



AUGUST 2013

COMPETITION & REGULATION UPDATE

ACCC OBTAINS ITS FIRST UNFAIR CONTRACT TERMS
DECLARATIONS: *ACCC V BYTECARD PTY. LIMITED*

The Australian Competition and Consumer Commission's (ACCC) first case¹ solely based on the unfair contract terms provisions of the Australian Consumer Law² (ACL) has resulted in the Federal Court declaring by consent that four terms in that standard form contract are unfair contract terms and therefore void (ie. of no effect).

ABOUT THE CASE

Background

Bytecard Pty. Limited (better known as NetSpeed Internet Communications) is a provider of internet access services throughout Australia. NetSpeed offers its services under standard form contracts that include a list of 'Terms and Conditions' (T&Cs).

The case concerned the T&Cs in use during the period from 1 January 2011 to April 2013. The terms declared void are set out in full in the [attachment](#) at the end of this Update.³

The ACCC's concerns

The ACCC was concerned that four terms in the T&Cs were unfair terms of a consumer contract,⁴ and hence void under section 23 of the ACL.⁵

¹ DLA Piper acted for the ACCC in this proceeding.

² Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

³ Following the commencement of the proceeding, NetSpeed amended the T&Cs, including for existing customers.

⁴ A consumer contract is defined by section 23(3) of the ACL to be a contract for a supply of goods/services or a sale/grant of an interest in land to an individual whose acquisition of the goods/services/interest is wholly or predominantly for personal, domestic or household use.

⁵ Section 23(2) of the ACL provides that the balance of the contract continues to bind the parties if it is capable of operating without the unfair term.

In determining whether a term of a consumer contract is unfair,⁶ the extent to which the term is transparent⁷ and the contract as a whole must be taken into account.⁸

Under the now void unfair terms in its T&Cs, NetSpeed was able to:

- unilaterally vary the amount payable under its contracts without prior notice, however it did not have to allow consumers to terminate to avoid the obligation to pay the varied amount or an opportunity to negotiate;
- require the consumer to indemnify NetSpeed in any circumstances (including where the consumer was not in breach of the contract and any loss may have been caused by NetSpeed's breach and even wilful misconduct) yet there was no corresponding term applicable to NetSpeed;
- terminate its contracts at any time without cause while the consumer's right to terminate was subject to conditions.

It was agreed that each of the terms are unfair as:

- they would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- they were not reasonably necessary in order to protect the legitimate interests of NetSpeed being the party who would be advantaged by the term; and
- they would cause detriment (whether financial or otherwise) to a consumer if applied or relied on by NetSpeed.⁹

WHAT THE CASE MEANS FOR BUSINESSES THAT USE STANDARD FORM CONTRACTS

The Chairman of the ACCC, Rod Sims said this case '...acts as a warning to businesses. The ACCC won't hesitate to take action against businesses who continue to include unfair terms in their standard form consumer contracts...this matter is a timely reminder for all businesses to review their consumer contracts to ensure that potential unfair contract terms are removed or amended.'¹⁰

What you should look for when reviewing your contracts

If you use standard form contracts¹¹ for dealings with consumers, this case highlights that you should consider the following questions:

Variation

Do your contracts entitle you to unilaterally vary the amount payable to you without providing consumers with:

- prior notice; or
- an opportunity to negotiate varied terms?

⁶ Section 25(1) of the ACL provides a non-exhaustive list of examples of the kinds of terms of a consumer contract that may be unfair.

⁷ Section 24(3) of the ACL provides that a term is transparent if it is:

- a. expressed in reasonably plain language; and
- b. legible; and
- c. presented clearly; and
- d. readily available to any party affected by it.

⁸ Section 24(2) of the ACL.

⁹ As required by section 24(1) of the ACL.

¹⁰ ACCC media release, 30 July 2013 available at <http://www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair>.

¹¹ Under section 27(1) of the ACL a contract is presumed to be a standard form contract unless another party proves otherwise. Section 27(2) of the ACL provides a list of matters the Court must take into account when determining this issue including whether a party was given an effective opportunity to negotiate the terms.

Indemnities

Do your contracts require the consumer to indemnify and hold you harmless in any circumstances, even where:

- there may have been no breach of the contract, negligence or other wrongful act on the part of the consumer; or
- the liability, loss, claim, judgment or damage may have been caused or contributed to by your own breach of the contract, your negligence, your wilful misconduct or other wrongful act?

In contrast, is there no corresponding term that requires you to indemnify your customers?

Termination

Do your contracts entitle you to terminate at any time without cause or reason and without giving compensation to the consumer?

In contrast, is the consumer's right to terminate conditional upon the consumer taking certain actions such as providing notice to you in writing by a certain date, paying all accounts in full and paying a cancellation fee or similar?

If you answered yes to any of the above questions we recommend that you seek advice on the compliance of your contract with the ACL.

RELATED ARTICLE

[Click here](#) for our related update from March 2013 on 'The ACCC review of unfair contract terms for online retailers.'

MORE INFORMATION

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ATTACHMENT: THE T&CS THAT WERE DECLARED VOID

The relevant T&Cs were:

Section 1.7: *NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.*

Section 4.1: *The User agrees to indemnify and hold NetSpeed, its affiliates, its licensors, its contractors or their respective employees harmless against any and all liability, loss claim, judgment or damage. This indemnity includes, but is not limited to an indemnity against all actions, claims and demands (including the cost of defending or settling any actions, claim or demand) which may be instituted against us, as well as all expenses, penalties or fines (including those imposed by any regulatory body or under statute).*

Section 4.2: *The User agrees to indemnify NetSpeed for any expenses including, but not limited to:*

- a. attorney's fees and cost of litigation,*
- b. its licensors,*
- c. its contractors or their respective employees as the result of any and all use of User's account whether authorised or not authorised or as a result of the negligence,*
- d. wilful misconduct, or*
- e. breach of any of the terms of this Agreement by User, (including but not limited to claims, liabilities, losses, damages, judgments and costs),*
- f. disruption to User's telephone services during the installation of an ADSL Service.*

Section 6.5: *With the exception of obligations under the Broadband Guarantee Program, NetSpeed reserves the right to terminate any account at any time with or without cause or reason. In the event that NetSpeed would choose to take this action the User understands and agrees that the Users (sic) only compensation would be a prorated refund for the current period that User has already paid.*