

Telecommunications Contracts

Check List of

Fair & Unfair Contract Terms

General Principles

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

It is necessary for a company¹ to comply with the general principles and the checklist in substance before a contract will be classed as fair.

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

Principle 2: Clarity and Intelligibility

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

Principle 4: Entry and exit terms are fair and reasonable

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

Principle 6: The contract can be fairly enforced

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

The contract:

F1.1 Is in writing (whether in hard copy or electronic form).

F1.2 Is in two parts²

Part I provides a summary of the following clauses:

- Termination rights
- 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.

¹ The term “company” in this document means the provider of telecommunications goods or services, whether alone or in conjunction with other products.

² Where a contract is in electronic form, eg displayed on a web page, consumers should be required to open terms and conditions before being able to sign any agreement. The first part of the contract to be displayed should be Part 1.

- F1.3 Provides examples of how consumer significant clauses may operate in practice.
- F1.4 Undertakes to provide bills that 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
- F1.5 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.
- F1.6 Provides standardised call rates (per minute) for call cost comparisons.
- F1.7 If in electronic form, must be easily downloaded by the consumer.

Principle 2: Clarity and Intelligibility

The contract:

- F2.1 Does not exercise the option to call up the Standard Form of Agreement under Part 23 of the Telecommunication Act 1997 ("SFOA").
- F2.2 Is not excessively long, does not use excessively long sentences, clauses or paragraphs.
- F2.3 Is in 11 point font or larger.
- F2.4 Uses plain English see eg. NRMA Contract. Avoids technical and legal jargon and where use of such language is unavoidable, provides explanations.
- F2.5 Uses headings to increase intelligibility.
- F2.6 Is available in large print format.
- F2.7 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:

- F3.1 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.
- F3.2 Delivers the key selling message contained in advertisements relating to the service or product subject of the contract.

Fees and charges

The contract:

- F3.3 Outlines the circumstances in which fees can be applied.
- F3.4 Discloses all fees and charges.
- F3.5 Specifies termination fees that are a reasonable pre-estimate of loss or provides a formula for calculation.
- F3.6 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).
- F3.7 Preferably does not charge late payment fees but if they are charged, the fees are calculated with reference to cost.
- F3.8 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.
- F3.9 Allows the consumer the option of terminating the contract without penalty where a price increase greater than CPI is sought.
- F3.10 Clearly sets out payment terms.
- F3.11 Undertakes that the company will notify the consumer where charges exceed a pre-agreed limit.
- F3.12 Provides that no fee applies for infringing a minimum use clause.
- F3.13 Requires an opt-in to access premium services including international calls, 1900, gambling lines, sex or introduction lines.

Credit Reporting

The contract:

- F3.14 Advises the company’s credit reporting intentions generally.
- F3.15 Provides that the company will specifically advise the consumer before a credit report is made, including the reason/s the company proposes to make the report.

Billing

The contract:

- F3.16 Provides that a hard copy bill will be sent to the consumer each billing period.
- F3.17 Advises credit limits are available and may be applied with the agreement of the consumer.
- F3.18 Provides an option for notification of high or unusual bills.
- F3.19 Advises there is no obligation to pay outside the billing cycle unless the consumer wishes to do so.
- F3.20 Provides an option for consumers to access services that enable the consumer to accurately check their account balance at any time.

Usage

The contract:

- F3.21 Provides that stored value will not expire other than through use.
- F3.22 Provides that credit not used in one billing period will rollover to the next billing period.

Principle 4: Entry and exit terms are fair and reasonable

The contract:

- F4.1 Gives cooling-off rights of 10 clear business days and does not allow the company or the consumer to contract out of these rights.
- F4.2 Acknowledges that the existence of a cooling off period does not vary the delivery date for goods or services provided under the contract.
- F4.3 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.
- F4.4 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.
- F4.5 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.
- F4.6 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.
- F4.7 Clearly and accurately identifies the parties to the contract.
- F4.8 Includes "Guarantor" as well as "Principal" sections for parties to complete.

- F4.9 Provides an 'opt-in' mechanism for use of the consumer's information other than use necessary to perform the contract.
- F4.10 Prohibits the suspension/disconnection of service for non-payment of third party charges.
- F4.11 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.
- F4.12 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.
- F4.13 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:

- F5.1 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.
- F5.2 Provides that the consumer will be given notice of any proposed assignment of the contract by the company.
- F5.3 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.
- F5.4 Provides that no assignment of the consumer's account can occur without the consumer's explicit informed consent.
- F5.5 Requires that the minimum period of the contract (if any) apply to both the supplier and the consumer.
- F5.6 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.
- F5.7 Provides a standard procedure or practice that provides for the variation of Individual terms of the SFOA upon request by the consumer.

Principle 6: The contract can be fairly enforced.

The contract:

- F6.1 Is free from unconscionable terms (examples of terms that individually, or in combination with other terms, may be unconscionable appear in the 'black list').
- F6.2 Has been procured without misleading and deceptive conduct.
- F6.3 Contains exclusion clauses that acknowledge the consumer's rights under the Trade Practices Act 1974 and note they cannot be contracted out of.
- F6.4 Only purports to bind those consumers with legal capacity to enter into contracts.

Telecommunications Contracts

Check List of Unfair Contract 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 and infringe the six principles outlined in the ‘Check List of Fair Contract Terms’. Clauses are grouped to match the six principles outlined in the Check List of Fair Contract Terms. If a contract includes a number of the clauses outlined in this Checklist 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 (Principle 1)

The contract:

- U1.1 Contains purported acknowledgement by the consumer that certain documents have been provided.
- U1.2 Fails to provide information about how the consumer may complain.
- U1.3 Attempts to limit or suspend service provision where a consumer makes a complaint to the TIO.
- U1.4 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.
- U1.5 Contains limitation of liability clauses that fail to acknowledge that TPA warranties cannot be excluded.
- U1.6 Purports to exclude representations about quality of service (including coverage).

Clarity and Intelligibility (Principle 2)

The contract:

- U2.1 Is excessively long or uses excessively long sentences, clauses or paragraphs.
- U2.2 Contains extensive cross-referencing.
- U2.3 Uses print of less than 11-point font.
- U2.4 Uses print of less than 11 point to qualify a representation in larger print.
- U2.5 References other documents not provided to the consumer on the spot.
- U2.6 Refers to definitions in other documents.
- U2.7 Fails to define key terms.
- U2.8 Calls up the SFOA.
- U2.9 Contains technical, legal or other forms of language other than plain English.

Fairness (Principle 3)

Fees and charges

The contract:

- U3.1 Fails to disclose all applicable fees and charges.
- U3.2 Contains penalty fees i.e. fees that are not a reasonable pre-estimate of loss.
- U3.3 Permits the charging of late payment fees.
- U3.4 Imposes charges where disconnection is the fault of the supplier.
- U3.5 Includes termination fees that include charges for services that will not be provided.
- U3.6 Contains billing charges (however described).
- U3.7 Levies fees on termination of the contract by the consumer that are not a reasonable pre-estimate of loss.
- U3.8 Permits suspension of service for late payment.
- U3.9 Permits the levying of a bond or security deposit.
- U3.10 Permits the levy of number porting fees.
- U3.11 Permits the levy of fees and charges for other service changes.
- U3.12 Provides that all prices, fees and/or charges are subject to change without notice.
- U3.13 Allows only one method of payment, which method is not face to face.
- U3.14 Permits direct debit payment only.

Credit Reporting

The contract:

- U3.15 Fails to outline the company's credit management policy.
- U3.16 Permits credit reporting of any amount outstanding.
- U3.17 Permits the company to make a credit report without notifying the consumer.
- U3.18 Permits the company to refuse service provision for past or related product failure.

Usage

The contract:

- U3.19 Penalises low usage.
- U3.20 Penalises high usage without adequate monitoring or information provision to the consumer.
- U3.21 Provides that stored value will expire after a specified period.
- U3.22 Permits variation to usage conditions or per-call prices of stored-value products after purchase.

Entry and Exit Terms (Principle 4)

The contract:

- U4.1 Permits the supplier to extend the term of the agreement at any time or without notice.
- U4.2 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.
- U4.3 Permits suspension/disconnection of service where the parties are in dispute.
- U4.4 Permits suspension/disconnection of service for non-payment of third party charges.
- U4.5 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.
- U4.6 Does not include a requirement to notify the consumer of suspension or disconnection.
- U4.7 Renders the consumer liable under the contract where the equipment is lost, stolen, damaged or defective.
- U4.8 Excludes insurance cover where the consumer has payments outstanding.
- U4.9 Purports to remove a consumer's right to complain after the expiration of a certain period.
- U4.10 Purports to remove the consumer's right to criticize or report the company.
- U4.11 Fails to inform the consumer of applicable complaint and dispute resolution procedures or entry points.
- U4.12 Permits variation of the contract by persons other than the authorised consumer.

Variation and Transfer (Principle 5)

The contract:

- U5.1 Allows variation of terms by the company at any time or without notice.
- U5.2 Does not allow the consumer to terminate the contract or penalises termination where variation occurs.
- U5.3 Does not require the consumer to be notified of any variation.
- U5.4 Permits the supplier to assign the contract without notice and a right of termination being provided to the consumer.
- U5.5 Does not provide equal or equivalent rights to the supplier and the consumer.
- U5.6 Provides for notice to consumers other than individual notice (eg by advertisement or on a web-site).

U5.7 Permits charges to be levied on consumers for the provision of notice.

U5.8 Does not require the explicit informed consent of a consumer to transfer.

Enforceability (Principle 6)

The contract:

U6.1 Contains unconscionable terms (note the terms outlined above, individually or in combination may constitute unconscionable terms).

U6.2 Was procured through misleading and deceptive conduct.

U6.3 Purports to exclude the operation of the Trade Practices Act 1974.