise misleading information. If customers have been misled and relied to their detriment on that information a ‘fine print’

		<p>software. Subject to the Consumer Guarantees, you undertake to act on any advice given by any iiNet staff member at your own risk;</p> <p>(b) we make reasonable efforts to ensure that the information on our Website is correct and up to date. However, we do not warrant the accuracy of that material.”</p>	<p>contract clause cannot change that reality. To attempt to disclaim responsibility for misleading conduct or other liability under the ACL is highly likely to be unfair.</p>
Variation powers	Arguably unfair	<p><i>Our Customer Relationship Agreement Section A</i></p> <p>1 The iiNet customer relationship agreement contains tiered rights to vary similar to those used by Optus.</p>	<p>The document refers to iiNet needing to change the terms from time to time. However there is no description of what constitutes a ‘need’. The clause would better if there were some limit on the discretion to change terms at any time.</p>
What happens at the end of a fixed term agreement?	Yes	<p>At the end of the commitment period the contract is rolled over, and customers may then terminate at any time.</p>	
Supplier’s right to terminate?	Yes	<p><i>Our Customer Relationship Agreement Section A</i></p> <p>13.1 Standard rights to terminate with 14 days to remedy a material breach other than late payment for which a customer [has] seven days to rectify after being given notice.</p>	<p>Less generous remedy period than some other suppliers.</p>
Customer’s right to terminate?	Yes	<p><i>Our Customer Relationship Agreement Section A</i></p> <p>13.6 sets out consumers rights to terminate including for material breach by supplier and prolonged supply failure.</p>	<p>Broadly reciprocal. Clearly expressed.</p>

Suspension?		As above	
Excessive use	Possibly unfair	<i>Fair use policy</i> Based on comparison with other users	This type of approach makes it difficult for consumers to assess their obligations.
Early termination fee	Could be more clearly expressed	<i>Our Customer Relationship Agreement</i> Under the iiNet contract an early termination fee is payable. It was difficult to work out what this amount was for any particular product or plan. This is because the contract terms referred to both an 'early termination fee' and contract 'break fees' being payable. In any event both of these fees were less than the full price for the contract term.	
Late payment fee	Needs further investigation	<i>Our Customer Relationship Agreement Section A</i> iiNet charges a fee for late payment of 3% per annum calculated on the daily unpaid balance of the unpaid amount.	Is this a reasonable estimate of costs incurred?
Default fee	Further investigation	<i>Our Customer Relationship Agreement Section A</i> 8.9 decline fee specified in pricing tables <i>Section C</i> not currently charged.	

Relocation	Yes	iiNet charges only a relocation fee provided the service is reconnected within a specified time of 14 days.	
Assignment	Yes	<i>Our Customer Relationship Agreement Section A</i> 18 iiNet can assign its obligations but only to a supplier who will meet the same terms and conditions.	Customers' interests are considered.
Control over content	Yes	<i>Our Customer Relationship Agreement</i> 4.2 contains a standard prohibition on offensive content.	
Consumer Guarantees (ACL pt 3-2)			
Information about Consumer Guarantees in the contract	Yes	<i>Our Customer Relationship Agreement Section A</i> Definition of Consumer Guarantees refers to Pt 3-2 of the Australian Consumer Law. 15.1 acknowledgment of obligations under the consumer guarantees and gives examples of types of consumer guarantees	
Exclusions and limitations consistent with consumer guarantees in the ACL	Inaccurate and possibly unfair	<i>Our Customer Relationship Agreement Section A</i> "15.1 We agree to provide Services to you subject only to the terms, conditions and warranties contained in this CRA and the Consumer Guarantees. Any liability that we might otherwise have to	This term recognises the mandatory force of the consumer guarantees under the ACL. However, there are other types of liability that also attach under the ACL that cannot be excluded, eg liability for misleading and deceptive conduct and for unfair

		you in connection with our CRA or Service is expressly excluded.”	contract terms. In addition, it might be asked whether it is fair for a provider to exclude any liability at all. What about liability for its own negligence?
	Yes	<i>Our Customer Relationship Agreement Section A</i> 15.4 and 15.7 iiNet exclusions/limitations of all of liability expressly acknowledge the mandatory obligations imposed by the consumer guarantees in the ACL and remedies under the ACL. See also 19.9(a).	
	Could be clearer	<i>Our Customer Relationship Agreement Section A</i> 15.9 “we are not liable for failing to comply with any of our obligations under our CRA if a Force Majeure Event occurs which prevents us from performing those obligations.”	This limitation of liability should acknowledge that it does not detract from the rights of customers arising under the ACL.

<p>Service/coverage?</p>	<p>Yes</p>	<p><i>Our Customer Relationship Agreement</i></p> <p><i>Section A</i></p> <p>“6.1 Standard of service</p> <p>Subject to the consumer guarantees and your rights under clause 15.2, we aim to provide, but do not guarantee, a continuous, fault free service.”</p> <p>See also Section B2 2.5.</p>	<p>Clearly acknowledges that limits on service are subject to the consumer guarantees.</p>
	<p>Probably void and misleading</p>	<p><i>Our Customer Relationship Agreement</i></p> <p><i>Section B1: Phone service description</i></p> <p>“8.1 Within a service area, it is technically impracticable to guarantee that the Service is available in each place within that area, or that capacity is available at all times to make and receive calls, or that the Service is free of faults or errors.”</p>	<p>There should be express acknowledgment that this provision does not detract from customers’ rights under the ACL.</p>

KOGAN MOBILE			
Legal obligation	Compliant?	Document/clause	Comments
TCP Code - Disclosure			
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No		Information about Kogan Mobile's voluntary warranties or the ACL consumer guarantees on the Kogan Mobile website could not be located.
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Kogan Mobile General Terms and Conditions</i>	
Easily accessed (rule 4.5.1)	Yes		Can be downloaded.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Yes	<i>Kogan Mobile General Terms and Conditions</i>	Would be assisted by an index and by hypertext links.
Clear presentation? (4.5.1)	Yes		
Plain language? (Rule 4.5.2)	Could do better	<i>Kogan Mobile General Terms and Conditions</i>	Some of the drafting in the Kogan Mobile contracts was difficult to understand.
Relationship between documents			
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause	Unfair	<i>Kogan Mobile General Terms and Conditions</i>	The entire agreement clause is unfair will probably be under the ACL. It is an attempt to restrict

		<p>“17.1. The Service Terms constitutes the entire agreement between you and us. No understanding, arrangement or provision not expressly set out in the Service Terms will bind the parties.”</p>	<p>the rights of consumers under the general law. It favours the interests of the supplier and the impact of the clause is unlikely to be appreciated by consumers.</p>
<p>Variation powers</p>	<p>Probably unfair</p>	<p><i>Kogan Mobile General Terms and Conditions</i></p> <p>“2.7. We reserve the right to modify fees and charges for Services and products we provide at any time by notice to you. You will be notified via email not less than 14 days prior to any such changes. Your continued use of the Service after such notice will constitute acceptance of the variation. Notices under the Service Terms must be sent by post, unless we specify an alternative means of giving notice in order to verify your identity.”</p>	<p>This variation power is likely to be unfair and therefore void under the ACL. The term is unreasonably broad and unduly balanced in favour of the supplier. In particular, there is no fetter on the otherwise unlimited discretion to make changes. There is no clear right for consumers to terminate the contract if adversely affected by the changes.</p>
	<p>Probably unfair</p>	<p>“11.1. We reserve the right to amend the Service Terms, any service plans or Fees at any time upon notice (in such form as may be determined by us) to you. Notice via electronic mail to your electronic mail addresses, by the posting on our website and your continued use of or subscription to the Service will be sufficient notice for this purpose.”</p>	<p>As above</p>

What happens at the end of a fixed term agreement?		No provision.	
Termination powers	Unfair	<p><i>Kogan Mobile General Terms and Conditions</i></p> <p>“3.3 We reserve the right to suspend, without prior notice, provision of the Service in whole or part if, in our discretion, we consider that you have not complied with one or more of the terms in the Agreement or the Acceptable Use Policy or have otherwise misused or abused the Service.”</p> <p>See also 7.1.</p>	<p>This clause is almost certainly unfair and void under the ACL</p> <p>The supplier has an absolute discretion to determine whether the customer has complied with the contract. The discretion should at least be qualified by a requirement of reasonableness. Even better, the matter should be one of law not discretion.</p> <p>The supplier should not have a right to suspend for any breach at all. The right to terminate should be limited at least to material breaches.</p>
	Probably unfair	<p><i>Kogan Mobile General Terms and Conditions</i></p> <p>“7.2 We may terminate the Service Terms immediately if:</p> <p>a) you have breached any provision of the Service Terms; ...”</p>	<p>The termination rights specified in this term are likely unfair and void under the ACL. The term is unreasonably broad. It allows the supplier to terminate in response to any breach, not merely material breaches. There is no right to notice or an opportunity to remedy.</p>
Excessive use	Could do better	<p><i>Kogan mobile acceptable use policy</i></p> <p>“5.1 You must not:</p> <p>stay connected to the Service continuously for an unreasonable amount of time, or download or upload an unreasonable volume of data, given the purposes for which the Service is provided to you and the usage patterns of other users (for example, staying connected</p>	<p>This clause provides examples of unacceptable use. However, they are only examples. Greater consumer certainty would be provided by clear guidelines.</p>

		continuously for several days, or downloading gigabytes of data in a short period) ...”	
	Probably unfair	<i>Kogan mobile acceptable use policy</i> “You must not: use the Service in a way that is excessive or unreasonable (as reasonably determined by us, having regard to the limits that we consider reasonable for an individual that is using the Service for residential purposes only);	This term is probably unfair and void under the ACL because it gives the supplier an unfettered discretion over the level of use that is ‘unreasonable’.
Early termination fee		Not specified	
Dishonour fee	More information needed	<i>Kogan Mobile General Terms and Conditions</i> “2.9. Invalid credit card transactions will be charged back to your account. Any fees incurred for credit card chargebacks will also be charged back to your account.”	Customers should be informed about the amount of the fee.
Relocation		Not specified	
Assignment	Unfair	<i>Kogan Mobile General Terms and Conditions</i> “12.2. We may assign any of our rights or obligations under the Service Terms.”	This clause is unfair and probably void under the ACL. It does not provide any protection for the interests of consumers in cases of assignment.
Exclusive jurisdiction	Unfair	<i>Kogan Mobile General Terms and Conditions</i> “14.1. The Service Terms are governed by the laws in force in Victoria, Australia and both you and we submit to the	It is unfair to require consumers to consent to an exclusive jurisdiction. Such measures have the effect of discouraging consumers outside of that jurisdiction from exercising their rights.

		exclusive jurisdiction of the Victorian courts.”	
Consumer guarantees (ACL pt 3-2)			
Information about consumer guarantees in the contract	Could do better	<i>Kogan Mobile General Terms and Conditions</i>	The contract contains a rather jumbled recognition of the ACL – using incorrect terminology and only a partial description of consumers’ rights
Exclusions and limitations consistent with consumer guarantees	Inaccurate	<p><i>Kogan Mobile General Terms and Conditions</i></p> <p>“8.1. When “you” are a consumer as defined by any relevant law such as the Competition and Consumer Act 2010 (Consumer), then certain guarantees and other terms will be implied into the Service Terms for the benefit of the Consumer and, where prescribed by Law, those guarantees and other terms cannot be modified or excluded by the Service Terms (Consumer Guarantees). Two of these Statutory Warranties are implied warranties that we will provide services to a Consumer with due care and skill and that any goods supplied to a Consumer in connection with those services will be reasonably fit for the purpose supplied. These Consumer Guarantees applied to the extent required by Law and not able to be excluded or limited. In all other cases</p>	<p>The recognition of the consumer guarantees in the ACL in this term is unlikely to save terms in other parts of the document, which limit the supplier’s service obligations and which do not acknowledge the impact of the ACL from the likelihood of being misleading and void.</p> <p>The language used in this term is inaccurate. For example, the relevant law should be referred to as the ACL. More significantly, the consumer guarantees are not implied into the contract. The language of ‘terms’ and ‘warranties’ is not used in the ACL.</p>

		and except where inconsistent with these Consumer Guarantees, the provisions of this clause 8 and clause 9 apply.”	
	Inaccurate	“8.2. When “you” are not a Consumer, our liability for breach of a Consumer Guarantee is limited to (at our election): ...”	This limitation of liability simply doesn’t work. If a customer is not a ‘Consumer’ for the purposes of the ACL, then the consumer guarantees do not apply and cannot therefore be breached.
	Probably void	<i>Kogan Mobile General Terms and Conditions</i> “8.3. Except in relation to breach of a Consumer Guarantee, we exclude all liability for: a) breaches of any express or implied term, condition, guarantee or warranty; and b) negligence, ...”	In most cases, the consumer guarantees will prevent the supplier from excluding liability for negligence. The attempt to do so is also likely to be unfair under the ACL. It is fundamental obligation in a service contract that the supplier will take reasonable care. To exclude liability for negligence detracts from this fundamental obligation to the detriment of consumers.
	Void and misleading	<i>Kogan Mobile General Terms and Conditions</i> “9.1. You indemnify us against all claims, actions, proceedings, costs, expenses (including legal costs on a full indemnity basis), demands, liabilities, losses (whether direct, indirect or consequential) and damages which we may incur arising out of or pursuant to any negligent or illegal act or omission by you, breach by you of the Service Terms or our Acceptable Use Policy or any unauthorised use by you of the Service.”	This clause should acknowledge that the obligation for customers to indemnify the supplier cannot detract from customers’ rights under the consumer guarantees in the ACL. The term is also arguably too broad. For example, consumers should not have to indemnify the supplier against losses it could reasonably itself have avoided.

	Arguably misleading and void	<i>Kogan Mobile General Terms and Conditions</i> 13 Excludes liability for Force Majeure events	The contract should acknowledge that this limitation of liability does not apply to the suppliers' liability for a failure to comply with a consumer guarantee.
Coverage	Arguably void and misleading	<i>Kogan Mobile General Terms and Conditions</i> “3.1 We do not warrant that the Service will be uninterrupted or error free and access to the Service may be interrupted for maintenance, to address security concerns, or due to other emergencies or for other reasons. We have the right to manage and control security and access to systems and information stored within our systems, as we deem appropriate. We may vary or suspend the Service (or any part of it).” See also 5.6. And similarly <i>Kogan Mobile Prepaid Plan Terms and Conditions</i> 1.3.2	This limitation clause should acknowledge that the supplier is subject to non-excludable consumer guarantees of service under the ACL.
	Arguably unfair	<i>Kogan Mobile Prepaid Plan Terms and Conditions</i> “1.3.1 The service is not available in all areas of Australia. ... You are responsible for inquiring whether coverage is available in the area in which you would normally use the Service.”	Given the supplier has better exercise in assessing coverage than the customer; customers should not have primary or sole responsibility to assess this issue. The supplier should prompt the customer to check coverage at the time the contract is made. The customer should also have a right to terminate if the coverage is not of acceptable quality in the area in which they use the service.

NETSPEED			
Legal obligation	Compliant?	Document/ clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No		Information about Netspeed's voluntary warranties or the ACL consumer guarantees could not be located on the Netspeed website.
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>General Terms and Conditions</i>	
Easily accessed (rule 4.5.1)	Could do better		The Netspeed contract could be printed but not be downloaded from the webpage.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	No		The Netspeed contract is found in a dialogue box on its website. This format is difficult to read and navigate online. There is no index.
Clear presentation? (4.5.1)	Could do better		Narrow spacing made the Netspeed contract difficult to read online.
Plain language? (Rule 4.5.2)	Could do better		The Netspeed contract was not expressed in particularly simple or plain language.
Relationship between	N/A		

documents			
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause	Unfair	<p>General Terms and Conditions</p> <p>Netspeed’s contract disclaims relevance of any previous representation or agreement.</p> <p>10.1 “These Terms and Conditions supersede all previous representations, understandings or agreements and shall prevail notwithstanding any variance with terms and conditions of any order submitted.”</p>	This term limits consumers’ common law rights to rely on representations made by the supplier prior to the point to sale. The term is highly likely to be void as unfair under the ACL.
Variation powers	Unfair	<p>General Terms and Conditions</p> <p>Netspeed purports to retain an absolute power to make changes.</p> <p>1.7 “NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.”</p>	<p>This term does not even contain an obligation for Netspeed to notify customers of adverse changes and does not provide a clear right for customers to respond to adverse changes. As such the clause goes beyond the legitimate interests of the supplier and neglects the interests of the consumer.</p> <p>The clause will almost certainly be void as unfair under the ACL.</p>
	Could do better	<p>General Terms and Conditions</p> <p>1.11 “NetSpeed may modify this Agreement from time to time by placing a notice on the</p>	The rights of customers to respond to changes to the agreement should be clearly spelt out, as should their rights to notice. The term would also benefit from

		<p>website http://www.netspeed.com.au. It is the User's responsibility to check this online regularly. Continued use of the Service by the User following notice of modification shall be deemed to be User's acceptance of any such modification of this Agreement. If the User does not agree to any modification of this Agreement, the User must immediately stop using the Service.”</p>	<p>some controls over the exercise of the discretion to make changes.</p>
<p>What happens at the end of a fixed term agreement?</p>		<p>No provision</p>	
<p>Supplier’s termination powers</p>	<p>Probably unfair</p>	<p>General Terms and Conditions</p> <p>“6.1 NetSpeed reserves the right to cancel the Service for any reason without prior notice if:</p> <ul style="list-style-type: none"> • you Breach the terms of this Agreement or • your nominated payment method is refused or dishonoured or • you have provided us with false or misleading information.” 	<p>This term allows Netspeed to terminate in response to any breach of the contract by a customer. As such it detracts from customers rights under the common law.</p> <p>The term should at least be limited to termination in response to a serious or material breach by a consumer. Termination might also be limited to circumstances where consumers fail to remedy the breach within a specified time, as is the practice of other providers.</p> <p>This term is highly likely to be void as unfair under the ACL.</p>
	<p>Unfair</p>	<p>General Terms and Conditions</p> <p>6.5 “With the exception of obligations under the Broadband Guarantee Program,</p>	<p>This term is inconsistent with the above and also unreasonably broad.</p>

		NetSpeed reserves the right to terminate any account at any time with or without cause or reason. In the event that NetSpeed would choose to take this action the User understands and agrees that the Users only compensation would be a prorated refund for the current period that User has already paid.”	
Customers’ termination powers	Arguably unfair	Not specified	The absence of consumer termination rights in the contract creates a wrongful impression that customers cannot terminate without penalty in any circumstances.
Early termination fee	Yes	General Terms and Conditions An early termination fee is payable equal to the change on the remaining contract period.	
Late payment fees	Further investigation warranted	General Terms and Conditions 5.10 Netspeed charges a fee for late payments of 2% per month or \$11.50, whichever is greatest.	
Relocation	Further investigation warranted	General Terms and Conditions Netspeed charges a \$99 fee if within the first six months. A new application fee and a new term also commence on relocation.	If a relocation fee is imposed it is not clear why the supplier should also require a new minimum term.
Control over content	Yes	General Terms and Conditions 3.9 Netspeed has a sole discretion to disable or remove material that it deems inappropriate.	
Assignment		No assignment provisions	

Consumer Guarantees (ACL pt 3-2)			
Information about Consumer Guarantees in the contract	Inaccurate	<p>General Terms and Conditions</p> <p>3.10 This term refers to the now outdated implied terms under the <i>Trade Practices Act</i> applying to goods.</p> <p>The term does not acknowledge the application of the consumer guarantees to the supply of its services.</p>	
Exclusions and limitations consistent with consumer guarantees	Void and misleading	<p>General Terms and Conditions</p> <p>Netspeed attempts to exclude all possibility of liability in respect to its services.</p> <p>8.1 “NetSpeed makes no warranties of any kind, whether express or implied, for the services it provides. NetSpeed also disclaims any warranty of merchantability or fitness for a particular purpose.”</p>	The consumer guarantees in the ACL cannot be excluded by contract.
	Void and misleading	<p>General Terms and Conditions</p> <p>“NetSpeed will not be responsible for any direct, indirect or consequential damages, which may result from the use of its services including loss of data resulting from delays, non-delivery or interruption in service. While we take great care with information that you deposit with us we cannot and do not guarantee that all such information will reach its intended destination (including</p>	This term should acknowledge the obligations imposed by the consumer guarantees, which cannot be excluded.

		electronic mail) inside or outside our network.”	
	Unfair and void	<p>General Terms and Conditions</p> <p>Netspeed requires extensive indemnity obligations from customers.</p> <p>4.1 “The User agrees to indemnify and hold NetSpeed, its affiliates, its licensors, its contractors or their respective employees harmless against any and all liability, loss claim, judgment or damage. This indemnity includes, but is not limited to an indemnity against all actions, claims and demands (including the cost of defending or settling any actions, claim or demand) which may be instituted against us, as well as all expenses, penalties or fines (including those imposed by any regulatory body or under statute)”.</p>	<p>This term is overly broad and imbalanced in favour of the supplier.</p> <p>Consumers should not be required to indemnify Netspeed for all possible losses. Read literally, consumers are required to indemnify Netspeed even against losses caused by its own breach of contract or the contract or through negligence.</p> <p>The term should also expressly acknowledge that it does not apply to rights granted to consumers under the ACL.</p>
Coverage	Void and misleading	<p>General Terms and Conditions</p> <p>1.3 Netspeed gives no ‘warranty’ as to the quality of the service.</p> <p>“Neither NetSpeed nor any of its affiliates, its licensors, its contractors or their respective employees warrant that the Service will be uninterrupted or error free; nor does NetSpeed make any warranty as to the results from use of the Service”.</p> <p>1.10 “NetSpeed makes no guarantee that the Service will be uninterrupted or error free;</p>	<p>These terms should expressly acknowledge that they are subject to the obligations imposed by the consumer guarantees in the ACL.</p>

		nor does NetSpeed make any warranty as to the results from use of the Service”.	
--	--	---	--

TPG			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	No		Information about voluntary warranties provided by TPG or the consumer guarantees under the ACL on the TPG website was not located.
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Standard Terms and Conditions</i>	
Easily accessed (rule 4.5.1)	Limited		The TPG consumer contracts could not be downloaded from the webpage.
Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)	Limited		Clear headings but no hypertext or index.
Clear presentation? (4.5.1)	Yes		The TPG contracts were clearly presented.
Plain language? (Rule 4.5.2)	Yes		The TPG contracts were expressed in relatively simple language. Though the occasional use of legalese intrudes eg 'force majeure'.
Relationship between documents			Customers may need to read two documents dealing slightly differently with same issue eg termination, liability.
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Acknowledgement clause	Unfair	<i>Mobile Service Description and Terms</i>	Such terms are highly likely to be void as unfair under the ACL. If a consumer has not received or understood all terms then they

		<p>“7.4. You acknowledge that before entering into the agreement you have received and understood the terms and conditions of your package, plan, applicable promotion(s) and fees and charges.”</p>	<p>simply have not received and understood all the terms. In some cases this may give rise to legal relief. For the contract to assert the contrary detracts from consumers’ common law rights and unduly favours the interests of the supplier.</p>
<p>Variation powers</p>	<p>Could do better. Arguably unfair.</p>	<p>Standard Terms and Conditions</p> <p>3 This document contains standard powers to vary the contract terms and conditions. Customers will be given notice and a right to terminate in the event of adverse changes.</p>	<p>The clause would be more clearly fair if there were some limits on the right of TPG to make any changes it chooses.</p>
<p>What happens at the end of a fixed term agreement?</p>	<p>Yes</p>	<p>Standard Terms and Conditions</p> <p>6.3 The TPG contract will automatically renew at the end of the contract period subject to the consumer giving 30 days notice of termination.</p>	
<p>Supplier’s right to terminate?</p>	<p>Not as good as some others</p>	<p>Standard Terms and Conditions</p> <p>Unlike other telecommunications contracts, TPG has discretion as to where it will give a consumer in breach the opportunity to remedy a breach otherwise giving rise to a right to terminate.</p> <p>“12.2 we will generally provide you with notice of your failure and</p>	<p>This leads to uncertainty for consumers. A fixed period of time in which a breach should be remedied would be better.</p>

		allow you a reasonable time to remedy it.”	
	Not as good as some others	<p>Standard Terms and Conditions</p> <p>In the case of late payment, TPG is given an immediate right to terminate “if not remedied in what we consider to be a reasonable time”.</p>	This type of open-ended discretion creates uncertainty for customers.
Customer’s right to terminate?	Probably unfair	<p>Standard Terms and Conditions</p> <p>6.2 provides that if customers terminate within the minimum contract period they will pay an early termination fee.</p> <p>There are similar provisions in the service descriptions.</p> <p>Customers are not given any express rights to terminate without penalty in response to a serious breach by TPG or in the type of circumstances that TPG has a termination right, such as insolvency.</p>	<p>Customers have some rights to terminate without penalty in response to a serious breach by the supplier under the common law of contract but most customers will not know this.</p> <p>A fairer approach would be for customers to be given express, reciprocal rights of termination.</p>
Suspension		As above	
Excessive use	Probably unfair	<p>Standard Terms and Conditions</p> <p>19.2 TPG reserves the right to determine what is excessive use and may suspend or cancel a customer's access without notice in such circumstances.</p>	This power provides no certainty to customers.
Early termination fee	Yes	For ADSL, TPG charges 50% of	

		outstanding amount for the remaining term of the contract to a maximum of \$350 (this is less than full amount that would have been paid).	
Late payment fee		<i>Standard Terms and Conditions</i> 10.14 if charge is not paid after notice it will be referred to a debt collection agency and customer must pay all associated costs.	
Dishonour fee	Further investigation warranted	<i>Standard Terms and Conditions</i> TPG charges a dishonour fee of \$16.50 for cheques and \$10 for direct debit.	
Withdrawal fee?	Further investigation warranted	<i>Service Description and Terms - ADSL2+ with TPG Home Phone bundle, ADSL2+ with Landline Rental bundle & Naked ADSL2+</i> 10.2 states that application withdrawal fee will be charged. The amount is \$109 for 'naked broadband' no fee is specified for bundled services.	Presumably this is a fee for withdrawing before the contract is commenced. In the absence of a contract there seems to be little basis on which TPG could charge such a fee. The fee is also very high given that no service will have been installed.
Relocation	Yes	<i>Standard Terms and Conditions</i> TPG charges relocation fees that vary according to term and nature of service. For ADSL the	Query why a minimum term is needed, but not excessive.

		fee is \$129.66 with a 6-month minimum term.	
Control over content	Yes	<i>Standard Terms and Conditions</i> This document contains extensive prohibitions on the use of the service to transmit or post offensive material and a broad discretion to suspend the use of the service on this basis.	
Assignment	Yes	<i>Standard Terms and Conditions</i> 15 TPG may assign its rights under the agreement without permission or notice if it considers there is no detriment to customers.	Possible detriment to consumers must be taken into account.
Consumer guarantees (pt 3-2 of the ACL)			
Information about the consumer guarantees	Inaccurate and could do much better	<i>Standard Terms and Conditions</i> “14.1. You may have certain rights and remedies under: (a) the Competition and Consumer Act 2010 (Cth) and other laws, which may imply certain conditions and warranties into this agreement; and (b) the Customer Service Guarantee issued by the ACMA, which established minimum connection	The language used in this term to explain customers' rights is inaccurate. It would be better to refer to the ACL, which is where the relevant consumer provisions are contained. Moreover, significantly, the ACL does not imply terms into contracts. It provides mandatory guarantees that are not linked to the existence of a contract. Without explanation about the scope of customers' rights or direction to information on the ACCC website customers will not understand the scope of their

		and fault repair times, breach of which entitles you to certain specified amounts of damage.”	rights.
Exclusions and limitations consistent with consumer guarantees	Yes, although inaccurate	Standard Terms and Conditions “14.2. We do not exclude or restrict or modify those rights, remedies or implied conditions and warranties.”	Acknowledges that rights under the ACL cannot be excluded. Note, however, there are no implied conditions and warranties under the ACL.
	Yes	Standard Terms and Conditions 14.3 Contains a limitation of liability that is expressed in accordance with s 64A of the ACL (i.e. limitations apply to services not ordinarily acquired for personal etc purposes).	
	Arguably void and misleading	Standard Terms and Conditions “14.6. You indemnify us from and against all actions, claims, suits, demands, liabilities, losses, costs and expenses arising out of or in any way connected with your use of the service or the equipment in a manner contrary to the terms of this agreement”.	The clause should clearly state that the indemnity obligation is subject to any rights that customers’ have under the ACL. This point is not clear from the earlier explanation of customers’ rights under the ACL.
	Void and misleading	Mobile Service Description and Terms “18.1 Miscellaneous	These limitations on the liability of TPG are void insofar as they attempt to exclude consumers’ rights under the ACL.

		<p>You use the service at your own risk and we take no responsibility for any data downloaded and/or the content stored on your computer or mobile phone.”</p>	<p>They are also misleading because they do not acknowledge the possibility of mandatory quality standards applying to TPG's services and products under the ACL. Even the heading is misleading.</p> <p>The reference in the general terms to the ACL is not sufficient to save these provisions. This is because customers should not be expected to refer to another, separate document to understand their rights.</p> <p>Moreover, the general terms themselves are expressed to be subject to the specific service terms in the event of any inconsistency. This means that, on the internal logic of the documents, the broad limitations on liability that do not recognize the ACL prevail over the limitations that do.</p>
	<p>Void and misleading</p>	<p><i>Mobile Service Description and Terms</i></p> <p>“18.1 You agree not to make any claim against us, our suppliers, employees, contractors or assignees for any loss, damages or expenses relating to, or arising from, the use of the service.”</p> <p>See similarly <i>Service Description and Terms - ADSL2+ with TPG Home Phone bundle, ADSL2+ with Landline Rental bundle & Naked</i></p>	<p>As above</p>

		ADSL2+ Clause 17.1.	
Quality of service	Void and probably misleading	<p>Mobile service description and terms</p> <p>“5.1. While we will endeavour to make Mobile services available to customers 24 hours a day, 7 days a week, Mobile services are not fault free and we cannot guarantee uninterrupted service, or the speed, performance or quality of the service. There are many factors outside of our control which affect Mobile services, such as the performance of third party suppliers and equipment, Force Majeure events, electromagnetic interference, network congestion, and performance of your equipment. We accept no liability for interruptions to your Mobile service or for any resulting damage or loss suffered by you or any third party.”</p> <p>See similarly Service Description and Terms - ADSL2+ with TPG Home Phone bundle, ADSL2+ with Landline Rental bundle & Naked ADSL2+ 6.1</p>	Provision of the service is subject to the consumer guarantees in the ACL. Attempts to exclude this liability are void. It is misleading to suggest there are no such obligations applying to the service.

VODAFONE			
Legal obligation	Compliant?	Document/clause	Comments
Disclosure requirements under the TCP Code			
Website information about voluntary warranties and consumer guarantees (rule 4.1.3(f))	Yes	<i>Repair, exchange and refunds policy</i>	<p>This document sets out ‘the principles of our service and device repair, exchange and refunds policy’. This provides clear steps covering the complaint process.</p> <p>Vodafone clearly explains that its voluntary warranties are in addition to customers' rights under the ACL.</p>
	Yes	<i>Vodafone repair warranty</i>	<p>Vodafone’s voluntary warranty information contains many exclusions and limitations on Vodafone's liability.</p> <p>However, the warranty information correctly, states that its benefits are ‘in addition’ to other rights and remedies you may have at law’.</p> <p>The specific information required under regulation 90 about the ACL consumer guarantees is included.</p>
All contract terms?			
Available? (Rule 4.5.2)	Yes	<i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i>	The general terms are supplemented by product specific terms.
Easily accessed (rule 4.5.1)	Yes		All contractual documents can be downloaded from the Vodafone web page.

Transparency obligations under the TCP Code			
Easily navigated? (Rule 4.5.1)			The Vodafone contracts did not contain hypertext links or an index. These absences made the contracts more difficult to navigate.
Clear presentation? (4.5.1)			Vodafone contracts were clearly presented.
Plain language? (Rule 4.5.2)			Vodafone contracts were expressed in relatively simple language.
Relationship between documents			Vodafone customers had to navigate a number of different documents relating to their service. Links between documents would ease this process.
Substantive fairness under the ACL			
Unfair contract terms (pt 2-3)			
Entire agreement clause			Not included
Variation powers	Could be better Arguably unfair	<i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i> <i>Section 2</i> 3 Vodafone is granted a right to modify, add to or withdraw terms of its agreements at any time. Vodafone’s notice obligations and	As with other suppliers, the term would more fair if the discretion of Vodafone to make changes was in some way constrained.

		consumers rights to terminate apply where the change would adversely affect the customer.	
	Yes	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>Unlike some other suppliers, Vodafone does not reserve the right to make changes without allowing a right to terminate if that change has an adverse effect on customers for some categories of events, eg tax changes.</p>	
What happens at the end of a fixed term agreement?	Yes	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>12.1 At the end of the commitment period the contract is rolled over, and customer may then terminate at any time.</p>	A good balance between interests of both parties.
Supplier's right to terminate?	Yes – though not as generous as Optus	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers</i></p>	This is a much shorter period than provided by some other suppliers.

		<p><i>commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>13 The termination powers in Vodafone's contracts are fairly standard. Customers are given a 7-day period to remedy a serious breach before Vodafone can terminate the contract.</p>	
<p>Customer's right to terminate?</p>	<p>Could be better</p>	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>There is no term specifically dealing with customers' right to terminate without penalty in the event of a serious breach that has not been remedied by the supplier. (Although there is a reference to this possibility in terms 12.4 or 16.2).</p>	<p>The general law would provide a right for customers to terminate in this situation. However, consumers may not be aware of this right and it should be spelled out to ensure fairness in reciprocal termination rights.</p>
	<p>No</p>	<p><i>Vodafone network guarantee</i></p> <p>Vodafone provides a 30-day network guarantee. Customers who are not happy with the service can terminate without penalty in this period. The guarantee can be withdrawn at any time.</p>	<p>This power to withdraw should be qualified not to apply to customers who have commenced their 30 day period on reliance on the offer. Anything else is unfair and possibly misleading.</p>

Suspension	Yes	As above	
Early termination fee	Could be better	<i>Vodafone plans</i> An early termination fee is payable. For post paid mobile phone customers, the fee is the monthly cost of the plan multiplied by the months remaining on the plan.	Under this term, the supplier is claiming all profit foregone on early termination. Some discount should be given for early termination.
Late payment fee	Further investigation warranted	<i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i> <i>Section 3 Part 8</i> Vodafone charges various \$10 amounts for late payment (although direct debit)	
Dishonour fee	Further investigation warranted	<i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i> <i>Section 3 Part 8</i> Vodafone charges a \$16.50 dishonour fee.	
Relocation		No provision	
Content		<i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1</i>	

		<p><i>January 2011</i></p> <p><i>Section 2</i></p> <p>7.2 Standard prohibition of and controls over ‘improper, immoral or fraudulent’ content.</p>	
Assignment	No	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p>23.3 Vodafone retains a broad right to assign its rights and obligation to anyone else. Notice is only given if the transferee is not a related company.</p>	No protection against detriment to customers is provided.
Consumer guarantees			
Information about consumer guarantees	Yes	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>Vodafone provides a good summary of its obligations under the consumer guarantees.</p>	Well done
Exclusions and limitations consistent with consumer guarantees	Yes	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers</i></p>	Nicely done

		<p><i>commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>21.2 “All of the provisions of this clause 20.2 {limitations on liability} are to be read subject to the provisions of clause 20.1 [consumer guarantees].”</p> <p>Similar for 21.3.</p>	
Coverage	Arguably void misleading	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>5.2 “We will use reasonable care and skill in providing the Service. However, given the nature of the Service (including our Services’ reliance on systems and services that We do not own or control), We cannot promise that the Vodafone Network is free from faults or interruptions and that the Service (and each of its features) will not be subject to congestion, “drop-outs” and/or loss of data.”</p>	This provision should made clear so that it does not detract from customers' rights under the ACL.
	Probably unfair	<p><i>Standard terms for the Supply of the Vodafone Mobile</i></p>	It is legitimate for a supplier to limit its service obligations to the extent it is able to provide

		<p><i>Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>5.3 Customers agree “only to use the Service in the Mobile Coverage Area.”</p>	<p>coverage. It is onerous to expect consumers themselves to monitor coverage area and to only use their phones within the coverage area. Coverage outside metropolitan areas varies considerably even across small distances.</p>
Who is protected?	Possibly unfair	<p><i>Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers commencing or Renewing on or after 1 January 2011</i></p> <p><i>Section 2</i></p> <p>The standard terms provide that where a service is provided for personal use, it must not be used for business purposes. The obligation on customers is expressed in absolute terms.</p> <p>“7.2 (d) Where We state that a particular Plan is not to be used for commercial purposes, You must only use the Plan for the purpose of making calls for Your own personal use and not for any commercial purpose, including: any calls made for a business; ...”</p>	<p>This term is potentially unfair contrary to the ACL. The occasional call for business purposes should not constitute a breach of a consumer contract. Such customers are still covered by the protection of the ACL. The clause would be fairer if it restricted customers to use <i>primarily</i> for personal purposes.</p>

	Clarification needed	<p><i>Post and pre paid terms</i></p> <p>Where a product is restricted to a personal use, for example a mobile phone plan, the contracts states that they are not available to a medium or large business.</p>	Somewhat surprisingly there seems to be no mention of small business users.
--	----------------------	---	---