

Annex II: Examples of Unfair Terms in Consumer Contracts

Some examples of contract terms which are allegedly unfair in ACA's opinion are provided below. Examples are taken from contracts for lending, telecommunications, and e-commerce. We should not that it was only necessary to pick up contracts that were to hand to create a quite long list of contract terms that do not appear to us to fair – whole industries that tend to use standford form agreed terms are not included in this listing. It is quite clear unfair and unjust terms are not difficult to find.

The examples below are intended to illustrate the types of terms that we believe should be able to be examined for fairness by a regulator under appropriate provisions in the Trade Practices Act and mirror provisions in other relelvant Acts.

A. Lending Contracts

The following examples are taken from a small selection of contemporary standard contracts of mainstream lenders.

Unilateral change clauses

Many major lenders include unlimited or very broad unilateral change clauses in their standard form home loan, personal loan and credit card facilities. The Commonwealth Bank's current *Usual Terms and Conditions for Consumer Lending* [PF 1] is typical. Clause 10.4 states in part:

For time to time we may:

- a) change the amount of or basis for calculating any fee or charge, change the interest or fee charging cycle, or both, and, except during any fixed interest rate period of the Loan, change any interest rate margin, any link to a reference interest rate and the basis for calculating interest;*
- b) impose and debit to the Loan Account any new fee or charge;*
- c) change the frequency of repayments;*
- d) change the Loan Account number ...;*
- e) change the way we describe any reference interest rate; and*
- f) change any other terms and conditions.*

The right, under f), to change unilaterally *any* term in the contract goes well beyond the well-established and accepted practice of lenders offering products that allow alteration of interest rates and/or fees and charges over the course of the loan term.

Tendentious default provisions

Some major lenders include in the General Conditions for their home loan contracts a clause to the effect that the customer/ borrower is in default if they breach *any* term of

any agreement they have with the lender. Clause 7.1 of the Colonial State Bank Home Loan General Conditions [NS.379 (2/97)] is typical:

You are in default under this contract if:

- a) you breach any term of this contract;*
- b) there is a default under the security;*
- c) you breach any term of any other contract or security you have with us;*
and,
- d) we believe on reasonable grounds that we were induced to enter this contract or the security by fraud*

On the basis of this term, a borrower who also had a credit card facility with the bank would not only be in default if they breached any term of the home loan agreement (however minor or technical), they would also be in default *under the home loan* if they got behind with their credit card payments.

Such clauses are also found in other consumer credit facilities apart from home loans, including the GE Capital Finance's credit card (*Buyer's Edge Credit Contract*, effective Nov 2001). Indeed, the GE facility agreement manages to go further. Thus, by virtue of Clause 23.2:

You are in default if:

- (a) you breach any term of the credit contract or the terms of any other agreement or security you have with us; or*
- (b) any information you give us in connection with applying for the account is false or, in our opinion, misleading (by omission or otherwise); or*
- (c) we consider there has been a material adverse change in your financial circumstances.*

So if, in GE Capital Finance's view, there has been "a material adverse change" [see sub-clause c)] in the borrower's financial circumstances - whether or not he or she has breached any obligation under any agreement with the company - the borrower is deemed to be in default (and therefore obliged to pay any outstanding balance in full immediately: Clause 23.1). To ensure that GE becomes aware of any such adverse change, the contract contains another oppressively broad clause [32.1] requiring the consumer to "to notify us promptly of *anything* which might adversely affect your ability to meet your obligations to us" (emphasis added). Ordinary consumers meeting their payment obligations may wonder both *why* they should be required to keep GE informed of any deterioration in their financial circumstances and *why* GE can make them defaulters just because their circumstances have deteriorated.

Note also that, in contrast to the Colonial State term, under the GE Capital Finance default clause, the borrower will be in default if *any* information they give or fail to give GE (whether or not material to the decision to lend) is false or misleading *in GE's opinion* (whether or not there is a reasonable basis for that opinion).

The *St George Personal Loan General Terms and Conditions* (as at 19 February 2001) provide a further example of tendentious definitions of when the customer is in "default". Clause 11 c) states, inter alia, that the borrower will be in default if:

... you give, or another person gives, us incorrect or misleading information in connection with this loan agreement or a security (emphasis added)

The extension to 'another person' is unreasonable. St George may obtain information from third parties whose accuracy the consumer has no control over and cannot be expected to vouch for.

Evidence clauses

Clauses that confer a particular evidentiary value upon certificates or other documents issued or held by lenders or third parties are frequently used in standard loan and security agreements. Generally, such clauses may be acceptable where they do no more than create a presumption - which it is open to being rebutted - that information contained in the lender's certificate or other document is accurate ('sufficient' or 'prima face' evidence clauses). However, some evidence clauses go further and attempt to deny or greatly restrict the consumer party's ability to challenge information contained in certificates and other documents etc ('conclusive' evidence clauses). Although conclusive evidence clauses have been extensively criticised by the Courts as being unnecessary to protect the legitimate interests of finance providers, they continue to be found in consumer credit and security contracts.

An example is Clause 4.4 of AGC's credit card facility, the AGC CreditLine Conditions [AGB058 (11/01)]:

Unless fraud or negligence is apparent, you [the customer] agree that an amount shown on a sales voucher or other transaction record is conclusive evidence of the price of the goods or services or the amount of the advance to which that voucher or transaction record relates.

Onerous obligation on the customer to keep credit card on them

Clause 6.2 of the AGC CreditLine Conditions requires the customer to carry their AGC credit card with them "whenever you can". Ostensibly this is to "protect your credit card". However, it would appear to have at least two other advantages from AGC's point-of-view. First, carrying the card will obviously facilitate impulse spending – "*If you need it, you've got it with CreditLine*". Secondly, the Clause may be of assistance to AGC in disputing liability in the event of unauthorised use of the card in circumstances where the card was not on the cardholder's person immediately prior to being stolen (eg it was stolen from the customer's home or workplace).

B. Telecommunications contracts (actual clause numbers not used)

Telecommunications contract terms, especially for mobile phone contracts, exhibit many of the same or similar features to the lending contract terms noted above. The following examples are from One.Tel, Primus, and Orange. The terms display examples of: unilateral change clauses, change without notice, clauses relying on contract terms not provided to the consumer, unilateral rights to apply a decision without explanation or guideline, “entire agreement” clauses attempting to exclude any reliance on verbal or advertising representations, unspecified and arguably unlawful penalty clauses, clauses excluding any responsibility for fit for purpose requirement under the law, and a more specific attempt to exclude any reliance on representations.

One.Tel

- a. "If you have not completed any part of this One.Form, you authorise One.Tel to complete this One.Form on your behalf and you agree to be bound by the completed form as if you had completed all parts of this One.Form before you signed it.
- b. "Additional terms will apply to special One.Tel promotions and offers of other products accepted by you. One.Tel will provide a copy of those additional terms if requested by you. Those additional terms will apply together with these terms.
- c. "One.Tel may vary charges or rates or charge to you any taxes or duties imposed in relation to the Services at any time without prior notice to you.
- d. "One.Tel may impose a credit limit on your account and/or require the payment of a security deposit or interim payment at its sole discretion and at any time.

Primus

- a. "This Agreement contains the entire understanding and agreement between the parties as to its subject matter. No oral explanation or information provided by any party to another shall affect the meaning or interpretation of this Agreement or constitute any collateral agreement warranty or understanding between the parties.

Orange

- a. "If you choose to cancel your agreement before the end of the minimum term you will be required to pay a cancellation fee [not specified].
- b. "If any product (including any handset and accessories) is faulty or not functioning it will be your responsibility to have it repaired or replaced so you can continue to use the service and you must continue to pay for the service.
- c. "We may require you to pay your account at any time if we consider that you exceed a reasonable limit on your account.
- d. "You agree you have not relied on any representation made by Orange that the service will be free of interruptions or faults and you are responsible for making your own assessment of whether you need continuous or fault free service.

C: Other examples: Clickwrap contracts (services provided through the Internet)

As provision of goods and services online becomes more common, consumers are increasingly clicking on the “I Accept” icon before entering a site or downloading

software. The idea behind these agreements – called clickwrap contracts¹ – is that the consumer accepts the terms of conditions on which goods and services are being offered prior to purchase (see www.choice.com.au/articles/a103199p1.htm). Like other contracts of adhesion where the consumer is in a “take or leave it” position, clickwrap contracts contain terms that are unfair.

Many clickwrap contracts for software also purport to prohibit a person from publicly reporting an evaluation of their product – a “red rag” for testing and research consumer organisations which would never submit to a prior consent clause before reporting their findings (but cannot get access to the product without passing through the clickwrap contract!). As an example:

From McAfee.com’s Software License Agreement for Evaluation Version of VirusScan 4.0:

- 2) The customer shall not disclose the results of any benchmark test to any third party without Network Associates' prior written approval.
- 3) The customer will not publish reviews of the product without prior consent from Network Associates.

The following examples of business-to-consumer clickwrap contract terms range from types of terms which are often also found in print contracts, to bizarre new attempts to limit risk to the supplier in the e-commerce market.

Westpac Online Banking terms and conditions includes a clause arguably excluding ‘fit for purpose’:

“We will not be liable for:

- Any parties (sic) reliance on the information obtained through use of Internet Banking; or
- Any failure or delay of Internet Banking to provide information or perform operations requested.
- In any event other than our negligence, fraud or wilful misconduct, an amount in excess of \$500 ...”

AMP’s eservice terms and conditions: arguably excluding fit for purpose as well as having the consumer agree transference of risk for negligence:

“Your Trustee and AMP and its directors, officers, employees, consultants, advisers and associates do not accept any responsibility arising in any way (including by reason of negligence) for error in, and omission from, the information and do not accept any responsibility for any loss or damage, however caused, as a result of any person relying on any information contained in eServices.”

Examples of Clickwrap contracts from ‘new economy’ companies:

¹ Also called “shrinkwrap” and “click-on” contracts.

From the MSN.com (Microsoft) Website “Terms of Use and Notices” – a warranty and liability disclaimer clause:

MICROSOFT CORPORATION AND/OR ITS RESPECTIVE SUPPLIERS MAKE NO REPRESENTATIONS ABOUT THE SUITABILITY, RELIABILITY, AVAILABILITY, TIMELINESS, AND ACCURACY OF THE INFORMATION, SOFTWARE, PRODUCTS, SERVICES AND RELATED GRAPHICS CONTAINED ON THE MSN WEB SITES FOR ANY PURPOSE. ALL SUCH INFORMATION, SOFTWARE, PRODUCTS, SERVICES AND RELATED GRAPHICS ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND. MICROSOFT AND/OR ITS RESPECTIVE SUPPLIERS HEREBY DISCLAIM ALL WARRANTIES AND CONDITIONS WITH REGARD TO THIS INFORMATION, SOFTWARE, PRODUCTS, SERVICES AND RELATED GRAPHICS, INCLUDING ALL IMPLIED WARRANTIES AND CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. IN NO EVENT SHALL MICROSOFT AND/OR ITS SUPPLIERS BE LIABLE FOR ANY DIRECT, INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, CONSEQUENTIAL DAMAGES OR ANY DAMAGES WHATSOEVER INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF USE, DATA OR PROFITS, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE USE OR PERFORMANCE OF THE MSN WEB SITES, WITH THE DELAY OR INABILITY TO USE THE MSN WEB SITES OR RELATED SERVICES, THE PROVISION OF OR FAILURE TO PROVIDE SERVICES, OR FOR ANY INFORMATION, SOFTWARE, PRODUCTS, SERVICES AND RELATED GRAPHICS OBTAINED THROUGH THE MSN WEB SITES, OR OTHERWISE ARISING OUT OF THE USE OF THE MSN WEB SITES, WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, EVEN IF MICROSOFT OR ANY OF ITS SUPPLIERS HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGES. BECAUSE SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY NOT APPLY TO YOU. IF YOU ARE DISSATISFIED WITH ANY PORTION OF THE MSN WEB SITES, OR WITH ANY OF THESE TERMS OF USE, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE MSN WEB SITES.

From Gator.Com’s “Software License and Terms of Service Notice” for Gator:

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FEES FOR, ANY CLAIM BASED UPON: (I) ANY METHOD OR PROCESS IN WHICH THE SOFTWARE OR SERVICES MAY BE USED BY YOU; (II) ANY RESULTS OF USING THE SOFTWARE OR SERVICES; (III) ANY USE OF OTHER THAN A CURRENT UNALTERED RELEASE OF THE SOFTWARE; OR (IV) THE COMBINATION, OPERATION OR USE OF ANY OF THE SOFTWARE OR SERVICES FURNISHED HEREUNDER WITH NON-GATOR.COM PROGRAMS OR DATA IF SUCH INFRINGEMENT WOULD HAVE BEEN AVOIDED BY THE COMBINATION, OPERATION, OR USE OF THE SOFTWARE OR SERVICES WITH OTHER PROGRAMS OR DATA.

From a set of CD's containing royalty-free audio samples in PCM WAV format, a totally bizarre term in the license agreement:

(h) Low moral and illegal use: It is absolutely inadmissible to use the software or single pictures, graphics, sound, and videos in any form for a working result where they fringe the ruling general moral decency feelings or the religious opinion of a third party. It is absolutely inadmissible to use the software or single pictures, graphics, sound and videos in any form for a working result where they fringe the ruling general moral and decency for working results with pornographic contents or for working results with contents which incites to discrimination of cruelty or any inhuman violence against human beings in any kind described. Which express glorify or plays down such violence which the cruelty or any inhuman of an event in a human dignity to infringe the way described or the connection with propaganda materials of constitution adverse organization or assessment or the use of a sign of constitution adverse organization.

D. Other Contractual Issues – Financial Intermediaries

This following is an example from the financial planning industry of a fairly typical authority which consumers are requested to sign. The requirements go well beyond what a planner should need to have access to in order to carry out their function. The planner (or others within a firm) has access, under this type of authority, to such substantial information about the consumer, that assuming the consumer's identity for fraudulent purposes would be quite easy.

Client Authority for My Financial adviser to Obtain Certain Financial Information

- To enable my Financial Planner, _____, of XXX Financial Planning Pty to review my financial affairs, I authorise XXX to:
- Obtain from any Bank, Building Society, Credit Union, Life Insurance Office, Fund Manager or Financial Institution, details of any transaction with them including the provision of bank statements.
- Obtain from any third party(s) including Accountants, Real Estate Agents, customers/suppliers, Lawyers, State and Federal Government Departments, Insurance Companies and Superannuation Funds, details of any transactions of a financial nature with them.

- Obtain from my employer, details of any information about my salary/wages, superannuation benefits and insurance protection options.

Appendix II-a: Black and White List of Consumer Contract Terms in Telecommunications Contracts

Black List of Consumer Unfriendly Terms

This document sets out a number of types of clauses, which, if included in a telecommunications contract – whether the exact wording used here is chosen, or wording of similar effect – are detrimental to the interests of the consumer. If a contract includes a number of the clauses outlined and there is no option to negotiate the terms, the contract may be open to challenge on the basis of unconscionability. The inclusion of any one of these clauses represents a departure from best practice.

Provision of Information

The contract:

- B1.1 Contains purported acknowledgement by the consumer that certain documents have been provided.
- B1.2 Fails to provide information about how the consumer may complain.
- B1.3 Purports to exclude representations made by or on behalf of the company whether verbal or written, whether made by the company's officers, employees, agents or contractors.
- B1.4 Contains limitation of liability clauses that fail to acknowledge that TPA warranties cannot be excluded.
- B1.5 Purports to exclude representations about quality of service (including coverage).

Clarity and Intelligibility

The contract:

- B2.1 Is excessively long or uses excessively long sentences, clauses or paragraphs.
- B2.2 Contains extensive cross-referencing.
- B2.3 Uses print of less than 11 point font.
- B2.4 Uses print of less than 11 point to qualify a representation in larger print.
- B2.5 References other documents not provided to the consumer on the spot.
- B2.6 Refers to definitions in other documents.

- B2.7 Fails to define key terms.
- B2.8 Calls up the SFOA.
- B2.9 Contains technical, legal or other forms of language other than plain English.

Fees and charges

The contract:

- B3.1 Fails to disclose all applicable fees and charges.
- B3.2 Contains penalty fees i.e. fees that are not a reasonable pre-estimate of loss.
- B3.3 Permits the charging of late payment fees.
- B3.4 Imposes charges where disconnection is the fault of the supplier.
- B3.5 Includes termination fees which include charges for services that will not be provided.
- B3.6 Contains billing charges (however described).
- B3.7 Levies fees on termination of the contract by the consumer that are not a reasonable pre-estimate of loss.
- B3.8 Permits suspension of service for late payment.
- B3.9 Permits the levying of a bond or security deposit.
- B3.10 Permits the levy of number porting fees.
- B3.11 Permits the levy of fees and charges for other service changes.
- B3.12 Provides that all prices, fees and/or charges are subject to change without notice.
- B3.13 Allows only one method of payment, which method is not face to face.
- B3.14 Permits direct debit payment only.

Credit Reporting

The contract:

- B4.1 Fails to outline the company's credit management policy.
- B4.2 Permits credit reporting of any amount outstanding.
- B4.3 Permits the company to make a credit report without notifying the consumer.

B4.4 Permits the company to refuse service provision for past or related product failure.

Usage

The contract:

B5.1 Penalises low usage.

B5.2 Penalises high usage without adequate monitoring or information provision to the consumer.

B5.3 Provides that stored value will expire after a specified period.

B5.4 Permits variation to usage conditions or per-call prices of stored-value products after purchase.

Variation and Transfer

The contract:

B6.1 Allows variation of terms by the company at any time or without notice.

B6.2 Does not allow the consumer to terminate the contract or penalises termination where variation occurs.

B6.3 Does not require the consumer to be notified of any variation.

B6.4 Permits the supplier to assign the contract without notice and a right of termination being provided to the consumer.

B6.5 Does not provide equal or equivalent rights to the supplier and the consumer.

B6.6 Provides for notice to consumers other than individual notice (eg by advertisement or on a web-site).

B6.7 Permits charges to be levied on consumers for the provision of notice.

B6.8 Does not require the explicit informed consent of a consumer to transfer.

Entry, Termination and Disconnection

The contract:

B7.1 Permits the supplier to extend the term of the agreement at any time or without notice.

B7.2 Purports to obtain consumer consent to the collection, use or disclosure of their personal information for purposes other than the supply of the services subject of the contract.

B7.3 Permits suspension/disconnection of service where the parties are in dispute.

- B7.4 Permits suspension/disconnection of service for non-payment of third party charges.
- B7.5 Permits suspension/disconnection of service for non-payment of charges for other services provided by the company (bundled or otherwise) that are unrelated to the primary purpose of the contract.
- B7.6 Does not include a requirement to notify the consumer of suspension or disconnection.
- B7.7 Renders the consumer liable under the contract where the equipment is lost, stolen, damaged or defective.
- B7.8 Excludes insurance cover where the consumer has payments outstanding.
- B7.9 Purports to remove a consumer's right to complain after the expiration of a certain period.
- B7.10 Purports to remove the consumer's right to criticize or report the company.
- B7.11 Fails to inform the consumer of applicable complaint and dispute resolution procedures or entry points.
- B7.12 Permits variation of the contract by persons other than the authorised consumer.

White List of Consumer Friendly Terms

This documents sets out a number of principles which form part of any consumer-friendly contract (see headings in bold) and a list of specific clauses or clause types which should form part of a consumer friendly contract (see clauses accompanying the check boxes).

It is necessary for a company² to comply with the general principles and the checklist in substance before a contract will be classed as consumer friendly.

Principle 1: Comprehensive and accurate information should be provided to consumers

The contract:

- W1.1 Is in writing (whether in hard copy or electronic form).
- W1.2 Is in two parts – Part I provides a summary of the following clauses:
- Termination rights

² The term “company” in this document means the provider of telecommunications goods or services, whether alone or in conjunction with other products.

- Price, fees and charges
 - Term
 - How the contract may be varied
 - Description of service
 - Coverage of mobile services
 - Disclosure of limitations to service eg limited use of override codes
 - Cooling off rights
- Part II provides a complete set of contract terms.

W1.3 Provides examples of how consumer significant clauses may operate in practice.

W1.4 Undertakes to provide bills which set out the consumer's position with the company, including the following matters:

- The remaining period of the contract
- A total payout figure for the contract
- The status of the service including
 - authorised account holder/s
 - 1900 option on/off
 - overseas calling on/off
 - calling number display on/off
- Information about the availability of itemisation on request

W1.5 Outlines the consumer's right to complain including the company's internal dispute resolution (IDR) process and the availability of the TIO. The company's IDR system should extend to handset complaints.

W1.6 Provides standardised call rates (per minute) for call cost comparisons.

W1.7 If in electronic form, must be easily downloaded by the consumer.

Principle 2: Clarity and Intelligibility

The contract:

W2.1 Does not exercise the option to call up the Standard Form of Agreement under Part 23 of the Telecommunication Act 1997 ("SFOA").

W2.2 Is not excessively long, does not use excessively long sentences, clauses or paragraphs.

W2.3 Is in 11 point font or larger.

W2.4 Uses plain English see eg. NRMA Contract. Avoids technical and legal jargon and where use of such language is unavoidable, provides explanations.

W2.5 Uses headings to increase intelligibility.

W2.6 Is available in large print format.

W2.7 Is available in languages other than English – at a minimum the top five non-English languages spoken in the company’s supply territory.

Principle 3: Fairness – including symmetry of rights and obligations as between the consumer and the company.

Contracts and advertising

The contract:

W3.1 Is consistent with sales representations (including verbal representations from customer service representatives or salespeople and marketing material) eg. if the handset is stated to be “free” in advertising, it must be free in all circumstances, including early termination.

W3.2 Delivers the key selling message contained in advertisements relating to the service or product subject of the contract.

Fees and charges

The contract:

W3.3 Outlines the circumstances in which fees can be applied.

W3.4 Discloses all fees and charges.

W3.5 Specifies termination fees that are a reasonable pre-estimate of loss or provides a formula for calculation.

W3.6 Limits the amount of operational fees to the cost of provision of service (and where they exceed \$5 must be the basis of further negotiation with consumers).

W3.7 Preferably does not charge late payment fees but if they are charged, the fees are calculated with reference to cost.

W3.8 Preferably does not allow price increases for the life of the contract, but if they are allowed, limits the amount of price increase that is permitted for the life of the contract to CPI.

W3.9 Allows the consumer the option of terminating the contract without penalty where a price increase greater than CPI is sought.

W3.10 Clearly sets out payment terms. A benchmark example appears in Appendix A.

W3.11 Undertakes that the company will notify the consumer where charges exceed a pre-agreed limit.

W3.12 Provides that no fee applies for infringing a minimum use clause.

W3.13 Requires an opt-in to access premium services including international calls, 1900, gambling lines, sex or introduction lines.

Credit Reporting

The contract:

W3.14 Advises the company's credit reporting intentions generally.

W3.15 Provides that the consumer will be specifically advised by the company before a credit report is made, including the reason/s the company proposes to make the report.

Billing

The contract:

W3.16 Provides that a hard copy bill will be sent to the consumer each billing period.

W3.17 Advises credit limits are available and may be applied with the agreement of the consumer.

W3.18 Provides an option for notification of high or unusual bills.

W3.19 Advises there is no obligation to pay outside the billing cycle unless the consumer wishes to do so.

W3.20 Provides an option for consumers to access services that enable the consumer to accurately check their account balance at any time.

Usage

The contract:

W3.21 Provides that stored value will not expire other than through use.

W3.22 Provides that credit not used in one billing period will roll-over to the next billing period.

Principle 4: Entry and exit terms are fair and reasonable

The contract:

W4.1 Gives cooling-off rights of 10 clear business days and does not allow the company or the consumer to contract out of these rights.

W4.2 Acknowledges that the existence of a cooling off period does not vary the delivery date for goods or services provided under the contract.

W4.3 Contains exclusion clauses which acknowledge the consumer's rights under the *Trade Practices Act 1974* and note they cannot be contracted out of.

W4.4 Provides that where the handset or device is lost, stolen or is damaged or defective through no fault of the consumer, the consumer has the option to:

- a) Terminate without penalty; or
- b) Continue with new equipment.

W4.5 Provides that where the handset or device is lost or stolen, is damaged or is defective through no fault of the consumer, the consumer will not incur network or other standing charges.

W4.6 Is consistent in the manner in which it deals with questions of ownership and obligation eg a contract that specifies the equipment remains the property of the company should not place responsibility to repair upon the consumer.

W4.7 Synchronises the term of the warranty for supplied equipment with the term of the service contract to reflect the expected useful life of the equipment supplied to the consumer.

W4.8. Clearly and accurately identifies the parties to the contract.

W4.9 Includes "Guarantor" as well as "Principal" sections for parties to complete.

W4.10 Provides an 'opt-in' mechanism for use of the consumer's information other than use necessary to perform the contract.

W4.11 Prohibits the suspension/disconnection of service for non-payment of third party charges.

W4.12 Prohibits the suspension/disconnection of service for non-payment of charges for other services from the company (bundled or otherwise) that are unrelated to the primary purpose of the contract. For example if a consumer enters a contract with XYZ Communications for telecommunications services and the contract also offers and option to purchase a computer by instalments, the consumer should not be disconnected from their telephone service for non-payment of charges relating to the computer.

W4.13 Prohibits the suspension/disconnection of supply of one telecommunications service for non-payment of charges relating to another telecommunications service, where both services are provided by the same company. For example a consumer's home phone should not be disconnected for non-payment of the consumer's mobile phone bill.

W4.14 Has provisions that exonerate the consumer from unexpectedly large charges (whether in amount or proportional to the consumer's average usage) relating to services incurred without the authority of the account holder. For example, internal dumping, modem jacking or unauthorised use of services.

Principle 5: Terms relating to variation and transfer give equal or equivalent rights to consumers and providers

The contract:

W5.1 Provides that in the event of variation to the contract which is significant or detrimental to the consumer, the consumer is permitted to terminate the contract within 1 month of the variation, without penalty, during which time the original terms of the contract will apply.

W5.2 Provides that the consumer will be given notice of any proposed assignment of the contract by the company.

W5.3 Provides that the consumer will be given the option of terminating the contract without penalty if they do not wish to transfer under any proposed assignment of the contract by the company.

W5.4 Provides that no assignment of the consumer's account can occur without the consumer's explicit informed consent.

W5.5 Requires that the minimum period of the contract (if any) apply to both the supplier and the consumer.

W5.6 Provides that consumers will be provided with notice of variations to their contract *individually* and at no cost. Thus, an advertisement in a national newspaper or notice on a web-site is not sufficient. Preferably, the communication will be by means the consumer has nominated as their preferred means of communication.

W5.7 Provides a standard procedure or practice that provides for the variation of individual terms of the SFOA upon request by the consumer.