COMMUNICATIONS ALLIANCE LTD

UNFAIR CONTRACT TERMS LAW – DRAFT GUIDANCE FOR CONSULTATION

SUBMISSION BY
COMMUNICATIONS ALLIANCE

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1 INTRODUCTION

Communications Alliance welcomes the opportunity to provide a submission on the ACCC's draft publication *Australian Consumer Law*: a guide to unfair contract terms and to respond to the ACCC's request:

1. for comments on whether the draft guide clearly outlines the obligations arising from the new laws;

2. for information which would better assist industry stakeholders; and

3. for additional information which would better assist industry stakeholders to understand the new law.

Communications Alliance is the peak industry body for the Australian communications sector. Its mission is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry and foster the highest standards of business behaviour.

As an example of its role within the industry, Communications Alliance developed the Telecommunications Consumer Protections Code (TCP Code) C628:2007 and its accompanying Telecommunications Consumer Protections Guideline (G631:2009). The TCP Code is an industry code registered by ACMA pursuant to section 117 of the *Telecommunications Act 1997* (Cth) and applies to all carriage service providers in their relationships with residential and small business customers. Chapter 5 of the TCP Code replaced the Consumer Contracts Industry Code (ACIF C620:2005) which was also registered by ACMA. That Code was first published in 2005, was produced by a working committee including industry and consumer representatives, the (then) ACA, the ACCC and the TIO. In producing the Code, the working committee considered:

1. the European Communities *Directive on Unfair Terms in Consumer Contracts*;

2. the UK Unfair Terms in *Consumer Contracts Regulation of 1999*;

3. the Communications Law Centre's reports "*Unfair Practices and Telecommunications Consumers*" (January 2001) and "*Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline*" (October 2003);

4. the *Fair Trading Act 1999* (Vic); and

5. the Australian Standing Committee of Officials of Consumer Affairs (Unfair Contracts Terms Working Party's) "*Unfair Contract Terms: a Discussion Paper*".

Members of Communications Alliance will be making individual submissions. This submission is made in addition to and complements any other submission you receive from the telecommunications sector.

2 EXECUTIVE SUMMARY

Any guidance provided by the ACCC on the likely application of the unfair contract terms provisions of the Australian Consumer Law is appreciated by the Communications Alliance and its members. However, we note that any guidance will be interpreted literally by consumers, so that:

- if an example of a fair provision is provided, consumers may assume that provisions that do not follow that example may be unfair;
- if an example is given of a term which is unfair, it will be assumed to be unfair in all circumstances, which may not be the case; and
- consumers need to be reminded that each of 3 elements must be present before a standard form consumer contract can be unfair: a significant imbalance and/or a detriment alone will not suffice.

The telecommunications sector has been at the forefront of regulating the content of terms in consumer contracts on an industry basis for some years. The sector has invested considerable time and expense over many years to develop a consensus among regulators, consumers and industry on terms that might be unfair in telecommunications contracts. As context will be important in reviewing terms that may be unfair under the new ACL, it is appropriate that the guide recognise the role of industry codes, such as the TCP Code.

3 SPECIFIC COMMENTS ON DRAFT PROVISIONS

3.1 Section 3. Terms which are exempt

(a) Terms that set the "upfront price" (page 8)

We suggest below an amendment to the guide to better align it to the definition of "upfront price".

The definition of "upfront price" in section 5(2) ACL is designed to capture all consideration to which the supplier is entitled under a contract for the supply of goods or services, so long as the consideration is disclosed at or before the time the contract was entered into.

If the consideration is for the supply itself (and is disclosed), it will form part of the "upfront price", even if it is payable on the occurrence of an event. For example, a fee may be referable to the volume of a consumer's use or to the number of units purchased.

The reference to contingencies in the guide may be misleading as it appears to give contingencies a broader role than was intended by section 5(2).

An "upfront price" is not limited to amounts which are required to be paid upfront. If consideration is payable in instalments, it will still form part of the "upfront price" for these purposes. The Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* makes this clear by confirming [at item 2.68] that it includes any interest payable and [t item 2.71] that it includes any future payment or series of payments.

The 11 May 2009 consultation paper and exposure draft [at page 17] and the Explanatory Memorandum [at item 2.70], confirm that all payments necessary for the provision of the supply, sale or grant are intended to be included in the upfront price, so long as they are disclosed upfront.

The statement in paragraph 4 of page 8 of the draft guide, that "this would exclude from the upfront price, for example, provisions that impose fees for additional goods or services that are not identified at the time the contract was made..." is confusing and may mislead.

Firstly, it is ambiguous. It could mean that:

> the fees are not identified at the time the contract was made, but the additional goods and services are;
>
> the fees are identified at the time the contract was made, but the additional goods and services are not; or
>
> neither the fees nor the additional goods and services are identified at the time the contract was made.

Secondly, while undisclosed fees may fail the test in section 5(2)(b), additional goods or services a consumer later decides to acquire, that were not disclosed upfront, will not do so. The reference in section 5(2) (b) to disclosure relates only to the "consideration".

The "upfront price" relates to amounts payable for the goods or services that are the subject of the supply under the contract. Additional goods or services, whether or not they are identified at the time the initial contract is made, that are later supplied to the consumer would be under either:

a variation to the existing contract; or

a new agreement,

in each case requiring the consumer's agreement as to price. The consideration for the subsequently ordered goods or services would be part of their own, separate, upfront price.

We also note that the reference to default, penalty and exit fees may be misleading in certain contexts.

In the telecommunications industry, consumers often benefit by contracts which allow them to pay a contract price over the life of a contract. For example, a 2 year contract for the provision of mobile phone services may include the purchase price of a mobile phone handset paid for in instalments over the life of the contract. If the consumer decides to exit the contract early for convenience or the carriage service provider terminates as a result of the consumer's breach, the remaining instalment payments are usually accelerated and payable at the time of exit. While this could be described as a "penalty fee" or "exit fee" it is simply an acceleration of instalment payments, which would have otherwise been payable in the future. The example on page 8 of the draft guide which excludes "default penalty fees or exit fees" from the "upfront price" is confusing and therefore unhelpful. Similarly, the following paragraph of the guide states that contingent fees are often referred to as default fees. We ask that these examples are amended to clarify the distinction between payments (whatever they are called) that form part of the consideration and those that do not.

For these reasons, we suggest that the guide be amended to read:

> *"For the purpose of the provisions, in general the "upfront price" in a standard form consumer contract includes the price for the supply, sale or grant under the contract disclosed at or before the time the contract was entered into by the parties. A disclosed "upfront price" may be payable at the time the contract is entered into, in instalments during the contract term or when the contract ends.*
>
> *The "upfront price" would not include further payments under the contract that are contingent on the occurrence or non-occurrence of a particular event. This would exclude from the upfront price, for example, provisions that impose additional*

Deleted: *fees for additional goods or services that are not identified at the time the contract was made and*

fees for a default or exit, over and above the price for the goods or services acquired.

Each agreed supply under a contract may have its own "upfront price". If, for example, the consumer orders additional goods or services under the same contract, the consideration for the subsequent supply will be the "upfront price" for that supply, if it is disclosed before the consumer agrees to the additional supply."

Deleted: *default penalty fees or exit fees*

(b) Terms that are required or permitted by law (page 8)

Compliance with the TCP Code is mandated under the Telecommunications Act.

The TCP Code does not require any individual provision to be included in a consumer contract but it permits provisions having a particular object or effect to be included, explicitly recognising that such terms will not be unfair. An example of this is section 5.1.5(a) of the TCP Code.

We request that the example of the TCP Code be included on page 8 of the guide, after the reference to mandatory consumer contracts.

3.2 Section 4. When is a term "unfair"?

The text under the heading "The Quick Answer" makes it clear that each of the elements listed in the three bullet points is necessary before a term is unfair. This was not clear in all of the sections dealing with these elements. We have suggested below several amendments to clarify this.

(a) Not reasonably necessary (page 10)

To confirm clear that this element must be found for a term to be unfair (and to follow the language used in the "significant imbalance" section), please amend the opening sentence to read:

"Under the second limb of the test for unfairness, a court must find that the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term."

Deleted: *a term would be unfair if the court finds that it*

We ask that a further paragraph be inserted at the end of this section to include an example of a term which may be reasonably necessary. An appropriate example may be:

" For example, it may be reasonably necessary for a telecommunications services provider to be able to respond immediately to events which threaten the security of a telecommunications network, without first notifying a consumer, even if the consumer."

(b) Detriment (page 11)

Consistent with the change suggested above, please amend the first sentence from "requires the court to consider whether" to "requires the court to find that".

The guide states that forms of detriment "may include inconvenience, delay or distress suffered by the consumer". We are concerned that this may mislead consumers as to their rights under the ACL.

Firstly, as the unfair contract terms law only applies to standard form contracts, when examining whether a term would cause detriment, it may be inappropriate to consider the impact on each and every consumer. This will be a matter for the courts to decide.

Secondly, even if the impact on any one consumer was the test, a mere inconvenience or delay, especially if minor or temporary, in and of itself, is unlikely to constitute "detriment".

In other contexts, detriment has been described as a "material disadvantage" or "harm": Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387. It is defined in the Macquarie Dictionary as "loss, damage or injury". These concepts are a long way from mere inconvenience, delay or distress.

We acknowledge that on 11 May 2009, Treasury released a consultation paper and an exposure draft of the Bill. The consultation paper [at page 11] states that the fact that detriment was not limited to financial detriment:

> *"is designed to allow the court to consider situations where there may be other forms of detriment, such as inconvenience, delay or emotional distress....."*

We also note that the Senate Economics Legislative Committee report on the Bill in September 2009 concluded [at page 38] that:

> *"courts should be allowed to take into account non-financial forms of detriment such as inconvenience, delay or emotional distress."*

However, neither the ACL nor the Explanatory Memorandum to the Bill provides guidance on the intent behind the meaning of "detriment", other than that it may include detriment which is not financial.

The Second Reading Speech [24 June 2009 Hansard page 6986] states that:

> *"Detriment includes both financial and non-financial detriment. It has been suggested that the only relevant detriment is financial detriment, which may be so in some cases but other forms of detriment should be taken into account."*

The Second Reading Speech does not refer to examples of non-financial detriment. An earlier draft of the Second Reading Speech was circulated by Capital Monitor. It stated that:

> *"In the context of the provisions, detriment includes both financial and non-financial detriment. Some have suggested that the only relevant detriment is financial detriment. And in some cases that is all that will really be relevant. But in others, where a business abuses the terms of a contract by behaving unreasonably, causing irritation, inconvenience and distress to a customer, then this can – and should – be taken into account."*

The examples in this draft of the Second Reading Speech are narrower than those referred to above, as a business would need to cause each of irritation, inconvenience and distress. Moreover, this version was not read in Parliament. These examples were apparently deliberately removed from the draft Second Reading Speech.

On this basis, and as neither the Bill nor the Explanatory Memorandum refers to examples, the interpretation of non-financial detriment should be left to the courts. We therefore request that the references to "inconvenience", "delay" and "distress" be removed from the guide. Including these references provides an interpretation which does not appear from the Bill, the Explanatory Memorandum or the Second Reading Speech, may contradict the Minister's intention in removing them from the draft Second Reading Speech and may suggest to a consumer that they can treat as void a standard form contract that would cause them an inconvenience.

(c) Examples of terms that may be unfair (page 11)

As terms may be fair in some contexts and not in others, industry context will be relevant. As ACMA notes on its website, the Consumer Contracts Code (now found in chapter 5 of the TCP Code) was developed "as an objective standard to help suppliers and customers check that contracts and practices are fair" (see www.acma.gov.au/WEB/STANDARD/pc=PC_1737).

We suggest that this section of the guide note that other useful examples may be available for consumers. For example, the section could read:

> *"... they are examples of the kinds of terms of a consumer contract that may be unfair. Other examples of terms that may be unfair may be found in guidance provided by industry bodies. For example, the Telecommunications Consumer Protection Code (C628:2007) (found at www.acma.gov.au/WEB/STANDARD/pc=PC_2525) contains useful examples from telecommunications contracts."*

As is noted in the Explanatory Memorandum, although many of the examples in section 4(1) are of a party making unilateral changes to a contract, unilateral variations are not prohibited or presumed to

be unfair. In fact, as noted in the Explanatory Memorandum [at 2.55], unilateral variation of contract terms is expressly contemplated by certain legislation. We request that page 11 of the draft guide also include reference to this, otherwise the many examples of unilateral acts may lead a reader to presume that unilateral change is a problem in itself. For example, after the insertion above, insert as a new clause:

> *"Many of the examples listed below are of terms that allow a party to make changes to a contract on a unilateral basis. However, unilateral rights are not prohibited or presumed to be unfair. They are expressly contemplated in certain legislation, such as in the National Consumer Credit Protection Act 2009 and the Telecommunications (Standard Form of Agreement Information) Determination 2003."*

(d) Section 4(1)(a) ACL (page 12)

a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract

We request that an additional paragraph be added at the end of this section to take into account the commonly accepted position that liability can be excluded for force majeure events and to refer to the position stated in the Explanatory Memorandum [at 2.57] regarding legitimate limits on liability:

> *"Terms that exclude a supplier's liability for failure to perform due to an event outside the supplier's control may not be unfair.*
>
> *Similarly, many limitations on a supplier's liability are commercially reasonably or expressly permitted by law for public policy reasons."*

(e) Section 4(1)(b) ACL (page 12)

a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract

The first paragraph of this section provides examples of conduct that may (but need not) be unfair. Yet note 13 may lead a reader to conclude that:

- a party's right to terminate a contract needs to be validated;
- a party must have a valid business reason to terminate a contract, so can never terminate without cause; and
- a contract that is unprofitable cannot be terminated without cause.

None of these conclusions is correct.

The example of a term that may be unfair in section 4(1)(b) is that of a unilateral right to terminate. It does not suggest that termination

without cause (with or without notice) will necessarily be unfair. We ask that note 13 be deleted or that it is amended to read:

> *"An example of a valid business reason t may be where the supplier has reasonable grounds for believing that the consumer is insolvent and unable to pay future bills. ."*

Deleted: *that might validate one party's right to terminate a contrac*

Deleted: *Mere unprofitability of the contract would not be considered a valid business reason to terminate a contract.*

We suggest the following amendments to paragraph two of this section to clarify the ambit of the AAPT case:

> "An example of this arose in the Victorian case of *Director of Consumer Affairs Victoria v AAPT Limited*, where Morris J found that an immediate termination clause in a mobile phone contract for any breach had an application so broad that it was considered unfair:"

Deleted: potentially

Deleted: broad

After the extract from the AAPT case, it would be helpful to provide examples of when a unilateral right to terminate might not be unfair, such as the following:

> *"A unilateral right to terminate may not be unfair where the right may only be exercised, for example:*
>
> *by providing a notice and/or remedy period; or*
>
> *if the other party was in breach (unless the breach was inconsequential)."*

(f) Section 4(1)(d) ACL (page 13)

a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract

As noted in our comments above, the Explanatory Memorandum makes it clear that unilateral variation will not, in and of itself, be necessarily unfair. This is not reflected in this section of the guide.

We agree with the examples given in the second paragraph of this section and that a term which increases penalties or requirements or reduces benefits may be unfair. However, it would be unfair not because it caused significant imbalance, but because:

(i) it caused a significant imbalance; **and**

(ii) it was not reasonably necessary to protect the supplier's legitimate interests; **and**

(iii) it would cause detriment.

The second paragraph in this section focuses only on (i), and implies that a term may be unfair if (i) existed, without reference to (ii) or (iii). This may confuse or mislead the reader.

The examples set out as dot points at the end of the section should be linked by the word 'or' rather than 'and', as these examples do not need to co-exist for the contract to be considered fair. The

second dot point, referring to legitimate interests, should be removed, as if that element is present, the term cannot be unfair within the meaning of section 3(1) ACL. In addition, as these are not the only circumstances in which a unilateral variation clause may be acceptable, it should read "a unilateral clause may be more likely to be acceptable".

Similarly, the paragraph above the dot points contains an example of an extreme case. Providing this example may imply that:

- a unilateral variation right; or
- a right exercisable in specific identified circumstances only; or
- a right exercised to the supplier's advantage or the consumer's detriment; or
- a right exercised without notice

will, in each case, be likely to be unfair. We request the section clarify that this is not the intent. While a clause may be more likely to be fair if these elements are absent, their presence will not necessarily render a clause unfair.

(g) Section 4(1)(e) ACL (page 14)

a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract

For the reasons mentioned above, please delete the reference to inconvenience.

We suggest that this section include a reference to industry practice and reasonable consumer expectations where it is common for contracts to continue on a month-to-month basis after a fixed term, such as in the mobile or internet sectors:

> *"Automatic renewal for a reasonably short period is common practice in some industries and can advantage the consumer. For example, the automatic renewal of mobile phone or internet contracts on a month-to-month basis at the end of a fixed term contract is unlikely to be unfair."*

(h) Section 4(1)(g) (page 15)

a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, or the financial goods or services to be supplied under the contract.

We request that the examples set out as dot points at the end of the section be linked by the word *'or'* rather than *'and'* as not all these examples need to exist for the contract to be considered fair.

We request that the following example be added to the end of this section:

"The ability to unilaterally vary the characteristics of the goods or services to be supplied may not be unfair where notice of such variation is given and the consumer is offered the option of terminating the contract for a period after the notice is given. For example, section 5.1.3(d)(ix) of the Telecommunications Consumer Protections Code (C628:2007) notes that a term may be unfair if its effect is to permit a supplier to unilaterally vary the characteristics of goods or services, during a fixed term contract on less than 21 days notice to the consumer, without offering the consumer the right to terminate the agreement within 42 days of the date of notice."

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