

AUSTRALIAN
COMMUNICATIONS
INDUSTRY FORUM



INDUSTRY CODE
ACIF C620:2005
CONSUMER CONTRACTS

ACIF C620:2005 Consumer Contracts Industry Code

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EXPLANATORY STATEMENT

This is the Explanatory Statement for the ACIF C620:2005 **Consumer Contracts** Industry Code.

This Explanatory Statement outlines the purpose of the Industry Code and the factors that have been taken into account in its development.

Background

In June 2001, the Australian Communications Industry Forum (ACIF) Consumer Codes Reference Panel (CCRP) decided there was a need to provide guidance to the Australian telecommunications industry about issues of fairness and unfairness in consumer contracts. The CCRP formed a working committee and tasked it with the development of a guideline to address the issues.

A report published by the Communications Law Centre (CLC) in January 2001, *Unfair Practices and Telecommunications Consumers* (the First CLC Report), was influential in the CCRP's decision. The First CLC Report examined developments in Europe and the United Kingdom, including the European Communities' *Directive on Unfair Terms in Consumer Contracts* (the EC Directive) and the *Unfair Terms in Consumer Contracts of 1999* (the UK Regulation) and their relevance to Australia.

The CCRP recognised that service providers and consumers would benefit from additional and specific guidance on issues of contractual fairness. Of particular relevance to this view is that consumer supply contracts in the Australian telecommunications industry are commonly prepared in advance by the supplier and there is little or no scope for these contracts to be individually negotiated by consumers. These include Standard Forms of Agreement made in accordance with Part 23 of the *Telecommunications Act 1997* (Cth).

In addressing its task of developing a guideline, the working committee recognised the valuable work of the First CLC Report and the analytical approach adopted in the UK Regulation. The First CLC Report also provided a listing of current issues, including those identified by an analysis of complaints data from the Australian Competition and Consumer Commission and the Telecommunications Industry Ombudsman (TIO). In December 2002, ACIF published G601:2002 **Consumer Contracts** Industry Guideline (the Guideline).

The CCRP provided the Australian Communications Authority (ACA) with two reports in 2003 about the progress of the industry in reviewing current practice and in adopting the Guideline. The ACA reviewed the impact of the Guideline to assess industry compliance with the Guideline and determine if there was evidence of significant improvement in the contractual environment for consumers. It also commissioned the CLC to provide a report on industry compliance. The CLC report, *Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline* was published in October 2003 (the Second CLC Report). As a consequence of the Second CLC Report, and its own findings, the ACA in November 2003 requested ACIF to develop an industry code on consumer contracts.

ACIF then established a new working committee to develop an industry code on consumer contracts. The committee's terms of reference included consideration of the EC Directive and the UK Regulation, the two CLC Reports, and new developments in Australia including amendments to the *Fair Trading Act 1999* (Vic) and the Australian Standing Committee of Officials of Consumer Affairs (Unfair Contracts Terms Working Party) *Unfair Contract Terms: a Discussion Paper*.

Current Regulatory Arrangements

Under various federal and state legislation and the general law applied by Australian courts and tribunals, there are prohibitions and remedies to redress imbalances between parties to a contract. However, these regulatory arrangements apply technical rules and legal principles to very specific forms of personal or 'circumstantial' disadvantage. For example, in recent years, the codification of prohibitions against 'unconscionable' conduct under the *Trade Practices Act 1974* (Cth) and various state and territory fair trading laws consider the circumstances surrounding the supply of goods and services before relief may be ordered, including by taking into account the relative bargaining positions of the parties, the consumer's ability to understand the relevant documents and whether the consumer was required to comply with conditions not reasonably necessary for the protection of the legitimate interests of the supplier.

The prohibitions relating to unconscionable conduct typically apply where pressure has been unduly exercised or unfair tactics employed against specific categories of 'vulnerable' consumers, and therefore have more limited application to relationships between service providers and broader classes of consumers. Moreover, from an industry perspective, these laws do not provide a set of clearly identifiable rules which may be readily applied to contracts in the telecommunications industry.

A recent development in this context has been the introduction of Part 2B of *Fair Trading Act 1999* (Vic) which provides that unfair terms in consumer contracts (as defined in the Act) are void and identifies a number of factors to be taken into account in determining whether particular terms are potentially unfair.

Part 23 of the *Telecommunications Act 1997* allows service providers to develop standard forms of agreement (SFOAs) for their customers. This is the predominant form of contractual arrangement for consumers. SFOAs must contain relevant information on the prices, terms and conditions under which the goods or services are provided. SFOAs must be lodged with the ACA and must be publicly available. The ACA has issued a determination under Part 23 which requires service providers to develop a summary of their SFOAs and sets out arrangements for notifying customers of changes to the SFOA. This Code applies in addition to the requirements set out in the ACA's determination as varied from time to time.

ACIF Codes also provide specific rules relating to consumer contracts. ACIF C521:2004 **Customer Information on Prices, Terms and Conditions** Industry Code has requirements on advertising, information provided to the customer before and at point of sale, as well as rules governing continuing access to contract information. ACIF C546:2001 **Customer Transfer** Industry Code also sets out rules regulating the behaviour of sales representatives in relation to the transfer or "churning" of customers.

However, despite these developments, it is clear that the telecommunications industry would benefit from specific guidance on terms and conditions that should not be used in telecommunications supply contracts because of the likelihood of unfairness to consumers.

Why Current Regulatory Arrangements are inadequate

With the exception of Victorian legislation referred to above, federal and state laws do not identify or provide guidance on contract terms which may be unfair, nor provide guidance on the structure and format of contracts to ensure consumers can easily read and understand important contract terms.

While other ACIF Codes require the provision of accurate and accessible information and require appropriate behaviour of a service provider's sales staff in dealing with consumers, these Codes do not expressly deal with the fairness of the contract terms or

the actual format of a contract to ensure important contract terms are accessible and capable of being easily read and understood by consumers.

How the Code Builds on and Enhances the Current Regulatory arrangements

This Code has been informed by the EC Directive and the UK Regulation as well as the Victorian legislation and provides industry specific examples and specific rules identifying contract terms which are unfair and how contracts should be set out to ensure legibility and comprehension of the terms.

What the Code will Accomplish

The objective of the Code is to address aspects of consumer detriment arising from the imbalance in bargaining power between service providers and their residential and small business customers. The Code covers mass market contracts used by residential and small business consumers.

This Code seeks to ensure that the terms of contracts between service providers and residential and small business consumers are fair and are presented by service providers in a form that is readily accessible, legible and capable of being readily understood by consumers.

Industry compliance with the Code will enhance customer confidence in the fairness, accessibility and intelligibility of consumer contracts as improved practices by service providers regarding fairer contract terms become standard practice.

How the Objectives will be Achieved

The Code applies to carriage service providers including internet service providers, and covers contracts for supply of telecommunications services, including fixed and mobile telephone calls and internet services to residential and small business customers.

The Code identifies and prohibits the use of unfair terms. It provides an objective basis for determining the circumstances in which a contractual term is unfair, including by taking into consideration the legitimate rights and obligations of both consumers and service providers. Further, the Code contains examples specific to the telecommunications industry which provide additional context and information about the practical effect of the Code rules. The Code also states the minimum requirements for the format and structure of contracts, as well as rules to promote the use of plain language. It is expected that these rules and the guidance they give to service providers on appropriate contracting practices will lead to an improvement in the consumer contracting environment in the telecommunications industry.

In handling complaints under this Code, the TIO's investigative staff will consider whether a Code rule has been breached every time they address a complaint, irrespective of whether an industry participant is a signatory to the Code. The TIO records all potential and confirmed breaches, which are, in turn, reported to the ACA.

Anticipated Benefits to Consumers

By providing service providers with a minimum set of standards for determining whether the terms in their consumer contracts are fair and intelligible, this Code will both encourage and promote improved industry practices.

This Code will be registered by the ACA, enabling the ACA to direct service providers to comply with Code rules regardless of whether they are a Code signatory. Code registration will benefit consumers who can be reasonably sure, when choosing a telecommunications service provider, that their contracts are both fair and intelligible.

Anticipated Benefits to Industry

The Code benefits industry by providing greater clarity about unfair terms in consumer contracts and ensuring that consumer contracts are accessible, legible and intelligible for consumers.

Registration of the Code ensures that all sections of the industry operate on an equal footing in relation to contract terms. Compliance with the Code will lead to a reduction in the volume of customer complaints, contribute to customer confidence and build customer loyalty.

Anticipated Cost to industry

Service providers have indicated that implementation of the Code will have a significant impact on some of the existing industry operating practices and procedures which will add considerable costs to industry.

The existing regulatory regime in relation to SFOAs is established in the *Telecommunications Act 1997*. Regulations made under the Act allow for SFOAs to be used for a wide range of telecommunications goods and services. In addition, the ACA's SFOA Determination provides rules about providing information to customers (by way of summaries) and the ways in which notice of changes must be given to customers. This Code, amongst other things, significantly alters the notice and unilateral variation regime currently in place.

Service providers have indicated they will incur substantial initial and ongoing costs in relation to compliance with this Code. The amount of the costs incurred will vary depending on the number and types of services supplied by respective participants and the level of modifications required to their existing contractual arrangements. Given the diversity in nature and size of industry participants, the cost for each industry participant will vary greatly.

Compliance with the Code will require existing service providers to review the terms of their existing contracts and all related documentation and modify these. In addition, in order to implement the modified contract terms, service providers will need to modify their processes and systems, as well as policies and operating practices and associated procedures, including staff education and training. Service providers needing to change their contracts as a result of the Code, will have to undertake the following steps (with associated costs):

- assessment of changed business risk and costs associated with increased business risk;
- new business processes and/or business rules;
- drafting of new contracts (including legal drafting time);
- preparation of collateral and new contracts (including printing);
- distribution of new collateral and contracts; and
- staff training (including front of house staff and complaints handling staff).

New entrants will need to ensure that compliance with the Code is built into their processes and systems.

Tony Shaw
Chairman
CCRP/WC16 : Consumer Contracts Working Committee

PARTICIPANTS

The Working Committee that developed this Industry Code consisted of the following organisations and their representatives:

Organisation	Membership	Representative
Australian Communications Authority	Non-Voting	Vivienne Ireland/Alan Chalmers
Australian Competition and Consumer Commission	Non-Voting	David Ablett/Shane Adams
Communications Law Centre	Voting	Derek Wilding/Elizabeth Beal
Consumers' Telecommunications Network	Voting	Teresa Corbin/Sarah Wilson
Country Women's Association	Voting	Myra Pincott/Pam Gilbert
Hutchison Telecoms	Voting	Trent Czinner/Jarrold Nink
Optus	Voting	Philippa Measday/Gary Smith
Small Enterprise Telecommunications Centre	Voting	Ewan Brown/Gordon Frend
Telstra	Voting	Samantha Lovrich/Sarah Greenstreet
Telecommunications Industry Ombudsman	Non-Voting	John Pinnock/Silvia Superina
Vodafone	Voting	Paul Gray/Kathryn Fox

This Working Committee was chaired by Tony Shaw. Holly Raiche of ACIF provided project management support.

Allens Arthur Robinson provided drafting advice.

TABLE OF CONTENTS

1	INTRODUCTION AND REGISTRATION WITH ACA	2
1.1	Introduction	2
1.2	Registration with ACA	2
2	SCOPE AND OBJECTIVES	3
2.1	Scope	3
2.2	Objectives	3
3	CODE ADMINISTRATION AND COMPLIANCE	5
3.1	Code Administration and Compliance Scheme	5
3.2	Powers of the Telecommunications Industry Ombudsman to handle complaints under this Code	5
3.3	Power to handle Industry Complaints under this Code	5
3.4	Code Implementation	6
3.5	Code review	6
4	ACRONYMS, DEFINITIONS AND INTERPRETATIONS	7
4.1	Acronyms	7
4.2	Definitions	7
4.3	Interpretation	8
5	REFERENCES	10
6	UNFAIR TERMS	11
6.1	Terms must not be unfair	11
6.2	Assessment of Terms for Unfairness	12
6.3	Exceptions	15
7	PRESENTATION OF CONTRACT TERMS	20
7.1	Plain Language	20
7.2	Format and Structure	20
7.3	Information Accessibility	22

1 INTRODUCTION AND REGISTRATION WITH ACA

1.1 Introduction

- 1.1.1 Section 112 of the *Telecommunications Act 1997* (Cth) sets out the intention of the Australian Parliament that bodies and associations in the telecommunications industry develop industry codes relating to telecommunications activities of those bodies.
- 1.1.2 The development of this Code has been facilitated by the Australian Communications Industry Forum (ACIF) through a Working Committee comprising representatives from the telecommunications industry, Government regulatory agencies, the Telecommunications Industry Ombudsman and consumer groups.
- 1.1.3 This Code should be read in the context of other relevant Codes and Guidelines, including the:
- (a) ACIF C521:2004 **Customer Information on Prices, Terms and Condition** Industry Code;
 - (b) ACIF C546:2001 **Customer Transfer** Industry Code;
 - (c) ACIF C541:2003 **Credit Management** Industry Code; and
 - (d) ACIF C542:2003 **Billing** Industry Code.
- 1.1.4 This Code should be read in conjunction with related legislation, including the:
- (a) *Telecommunications Act 1997* (Cth);
 - (b) *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth);
 - (c) *Trade Practices Act 1974* (Cth); and
 - (d) *Fair Trading Act 1999* (Vic) Part 2B.
- 1.1.5 If there is a conflict between the requirements of this Code and any requirements imposed on a Supplier by statute, the Supplier will not be in breach of this Code by complying with the requirements of the statute.

1.2 Registration with ACA

This Code is registered with the Australian Communications Authority pursuant to section 117 of the *Telecommunications Act 1997* (Cth).

2 SCOPE AND OBJECTIVES

2.1 Scope

- 2.1.1 This Code applies to carriage service providers, a section of the telecommunications industry under section 110 of the Act. They are collectively referred to as Suppliers in this Code.

NOTE: Carriage service providers include internet service providers.

- 2.1.2 This Code regulates the following telecommunications activities referred to in section 109 of the Act:
- (a) carrying on business activities as a carriage service provider; and
 - (b) the supply of goods or services by carriage service providers for use in connection with the supply of a listed carriage service.

NOTE: Listed carriage services include fixed-line and wireless communications services (including mobile and internet services).

- 2.1.3 Subject to the exclusions set out in section 2.1.4 below, this Code applies to contracts for the supply of:
- (a) telecommunications goods and services by a carriage service provider under the same contract for supply of a listed carriage service; and
 - (b) content services otherwise supplied by the carriage service provider in connection with the supply of a listed carriage service,

where such supply is to a Consumer.

NOTE: Refer to the definition of "Consumer" in subsection 4.2 of this Code.

- 2.1.4 This Code does not apply to:
- (a) contracts between carriage service providers and persons who are not Consumers within the meaning of subsection 4.2 of this Code;
 - (b) contracts for the supply of content services by third parties who are not carriage service providers; and
 - (c) the terms of a contract, to the extent to which they apply to the provision by a carriage service provider of a subscription broadcasting service and/or a television subscription narrowcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth).

2.2 Objectives

The objectives of this Code are:

- (a) to identify and prohibit the use of unfair terms in Contracts;

- (b) to provide an objective basis for determining whether a contractual term is unfair by taking into account the legitimate rights and obligations of both Consumers and Suppliers; and
- (c) to state the minimum requirements for the format and structure of Contracts and to encourage the use of plain language.

3 CODE ADMINISTRATION AND COMPLIANCE

3.1 Code Administration and Compliance Scheme

Under ACIF Code signatory arrangements, signatories to this Code are subject to ACIF's Code Administration and Compliance Scheme (October 2003) (the "Scheme"). Accordingly, all signatories who are bound by this Code are also bound by the Scheme.

3.2 Powers of the Telecommunications Industry Ombudsman to handle complaints under this Code

Under section 114 of the *Telecommunications Act 1997* and, subject to consent by the Telecommunications Industry Ombudsman, this Code confers on the Telecommunications Industry Ombudsman the functions and powers of:

- (a) receiving;
- (b) investigating;
- (c) facilitating the resolution of;
- (d) making determinations in relation to;
- (e) giving directions in relation to; and
- (f) reporting on,

complaints made by the end users of carriage services about matters arising under or in relation to this Code, including compliance with the Code by those industry participants to whom this Code applies.

3.3 Power to handle Industry Complaints under this Code

- 3.3.1 Complaints may be made under this Code to ACIF by a member of the industry (or a voluntary or non-profit consumer organisation or similar body) (an "Industry Complaint") about a contravention of this Code by a signatory to this Code.
- 3.3.2 Complaints by a member of the industry (or a voluntary or non-profit consumer organisation or similar body) about a contravention of this Code by a signatory to this Code may be referred from the ACA under the power granted to the ACA in section 514 of the *Telecommunications Act 1997*, subject to ACIF's agreement to accept the referral. Without limiting the grounds on which ACIF may withhold its agreement to accept a referral, ACIF may withhold its agreement where it considers that the complaint can be more conveniently dealt with in another forum or that handling the complaint may impose an unreasonable cost burden on ACIF.
- 3.3.3 ACIF must handle Industry Complaints under clause 3.3.1 or 3.3.2 of this Code in accordance with the provisions of the ACIF G514:2003 **Code Administration and Compliance Scheme**.

3.4 Code Implementation

- 3.4.1 Any Contract entered into after the date of registration of this Code must comply with this Code on or before six months from that date.
- 3.4.2 Subject to clauses 3.4.3 and 3.4.4, this Code does not apply to Contracts entered into before the date of registration of this Code.
- 3.4.3 Contracts for fixed line services provided under a Standard Agreement must comply with this Code on or before six months from the date of registration
- 3.4.4 For Consumers with Contracts that are not for fixed line services entered into before the date of registration of this Code, Suppliers must:
 - (a) make the Contract compliant with this Code on or before six months from the date of registration; or
 - (b) issue a Notice in Writing of the availability of Code compliant Contracts:
 - (i) for Consumers with a Contract with a Fixed Contract Period, at a reasonable time prior to the expiry of the Fixed Contract Period; or
 - (ii) for Consumers with a Contract which does not have a Fixed Contract Period, on or before six months from the date of registration.

3.5 Code review

Review of this Code will be conducted two years after registration is completed by the ACA and every five years subsequently.

4 ACRONYMS, DEFINITIONS AND INTERPRETATIONS

4.1 Acronyms

For the purposes of this Industry Code, the following acronyms apply:

ACA	Australian Communications Authority
ACIF	Australian Communications Industry Forum

4.2 Definitions

For the purposes of this Industry Code, the following definitions apply:

Act

means the *Telecommunications Act 1997* (Cth).

Consumer

means:

- (a) a person who acquires a Telecommunications Product for the primary purpose of personal or domestic use; or
- (b) a business or non-profit organisation (including a body corporate, sole trader, partnership, trust, or registered charity) which at the time it enters into the Contract:
 - (i) does not have a genuine and reasonable opportunity to negotiate the terms of the Contract; and
 - (ii) has or will have an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than \$20,000,

but excludes any person or entity acquiring a Telecommunications Product for the purposes of resale.

NOTE: For the purposes of estimating the annual spend in relation to subclause (b)(ii) above it is appropriate to review the average annual spend for the previous three years, if available, excluding any significant capital outlay of which the Supplier is aware, and services identified under clause 2.1.4 of this Code.

Contract

means an agreement (including a Standard Agreement) between a Supplier and a Consumer for the supply of a Telecommunications Product, the terms of which are available in writing.

NOTE: Terms are available in writing when they are either printed in hard copy or available to be printed in hard copy.

Fixed Contract Period

means an agreed fixed contract period other than a month to month contract period.

Notice in Writing

means providing the relevant information in writing by any of the following methods:

- (a) delivering the information to the Consumer in person;
- (b) sending the information by pre-paid post to the address listed in the Supplier's records for the relevant Consumer;
- (c) transmitting the information to the Consumer's electronic mail address if the Consumer:
 - (i) has an electronic mail address; and
 - (ii) has consented to the Supplier sending the information to the Consumer at that address;
- (d) including the information on or in the Consumer's bill, including a bill made available to the Consumer in electronic format via the Supplier's website, where the Consumer has expressly consented to receiving the bill in that format; and
- (e) in the case of Contracts for pre-paid telecommunications services, any of the above means, or by making the information available to the Consumer by means such as through a website or at a retail outlet of the Supplier and informing the Consumer (by means of a recorded message or text message, or in writing) how the Consumer can obtain the information.

NOTE: If the information is made available through the Supplier's website, it should be easy to find from the Supplier's home page or the full URL should be provided.

Standard Agreement

means a standard form of agreement within the meaning of Part 23 of the Act.

Telecommunications Product

means:

- (a) a carriage service within the meaning of the Act;
- (b) any other telecommunications related goods or services supplied under the contract for supply of the carriage service; and
- (c) a content service (other than a subscription broadcasting service or a television subscription narrowcasting service) provided by the Supplier in connection with the supply of the carriage service.

Supplier

means a carriage service provider within the meaning of section 87 of the Act.

4.3 Interpretation

In this Code:

- (a) headings are for convenience only and do not affect interpretation;
- (b) boxed text is intended as an aid to the interpretation of Code rules and is not binding on Suppliers;
- (c) words and expressions in this Code which are not defined have the meaning given to them by the Act; and

- (d) the following rules of interpretation apply unless the context requires otherwise:
 - (i) the singular includes the plural and conversely;
 - (ii) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - (iii) mentioning anything after include, includes or including does not limit what else might be included; and
 - (iv) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.

5 REFERENCES

Publication	Title
Industry Codes and Guidelines	
ACIF C521:2004	Customer Information on Prices, Terms and Conditions Industry Code
ACIF C560:2001	Customer Transfer Industry Code
ACIF C542:2003	Billing Industry Code
ACIF C541:2003	Credit Management Industry Code
ACIF G601:2002	Consumer Contracts Industry Guideline
Legislation	
<i>Telecommunications Act 1997 (Cth)</i>	
<i>Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)</i>	
<i>Trade Practices Act 1974 (Cth)</i>	
<i>Fair Trading Act 1999 (Vic) (Part 2B)</i>	
Other Publications	
Communications Law Centre, <i>Telecommunications Consumer Contracts: Compliance with the ACIF Consumer Contracts Industry Guideline</i> , October 2003	
Communications Law Centre (CLC), <i>Unfair Practices and Telecommunications Consumers</i> , January 2001 (available for purchase from CLC)	
Communications Law Centre (CLC), <i>Report on Fair Terms in Telecommunications Consumer Contracts 2003</i> (available from the CLC's website at www.comslaw.org.au)	

6 UNFAIR TERMS

6.1 Terms must not be unfair

6.1.1 A term in a Contract must not be unfair.

NOTE: All terms in a Contract are assessable for fairness.

6.1.2 A term in a Contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the Contract to the detriment of the Consumer.

6.1.3 Relevant circumstances for the purpose of subsection 6.1 include:

- (a) the circumstances in which the parties entered into the Contract, including whether the term was individually negotiated;
- (b) whether the format and structure of the Contract comply with section 7 of this Code; and
- (c) whether the parties have acted in good faith in relation to their respective rights and obligations under the Contract.

NOTE: Due to the nature of the Supplier/Consumer relationship, the rights and obligations of the parties in a Contract are inherently different. Therefore, contracts for the supply of telecommunications services are likely to result in some imbalances between Suppliers and Consumers that may be reasonable in the circumstances and not unfair under this Code. For example, Suppliers need to be able to respond to events which threaten the security of a network or to intervene if they suspect a Consumer's handset has been stolen and used without the Consumer's consent. This Code recognises that some imbalances may be reasonable while other imbalances may be unfair and result in detriment to the Consumer.

6.1.4 The following are not relevant to an assessment of whether a term of a Contract is unfair:

- (a) the price stated for a Telecommunications Product or remuneration of the Contract; or
- (b) the features of a Telecommunications Product or the description of the performance or operation of those features stated in the Contract,

provided these are accurate in all material respects.

NOTE: The Code is not intended to regulate the setting of prices for goods and services nor the technical attributes of the products Suppliers choose to offer in the telecommunications market.

6.2 Assessment of Terms for Unfairness

Without limiting subsection 6.1, in assessing whether a term in a Contract is unfair, it is relevant to consider whether the term has the object or effect of:

- (a) excluding or limiting the liability of the Supplier in a manner that is contrary to law or in a manner that is not clearly expressed or misleads the Consumers as to their rights at law;

EXAMPLES:

- *A term which permits the Supplier to exclude liability for representations made by employees, agents, dealers or other contractors when acting in the scope of their authority;*
- *A series of terms which exclude liability in a manner that is contrary to law along with a statement to the effect that "nothing above should be taken to reduce any rights that you may have at law".*

- (b) permitting the Supplier to avoid or limit the performance of its obligations under the Contract to the detriment of the Consumer other than in relation to:

- (i) a suspension of the supply of goods or services for a reasonable period for maintenance, repair or similar operational reasons;
- (ii) suspension or termination of the Contract for material breach of the Contract by the Consumer;

NOTE: Without limiting what may be included, a material breach of a Contract includes the Consumer's failure to perform or comply with important obligations under the Contract; for example, the failure to pay amounts due and payable in accordance with the terms of the Contract.

- (iii) suspension of the service if there are reasonable grounds for suspecting fraud or other illegal conduct in relation to the service by the Consumer or any other person using the service;
- (iv) termination of the Contract where there is evidence to suggest fraud or other illegal conduct in relation to the service by the Consumer or any other person using the service;
- (v) suspension or restriction of a service if there are reasonable grounds for believing the Consumer represents a credit risk in relation to that service, provided the Supplier has taken reasonable steps to give notice to the Consumer of the suspension or restriction of the service; and

NOTES: Reasonable grounds for suspecting a credit risk include:

- *an unusual high volume or spend for the relevant service when compared with previous account activity for that service;*
- *the failure of the Consumer to respond to notices from the Supplier about unusual high volume or spend;*

- *the failure to pay a current bill in circumstances where the Consumer's payment history indicates a series of late payments, dishonoured payments or failures to pay;*
- *any public notices as to pending insolvency or bankruptcy i.e. winding-up applications or bankruptcy petitions.*

*Reasonable steps to give notice are those set out in ACIF C547:2003 **Credit Management** Industry Code.*

- (vi) suspension, restriction or termination, where appropriate, of a service in accordance with an acceptable use policy, provided that the relevant terms of the acceptable use policy comply with this Code;

NOTE: Acceptable use policies are terms of a Contract which may impose limits in specific circumstances on a consumer's use of a service, including for network integrity, commercial, operational or legal reasons.

- (c) permitting the Supplier to indefinitely suspend all the services under the Contract;
- (d) permitting the Supplier to require the Consumer to pay a reconnection fee for suspension events caused by the Supplier's error or failure to perform its obligations under the Contract;
- (e) excluding or limiting the Consumer's right to a pro-rata refund of relevant charges for the period a service is suspended, where the suspension is for any reason other than:
 - (i) at the Consumer's request;
 - (ii) for the Consumer's material breach of the Contract;
 - (iii) for a system or network outage that results in the service being inaccessible for an insignificant period; or

NOTE: The extent to which a system or network outage constitutes an insignificant period will vary depending on the type of service, but will not be considered significant if the outage is of short duration. However, outages may be considered significant if they are of short duration but occur persistently.

- (iv) where the Supplier has suspended or restricted a component of a Consumer's service because the Supplier has reasonable grounds to believe that the Consumer represents a credit risk in relation to that component of the service;

NOTE: It may be reasonable for a Supplier not to refund rental charges for fixed line services if the Supplier suspended the Consumer's access to international calls because the Supplier has reasonable grounds to believe the Consumer represented a credit risk in relation to international calls (as the Consumer would still have access to all other features of the service).

Refer to the note under clause 6.2(b)(v) in relation to reasonable grounds for suspecting a credit risk.

- (f) permitting the Supplier to terminate a Contract for convenience:
 - (i) at any time during a Fixed Contract Period; or

- (ii) at any other time unless the Supplier gives the Consumer at least 30 days Notice in Writing and either refunds any unexpired prepaid credits or, if the Consumer agrees, applies those credits for use on another service;

NOTE: A Supplier terminates "for convenience" if they end a Contract in circumstances where there is no breach of the Contract by the Consumer and there is no other event which triggers the right to terminate.

- (g) requiring a Consumer to pay a fee or charge for breach of a term of the Contract if the fee or charge is not a genuine estimate of the loss suffered or likely to be suffered by the Supplier;
- (h) permitting the Supplier to automatically renew or extend a Contract which has a Fixed Contract Period for a further Fixed Contract Period without obtaining the Consumer's express consent at a reasonable time prior to the expiry of the Fixed Contract Period;
- (i) requiring the Consumer to give more than 30 days prior notice to terminate the Contract;
- (j) permitting the Supplier to unilaterally amend or vary the characteristics of goods or services, including price, in a Contract with a Fixed Contract Period (except as provided in clauses 6.3(n) to (t) below) without:
 - (i) issuing a Notice in Writing to the Consumer at least 21 days prior to the date on which the variation is intended to take effect; and
 - (ii) offering the Consumer in the notice the right to terminate the Contract within 42 days of the date of the notice referred to in subclause (i) above without incurring fees or charges other than:
 - (A) usage or network access charges incurred up to the date on which the Contract ends; and
 - (B) any outstanding amounts that cover installation costs or equipment (where such equipment can be used in connection with services provided by other Suppliers);
- (k) limiting the Consumer's right to make a complaint or a claim to a competent body authorised to consider the complaint or claim or otherwise purporting to exclude any remedy that would be available to the Consumer by operation of law;
- (l) excluding the governing law of the State or Territory in Australia in which the Consumer ordinarily resides or the jurisdiction of the courts in that State or Territory;
- (m) limiting the evidence the Consumer may present in legal proceedings or imposing the evidential burden on the Consumer in legal proceedings;
- (n) requiring the Consumer to pay early termination fees or unbilled charges and similar payments within an unreasonable period following termination of the Contract;
- (o) permitting the Supplier to unilaterally determine or enforce a right or obligation under the Contract without stating, in reasonable detail,

the relevant act, omission, condition, event or legislation (as the case may be) which affords the Supplier the right to do so;

- (p) requiring the Consumer, in relation to communications between end users, to assign, licence or otherwise transfer their intellectual property rights to the Supplier in a manner that exceeds the intellectual property rights reasonably required by the Supplier to supply the relevant service or to perform its obligations under the Contract;
- (q) permitting the Supplier to suspend or terminate a service supplied to the Consumer under a separate and independent Contract solely for breach or default of any other Contract between the Consumer and the Supplier unless there are reasonable grounds for believing the Consumer represents a credit risk; and

*NOTE: Refer to note under clause 6.2(b)(v) in relation to reasonable grounds for suspecting a credit risk. Action taken must be in accordance with ACIF C547:2003 **Credit Management** Industry Code.*

- (r) permitting the Supplier to collect personal information from the Consumer that exceeds what is reasonably required by the Supplier to supply the relevant service or to perform its obligations under the Contract unless the Consumer has the option of not providing that additional information and still acquiring the service.

6.3 Exceptions

A term of a Contract is not unfair within the meaning of section 6.1 to the extent the object or effect of the term is to:

- (a) permit the Supplier to terminate the Contract or suspend or restrict the supply of goods or services under the Contract, in accordance with ACIF C541:2003 **Credit Management** Industry Code, for the Consumer's non-payment of invoices by the due date or a later date if agreed by the parties;
- (b) permit the Supplier to terminate the Contract or suspend performance of its obligations under the Contract if the Consumer dies or becomes bankrupt, insolvent or subject to a winding-up order or similar insolvency event, provided that the Supplier has a reasonable belief that it is unlikely to receive or retain payments for amounts due and payable by the Consumer under the Contract;
- (c) permit the Supplier to suspend or restrict the supply of a service if there are reasonable grounds for believing:
 - (i) a threat or risk exists to the security of the service or the integrity of the network; or
 - (ii) the provision of the service may cause death, personal injury or damage to property;
- (d) permit the Supplier to suspend or restrict the supply of a service in cases of emergency, including for the provision of support to emergency and other essential services;
- (e) limit a Supplier's liability for failure to perform its obligations under a Contract where that failure is due to an event occurring outside the Supplier's reasonable control including, for example, explosion,

natural disaster, earthquake, war (declared or undeclared) or act of God;

- (f) permit the Supplier to terminate the Contract or to suspend or limit or vary performance of its obligations under the Contract in order to comply with:
 - (i) legislative or regulatory requirements; or
 - (ii) the order of a court or lawful direction of a competent authority,to the extent the legislative or regulatory requirements or order or direction unavoidably requires the Supplier to do so;
- (g) permit the Supplier to suspend, intercept or terminate a service in order to comply with a warrant or other court order, or as otherwise required or authorised by law;
- (h) impose a reasonable termination or expiry date for services or components of services not being used by a Consumer provided that the terms of the Contract:
 - (i) enable the Consumer to determine the relevant expiry or termination date;
 - (ii) disclose the right of the Consumer to obtain a credit or rebate in relation to any amount paid in advance; and
 - (iii) in the case of pre-paid services, ensure termination for lack of usage does not occur prior to the agreed expiry date of any credit;

NOTE: A message service is an example of a component of a service.

- (i) permit the Supplier to terminate the Contract or suspend or limit performance of its obligations under the Contract if the Consumer resells the service being supplied or otherwise engages in conduct which deems the Consumer to be a carriage service provider within the meaning of the Act;
- (j) make special offers for goods or services available to the Consumer for a limited period (the special offer), where the terms of the special offer are clearly stated and the terms that apply after the special offer expires form part of the Contract;

EXAMPLES:

"Get 100 free SMS a month until 31 December 2004"

"2 free ringtones a month for the first 2 months"

where the price of SMS after 31 December and the cost of the ringtone after the first two months are notified to the Consumer or are included in the Supplier's pricing plan.

- (k) make special offers in relation to new technologies, features or services available to the Consumer for a limited period (the special offer), where the terms of the special offer are clearly stated but the terms that apply after the special offer expires do not form part of the Contract, provided that:

- (i) the Supplier provides reasonable notice to any Consumer who has used the goods or service of the terms to apply after the special offer ceases to be available;
- (ii) the Consumer is able to elect not to use the goods or services that are the subject of the special offer without attracting any additional charges; and
- (iii) the special offer is a legitimate special offer and not designed to circumvent the obligation of the Supplier in relation to the rules governing unilateral variation of prices in this Code;

NOTES:

New technologies, features or services are those that:

- *Suppliers in the industry generally have not previously offered Consumers; or*
- *the relevant Supplier has not previously offered to Consumers generally, or to an individual class of Consumer.*

The clause does not apply to aspects of services such as call costs (whether local or long distance), flag fall, voicemail deposit and retrieval, SMS or MMS fixed call cost, additional download charges for an internet service, or monthly access fees unless they relate to new technologies, features or services.

"Reasonable notice" for the purposes of subclause (i) above would be any of the methods outlined in the definition of Notice in Writing, subclause (e), excluding recorded messages.

- (l) limit the Consumer's rights to set-off any amounts payable under the Contract provided that the Supplier agrees on request of the Consumer to set-off any deposit held by the Supplier as security for amounts payable by the Consumer under the Contract when the contract terminates and:
 - (i) the amount payable by the Consumer in full and final payment of their account with the Supplier is not greater than the amount of the security deposit; and
 - (ii) the Consumer provides all consents or authorisations reasonably required by the Supplier;

NOTE: If the final amount payable is more than the amount of the security, when the Consumer pays the difference, the set off will be taken to have occurred.

- (m) require payment of a security bond by the Consumer if there are reasonable grounds to believe the Consumer is a credit risk;

NOTE: Refer to note under clause 6.2 (b)(v) in relation to reasonable grounds for suspecting a credit risk.

- (n) permit the Supplier to vary the prices of international services, provided that:
 - (i) the variable nature of the prices is clearly stated and forms part of the Contract; and
 - (ii) the applicable prices are available to the Consumer;

EXAMPLE: "International call rates subject to variation. Please contact us to confirm any prices before calling or see our website at www.yyyy.com.au."

- (o) permit the Supplier to vary the amount of international roaming charges, provided that:
 - (i) the variable nature of the roaming charges is clearly stated and forms part of the Contract; and
 - (ii) the applicable roaming charges are available to the Consumer;

EXAMPLE: "International roaming rates subject to variation. Please contact us to confirm any prices before traveling overseas or see our website at www.yyyy.com.au for indicative pricing."

- (p) permit the Supplier to impose or vary a fee or charge for a Telecommunications Product where the fee or charge is a tax imposed by law;
- (q) permit the Supplier to vary or impose a fee or charge for a service ancillary to the supply of the Telecommunications Product (such as a billing fee or credit card transaction fee) where:
 - (i) the Supplier has offered the Consumer use of a reasonable alternative at no additional fee or charge; or
 - (ii) the Consumer has been given a right to terminate the Contract without incurring fees or charges other than usage and network access charges;

NOTE: In relation to clause (q)(ii), fees or charges include those up to the date on which the Contract ends.

- (r) permit the Supplier to vary the price of a content service or premium service where the Supplier is reliant on a third party to provide the content or premium service and the variation results from an increase in price from the third party to the Supplier, provided that:
 - (i) the price of the content or premium service is clearly stated at the time it is offered with a clear statement that the price may change;
 - (ii) within a reasonable period of any proposed increase in price the Supplier provides reasonable notice of the increase to any Consumer who has used the content service within the previous six months; and
 - (iii) the Consumer is able to elect not to use the content or premium service without attracting any additional charges;

NOTE: Reasonable notice for the purposes of subclause (ii) would be any of the methods outlined in subclause (e) of the definition of Notice in Writing, excluding recorded messages.

EXAMPLE: "The price for YYY content/premium service is \$2.00 and is subject to change."

- (s) where the Supplier acquires a carriage service from a third party carrier or service provider for the purpose of resale, permit the Supplier to vary a term in a Contract where the variation results from

an amendment to the contract between the Supplier and the third party carrier or service provider (other than a related body corporate of the Supplier) for the supply of the carriage service, provided the Supplier:

- (i) issues a Notice in Writing prior to the date of the variation explaining the variation and its effect on the Consumer; and
- (ii) offers the Consumer in the notice the right to terminate the Contract within 42 days of the date of the notice referred to in subclause (i) above without incurring fees or charges other than:
 - (A) usage or network access charges (incurred up to the date on which the Contract ends); and
 - (B) any outstanding amounts that cover installation costs or equipment (where such equipment can be used in connection with services provided by other Suppliers);

EXAMPLE: Local call access from a carrier.

- (t) permit the Supplier to make changes to the characteristics, including price, of goods and services in a Contract with a Fixed Contract Period, in a manner that is likely to benefit a Consumer or have a neutral or minor detrimental impact on a Consumer. Where a Consumer demonstrates that a change has had more than a minor detrimental impact on them, the Supplier will offer the Consumer the right to terminate the Contract without incurring fees or charges other than:
 - (i) usage or network access charges (incurred up to the date on which the Contract ends); and
 - (ii) any outstanding amounts that cover installation costs or equipment (where such equipment can be used in connection with services provided by other Suppliers).

NOTE: Nothing in clause 6.3(t) precludes the Supplier offering the Consumer alternative remedies to address the impact of the change in addition to an exit right.

7 PRESENTATION OF CONTRACT TERMS

7.1 Plain Language

- 7.1.1 A Supplier must ensure that the terms of a Contract:
- (a) are clearly expressed by using words in their plain and ordinary meaning;
 - (b) are consistent in the use of definitions and other terminology; and
 - (c) that may have multiple valid interpretations are completely defined and used consistently.

NOTE: Where a Supplier uses terms such as kilobyte, megabyte or gigabyte, the terms should be defined in the Contract and used consistently in the Contract and all collateral material, i.e., always using the decimal measurement or always using binary measurement.

- 7.1.2 A Supplier must avoid the use of complex definitions or technical terms as far as is reasonably practicable having regard to the subject matter of the Contract.

7.2 Format and Structure

- 7.2.1 A Supplier must ensure that the terms of a Contract are available in writing and are legible having regard to the medium and format used.
- 7.2.2 A Supplier must take reasonable steps to ensure that any document which contains the material terms of the Contract:
- (a) is available in hard copy in a minimum 10 point font by reference to the font size of Times New Roman or equivalent size in any other font or, if also available in electronic format, is capable of being printed in that font size;

NOTE: A minimum 10 point font is recommended for all contractual documentation. However, it is not required for those parts of documents which are used for information gathering purposes only provided the relevant part is in a legible font. For example, the font size on an application form denoting "name", "address" or any other information to be completed by the Consumer may be less than 10 point to provide for economies in layout provided the overall layout is legible.

- (b) avoids clauses or paragraphs which are excessive in length;
- (c) groups the terms by subject matter or otherwise in a clear and logical order with subheadings;
- (d) includes an index or table of contents for the terms where necessary for ease of reference;
- (e) avoids excessive cross-referencing and the incorporation of terms from other documents which are not available or

accessible to the Consumer at the same time as the document;

- (f) ensures the text of the document appears in a colour that contrasts sufficiently with its background; and

NOTE:

- *Contract terms should appear in plain type fonts. Unusual graphic fonts should be avoided.*
- *Clear and contrasting text and backgrounds should be used e.g., black print on white background or other dark colour on a light background.*

- (g) brings important terms to the attention of Consumers in a manner that is reasonable having regard to the length of the document and subject matter of the Contract.

NOTE:

Suppliers should ensure that the important terms of the Contract are set out in an open and accessible manner. This may include the use of headings, grouping of terms in a logical manner, adequate spacing to differentiate the separate terms and highlighting those terms in bold text or by using equivalent format and layout techniques.

In this context, important terms include:

- * the types of charges that apply to the supply of the relevant goods or services;*
- * the amount of the charges or their manner of calculation for the relevant goods or services and any circumstance or condition that must exist before a charge becomes payable;*
- * payment obligations (including time for payment, minimum payments and late payment fees);*
- * the term of the Contract (including any minimum term) and how it may be terminated early, renewed or extended (including any notice periods);*
- * the termination rights of each party (including any notice periods or fees and charges payable upon early termination);*
- * how the Contract may be amended or varied (including the minimum period of notice before the variations take effect, how Consumers will be notified of the variations) and any rights for the Consumer to exit the Contract that may arise;*
- * how Consumers may obtain or access a copy of amended or varied terms or a complete up-to-date copy of the Contract;*
- * terms which impose liabilities upon the Consumer in addition to the obligation to pay fees and charges such as liability for damage to equipment or goods or charges for loss or failure to return Supplier property (e.g., SIM cards);*

** terms which impose conditions or restrictions which may apply to use of a service (e.g., limits on call volumes or downloads); and*

** privacy terms and conditions.*

Schedule 1 of the Telecommunications (Standard Form of Agreement Information) Determination 2003 specifies the terms and conditions of Standard Agreements which must be made available to customers in a written summary. Whether the Contract is a Standard Agreement or not, it is recommended that Suppliers include a summary of the important terms such as those specified in Schedule 1 of the Determination (particularly if it is a lengthy document).

7.3 Information Accessibility

7.3.1 A Supplier must include in the Contract, or in a document made available or accessible to the Consumer at the same time as the Contract:

- (a) a contact number for the Supplier's customer assistance line (including, if any, a telephone typewriter (TTY) number);
- (b) the contact telephone number of the National Relay Service (133 677); and
- (c) the contact telephone number of the Translating & Interpreting Service (TIS) (13 1450).

7.3.2 If the terms of a Contract are made available on the Supplier's website, the terms must be accessible in accordance with the Web Content Accessibility Guidelines published by the World Wide Web Consortium (W3C) (available at www.w3.org).

*NOTE: Other obligations on the provision of information to people with disabilities and people from non-English speaking backgrounds are contained in ACIF G586:2001 **Access to Telecommunications for People with Disabilities** Industry Guideline and the Information Accessibility rules set out in ACIF C521:2001 **Customer Information on Prices, Terms and Conditions** Industry Code.*

The policy objective of the greatest practicable use of industry self-regulation without imposing undue financial and administrative burdens on industry is central to the regulatory scheme of the *Telecommunications Act 1997*.

ACIF was established to implement the policy of industry self-regulation. It is a company limited by guarantee and is a not-for-profit membership-based organisation. Its membership comprises carriers/carriage service providers, business and residential consumer groups, industry associations and individual companies.

ACIF's mission is to develop collaborative industry outcomes that foster the effective and safe operation of competitive networks, the provision of innovative services and the protection of consumer interests. In the development of Industry Codes and Technical Standards as part of its mission, ACIF's processes are based upon its principles of openness, transparency, consensus, representation and consultation. Procedures have been designed to ensure that all sectors of Australian society are reasonably able to influence the development of Standards and Codes. Representative participation in the work of developing a Code or Standard is encouraged from relevant and interested parties. All draft Codes and Standards are also released for public comment prior to publication to ensure outputs reflect the needs and concerns of all stakeholders.



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Level 9
32 Walker Street
North Sydney
NSW 2060 Australia

Correspondence:
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
TTY 61 2 9923 1911
E acif@acif.org.au
www.acif.org.au
ABN 56 078 026 507

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