



Submission to ENERGY COMPETITION COMMITTEE
Electricity Full Retail Competition: Final Electricity Industry
Code and Contracts

Centre for Credit and Consumer Law, Griffith University with funding from the National
Consumers Electricity Advocacy Panel

November 3rd, 2006

About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School. The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable small end-users.

The Centre for Credit and Consumer Law is funded by the Queensland Government's Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University. However, this submission is possible because of funding received by the Centre for Credit and Consumer Law from the National Consumers Electricity Advocacy Panel. Without this funding and without the availability of expert consultants the Centre would not have had the capacity to respond substantively to these proposals.

Clause 8.4 Price Comparator

Regarding clause 8.4; the clause could clarify how the Queensland Competition Authority (QCA) will make the comparator available to consumers. The clause could be explicitly linked to clause 3.2.4 or an adaptation made of elements of clause 3.2.2.

Clause 4.10.6 (Pass through cost where access is denied) and 4.18.10 (Denying access to meter)

We are also in support of the proposed obligation on retailers and distributors to contact customers using a mobile telephone at the time of having meter access difficulty in the context of potential disconnection (clause 4.18.10). However we would like to see the same obligation in clause 4.10.6 in relation to pass through of costs relating to a distributor attending premises. These must only be allowed where access does not occur directly as a result of the customer's actions and despite all reasonable attempts by the distributor and the retailer to make contact with the customer at the relevant time.

Clause 4.11 Undercharging and overcharging

We drew your attention in our previous submission to the lack of clarity in the undercharging and overcharging provisions due to the use of the concept of being as a result of a retailers or distributors error. We are disappointed that this has been resolved by creating a mechanism for unlimited overcharging and unlimited recovery of undercharging where this is not as a result of the retailer or distributor error. In our view there are adequate provisions dealing with illegal use or meter inaccessibility such that it is not necessary to make a fault distinction in the undercharging and overcharging provisions. This removes industry incentive to ensure accurate billing and to assist customers by reviewing information.

4.17.4 Security deposits – residential customers

The proviso in clause 4.17(d) has been removed despite our specific mention of this resulting in a best practice provision. We hope that our mention of this has not resulted in its removal. The deleted clause must be reinstated so that a residential customer will only be required to provide a

security deposit where one of the subclauses have been satisfied and they have been offered and refused an instalment plan. We reiterate our concern that customers on standard contracts may be required to provide security deposits and our other comments in relation to various other preconditions to a small customer being able to obtain a retail contract.

4.2 Retail contracts - Unfair terms

Chapter 4 of the Code allows for *negotiated retail contracts* that depart from the *standard retail contract* under the Code. A *negotiated retail contract* must comply with the Code's minimum requirements. Those requirements prevent a retail entity from excluding or limiting its liability from specified events and liabilities. It also prevents the entity from requiring the consumer to indemnify the retail entity from certain events and liabilities. The retail entity must also provide for a cooling off period.

These provisions are clearly aimed at preventing (or at least limiting) the inclusion of unfair and oppressive terms in contracts with small consumers. The logic being that the vast majority of small consumers are not, for practical purposes, in a position to negotiate the contract terms, other than perhaps the price and the length of service. The small consumer does not have the information advantages of the retailer, the capacity to comprehend the import of many of the contract terms, the means to employ a legal advisor to advise on the terms, or the bargaining power of the retail entity. The legislation and the Code therefore aims to limit the capacity of the retail entity to abuse its superior bargaining position by inserting unfair, abusive and surprising contract terms in negotiated retail contracts.

The aim of limiting or preventing unfair terms is consistent with the European Community's Unfair Terms in the Directive on unfair terms and consumer contracts 1993, which is given effect in the UK under the unfair terms in *Consumer Contracts Regulation 1999* (see below). Victoria has also implemented legislation prohibiting unfair terms (see annexure). The rationale and the operation of the regulations is succinctly set out in "Unfair Contract Terms: A discussion paper" by the Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party.¹

We suggest therefore that the Electricity Industry Code include provisions that adapt the UK and Victorian regulations for the Code's purposes to enable the QCA to specify unfair terms that cannot be included in negotiated retail contracts. This would allow much greater flexibility in the administration of the Code so as to avoid the inclusion of unfair terms in negotiated retail contracts. The present risk is that the minimum requirements under the Code set a relatively inflexible standard, which could easily be navigated around by retailers. Whilst a number of abusive and unfair terms are prohibited under the Code, there remains a capacity for retailers to include unfair terms that are not covered by the Code.

An adapted form of the UK and Victorian regulations would only provide the QCA a limited capacity to intervene to outlaw unfair terms. The experience of the EC, UK and Victoria is that the regulator's role is relatively uncontroversial. That is, there will be little doubt that any outlawed terms would be clearly unfair and abusive.

¹ "Unfair Contract Terms: A discussion paper" by the Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party pp.31- 35
[www.rtba.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/Unfair_Contract_Terms_body.pdf](http://www.rtba.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/Unfair_Contract_Terms_body.pdf) See also the UK Office of Fair Trading website at www.offt.gov.uk/Business/Legal/UTCC/default.htm

The terms outlawed under Schedule 2 of the UK legislation's indicative and non-exhaustive list are terms that have the object or effect of –

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

VICTORIAN FAIR TRADING ACT

PART 2B—UNFAIR TERMS IN CONSUMER CONTRACTS

s. 32V

32U. Definitions

For the purposes of this Part—

"**consumer**", in relation to a consumer contract, means a person to whom goods or services have been or are to be supplied under the contract;

"**injunction**" includes interim injunction;

"**prescribed unfair term**" means a term that is prescribed by the regulations to be an unfair term or a term to the like effect;

"**standard form contract**" means a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts used in that industry;

"**unfair term**" has the meaning given by section 32W.

32V. Application of Part

This Part does not apply to contractual terms—

- (a) contained in a contract (other than a contract in a prescribed class of contract) to which the **Consumer Credit (Victoria) Act 1995** applies;
- (b) that are required or expressly permitted by law, but only to the extent required or permitted.

32W. What is an unfair term?

A term in a consumer contract is to be regarded as 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.

32X. Assessment of unfair terms

Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of—

- (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
- (b) permitting the supplier but not the consumer to terminate the contract;

S. 32U
inserted by
No. 30/2003
s. 12.

S. 32U def. of
"consumer
contract"
repealed by
No. 106/2003
s. 5(a).

S. 32U def. of
"unfair term"
amended by
No. 106/2003
s. 5(b).

S. 32V
inserted by
No. 30/2003
s. 12.

S. 32V(a)
amended by
No. 42/2004
s. 3.

S. 32W
inserted by
No. 30/2003
s. 12.

S. 32X
inserted by
No. 30/2003
s. 12.

- (c) penalising the consumer but not the supplier for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
- (i) limiting the supplier's vicarious liability for its agents;
- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract.

S. 32X(c)
amended by
No. 106/2003
s. 6.

s. 32Y

32Y. Effect of unfair term

- (1) An unfair term in a consumer contract is void.
- (2) A prescribed unfair term in a standard form contract is void.
- (3) The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.
- (4) Sub-section (1) applies to any consumer contract entered into on or after the commencement of section 12 of the **Fair Trading (Amendment) Act 2003**.
- (5) Sub-section (2) applies to any standard form contract whether entered into before or after the term is prescribed.

S. 32Y
inserted by
No. 30/2003
s. 12.