

Victorian Court Action Over Alleged Unfair Terms In Mobile Phone Contracts

Bridget Edghill reviews the action taken by the Victorian Government in relation to alleged unfair terms in mobile phone contracts.

The Victorian Bracks Government has launched proceedings against Telecom Corp of New Zealand's (NZT) Australian telecommunications subsidiary, AAPT. The court action seeks to force AAPT to remove a number of terms from their mobile phone contracts which it considers to be unfair in light of the *Fair Trading Act 1999 (Vic) (Act)*.

The proceedings in the Victorian Civil and Administrative Tribunal (VCAT) allege that certain terms of the AAPT contract contravene the Unfair Terms in Consumer Contracts provisions contained in Part 2B of the Act. Pursuant the Act, a contract term is considered 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.”

The Victorian Consumer Affairs Minister, John Lenders observed that *“there are 11 clauses within AAPT’s mobile phone contract and seven terms in their prepaid phone contracts that we allege are unfair and therefore void.”*¹

COMMON TERMS DEEMED TO BE UNFAIR

The legal action arose after Consumer Affairs Victoria wrote to Telstra, Optus, AAPT, ‘3’, Orange, Virgin and SIM PLUS in August 2004, urging them to co-operate with Consumer Affairs Victoria to modify their consumer contracts to comply with the Act.

In particular, the Victorian Government identified a number of common terms in mobile phone contracts that it considers to be unfairly biased towards suppliers²:

- *Lock-in-terms (unilateral change terms)* that allow the supplier to vary important terms of the contract, or to perform it in a different way to that agreed or expected by the consumer. These terms enable the supplier to make these changes without providing fair and reasonable adjustments, or without the consumer being allowed to terminate the contract without penalty.
- *Punitive dispute resolution terms* that prevent or restrict the consumer's options regarding dispute resolution, with the effect of putting pressure on the consumer to give up, or settle on terms favourable to the supplier.
- *Restriction of reliability* that avoid, limit or restrict the liability of the supplier, its servants or agents for breach of the contract.
- *Penalty clauses* that unfairly inhibit consumers from exercising their rights.

Each supplier, with the exception of AAPT, agreed to work with Consumer Affairs Victoria to review and discuss their mobile phone contract terms. In light of AAPT's apparent unwillingness to cooperate, Victoria's Director of Consumer Affairs, David Cousins, commenced the proceedings which allege that certain term in AAPT's standard telephone and pre-paid mobile phone contracts contravene the Act as the terms allow AAPT to unilaterally change the contract and suspend services without notice, later charging a reconnection fee.

IMPACT OF DECLARING TERMS 'UNFAIR'

Pursuant to section 32Y of the Act, if Consumer Affairs Victoria is successful in having the terms declared to be unfair, the unfair terms will be void.

With more than 14 million mobile phones in Australia³, terms similar to those identified as being unfair by the Victorian Government are commonplace in phone contracts. A ruling in favour of AAPT will undoubtedly lead to other suppliers reviewing their own contracts.

The other telephone service providers were given until the end of 2004 to review their consumer contracts and notify the Victorian Government as to their actions and progress in modifying their own contracts to ensure that they comply with the Act. Service providers that fail or refuse to do so may risk being included in the action against AAPT.

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¹ AAP, "Vic Govt launches action against AAPT", 15 December 2004, The Age

² Media Release from the Minister for Consumer Affairs, "Bracks Government Puts Mobile Phone Companies on Notice to Comply with Victorian Fair Trading Law", 8 August 2004, available at

http://www.consumer.vic.gov.au/cbav/fairsite.nsf/pages/of_media_releases_080804?Open

³ "Vic Govt goes after mobile phone companies with new fair trading law" 10 August 2004, available at <http://www.wps.com.au/news.html?newskey=476>.