LOOKING AT THE FINE PRINT: STANDARD FORM CONTRACTS FOR TELECOMMUNICATIONS PRODUCTS AND CONSUMER PROTECTION LAW IN AUSTRALIA[1]

1 INTRODUCTION

Consumer contracts for telecommunications products are usually 'standard form contracts'[2], which means that they have been prepared by providers and presented to consumers on a 'take it or leave it basis'. In an ideal world, this lack of an opportunity for consumers to negotiate the terms of their contracts would not necessarily result in one-sided contracts that are balanced against the interests of those consumers. Ideally, consumers would shop around and select between providers not only on the basis of the products offered by them, but also on the basis of the contract terms accompanying those products. The reality is that this almost never occurs.[3] It is often difficult for consumers to scrutinise closely the terms of standard form contracts or to compare the contracts offered by different providers before making their purchasing decisions. Sometimes consumers are not given access to the contract until the point of sale, when they are already committed to the transaction and are, accordingly, less likely to be dissuaded from purchasing their chosen product by the recently revealed terms of the relevant contract.[4] In other cases, the contracts are difficult for consumers to read and understand because of the way in which they are presented and written. Even if consumers do read the standard form contracts presented to them, studies in behavioural economics have shown that consumers are usually not very good at predicting the likely impact of those contract terms on their future enjoyment of the product in question.[5]

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

3 See Margaret Jane Radin, *Boilerplate: the Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

4 See further J M Paterson, 'Consumer Contracting in the Age of the Digital Natives' (2011) 27 *Journal of Contract Law* 152.

5 See generally Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press).

The common law of contract provides very little support for consumers in their dealings with standard form contracts.[6] Consumers will be bound by the terms of a contract provided they have given some formal indication of 'consent' to those terms,[7] such as through signing a paper document,[8] agreeing verbally as part of a telephone conversation[9] or clicking 'I agree' in an online contract.[10] There is no common law requirement for timely disclosure of contract terms, which means that consumers do not have to have been provided with a realistic opportunity to compare and assess the terms before committing to the contract. Nor is there a requirement for consumers actually to have read or understood those terms before being bound. The common law does not regulate the substantive fairness of the terms of consumer contracts. As a result, consumers may be left at mercy of providers, who may choose to include in the 'fine print' of their standard form contracts onerous terms that undermine the very essence of the bargain consumers have entered into.

In Australia, recognition of the risks to consumers arising from the widespread use of standard form contracts in consumer transactions has lead to increasingly robust regulation to ensure both procedural and substantive fairness in the terms of those contract.[11] Protection for consumers of telecommunications products is provided through the *Telecommunications Consumer Protection Industry Code* ("TCP Code") and the *Australian Consumer Law* ("ACL"). The TCP Code includes provisions that seek to promote a fair contract making process by requiring consumers to be provided with salient information about the products they are purchasing and the contracts applying to the supply of those products. The TCP Code also requires those contracts to be 'transparent' in the sense of being clearly presented and expressed. The ACL contains new measures that ensure the very substance of standard form consumer contracts for telecommunications products is fair and thereby consistent with the reasonable expectations of consumers. The ACL does this, in particular, through the combined effect of the unfair contract terms regime, which renders void unfair terms in standard form consumer contracts, and the consumer guarantees regime, which provides consumers with non-excludable rights to goods or services of a reasonable standard of quality.

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6 See further J M Paterson, *'Consumer Contracting in the Age of the Digital Natives' (2011) 27 Journal of Contract Law 152.*

7 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.

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

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

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

11 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.

Despite the existence of these regimes, the Australian Competition and Consumer Commission ("ACCC") has expressed concern about the prevalence of unfair terms in consumer contracts in a number of industries, including the telecommunications industry.[12] These concerns are supported by a recent review of contract terms in consumer contracts in the telecommunications industry, undertaken by the Australian Communications Consumers Action Network ("ACCAN"). The "Fine Print Project" involved the review of standard form consumer contracts from ten providers[13] for forty two different telecommunications products,[14] including fixed line phone, mobile pre and post paid, internet and entertainment bundles, in order to assess compliance with the regulatory regimes in the TCP Code and the ACL governing the boiler plate or fine print terms.[15]

The Project found that most of the contracts reviewed contained terms that arguably did not comply with the substantive fairness requirements in the ACL. Perhaps unsurprisingly, the contracts of the larger providers of telecommunications products were largely compliant with the relevant regulatory regimes, the main concerns being with the sheer number of documents that consumers may be required to navigate and read. Some of the smaller providers' contracts demonstrated substantial levels of non-compliance with both the TCP Code and the ACL. Terms in the contract of one such provider have, in fact, recently been declared to be void as unfair terms under the ACL.[16]

This paper reports on these findings of the Fine Print Project. The paper outlines the regulatory regimes governing standard form consumer contracts for telecommunications products. It discusses the areas where the contracts surveyed did not comply with the regimes. The paper then considers why there is such a widespread failure in standard form consumer contracts for telecommunications products to comply with what is, at least in its core areas, a largely straightforward consumer protection regime. It is suggested that the issues identified by this project have broad implications for consumer protection in Australia. Most consumers have contracts for telecommunications products and access to those products is becoming essential for participation in the modern 'digital' society. It is disappointing if consumers of telecommunications products are not getting the benefit of the new consumer protection regimes that were enacted to protect them. It is also likely that at least some of the compliance issues found in the standard

12 Australian Competition and Consumer Commission, *Unfair Contract Terms – Industry Review* (2013). For recent enforcement action see *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

13 The providers covered in the review were: Telstra, Optus, Aldi Mobile, Boost Mobile, Dodo, iiNet, Kogan Mobile, Netspeed, TPG and Vodafone. The terms for Virgin Mobile were the same as for Optus.

14 All contracts discussed in this paper were as made available on the webpage of the provider on 15 March 2013.

15 The Fine Print Project Review (April 2013), on file with ACCAN.

16 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

form consumer contracts in the telecommunications industry are replicated in other industries.[17]

2 FAIR PROCESS: DISCLOSURE, ACCESS AND TRANSPARENCY

The TCP Code is made as a code governing the conduct of providers of telecommunications products pursuant to the *Telecommunications Act 1997* (Cth) s 117.[18] It is 'designed to ensure good service and fair outcomes for all Consumers of Telecommunications Products in Australia'.[19] 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 directed at promoting what is sometimes referred to as 'procedural fairness', namely fairness in the process of making a contract. The TCP Code does this by requiring consumers to be provided with salient information about the products they are purchasing[20] and by ensuring that consumers are given access to the contracts for those products before the time of purchase.[21] The TCP Code also promotes 'transparency' in consumer contracts for telecommunications products[22] by requiring those contracts to be provided in a format that is easy for consumers to navigate,[23] clearly presented[24] and expressed in plain language.[25]

The TCP Code disclosure, access and transparency requirements provide an important form of protection to consumers of telecommunications products. The requirements should assist consumers more easily to compare different products and to make better choices in entering into telecommunications contracts.[26] The requirements should also assist consumers after the contract is made in resolving any disputes or problems about their ongoing use of the product by assisting consumers in more easily ascertaining and understanding their contractual rights.

Almost all of the telecommunications providers surveyed complied with the TCP Code requirements to make information about their products and their standard form consumer contracts available on their websites. 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 language. There were of course

17 See the common features in the contracts surveyed in the ACCC Report.
18 The TCP Code in its current form was registered by ACMA on 1 September 2012.
19 TCP Code 1.
20 TCP Code r 4.1.2 – 4.1.3.
21 TCP Code r 4.5.1.
22 TCP Code r 4.1.1(b); 4.5.2. Transparency is also a factor to consider in assessing whether a term is unfair under the test for an unfair term set out in the ACL: see ACL s 24(3).
23 TCP Code r 4.5.1.
24 TCP Code r 4.1.1(b); 4.5.2(b).
25 TCP Code r 4.5.2(a).
26 For further insights on the types of information disclosure requirements that would assist consumers see Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press) Ch 4.

some exceptions, as illustrated by the following 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."[27]

All providers might have done more to utilise the creative potential of digital technology in presenting their contracts to consumers. In particular, providers might have improved the navigability of their contracts by including links between defined terms and the use of those terms in the contracts.

The core transparency issue for consumers seeking to obtain and understand the contract terms governing their telecommunications products was the number of documents that had to be located, opened, read and reconciled. The contracts of several providers had terms spread across a number of documents. In some cases, providers' contractual documents dealt with the same issues repeatedly but using different terminology and imposing different obligations in respect to the same issue, which makes it difficult for consumers accurately to gauge their contractual rights. For example, the documents of one major provider used different language to describe the consumer guarantee regime in Part 3-2 of 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 guarantees applying 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. [28]

3 SUBSTANTIVE FAIRNESS: UNFAIR TERMS AND CONSUMER GUARANTEES

The ACL, in schedule 2 of the *Competition and Consumer Act 2010* (Cth),[29] is a comprehensive consumer protection regime applying in all Australian jurisdictions. The ACL contains provisions promoting what is sometimes called 'substantive fairness' by regulating the very content of consumer contracts. The ACL does this through the 'unfair contract terms law', which renders void unfair contract terms[30] in standard form consumer contracts[31] that consumers had no opportunity to negotiate,[32] and through the 'consumer guarantees law', which requires goods

27 Kogan Mobile *General Terms and Conditions* 3.4.

28 See the various Telstra customer terms for home and family at http://www.telstra.com.au/customer-terms/home-family/index.htm.

29 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.

30 See also the TCP Code r 4.5.3.

31 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).

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

and services supplied to consumers to meet basic quality standards, regardless of any attempts by providers to exclude or limit their contractual liability.[33]

3.1 Unfair contract terms under the ACL[34]

Under the ACL, a term will be unfair if: [35]

a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

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

Although the unfair terms regime is of relatively recent origin in Australia, there are numerous sources of guidance for providers as to the type of terms that are likely to be unfair under the ACL and also alternative ways of drafting terms that protect the legitimate interests of providers without being unfair in their effect on consumers. The ACL sets out a list of 'examples of the kind of terms of a consumer contract that may be unfair'.[36] Both the ACCC and Consumer Affairs Victoria have published information on the unfair terms regime.[37] There are a number of decisions applying unfair contract terms law from the previous regime in Victoria and in the United Kingdom. More recently, the ACCC conducted a review of the standard form contracts used in a range of industries including telecommunications and identified a number of continuing concerns with potentially unfair terms.[38] Despite this guidance, the Fine Print Review found that the contracts of a number of providers contained terms that have been previously identified in these various sources as unfair or potentially unfair. While there is scope for argument over some of the terms identified, others were almost certainly void under the legislation.

33 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).

34 On the regulation of unfair terms under the ACL see further J M Paterson, *Unfair Contract Terms in Australia* (2012).

35 ACL s 24(1).

36 ACL s 25.

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

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

Entire agreement clauses

The contracts of a number of providers contained 'entire agreement' clauses providing that the written contract prepared by the provider represented the 'entire agreement' of the parties and that no other rights apply. The aim of such clauses is to exclude liability that might otherwise accrue to the provider for any representations or statements made by the provider in the course of negotiations and later relied upon by consumers. The form of such clauses may vary but the following is typical:

> "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." [39]

Entire agreement clauses of this type are likely to be void as unfair terms under the ACL. Both regulators and courts have regularly suggested that such clauses are unfair.[40] It is unfair for providers 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 provider. Entire agreement clauses may also reduce the incentive for providers to take care to ensure that the representations made by their employees and agents are accurate.

Providers of telecommunications products 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 provider does not attempt to disclaim responsibility for conduct that might otherwise have legal effect. For example, the issue was effectively, and fairly, by a provider in the following manner:

> "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."[41]

39 Netspeed *General Terms and Conditions* 10.1. Similarly iiNet, *Our Customer Relationship Agreement Section A,* 19.8; *Kogan Mobile General Terms and Conditions* 17.1.

40 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].

41 Telstra, *Our customer terms – BigPond service section - Part A – General terms for Big-*

Unilateral variation clauses

All of the standard form consumer contracts reviewed gave providers very broad rights to vary the terms of the contract and the conditions under which their products were provided, without obtaining the consent of their consumer customers.[42] Thus, under most telecommunications contracts surveyed:

- providers 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;[43]
- 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 provider associated with the changes; and
- there were no requirements that changes be a proportionate response to the circumstances that prompted the change.

Certainly, providers in the telecommunications industry, may have good commercial reasons for seeking a broad variation power to allow them to respond to changes affecting their own performance of the contract, as the service provided is affected by a range of variable including such as changes in costs, regulatory requirements or third party providers.[44] Nonetheless, broad or unfettered unilateral variation clauses are highly vulnerable to challenge as unfair terms under the ACL. Such terms have been included the 'grey list' of potentially unfair terms in the ACL,[45] identified the subject of concern to regulators[46] and struck down under

Pond services 8.1.

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

43 The Dodo general terms limited the power of Dodo to make changes to these types of matters.

44 The possibility of changes to telecommunications contracts is recognised in the *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11, made pursuant to the *Telecommunications Act 1997* (Cth). The determination is expressed to be subject to the provisions of the TPA, now the ACL.

45 ACL s 25(1)(d).

46 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

other unfair terms laws.[47]

Perhaps the most extreme clause in the contracts surveyed was the following:

> "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."[48]

Unsurprisingly this clause has now been declared unfair by the Federal Court. [49]

The key issue in assessing the validity of a unilateral variation clause will be the safeguards provided for protecting consumers' interests. [50] There are at least three ways in which such protection may be provided. These are through:

1. an undertaking to provide consumers with notice of changes;[51]

2. allowing consumers a right to terminate in response to changes, or at least in response to adverse changes; and

3. limits on the discretion of the provider to make changes.

Most contracts reviewed provided consumers with a right to notice of at least significant changes to the terms and conditions governing their use of the product[52] and rights to terminate in response to such changes.[53] The standard form consumer contracts of the most providers followed a 'tiered' approach to protecting the interests of consumers following changes to the contract terms. Consumers would receive

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Consumer Commission, *Unfair Contract Terms – Industry Review* (2013) 6.

47 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].

48 Netspeed *General Terms and Conditions* 1.7.

49 See also *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, [50].

50 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.

51 The *Telecommunications (Standard Form of Agreement Information) Determination 2003* s 11, which requires providers to give notice to consumers of variations to the contract likely to adversely effect those consumers.

52 The exception, which did not give notice rights, was the Netspeed, *General Terms and Conditions* 1.7.

53 The exception was Kogan *Mobile General Terms and Conditions* 2.7.

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. Most contracts provided that customers who terminated in response to an adverse change in the terms and conditions of supply would not have to pay outstanding fees for equipment they could no longer use.

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. The fundamental objection is that the variation rights in most telecommunications contracts contain no limits on the discretion of a provider to change the terms at any time or for any reason. Such broad ranging discretion is contrary to the very understanding of a contract. The consumer's right to terminate is not an adequate protection. Consumers who terminate may have sunk costs that they may be unable to recoup. Consumers may have incurred an 'opportunity cost' in choosing to contract with one provider as opposed to some other provider who, at the time of contracting, might have had competitive offers that are no longer available. Moreover, studies in consumer behaviour have highlighted the 'inertia' factor, which shows that consumers, once committed to an arrangement, tend not to opt out of that arrangement.[54] The inconvenience of change can be considerable and can provide a negative incentive for change. The combination of an unfettered power to make changes and the inertia of many consumers provides a risk of opportunistic behaviour by providers.

It is suggested that a provider who has contracted to provide services on particular terms should not be able to change those terms at whim, even if the consumer is given the right to terminate the contract should the changes impact adversely on them and even if consumers are released from charges they would otherwise have incurred. If providers want discretion to change the terms of the contract then the circumstances in which those changes can be made should be defined and there should be limits on the degree of change that can be made. Providers should not be able to vary the essential features of contracts they have committed themselves to perform.

Providers' rights to terminate

At the time of the Fine Print Project, one contract gave the provider an unfettered right to terminate at will:

> " [the provider] reserves the right to terminate any account at any time with or without cause or reason. …"[55]

54 Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 University of Chicago Law Review 1203.

55 Netspeed *General Terms and Conditions* 6.5.

This term has been declared unfair by the Federal Court.[56] It goes beyond what is needed to protect the provider's interests and gives no protection to the interests of consumers.

Even where a provider's right to terminate the contract is restricted to specified events, the termination right must be a proportionate response to those events. This concern with proportionality was apparent in *Director of Consumer Affairs Victoria v AAPT Ltd*.[57] 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".[58] President Morris stated: [59]

> "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."

Another contract reviewed provided:

> "We may terminate the Service Terms immediately if:
>
> a) you have breached any provision of the Service Terms; …"[60]

Terms in a standard form consumer contract that allow providers to terminate or suspend performance for any breach by consumers are similarly likely to be unfair under the ACL.[61] Termination is a disproportionate response to all breaches of contract. 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

56 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

57 [2006] VCAT 1493.

58 [2006] VCAT 1493, [53].

59 [2006] VCAT 1493, [53].

60 Kogan *Mobile General Terms and Conditions* 7.2.

61 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 VP, 24 October 2004).

consumer.[62] Terms that allow a provider 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.

Most of the contracts surveyed gave the providers a right to terminate only in response to a material breach of the contract 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. These clauses balanced the interests of both parties and provided a fair approach to termination by the provider.[63]

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 providers and also between products. For example, in some cases, the early termination fee for a mobile phone plan was almost the full cost of the plan, calculated by reference to the monthly cost and the time remaining on the contract. In other cases the contract specified 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 providers should only recover the costs directly associated with early termination.[64] Another view draws an analogy with agreed damages clauses to suggest that "fair" early termination fees can allow providers 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 providers, ranging from $5 (late fee) to $22 (dishonour fee). A default fee that is akin to a penalty under the common law is likely to be unfair.[65] Under the common

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

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

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

65 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*

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".[66] 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.[67] Are they a way of recouping costs to the provider that have been incurred by the late or dishonoured payment, such as administrative costs or the cost of borrowing 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 providers occasioned by the default, or whether they are imposed as penalties for breach and therefore unfair terms under the ACL.[68] This is a matter that may warrant further investigation.

Assignment

A number of the contracts surveyed allowed the providers to assign their rights and obligations under the contract without the consent of the consumer.[69] In one case this was expressed as an absolute right:

> "We may assign any of our rights or obligations under the Service Terms".[70]

Assignment clauses of this kind may be unfair contrary to the ACL[71] if they do not ensure that consumers are protected against detriment or prejudice.[72] Such protection was provided in other contracts. For example, one contract provided that the provider could only assign its obligations to providers who would supply the service on materially the same terms and conditions as under the original arrangement;[73] and another provided that the provider could only assign its

Unfair Terms in Consumer Contracts Regulations 1999 (2008) 41.

66 *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.

67 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.

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

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

70 Kogan *Mobile General Terms and Conditions* 12.2.

71 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)).

72 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.

73 iiNet *Our Customer Relationship Agreement Section A* 18.

obligations under the agreement without permission or notice if it considered there would be no detriment to customers.[74]

Exclusive jurisdiction

One standard form consumer contract surveyed committed the parties to the exclusive jurisdiction of the courts of Victoria.[75] Terms requiring consumers to sue in a particular jurisdiction are likely to be unfair contrary to the ACL.[76] 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.[77]

4.2 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 provider. The guarantees ensure that consumers are assured of basic standards of quality in the products they acquire. Thus in the supply of goods to consumer there are guarantees that:

- the goods will be of acceptable quality;[78]
- the goods are fit for any disclosed purpose;[79]
- in the case of a sale of goods by description, that the goods match their description;[80]
- spare parts and repair will be reasonably available for a reasonable period after the goods are supplied reasonably available;[81] and
- there will be compliance with express warranties.[82]

74 TPG *Standard Terms and Conditions* 15.
75 Kogan *Mobile General Terms and Conditions* 14.1.
76 *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].
77 Australian Competition and Consumer Commission, *A Guide to the Unfair Contract Terms Law* (2010) 21.
78 ACL s 54.
79 ACL s 55.
80 ACL s 56.
81 ACL s 58.
82 ACL s 59.

In the supply of services to consumers there are guarantees that:

- the services will be rendered with due care and skill;[83]
- the services, and any product resulting from the services, will be fit for a purpose[84] or to achieve a result[85] that the consumer made known to the provider; and
- the services will be supplied within a reasonable time.[86]

Regulation 90 wording for express warranties

Where a provider gives an express warranty against defects in respect to goods or services provided by it, the *Competition and Consumer Regulations 2010* (Cth) require certain specified information to be given to consumers.[87] This information includes details of who is giving the warranty, the period for which the warranty applies and how to claim under the warranty.[88] 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:[89]

> "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 provider does not provide the prescribed information, or does not provide it in the prescribed form, the provider may be subject to a civil pecuniary penalty[90] and may also be guilty of a criminal offence.[91] Almost all contracts that contained an express warranty surveyed under the Fine Print Project included the required 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 providers to include in their contracts good quality, accurate information about the consumer

83 ACL s 60.
84 ACL s 61(1).
85 ACL s 61(2).
86 ACL s 62.
87 *Competition and Consumer Regulations 2010* (Cth) reg 90.
88 *Competition and Consumer Regulations 2010* (Cth) reg 90.
89 *Competition and Consumer Regulations* 2010 (Cth) reg 90(2).
90 ACL s 224.
91 ACL s 151.

guarantees in the ACL. This information will assist consumers in understanding their rights under the legislation. In particular it will assist consumers in understanding that the consumer guarantees prevail over providers' contract terms and cannot be excluded by those contract terms. Accurate information about the statutory consumer guarantee regime also assists providers in complying with the ACL. Accurate contractual information about the consumer guarantees makes it more likely that terms dealing with the providers' contractual liability will be valid, as opposed to void as an attempt to avoid liability under the legislation[92] or misleading consumers about their statutory rights.[93]

The approach by providers in the contracts surveyed under the Fine Print Project varied considerably. Some providers did not acknowledge the ACL at all. Others referred to consumer protection legislation but in an inconsistent and inaccurate fashion. Still others used out of date terminology to describe consumers' rights, referring to 'implied terms' or 'warranties' rather than consumer guarantees[94] or the '*Trade Practices Act* 1974'[95] rather than the current legislation, the ACL , which is contained in schedule 2 to the *Competition and Consumer Act* 2010. This misuse of terminology does not assist consumers and in some cases may mislead them. It gives no confidence that the providers will accurately explain their rights and obligationsin face-to-face or telephone dealings with consumers.

Pleasingly, a couple of providers' contracts provided very good summaries of consumers' rights under the ACL and made clear that the consumer guarantees prevailed over the providers' own contract terms. For example, the following extract gives consumers a very clear indication of their statutory rights under legislation:

> "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.

92 See ACL s 64.
93 ACL s 29(1)(m).
94 Eg Dodo *Standard Form of Agreement – Consumer Services* 6.2; Kogan Mobile *General Terms and Conditions* 8.1.
95 Optus *Digital TV terms* 11.2.

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.] …"[96]

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.[97] This means that attempts by providers to limit or exclude their liability arising under the consumer guarantees will usually be void.[98] For example, under the ACL providers cannot exclude liability for failing to use due care and skill in the supply of services or limit their obligation to provide redress for goods that are not of acceptable quality. The consumer guarantees will prevail over any voluntary or extended warranty given by providers. [99] For example, the consumer guarantees may provide a right to redress for consumers even in circumstances where the providers' 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.[100] This prohibition might be breached by a provider who, in attempting to limit or exclude its liability under the contract, failed to clearly acknowledge the consumer guarantees in the ACL or to make clear that the rights under these guarantees 'trump' anything in the provider's contract. A provider 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.[101] Many of the contracts surveyed as part of the Fine Print Project contained exclusion clauses that would be void and/or misleading under the ACL.

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96 Optus, *Standard Form of Agreement* 13.2. Also well done in Vodafone *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service - Customers commencing or Renewing on or after 1 January 2011 Section 2*.

97 ACL s 64.

98 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.

99 ACL s 64.

100 ACL s 29(1)(m).

101 ACL s 224.

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

Some contracts contained limitation or exclusion clauses that did not acknowledge the non-excludable consumer guarantees under the ACL. For example, the one contract contained the following term:

> "[The provider] makes no warranties of any kind, whether express or implied, for the services it provides. [The provider] also disclaims any warranty of merchantability or fitness for a particular purpose. [The provider] 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.'[102]

Another provider's contract stated:

> "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 providers, employees, contractors or assignees for any loss, damages or expenses relating to, or arising from, the use of the service."[103]

These clauses are highly likely to be void as attempting to exclude liability under the ACL. The terms may also be misleading contrary to the ACL because they incorrectly represent that the provider can limit or exclude any liability that may arise in connection with the supply of its services. While the clauses do not expressly disclaim liability under the consumer guarantees in the ACL, they convey a strong and wrongful impression that the consumer has no rights of complaint against the provider for substandard services or products.[104]

Information about the consumer guarantees that is contained in another document prepared by the provider and located elesewhere on that provider's webpage should be not sufficient to save an otherwise void exclusion clause expressed in broad and absolute terms. Consumers are not necessarily experienced at reading legal documents together or at assessing the relationship between different and potentially inconsistent contract terms.

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102 Netspeed, *General Terms and Conditions* 8.1.

103 TPG *Mobile Service Description and Terms* 18.1.

104 This clause was not the subject of the recent declaration as to unfair terms in this provider's contract *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

Indemnity

Similarly problematic are broad indemnity clauses that require consumers to indemnify the provider for any losses it might incur, regardless of the parties' respective fault and without recognising the qualifications to this claim imposed by the ACL consumer guarantee regime. Once such clause has been declared to be unfair by the Federal Court:[105]

> "The User agrees to indemnify and hold NetSpeed, its affiliates, its licensers, 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)". [106]

Service interruption

In addition to excluding or limiting the provider's liability for certain losses, all of the contracts surveyed sought to ensure that the providers' obligations in respect to the service were narrowly defined, thus further reducing the potentially liability of the provider to consumers. There can be no complaint with a provider explaining in its contract that it cannot guarantee a continuous or fault free service. What is problematic is for a provider to attempt to disclaim responsibility for any loss suffered as a result of interruptions to the service. For example, the one 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 that affect Mobile services, such as the performance of third party providers 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."[107]

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105 *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

106 Netspeed *General Terms and Conditions* 4.1 and see also 4.2.

107 TPG *Mobile service description and terms* 5.1. See also Kogan Mobile *Prepaid Plan Terms and Conditions* 3.1; Netspeed *General Terms and Conditions* 1.3; Vodafone *Standard terms or the supply of the Vodafone Mobile Telecommunications Service (post 1 January 2011)* 5.2.

This type of unqualified term may be void as an attempt to exclude liability under the consumer guarantee regime in the ACL. There are undoubtedly a large number of variables that may affect the provision of telecommunications services. It is reasonable for a provider to explain to consumers that their service may be interrupted by events outside its control. However, providers nonetheless remain subject to the consumer guarantees in the ACL. The obligations imposed by these guarantees will be shaped by the particular nature of the services being provided but their application cannot be excluded merely because the services can never be fault free. For example, providers must use due care and skill in providing the service. Part of due care and skill may involve taking steps to minimise the detrimental effect of foreseeable disruptive events.

Terms describing the limits of the service and of the provider's liability for that service should contain an express acknowledgment that they are subject to the consumer guarantees in the ACL. This was nicely done in the term below, which clearly explained the continuing existence of consumers' rights under the ACL (albeit referring to warranties and not guarantees) and which 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."[108]

Coverage

A number of the contracts surveyed sought to disclaim the providers' responsibility for problems with the coverage of their service. For example:

> "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."[109]

Terms of this kind have the potential to impact harshly on consumers and may be void under the ACL. Consider the application of this clause on a consumer who enters into a mobile phone contract. The consumer lives in Tasmania. The coverage map for the provider indicates that the service is available in that part of

108 Dodo *Standard Form of Agreement – Consumer Services* 7.1

109 Aldi *Prepaid mobile terms and conditions* 1.3. Also iiNet *Customer Relationship Agreement, section B1 phone service description* 8.1; Kogan Mobile *Prepaid Plan Terms and Conditions* 1.3.1.

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.

However, 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 provider, expressly or by implication. If the provider 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. In some cases reliable coverage in a particular area will be a purpose made known to the provider, 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 provider their residential address.

Even leaving aside the issue of the consumer guarantees, it may also be argued that this type of term is unfair to the extent that it does not allow the consumer to terminate the contract without penalty in the event that, notwithstanding the coverage map, the consumer is unable to obtain coverage in the area in which it wishes to use the service. In such cases, the consumer will have done what is reasonable itself to ensure the service is suitable. The consumer should not be bound if the information provided by the provider proves unreliable as a guide to the service.

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

It is quite common to see consumer contracts that attempt to ensure that an otherwise overreaching exclusion clause is not void under the ACL by including a catch all statement that liability is excluded 'except to the extent permitted by law'. Terms of this type will not be void under the ACL as an attempt to exclude or limit liability arising under a consumer guarantees.[110] They acknowledge the possibility the provider's liability. However, such terms may be misleading because most consumers are not aware of their rights under consumer law and therefore most consumers will interpret the broad exclusion clause as substantially limiting their rights of complaint. [111]

In *Trade Practices Commission v Radio World Pty Ltd*[112] a retailer displayed the following sign on its premises:

110 ACL s 64.

111 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.

112 [1989] FCA 353.

> "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."

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 equivalent to ss 18 and 29(1)(m) of the ACL. Neave J accepted the arguments of the Trade Practices Commission that:[113]

> "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 [Trade Practices] 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."

The Fine Print Project review of consumer contracts for telecommunications products identified one provider that relied in this type of approach. It qualified its exclusion clauses with the statement 'we accept out liability to you … for breach of any non excludable rights under consumer protection laws'[114] and in another contract 'We will accept liability if it cannot be excluded under any legislation'.[115] Terms of this type suffer the same defects as discussed by Neave J. Without explicit reference to the ACL in the contract, and indeed an explanation of their rights, the qualification is likely to mean little to consumers. Consumers are likely to be misled into thinking that their rights to redress are more limited than in fact is the case, contrary to s 29(1)(m) of the ACL. Such terms may be unfair under Part 2-3 of the ACL for similar reasons.

113 [1989] FCA 353, [23].
114 Telstra *Our Customer Terms for Consumer Customers* 9.3. also 3.1.
115 Telstra *Foxtel on T-box Terms.*

Distinguishing between consumer and business customers?

A number of the providers surveyed distinguished between consumer and (small) business customers. This separation of customer groups may occur for a number of reasons, including that 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 event of failures in their service.

Who is a consumer?

It is important for providers who distinguish between business and consumer customers to recognise that even business customers may still be protected as 'consumers' under the ACL and TCP Code. In particular, the definition of a consumer for the purposes of the consumer guarantees in the ACL is not premised on how a customer actually uses the goods or services.[116] 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 on whether the goods or services were of a kind ordinarily acquired for personal domestic or household use of consumption (i.e. an objective test).[117] Under this definition, a person who acquires goods or services for their business may still be a consumer protected by the consumer guarantees in the ACL. Providers who use a narrower definition of consumers than in the ACL will not breach the ACL provided that they acknowledge the possible application of the consumer guarantee regime to their small business contracts. All the providers who distinguished between consumer and business customers did this in their small business contracts.

Excluding business uses

The providers surveyed who distinguished between consumer and business customers expressly stated in their consumer contracts that consumer services should not be used for business purposes. One contract was particularly strident and provided that consumers should only use the service for personal use and not for any commercial purpose, including 'any calls made for a business'.[118] Read literally, this type of clause precluded any, even one off, use of the service for business purposes. Such terms are likely to surprise many consumers. Even where a consumer purchases a service primarily for personal purposes, it is possible that s/he may occasionally use that service for business purposes. Indeed, in the digital

116 Although in some circumstances it may be possible to limit liability for consequential losses for products not ordinarily acquired for personal, domestic or household use, see ACL s 64A.

117 ACL s 3(2).

118 Vodafone *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. Similarly Aldi *Standard terms* 1.4.1; Dodo *Standard Form of Agreement* 10.24.

age, some overlap between business and private usage may be difficult to avoid. Consider, for example:

- a plumber who answers an emergency call on his or her personal mobile;
- a 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 in their use of their telecommunications products. Yet their conduct would breach of a contractual restriction on using the service for *any* business purpose.

Contract terms precluding customers from using the service for *any* business purpose may be unfair terms under the ACL, at least where the provider can terminate the contract in response to such usage. Occasional use of a consumer service for business purposes should not constitute a reason for a provider to terminate the contract to provided consumer services to a predominantly consumer customer. Such terms are disproportionate response to the risk to the provider 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. Thus, one provider's consumer terms applied to customers using services 'ordinarily' acquired for personal, domestic or household use and who were actually using the service for this 'primary' purpose.[119] The reference to the *primary* purpose of the service gives a degree of flexibility to a customer who acquires the service predominantly for personal use but occasionally for engages in a business use.

4 Why the lack of compliance?

The level of non-compliance in standard form consumer contracts for telecommunications products identified in the Fine Print Project is somewhat surprising. Contract terms are easier to monitor for regulatory compliance than conduct. The core aspects of the unfair terms and consumer guarantees regimes in the ACL are not difficult to apply. Regulators have published extensive guidance on the regimes. Certainly, the review found terms about which there may be a degree of debate as to whether they were unfair, for example variation powers and restrictions on business use. However, other terms were clearly inconsistent with decisions in England, in Victoria and regulatory guidance on unfair terms, for example, entire agreement clauses, exclusive jurisdiction and some termination

119 Telstra *Our Customer Terms General Terms for Consumer Customers* 1.2.

clauses. There were also numerous instances of terms that were inconsistent with the consumer guarantee regime in the ACL, in particular terms that contained broad limitations of liability without acknowledging consumers' non-excludable rights under the ACL. The consumer guarantee regime was introduced to increase certainty for both consumers and providers in the mandatory quality standards applying to the supply of goods and services to consumers. Yet consumers who read their contracts are likely to remain confused and even be mislead about their rights. Indeed there are good grounds to suspect that the contracts did not comply with the previous regime, as in many cases the drafting has not been updated.

Why is there such a high level of non-compliance with the ACL in telecommunications contracts? There are a number of possible explanations. One possible reason relates to the nature of telecommunications services. Many providers of telecommunications services are reselling services supplied by another provider and do not exercise control over the conditions of supply.[120] All providers are dealing with a service that is dependent on a number of variables beyond their control. Providers may therefore consider that they need to retain optimum flexibility and minimum liability in their dealings with consumers. Another possible reason goes to the very nature of fine print and boilerplate terms.[121] Boilerplate terms are the terms at the back of the contract. They are the terms contained in the precedents of the law firms that write the contracts. They are the terms that are not negotiated and rarely read. The focus of contracting parties is rather typically on the salient features of the transaction; the product or service provided, the price and the time of supply. If neither of the parties focuses on boilerplate then its content won't change, even in the face of obvious error, such as referring to the wrong legislation or in ignoring regulatory guidance.

It is also possible that some providers of telecommunications services do not regard compliance with the consumer law regime as a priority issue. These providers may not consider that the cost of compliance is balanced by the gain of avoiding complaints from consumers and enforcement action by regulators. Compliance would impose costs in rewriting contracts and in a reduction of the rights held by providers. By contrast, the risks associated with non-compliance may be calculated as relatively low. If consumers do not read the fine print terms of their contracts, the fairness of such terms is unlikely to be a factor influencing consumers to choose one provider's product over that of a competitor. Providers may deal with complaints from consumers about particular terms made after the contract is entered into on a one off basis and consumers are in any event unlikely to litigate over claims that are relatively small in monetary terms. At least, until recently, the risk of enforcement action by regulators may have been perceived as low. As of 2013, there was almost no case law on the consumer guarantees or the

120 [2006] VCAT 1493, [50].

121 See Oren Bar-Gill, *Seduction by Contract* (2012, Oxford University Press); Margaret Jane Radin, *Boilerplate: the Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

unfair contract terms regimes under the ACL.[122] That situation is now changing, with the ACCC taking enforcement action in respect to both regimes.[123] How long the impact of this action takes to produce a change in the compliance culture of affected providers remains to be seen.

Does the issue really matter? Many consumers will not experience problems with their telecommunications products. The value of maintaining a good reputation in the market may provide an incentive for telecommunications providers to treat those consumers who do experience problems fairly. However, the failure of most providers to ensure their contracts comply with relevant regulatory regimes, particularly the consumer guarantee regime, in their contracts gives little reason to think that their face-to-face advice to consumers will be any better. Consumers risk continuing to be wrongly advised about their rights when they try to complain to their providers about defective or substandard products. Moreover, 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, to pursue a claim against a provider or to switch to a different provider should the terms of their original contract prove overly onerous. More generally, a disregard for an important legislative regime regulating consumer contracts risks undermining the rule of law and the sanctity of contract. Contracts are meant to be binding agreements that delineate the rights and obligations of the parties to that agreement. This is not achieved if the contracts being used contain unfair terms that undermine the essence of the parties' bargain and whose enforcement depends on whether consumers are capable of asserting their statutory rights.

5 CONCLUSION

The Fine Print review of telecommunications contracts found significant levels of non-compliance with the relevant consumer protection regimes, a finding that is consistent with the ACCC report of its industry review undertaken in 2012.[124] Some contracts from a small number of providers showed almost no recognition of the applicable consumer protection rules. However, importantly, contracts from all providers 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 consumer contracts.

Most consumer advocates and regulators are familiar with the 'enforcement pyramid', supporting a regulatory approach that starts with consultation and

122 ACCC Media Release, 'ACCC institutes proceedings against Bytecard Pty Limited for unfair contract terms' (22 April 2013).

123 *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *Australian Competition and Consumer Commission v Bytecard Pty Limited* Consent order (P)VID301/2013.

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

moves to increasingly stringent enforcement measures in the event of sustained and deliberate disregard to the law by the subject of the regulation.[125] It may be that a high profile and vigilant approach to enforcement and a body of case law is now needed to promote better outcomes for consumers of the telecommunications products, a move the ACCC itself has forecast. [126] Such action is also likely to have a flow on effect to ensure better levels of compliance in other industries that make extensive use of standard form contracts in their dealings with consumers.

125 I Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, Oxford, 1992)

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