Common Telco B2C contract clauses likely to be unenforceable from March 2015

Speed read

In light of New Zealand's new unfair contract terms regime coming into force on 17 March 2015, we've updated our earlier article, *8 clauses in Telco retail contracts requiring change due to new NZ law*.

The Australian experience suggests plenty of terms in typical Telco consumer supply contracts will be non-compliant under New Zealand's new regime.

We outline examples of terms from Australian Telcos including Telstra and AAPT to show how they have been treated by regulators and tribunals. These terms range from limitation of liability provisions to early termination charge provisions. New Zealand's Telcos should be addressing these issues now.

February 2015

The Detail

This article assumes an understanding of the unfair contract terms changes to the Fair Trading Act. We've written extensively on these changes, and have compiled a summary of our articles here.

In this reprised article we look at the Australian experience and identify 8 clauses in standard Telco retail contracts requiring change under the new regime. The 2013 ACCC report[1] had a major focus on Telco terms: ACCC drove quite a few changes to the Telco's terms.

Additionally, the Australian regulators rely heavily on precursor unfair contract terms in the UK and in Victoria.[2] One of the leading Victorian cases involved review of a number of Telco terms used by a Telecom subsidiary, AAPT. We'll start with the terms in that case (and related parts of the 2013 ACCC report). Then we'll turn to other Telco terms in that report. They are just examples and there are plenty more besides (plus care is needed in translating the Victorian, Australian, and UK provisions to NZ conditions).

Context is everything in relation to the unfair contract terms regime, so the following are indicators of potential issues; the facts in each case must be addressed carefully.

AAPT's terms

In *Director of Consumer Affairs v AAPT*,[3] the relevant Victorian regulatory tribunal found against AAPT on a number of the terms in its mobile phone consumer contracts. The regulator had asked Telstra, Optus, Vodafone, '3', Orange, Virgin SIMPLUS and AAPT to make substantial changes to their terms, in response to a large number of consumer complaints. All but AAPT did this, so the regulator took AAPT to the regulatory tribunal.[4]

AAPT clauses in breach included the following (variations of which are commonly seen in NZ):[5]

- **Unilateral variation of terms**:

  "*We may vary any term of this Agreement at any time in writing. To the extent required by any applicable*

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laws or determinations by the Australian Communications Authority (ACA), we will notify you of any such variation.....To the extent permitted by law, AAPT may change a Supplier or its products, or vary our charges from time to time without notice to you. Otherwise, AAPT may vary these terms on 30 days written notice to you."

The tribunal said this was unfair as it enabled AAPT to vary the contract unilaterally, whereas the consumer couldn't. AAPT said that it had to have this right as it had upstream commitments, as an MVNO, to its supplying MNOs in the upstream agreements, and had to have such flexibility. The Tribunal disagreed.

The ability to change product, supplier or price unilaterally and without notice had additional problems. As the tribunal said, "*For example, it would enable AAPT to reduce the number of calls that a person could make pursuant to a prepaid mobile phone service which the person had entered in good faith. This term was an unfair term.*"

6 of the 11 Telco contracts reviewed by ACCC in its 2013 report also had similar problems, although 3 had balancing provisions, such as the ability for the consumer to exit following change. Of the 6, 5 agreed to change their terms during the ACCC review.

A particularly topical example for NZ, where uncapped data is provided, is the ability to cancel or suspend services for "*excessive or unusual use*". Telstra had such a clause in its Australian contracts. As a result of ACCC's review, Telstra amended the clause to provide a definition of "*excessive or unusual use*", and also provided greater transparency about when Telstra's rights would be exercised.

The 2013 ACCC report also confirms that giving notice only via the supplier's website, or similar, may be unfair in particular circumstances.

- **Suspend services**: The AAPT consumer agreement gave broad rights to suspend service, and the consumer still had to pay the on-going charges, whether or not the consumer caused the suspension. That was too wide and therefore an unfair contract term, even though AAPT said they were simply reflecting the upstream terms imposed by MNOs, Telstra, Vodafone and Optus. (There are issues to resolve around when and if a retail supplier can rely on onerous upstream provisions to enable it to impose otherwise unfair contract terms).

- **Termination rights**: AAPT could terminate the agreement immediately by notice if the consumer breached the agreement, or changed its address or billing contact details. These were unfair contract terms as AAPT could terminate even if the breach or change of address was inconsequential.

ACCC's *Unfair Contract Terms: Industry Review Outcomes* (2013) report

This report reviewed 11 Telco consumer contracts. In addition to the points above, and points relevant to Telcos made as to other industries, the following Telco issues were raised.

Consumer liable for things ordinarily outside their control

Telco contracts often have terms to that effect, such as in relation to usage of the phone or internet service. ACCC had

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concerns with 4 of the Telco contracts, and 3 Telcos made substantial changes. For Telcos, this is an important issue.

There's a good example of this issue in our article, *To read or not to read.....on-line terms? Or Hamlet?*. In the *Spreadex* case referred to in that article, an online betting business sued its customer for gambling losses racked up by the young son of the customer's girlfriend. The clause making the customer liable for unauthorised use - Clause 10(3) - was buried in 49 pages of terms. Under the UK unfair contract terms legislation,[6] the clause was not effective. As the judge said: "*..it would have come close to a miracle if he had read the second sentence of clause 10(3), let alone appreciated its purport or implications, and it would have been quite irrational for the claimant to assume that he had.*"

While Telco terms will usually be a lot less than 49 pages, it may not take much to make such a term unenforceable.

Terms preventing consumer from relying on representations by the business or its agents

ACCC said this was a particular issue for Telcos. Telco, Dodo, for example, had a clause that stated:

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

Following discussions with ACCC, Dodo deleted the clause. Such a clause can be an issue under the CGA, plus the new unfair contract terms regime (as well as under the FTA). 4 of the 11 Telcos had, said ACCC, problems in this area.

Terms seeking to limit consumer guarantee rights

Several Telcos had problematic clauses in this area. For example, Telco, TPG had this clause:

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

As a result of pressure from ACCC, TPG removed this clause, due to concerns under the consumer guarantees regime (this would also be an issue under the unfair contract terms regime).

One issue is that a CGA carve out (stated only briefly and not transparent to consumers) may not be compliant (increasingly so under the new regime).

Transparency and accessibility

This is a mandatory consideration when deciding whether terms are unfair, both in NZ and Australia. The ACCC report highlights the importance of this. ACCC also positively noted Telstra's approach of developing a one-page summary of the service for consumers. But real care is needed there too, given some important detail (e.g. ETCs) might be excluded from the one-pager, and therefore fall foul of the law.

Take the online betting example above, with the term that makes the customer liable for other's use (which is also a typical Telco term). Getting that term into a one-pager, along with other terms of significance, would be very challenging and, generally, not practical. By focusing only on limited terms, the position could even be worse.

Other issues

Price and product differentiation

One of the interesting and challenging questions will be as to how Telco product/price differentiation should be handled. What about a service with low pricing, based on low flexibility of service, compared to the same Telco's product

with higher pricing and more flexibility? Not only is that product differentiation ubiquitous in telecommunications but it is also economically efficient and should not be discouraged.

Not surprisingly, that's an issue for Jetstar with its low pricing and flexibility, and higher pricing to change the service as a trade. The Victorian courts have touched on this in *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, a case that Jetstar won when a traveller with a very low fare ended up paying a lot for a service change. The case highlights that, under both the Australian and the NZ regimes, the term is considered in the total context of the agreement; one term might balance or off-set another.

Early termination charges

Much has happened to the law relating to ETCs, as we reported in our article, *Early termination charges – major developments (and for the penalties regime)*. Add now the implications of the unfair contract terms regime, and the overlapping CGA regime. ETCs, depending on how they are drafted, could fall foul of both regimes. Even now, a contract that only allows a consumer out by paying an ETC may be in breach of the CGA.[7] Going forward, there are additional challenges to ETC under the unfair contract terms regime.

Upfront price carve-out

One of the unusual differences between the Australian and the NZ unfair contract terms regimes is that the NZ upfront price carve out (noted in our article, *New NZ Law - many consumer supply contracts potentially illegal by late 2013*) carves out conditional payments, whereas the Australian regime does the opposite. It's a difficult thing to delineate pricing that should be in and out of the regime: the choice here may make a substantial difference. For example, fees for services provided subsequently may be carved out of the NZ regime but not in the Australian regime. This will need careful consideration as to charges such as for Moves, Adds and Changes (MACs), etc. We've gone into more detail on this important issue for Telcos in our article, *Bank charges class action: how would that play out under new NZ consumer law, and implications for other suppliers?*.

1. Australian Competition & Consumer Commission *Unfair Contract Terms: Industry Review Outcomes* (14 March 2013).

2. Noting, however, the differences between the statutory regimes in each case.

3. (Civil Claims) [2006] VCAT 1493.

4. Consumer Affairs Victoria *Mobile phone providers – unfair contract terms*.

5. Note that the *Jetstar* decision noted below has some observations, not addressed here, on the *AAPT* decision.

6. Cases from the UK are relevant but must be analysed based on the NZ legislation.

7. See, e.g., page 9 of the ACCC report.

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