

EXECUTIVE OFFICE



Australian
Competition &
Consumer
Commission

9 April 2013

Ms Julia Morris
Committee Secretary
House Standing Committee on Infrastructure and Communications
PO Box 6021
Canberra ACT 2600

Dear Ms Morris

Inquiry into Information Technology Pricing

I write in response to your correspondence dated 25 March 2013 requesting further information from the Australian Competition and Consumer Commission (ACCC) to assist the House Standing Committee on Infrastructure and Communication in its Inquiry into Information Technology Pricing.

The ACCC's answers to the questions outlined by the Committee are provided below. To further assist the Committee I enclose a copy of the ACCC's recently published report titled 'Unfair Contract terms – Industry Review Outcomes.'

Copyright and Competition

Given that it is likely that most copyright content may move to an exclusive digital delivery model in the near future/ does this creation of a de facto import monopoly raise competition concerns for the ACCC?

The ACCC reiterates comments made in its submission to the Australian Law Reform Commission's (ALRC) Inquiry into Copyright and the Digital Economy (the Copyright Inquiry) that, while the mere grant of copyright does not in itself raise competition concerns, granting a monopoly right to import creates the potential for market power to be conferred on copyright holders.

The ACCC notes that a monopoly right to import, or a monopoly which is analogous to a monopoly right to import through exclusive digital delivery, is only one way in which market power might be conferred on copyright holders.

Market power might also, but not necessarily, arise through licensing practices such as collective or exclusive licensing.

The ACCC has not formed a view on the likely development of content delivery models but notes that exclusive licensing practices are not new and the ACCC considers that any competition concerns that may arise would derive from any anti-competitive behaviour on behalf of the firm with market power and potentially from its effect on the market in question. The ACCC considers that any concerns relating to exclusive digital content delivery would likely be of a similar nature.

Where copyright holders are able to limit competition and extend market power through agreements with rivals or through practices designed to exclude rivals and/or leverage market power, then competition and consumer welfare may be harmed. However, the competitive effects of such restrictions would depend on the characteristics of the market in which the licensing occurs and/or has an effect.

Given there remains some uncertainty about whether exclusive digital delivery models will become the only mode of delivery in the future, the ACCC has not formed a view at this time as to whether such a move would necessarily raise competition concerns. The ACCC notes that technological change, including the emergence of exclusive digital delivery models may raise concerns about the nature and extent of copyright. The ACCC considers that, to the extent possible, copyright protection and exceptions should operate on a technology neutral basis. The ACCC will continue to monitor developments in relevant markets carefully to ensure that competition is not restricted.

Should specific competition concerns arise, the ACCC considers that it would seek to address those concerns using its enforcement powers under Part IV of the *Competition and Consumer Act 2010* (CCA). Section 51(3) of the CCA may affect the ACCC's ability to take action in some circumstances with respect to intellectual property arrangements and this issue is further addressed in the response to the question below.

What action/ if any/ does the ACCC recommend in order to preserve current levels of competition in copyright markets?

One of the ACCC's key objectives is to promote competitive market structures, including through enforcement of the restrictions against anti-competitive conduct contained in the CCA. The ACCC does not have a particular view on current levels of competition in markets relevant to industries where the use of copyright material is a significant market feature.

In its submission to the Copyright Inquiry, the ACCC made a number of recommendations in relation to the extent and use of copyright protections, where it considered that those protections might be used to restrict competition and create market power. Broadly, the ACCC considers that a balance needs to be struck between copyright protections (which provide incentives for investment in copyright material) and ensuring optimal levels of

access to copyright material. This has become more complex in the digital economy because of the rise of intermediate use (i.e. creation of a new work, service or product that in some way uses pre-existing copyright material). The ACCC considers that facilitating consumption of existing copyright material will help to create and sustain markets for particular types of copyright material.

Where competition concerns arise relating to the use of copyright, the ACCC considers that its competition powers under Part IV of the CCA should enable it to address these concerns. To this end, the ACCC considers it important that the competition framework is appropriately equipped to deal with emerging issues in the digital economy and to ensure that market forces drive innovation and growth rather than anti-competitive conduct by market participants. As such, the ACCC considers that intellectual property arrangements should be assessed under the CCA like all other arrangements, such as price restrictions on downstream products, which would be in breach of the CCA.

Section 51(3) of the CCA provides a limited exception for certain licence conditions from some of the competition provisions of the CCA. The ACCC has long held the view that section 51(3) should be repealed and that it is appropriate for intellectual property rights to be subject to the same competition laws as all other property rights. The ACCC's views are set out in full in its submission to the Copyright Inquiry.

Terms and Conditions of Use

What processes are in place to allow assessment as to whether any such terms and conditions amount to unfair contracts or unfair dealings with consumers?

Broadly speaking, businesses are free to set the terms and conditions of their contracts as long as they comply with the law. From the ACCC's perspective, we would focus on competition and consumer obligations and whether the terms and conditions comply with the Australian Consumer Law, including the prohibitions on misleading or deceptive conduct and misrepresentations.

In respect of unfair contract terms, the Australian Consumer Law, which is contained within Schedule 2 of the CCA, provides some protection for consumers from unfair contract terms in standard form contracts. These laws apply to standard form contracts which are entered into on or after 1 July 2010, and to terms of existing contracts that are renewed or varied on or after 1 July 2010.

Under this law a term in a standard form consumer contract is considered unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- the term is not reasonably necessary 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.

Standard form contract terms that set out the price, that define the product or service being supplied, or that are required or permitted by another law, are exempt from these provisions.

Various avenues for relief exist for consumers who believe a standard contract term may be unfair. The ACCC and, in cases of financial products and services, the Australian Securities and Investments Commission (ASIC), are able to assist consumers to identify appropriate options available to them to resolve their concerns. Such options include:

1. The ACCC and ASIC can take action to have a standard contract term declared unfair and to seek redress through court orders which, for example:
 - declare all or part of a contract to be void
 - vary a contract
 - refuse to enforce all or any of the terms of a contract
 - direct a business to refund money or return property to a non-party consumer
 - direct a business to repair or provide parts for a product provided under a contract at the business' expense
 - direct a business to provide services to the non-party consumer at their expense, or
 - any other orders that the court thinks appropriate.
2. Consumers may seek assistance in resolving issues with businesses through alternative dispute resolution schemes. Ombudsman services, for example, provide dispute resolution services in many industries, including telecommunications, finance, and energy and water supply services.
3. Consumers may also take private legal action under the Australian Consumer Law to recover money or seek compensation for damage they have suffered because of an unfair contract term.

Can government offer consumers some relief from those sorts of agreements?

The ACCC can take legal action under the Australian Consumer Law in respect of standard form contract terms which may be unfair, or contract terms which may be misleading or deceptive. Such an action can result in a declaration that the particular contract term is void. This would protect consumers who would otherwise have been detrimentally affected by the term.

ASIC and state and territory fair trading agencies enforce the Australian Consumer Law and are able to act on behalf of individual consumers where there may be concerns about misleading and deceptive conduct or unfair

contract terms. There are also ombudsman services that provide dispute resolution services in various industries.

What role is there for the ACCC in this?

The ACCC makes decisions about the exercise of its enforcement powers and functions on the basis of its *Compliance and Enforcement Policy*. This Policy outlines the ACCC's compliance and enforcement priorities across the competition and consumer areas of interest. Matters in which the ACCC is more likely to give enforcement priority to include, among other things, conduct of significant public interest or concern or conduct which may result in substantial consumer detriment. The ACCC is less likely to prioritise enforcement action in matters which are issues of concern for individual consumers and which are primarily contractual or private right disputes.

The ACCC has among its current priority areas 'online consumer issues'. The ACCC has inquired into particular terms in standard form contracts in some industry sectors and recently published a report on that work. As noted above, a copy of this report is enclosed.

Yours sincerely

Brian Cassidy
Chief Executive Officer



Australian
Competition &
Consumer
Commission

ACCC Report

UNFAIR CONTRACT TERMS

Industry review outcomes

March 2013





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Competition &
Consumer
Commission

Unfair contract terms

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Australian Competition and Consumer Commission
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The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

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Executive summary

The introduction of the Australian Consumer Law (ACL) represents the most significant reform to the consumer law framework in Australia since 1974. The ACL has replaced numerous national, state and territory consumer laws, simplifying the law and improving its accessibility. As part of the ACL, the ACCC gained further tools to help it respond swiftly and appropriately to breaches of the law.

The ACL incorporates various provisions targeting specific consumer issues, including provisions which render void unfair terms in standard form consumer contracts. The ACCC reviewed standard form consumer contracts through the lens of these provisions in the airline, telecommunications, fitness and vehicle rental industries, as well as some contracts commonly used by online traders. A select number of standard form contracts used by prominent travel agents were also examined.

During these reviews, the ACCC identified issues under both unfair contract term laws and broader consumer protection laws. The ACCC worked with businesses to remove or change unfair terms in standard form contracts and address identified issues.

This report provides a summary of the outcomes and findings of the reviews, noting where issues remain.

In most cases, the businesses under review chose to make significant changes to some of their standard form contracts. Many businesses chose to delete or amend problematic terms. The following types of terms were of particular concern to the ACCC during the reviews, and the focus of amendments and the ACCC's collaborative compliance approach.

1. Contract terms that allow the business to change the contract without consent from the consumer.
2. Terms that cause confusion about the agency arrangements that apply and that seek to unfairly absolve the agent from liability.
3. Terms that unfairly restrict the consumer's right to terminate the contract.
4. Terms that suspend or terminate the services being provided to the consumer under the contract.
5. Terms that make the consumer liable for things that would ordinarily be outside of their control.
6. Terms that prevent the consumer from relying on representations made by the business or its agents.
7. Terms seeking to limit consumer guarantee rights.
8. Terms that remove a consumer's credit card chargeback rights when buying the service through an agent.

The ACCC found that in the majority of industries reviewed, most businesses took advantage of the opportunity to align their standard form contracts with the new national unfair contract terms provisions of the ACL. Problematic terms were identified and either amended or deleted in each of the eight categories listed above.

Particularly significant changes were achieved in relation to standard form contracts of major airlines, with 79% of problematic terms identified by the ACCC amended or deleted as a result of the review.

Some businesses have not fully cooperated with the ACCC during the review or have chosen not to change their standard form contracts to address problematic terms that were identified by the ACCC. The ACCC is now moving from a compliance to an enforcement response to resolve outstanding issues.

More generally, this report marks the point at which the ACCC transitions from its initial compliance review focus to a more enforcement focused approach to dealing with unfair contract terms.

The ACCC invites businesses to consider the terms and conditions of their own standard form contracts in light of the ACCC's findings, and to make changes where necessary to ensure their contract terms are compliant with the ACL.

1. Introduction

This report highlights the outcomes of the ACCC's unfair contract terms reviews, including an overview of the key results. It also identifies problematic contract terms and related practices that cause concern to the ACCC and which may warrant further actions and in some cases the possibility of court action.

The ACCC achieved significant improvements to standard form consumer contracts in a number of industries following the introduction of new protections and enforcement tools under the Australian Consumer Law (ACL).¹ The ACL has been the most significant Australian consumer law reform in a generation, replacing 13 generic consumer laws across Australia with a single, national framework. As a part of the ACL, national unfair contract terms laws came into effect on 1 July 2010.²

The ACCC reviewed standard form contracts in the airline, telecommunications and vehicle rental industries, identifying contract terms which posed problems under both general consumer protection law and the new unfair contract terms provisions during these reviews. The ACCC reviewed a number of standard form contracts used by prominent travel agents. The ACCC also led a national project with Consumer Affairs Victoria (CAV) to review standard form consumer contracts commonly used by online traders and also in the fitness industry.

The ACCC directly engaged with businesses to address fairness concerns and to restore balance to a number of important provisions in those contracts.

Standard form contracts are a regular feature in consumer transactions. For many businesses, they govern the relationship and are the main platform for interacting with customers. Clear, simple consumer contracts can build a foundation for positive relationships. Transparent contract terms can be a tool for communicating 'headline' consumer information and helping consumers to understand the key aspects of the agreement.

Good contract terms offer an opportunity for businesses to deal up front with areas of consumer dissatisfaction and dispute, thereby reducing complaints. Businesses working to align contracts with the ACL unfair contract terms provisions will in many cases be addressing these broader concerns.

The ACCC has a variety of approaches and tools at its disposal to ensure businesses comply with the ACL. Depending on the situation and the desired outcomes, the ACCC may take enforcement action or alternatively engage with businesses to articulate its concerns and to provide an opportunity for the business under review to address those concerns.

During this initial phase of reviewing unfair contract provisions, the ACCC decided to directly engage with the relevant businesses to identify and resolve issues.

The initial compliance review phase of the ACCC's approach to addressing unfair standard form contract terms has now concluded. This process has enabled the ACCC to identify problematic contract terms and related practices in the airline, online retail, telecommunications and vehicle rental sectors; and with some prominent travel agents, online traders and businesses in the fitness industry.

Overall, the ACCC found a good level of cooperation from businesses during the reviews, leading to substantial changes by businesses to their standard form consumer contracts. This also led to some broader improvements to the general business practices in these sectors.

However, some businesses have not fully cooperated with the ACCC during the reviews or have chosen not to change their standard form contracts to address problematic terms that were identified by the ACCC. The ACCC is now considering whether further actions and in some cases the possibility of court action is warranted against businesses to deal with specific provisions still in use which it considers may operate unfairly.

¹ The ACL is found in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*.

² Prior to 2010, Victoria was the only Australian jurisdiction to have unfair standard form consumer contract terms laws in place. From 1 July 2012, federal government agencies were able to take action under the provisions. Other state and territory authorities were not granted power under the unfair contract terms provisions until 1 January 2011.

The ACCC encourages businesses to review the terms and conditions of their own standard form contracts in light of the ACCC's findings, and to make changes where necessary to ensure terms are compliant with the ACL.

The unfair contract terms laws

The national unfair contract terms laws came into effect on 1 July 2010. Part 2–3 of the ACL provides a court may determine that a term of a standard form consumer contract is unfair and therefore void.

Under the ACL, a 'consumer contract' means a contract for the supply of goods and services or the sale or grant of an interest in land, to an individual who acquires it wholly or predominately for personal, domestic or household use or consumption.

Although the unfair contract terms provisions do not define a 'standard form contract', they outline a number of factors that the court must take into account in determining whether a contract is a 'standard form contract'. In broad terms, it will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties – that is, it is offered on a 'take it, or leave it' basis.

The unfair contract terms laws do not apply to a contract to supply goods or services from one business to another for business use.

Similar unfair contract terms provisions exist under the *Australian Securities and Investments Commission (ASIC) Act* in relation to standard form consumer contracts for financial products and services.

A test consisting of three elements is used to determine whether a term is unfair.

A term of a consumer contract will be considered unfair if:

1. it would cause a significant imbalance in the parties' rights and obligations under the contract
2. it is not reasonably necessary to protect the legitimate interest of a party to the contract (note that the party who would be advantaged by the term must prove that it is reasonable necessary), and
3. it would cause detriment to a party to the contract if it were to be applied or relied upon.

All three elements of the test must be proved in order for a court to find that a term is unfair. In determining whether a term is unfair in accordance with the test, the court must take into account the extent to which the term is transparent, and the contract as a whole.

The laws also provide examples of the types of terms that may be considered unfair and provide a framework for assessing the transparency of terms. Terms that set the upfront price and subject matter of a contract, and terms that are expressly required or permitted by another law are excluded from the unfair contract terms provisions.

Enforcement of the unfair contract terms is shared between the ACCC, ASIC and the state and territory consumer protection agencies. Individual consumers can also seek to enforce their rights under the law.

The ACCC, ASIC and the state and territory consumer protection agencies may apply to the court for a declaration that the term of the contract is unfair. It is then the role of the court to determine whether this is the case.

If a court makes a declaration that a term is unfair and a party subsequently seeks to apply or rely on the unfair term, the court may make orders including to vary the contracts or arrangements; an order refusing to enforce any or all of the terms of the contract; or an order directing the person to refund money or property to the injured person.

Further guidance about the unfair contract terms laws is provided in the Australian Consumer Law publication *A guide to the unfair contract terms laws*.³

³ http://www.consumerlaw.gov.au/content/the_acl/downloads/unfair_contract_terms_guide.pdf

Industry reviews

The aims of the ACCC industry reviews were to:

- evaluate compliance with unfair contract terms laws and broader ACL requirements in key national industries, by identifying problematic contracts and contract terms, as well as broader concerns
- work with business to achieve positive changes to standard form consumer contracts and related practices, to benefit consumers.

In identifying industries for the reviews, consideration was given to a range of factors including relatively high levels of consumer complaints, feedback from consumer stakeholders and potential for widespread consumer detriment in particular industries.

In addition to the ACCC's reviews of the airlines, telecommunications and vehicle rental industries and some prominent travel agencies, the ACCC and CAV led a national project to identify unfair contract terms in online retail contracts. With support from state and territory offices of fair trading, the review assessed online standard form contracts used by businesses offering varied products and services. After this initial assessment, the ACCC and CAV undertook targeted engagement with businesses whose contracts were identified as presenting the greatest concerns under both the unfair contract terms provisions and the ACL generally. All of the businesses engaged with during the ACCC and CAV national project on businesses operating online responded readily to concerns, amending problematic clauses and ensuring that their contracts were more balanced and transparent.

The ACCC invites other businesses operating in the online space to review their own standard form consumer contracts, and make amendments where necessary to ensure they comply with the ACL. The ACCC and the CAV also worked together to review standard form consumer contracts in the fitness sector as explained in more detail below.

The reviews have concluded. The ACCC is now considering whether further actions and in some cases the possibility of court action is warranted against businesses across all sectors to deal with specific provisions still in use which remain as a concern to the ACCC following these reviews.

2. Issues and outcomes

The ACCC sought to achieve positive change to standard form consumer contracts, and identified eight key issues during the industry reviews.

1. Contract terms that allow the business to change the contract without consent from the consumer.
2. Terms that cause confusion about the agency arrangement that apply and seek to unfairly absolve the agent from any liability.
3. Terms that unfairly restrict the consumer's right to terminate the contract.
4. Terms that suspend or terminate the services being provided to the consumer under the contract.
5. Terms that make the consumer liable for things that would ordinarily be outside of their control.
6. Terms that prevent the consumer from relying on representations made by the business or its agents.
7. Terms seeking to limit consumer guarantee rights.
8. Terms that seek to remove the consumer's right to a credit card chargeback facility when buying the service through an agent.

These issues arose in consumer contracts, individual contract terms and related business practices.

In some cases, the contract terms and associated practices caused concerns across all of the reviewed industries. In other cases, concerns were confined to a particular industry.

Issue 1: Contract terms that allow the business to change the contract without consent from the consumer

Terms that allow one party to vary the contract during its life without the consent of the other party may be considered unfair. Such terms are particularly likely to be unfair if they fail to provide an accompanying balancing right for the other party to consent to or reject the change, or to exit the contract.⁴ However, the inclusion of such a balancing right may not in itself be sufficient to negate the unfairness of the term.

Such a term can result in consumer complaints if a business relies on it to change a contract to the detriment of the consumer, without appropriately communicating the existence of the term or its operation to the consumer.

In the industries reviewed, the ACCC found this issue most prominently in telecommunications standard form contracts. Of eleven telecommunications standard form contracts reviewed, six included terms that purported to allow the businesses to vary the contract unilaterally. However, three of the contracts contained terms that were balanced by provisions which:

- allowed the consumer to exit the contract in the event of an unfavourable variation, or
- imposed a requirement on the business to obtain consumer consent prior to effecting the change.

The ACCC's work with the reviewed businesses led to considerable positive changes in these types of terms. For instance, TPG no longer has a problematic term of this kind relating to subscription fees in its contracts (see example below). Four other telecommunications businesses amended their terms as a consequence of the review so that balancing mechanisms were provided to make the operation of those terms fairer to the consumer.

⁴ Australian Consumer Law, ss. 25(1)(d), (f) and (g).

Example: How were contract terms that allow the business to change the contract without consent from the consumer amended to address the ACCC's concerns?

TPG's standard form consumer contract included a term enabling it to vary the subscription fees charged to consumers for a service, without providing notice. The term was worded as follows:

You must pay all subscription fees applicable to the plan for which you have registered. You understand that all fees and charges may be altered from time to time by us without notice, however, we will not increase the subscription fee for your plan until the end of the Minimum Contract Term.

This term was problematic because it had the effect of permitting TPG to change subscription fees payable under the contract during the life of the agreement, without notice to the consumer or adequate balancing provisions being included.

Following direct engagement with the ACCC as part of these reviews, TPG agreed to delete the section of the term allowing for unilateral variation of subscription charges. The amended term now reads:

You must pay all subscription fees applicable to the plan for which you have registered. Failure to pay subscription or usage charges will result in the suspension or termination of your service.

In some cases, businesses claimed that the practical implementation of the identified problematic clauses operated as though balancing provisions were in place. For example, one business allowed consumers to exit or change deals without penalty in the event that the business changes the fees without their consent. However, this business practice was not incorporated into its standard form contract. The ACCC does not consider this to be a satisfactory response by business to the concerns raised. The ACCC encourages businesses to expressly incorporate these practices into their contract terms, to limit consumer confusion and the potential for the misuse of terms allowing the business to change the contract without consent from the consumer.

In total, of the six telecommunications businesses contacted, five agreed to change their terms in a way that addressed concerns raised by the ACCC during the reviews.

These types of problematic terms were also identified in several contracts used by businesses trading online. Many online consumer transactions are one-off in nature, with each new sale being governed by a new, separate contract. In these circumstances, it may be reasonable for the standard trading terms to be varied from time to time provided that the terms that applied at the time the contract was entered into are not. However, some contracts reviewed were overly broad and failed to make this distinction. It is important that the terms that applied at the time of the sale will not be varied by the business without the consumer's consent during performance of the contract.

Example: How should online contract terms that allow the business to change the contract during performance of the contract without consent from the consumer be amended to resolve the ACCC and CAV's concerns?

Problematic terms allowing the business to alter the terms and conditions during the life of the contract were identified in the standard form contracts of businesses trading online. For example, the following term was identified as a concern in the standard form consumer contracts used by a major online retailer:

We may change or update this website and the terms and conditions at any time without providing you with prior notice.

The retailer has now amended this provision providing for due notice to be given to consumers, however, those amendments have not resolved the ACCC's concern in relation to changes being made to the terms and conditions after the sale is concluded:

We may change or update this website and the terms and conditions at any time by giving you notice as outlined below (by email, conventional mail or by posting it on the retailer's website).

When similar concerns were raised with other online businesses, their general approach was to resolve these concerns by amending such terms to provide balance to the contract, as follows:

For future orders, these terms may be different and so we recommend you read these terms carefully each time you agree to them during the ordering process.

We will not change any terms and conditions for an existing order that has been accepted by us; the terms and conditions that will apply to the order are the terms and conditions that applied at the time you placed the order.

Issue 2: Terms that cause confusion about the agency arrangements that apply and seek to unfairly absolve the agent from liability

The standard form contracts of some prominent travel agencies were reviewed by the ACCC. Some of the terms of those contracts were ambiguous and did not clearly explain the agency arrangements that applied between the travel agency and the provider of the travel services (such as the airlines and hotels) and also did not make clear which party was liable for any failure to supply the travel services to the consumer.

Following engagement between a travel agency and the ACCC, this business has now changed its standard form contracts to make it clear that it acts in the capacity of an agent on behalf of a third party travel provider and that it accepts liability where the failure to supply the travel services arises from its own failure to provide the agency services. Put simply, this travel agent has clarified that it will accept liability where it is at fault through its own actions.

The ACCC will continue to pursue this concern with other travel agencies until a satisfactory outcome is achieved.

Issue 3: Terms that unfairly restrict the consumer's right to terminate the contract

Terms that seek to 'lock in' consumers to long term contracts can be problematic when a business falls short of delivering on the contract, fails to live up to consumer expectations or has poor levels of customer service.

Contract terms that permit or have the effect of permitting one party (but not another party) to terminate the contract can be unfair,⁵ as can contract terms that penalise, or have the effect of penalising, one party (but not another party) for breach or termination of the contract.⁶ They are also inconsistent with the consumer guarantee laws under the ACL and are likely to lead to confusion on the part of the consumer about their rights under those laws.

Most businesses responded to the ACCC's concerns by altering their contracts, to remove or amend problematic terms of this type.

As part of broader implementation activities, the ACCC and CAV reviewed contracts offered in a range of sectors including the fitness, retirement villages and solar panels industries. Problematic termination clauses were evident in these industries. For example:

- *Solar panels*—the ACCC identified problematic termination clauses that sought to hold consumers to the contract after installation had started, even if the business had failed to deliver on 'essential' elements of the contract. Under some of these terms, a consumer could only seek redress by pursuing common law damages - rather than having the option to simply end the contract (see example below).
- *Fitness centres*—ACCC and CAV analysis found that consumers tended to raise concerns about early termination fees after entering into long term contracts not fully appreciating either the duration of the contract or the practical effect of exit and termination clauses - until they sought to end the agreement.

Following direct engagement with fitness centres, some, but not all, have implemented changes to ensure that the consumer is made aware before entering into the contract of the exact duration of the contract and the effect of the exit and termination clauses.

Another issue raised was the often unnecessary and burdensome obstacles imposed on consumers to exercise their rights to terminate these contracts, such as the onerous requirement of needing to attend in person at the fitness centre to first meet face-to-face with staff before the consumer is entitled to bring the contract to an end. Many businesses have now amended their contracts to remove such problematic terms.

⁵ Ibid, s. 25(1)(b).

⁶ Ibid, s. 25(1)(c).

Example: How were ‘lock in’ contract term issues addressed?

Prior to the review, a solar panel company provided customers with the right to cancel the contract provided the installation of the solar equipment had not commenced. However, this right to terminate was not set out clearly in the terms and conditions and consumers were required to imply this from a term which provided as follows:

Clause 8.5 You may not cancel, or otherwise terminate the Agreement or revoke any authority given under it after we certify that the Installation of the services has commenced.

The ACCC raised the issue of the lack of clarity with respect to this term. The business agreed to amend its terms and conditions to expressly state that consumers were entitled to terminate the agreement at any time before the installation had commenced by giving 10 days notice.

The ACCC raised a further issue with the business about Clause 8.5. The ACCC was concerned this provision sought to ‘lock in’ consumers during the installation process even if there was a major failure to comply with the consumer guarantees that apply under the ACL.

Following direct engagement by the ACCC as part of this review, the business retained this condition as set out in Clause 8.5 but agreed to add a further term to make it clear to consumers that this condition was subject to their consumer guarantee rights to reject the goods where a major failure to comply with the automatic consumer guarantees under the ACL occurred:

Clause 13.8 For the avoidance of doubt, nothing in this Agreement affects your rights to terminate this Agreement in the event that you reject the goods under section 259 of the Australian Consumer Law.

Section 259 of the ACL is the consumer guarantees provision that apply with respect to the supply of goods.

Issue 4: Terms that suspend or terminate the services being provided to the consumer under the contract

Under the unfair contract terms laws, courts may consider terms allowing the business to suspend or terminate the contract unfair, particularly where they:

- permit or have the effect of permitting one party (but not another party) to avoid or limit performance of the contract;⁷ or
- permit one party to decide whether the contract has been breached without the other party having recourse or a right to respond.⁸

The ACCC is likely to view suspension and termination clauses as problematic if:

- the business does not consider the impact on the consumer before seeking to rely on the term
- the business seeks to suspend or terminate the service without notice or any prior communication with the consumer, or
- the term does not provide an accompanying right for the consumer to seek a remedy, such as a refund or cancellation of the contract.

The ACCC found that these types of terms were a concern across industries reviewed.

⁷ Ibid, s. 25(1)(a).

⁸ Ibid, s. 25(1)(h).

Four telecommunications businesses were found by the ACCC to be using standard form contracts containing problematic suspension and termination clauses. Engagement with these businesses revealed their intentions to rely on the terms in confined circumstances only. For example, to prevent a consumer from using the service for fraudulent purposes, to on-sell a consumer service for commercial gain, or to support spamming and illegal activity. However, the terms as drafted were broadly applicable and could impact on any number of consumers not engaged in illegal or otherwise prohibited activity.

The ACCC achieved significant changes by engaging with businesses on this issue. In response to the ACCC's concerns, all four telecommunications businesses amended or deleted the problematic terms to either confine operation to intended purposes, or provide greater transparency about practical intent and the circumstances in which the business would seek to rely on the term. The box below provides an example.

Examples: How did businesses seek to address the ACCC's concerns about terms providing for the suspension and termination of services?

Prior to the ACCC's review, the standard form consumer contract used by a telecommunications provider, TPG, gave the business a broad right to suspend or disconnect the customer's access to any aspect of the service at any time and without notice to the consumer. The term was worded as follows:

We may at any time, without notice and at our absolute discretion, suspend or disconnect your access to part or all of the service, or delete or deny you access to your data if we have reasonable cause to do so.

This term demonstrated a serious level of non-compliance in that it gave one party to the contract broad powers to terminate the contract without any balancing rights being provided to the other party. In response to direct engagement by the ACCC with TPG, it agreed to delete this term in full.

Telstra's standard form consumer contracts contained a provision which conferred a broad discretion on Telstra to cancel or suspend services in the event of 'excessive or unusual use'. As a result of direct engagement by the ACCC with Telstra, the standard form consumer contracts were amended to provide a definition of 'excessive and unusual use' which satisfactorily addressed the ACCC's concerns about this clause and provided greater transparency to the consumer about when Telstra's rights under this clause would be exercised to cancel or suspend the services.

Terms enabling a business to avoid its contractual obligations by cancelling an order were found in the contracts of businesses operating online. On occasion there will be an unanticipated demand for products beyond the business' available supply. However, this does not permit a business operating online to exclude its contractual obligations to consumers.

Example: How did online businesses seek to address the ACCC's and CAV's concerns about terms enabling the business to avoid its contractual obligations by cancelling orders?

Terms that refer to providing refunds of any accepted payments imply that a business may cancel an order after a consumer has paid for it:

... if your order is rejected or is not accepted, we will provide a full refund of any payment received.

Businesses sought to address concerns raised about these types of clauses by amending their contracts to include balancing provisions enabling the consumer to cancel the contract:

You may cancel an order (whether it is accepted by us or not) by contacting our Client Centre prior to the dispatch of that order. On cancelling the order, we will refund your payment.

Despite those amendments, the ACCC will remain concerned if businesses rely on such clauses seeking to exclude their contractual obligations to consumers, where such conduct gives rise to bait advertising, which is specifically prohibited under the ACL.

Issue 5: Terms that make the consumer liable for things that would ordinarily be outside of their control

The ACCC industry reviews found that certain terms in standard form consumer contracts operated in ways that held consumers responsible for things that would ordinarily be outside of their control. For example:

- In the online sector, some broadly drafted terms sought to exempt the business from liability for errors or inaccuracies they would otherwise be responsible for, while making the consumer responsible for ensuring information provided to them was correct.
- Some terms identified in the telecommunications industry purported to require the consumer to pay for all charges and use of their service, regardless of whether they authorised that use or not.

The ACCC and CAV engaged directly with businesses operating online, in relation to clauses that raised concerns by stating that it was the responsibility of the consumer to ensure product information provided by the business is correct. Each business contacted chose to amend the problematic clauses to provide more balance.

The ACCC raised concerns directly with four major telecommunications businesses in relation to these types of provisions. Three out of the four businesses chose to amend or delete their terms to provide greater transparency to consumers about the operation of these terms. Some changes included additional guidance for consumers about how to mitigate against the risk of unauthorised use of the services. One business made it clear that consumer liability did not extend to charges incurred as a result of a mistake on the part of the business.

The ACCC also raised concerns with many of the major hire car companies examined during the review. None of the businesses adequately addressed the concerns raised.

Issue 6: Terms that prevent the consumer from relying on representations made by the business or its agents

Broadly drafted clauses that seek to absolve a business of responsibility for statements they, or their agents, make to consumers may be unfair. The ACCC achieved important compliance outcomes by engaging with businesses on entire agreement clauses, except in the case of the vehicle rental industry.

These types of terms can lead to a significant imbalance in the parties' rights and obligations, and can potentially confuse and mislead consumers.

The ACCC found this type of problematic term to be an issue in all industries reviewed, especially in the telecommunications industry. Due to the length and complexity of telecommunications standard form contracts, consumers often rely heavily on verbal representations made at the point of sale to form their understanding of the deal being offered. A term enabling a business to disclaim any responsibility for these representations is unfair.

The ACCC raised concerns directly with four of the eleven telecommunications businesses, two of five airlines, and two out of nine vehicle rental companies. Following engagement with businesses whose standard form contracts contained problematic terms of this nature, the majority of reviewed businesses agreed to delete these clauses to address ACCC concerns. An example of a telecommunications business' contract is contained below.

Example: How were terms preventing the consumer from relying on representations made by the business or its agents dealt with during the ACCC reviews?

Prior to the ACCC review, one telecommunications business, Dodo, contained the following term in its standard form consumer contract:

You acknowledge that you enter into this agreement entirely as a result of your own enquiries and that you do not rely on any statement, representation or promise by us or on our behalf not expressly set out in this agreement.

The ACCC considered that this clause demonstrated significant non-compliance with the law. Following discussions with the ACCC, Dodo deleted the term from its standard form contract in full.

Significant outcomes were achieved in the telecommunications and domestic aviation industries, with almost all companies agreeing to amend, delete or otherwise resolve the issue.

Three of the four telecommunications businesses agreed to amend or delete problematic entire agreement disclaimer terms.

Both airlines also agreed to amend or delete the identified terms, following negotiations with the ACCC.

The two vehicle rental companies declined to amend or delete problematic terms identified by the ACCC.

Issue 7: Terms seeking to limit consumer guarantee rights

The reviews identified a number of contract terms across industries that sought to limit consumer rights to refunds or warranties. In some cases, these terms misled consumers as to their rights under the consumer guarantees provisions of the ACL.

Terms that restrict consumer rights to refunds or warranties, in ways that breach ACL consumer guarantees provisions, raise both unfair contract terms concerns and broader ACL issues. Problematic terms were identified in online retail and the telecommunications sector.

Two online businesses cooperated with the ACCC during the review process and resolved the concerns about these problematic terms by changing their contracts to align with the remedies available to consumers under the consumer guarantee provisions of the ACL (see example below).

The ACCC also highlighted these concerns with a number of telecommunications businesses. Each of them either amended or deleted the term which is likely to greatly reduce the risk of those provisions misleading consumers as to their consumer guarantee rights under the ACL. An example is set out below illustrating how TPG responded positively to the concerns about this type of provision as raised by the ACCC during its review.

Examples: How were ACCC's concerns about terms seeking to limit consumer guarantees addressed during the reviews?

One telecommunications business, TPG, contained the following problematic term in its standard form consumer contract prior to the ACCC review:

All other terms, conditions, warranties, undertakings, inducements and representations, whether express or implied relating to the supply of the service and equipment are excluded.

Through direct engagement with TPG as part of the review, the ACCC raised concerns that this provision would operate to exclude a consumer's rights under the consumer guarantees provisions of the ACL. Consequently, TPG decided to delete this term altogether.

Prior to the ACCC review, an online retailer, Universal Music, contained the following provisions in its standard form consumer contract:

Clause 13 (para 2): To the fullest extent permitted by law, Universal disclaims all representations and warranties, express or implied, including but not limited to implied warranties of merchantability and fitness for a particular purpose and non-infringement.

Clause 13 (para 7): You understand, acknowledge and agree that you are assuming the entire risk as to the quality, accuracy, performance, timeliness, adequacy, completeness, correctness, authenticity, security and validity of any and all features and functions of Getmusic, the Website and Content.

These provisions contained overly broad statements about limitations of liability by purporting to place the entire onus of risk on the consumer and none on the business. These provisions were inconsistent with the consumer guarantee provisions of the ACL.

Following a letter by the ACCC, Universal Music sought to address these concerns by amending these terms to expressly acknowledge that Universal's liability to the consumer in relation to the supply of services was subject to the ACL and any liability sought to be excluded by this provision did not apply where there had been a failure by Universal Music to comply with a consumer guarantee.

Issue 8: Terms that remove the consumer’s right to a credit card chargeback facility when buying the service through an agent

When goods or services are purchased using credit cards, the consumer enjoys the benefit of a chargeback facility. A chargeback is a reversal of a credit card transaction. A consumer may have chargeback rights when they make a purchase using a credit card and something goes wrong, such as they do not receive the goods or what they receive is not what was described.

As a result of a complaint received from Choice the ACCC examined a standard form consumer contract used by a travel agency which sought to remove a consumer’s credit card chargeback rights when buying the travel services through the agency.

As a result of Choice’s focus on the issue and direct engagement by the ACCC, this travel agency has agreed to delete these provisions from the standard form contracts meaning that all consumers buying travel services through this agency will now have the benefit of the credit card chargeback facility fully restored.

When the ACCC contacted Flight Centre about this same issue, it explained that its contracts were amended in August 2012 to remove those provisions.

3. Broader consumer concerns

General consumer protection law

The ACCC reviews identified issues in various industries that were beyond the scope of the unfair contract terms laws, but raised concerns under general consumer protection law and other laws. Some of these concerns were addressed by businesses during the review process.

For instance, in the domestic aviation industry, three businesses included terms in their standard form contracts allowing them to use customer's personal details for a broad range of reasons not strictly linked to the supply of services. After negotiations with the ACCC, one business chose to amend the identified term to limit its operation so that it complied with the ACL. The other two businesses were able to demonstrate that the terms as worded complied with other, industry-specific statutory requirements, and consequently did not require amendment.

A number of broader ACL issues in the vehicle rental industry were identified as a result of the ACCC review. The companies approached have not addressed those concerns. These ACL issues remain of concern to the ACCC and will be pursued going forward. Enforcement action will be taken if warranted.

Businesses operating online

In relation to businesses operating online, the ACCC and CAV found that some businesses' standard form contracts contained clauses that:

- seek to limit the jurisdiction by which the contract is governed, and under which the consumer can bring an action in court
- seek to grant irrevocable, perpetual and royalty-free rights to a business to use the consumer's correspondence or other communications for any purpose.

Overall, all businesses contacted by the ACCC and CAV during the online industry review chose to address concerns by amending their clauses to be better balanced and more transparent.

Transparency and accessibility

During the industry reviews, the ACCC also observed a number of complex and lengthy contracts that hampered transparency and accessibility. The UCT framework provides for courts to consider the contract as a whole, and the degree of transparency in particular terms.

Following consultation with the ACCC, a number of businesses responded positively to concerns raised and chose to amend contracts to improve accessibility.

For instance, Telstra was one of the first businesses to develop a one-page summary for consumers of telecommunications services, albeit connected with the development of a consumer protection industry code applying to this particular industry. Other companies soon followed suit. The ACCC encourages the further development of easy to read and understand point of sale material for consumers which will assist them to make effective comparisons between different products being offered and also to allow them to compare the product of one telecommunications provider against that offered by another.

A select number of contracts used by travel agents were also found to have significant issues with respect to the transparency of those contracts and the lack of plain English used in them. Both of these features make it difficult for consumers to understand the contractual arrangements that they are required to sign up to when using a travel agent.

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As a result of the ACCC's direct approach, one travel agency has undertaken to change their contracts to make them more transparent and to use plain English in the drafting of them, to make them easier for consumers to read. The ACCC will continue to review the changes made to contracts used by travel agents until it is satisfied that the necessary improvements have been made.

The ACCC invites businesses generally to consider opportunities for reducing the length and complexity of their standard form consumer contracts to improve transparency and accessibility.

4. Future actions

It is pleasing for the ACCC to report that many of the reviewed businesses chose to make improvements to their standard form contract terms by amending or deleting the problematic terms raised by the ACCC during its review. Importantly, many businesses were also prepared to make broader improvements to their general business practices in some of these sectors which will enhance the experience of consumers when buying certain goods and services.

During this next phase, the ACCC will consider unresolved issues, such as those noted in the vehicle rental industry, from an enforcement perspective. The ACCC is now considering whether further actions and in some cases the possibility of court action is warranted against businesses to deal with specific provisions still in use which the ACCC regards as operating unfairly.

Now is a good time for businesses across all sectors to undertake a comprehensive review of their standard form consumer contracts, and more broadly, their customer handling processes and practices, to ensure that the contractual arrangements in place with their customers are consistent with the new national unfair contract provisions. Such a review will also allow businesses to ensure that their general customer handling processes and practices promote conduct by the business on a day to day basis which is compliant with the broader consumer protection provisions of the ACL.

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Translating and Interpreting Service: call 13 1450 and ask for 1300 302 502

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