

# CONSUMER LAW CENTRE VICTORIA

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## EDITORIAL

Unfair contract terms legislation is a welcome initiative

The consumer movement has become increasingly concerned about the extent of consumer contracts, including on-line contracts, that contain terms that are unfair and represent a serious undermining of consumers' rights under contracts.

It is pleasing then to report, that the Victorian parliament recently passed the *Fair Trading (Amendment) Act 2003* (Vic), which makes several important amendments to the *Fair Trading Act 1999* (Vic).

Among other amendments, the Act introduces a new Part 2B into the *Fair Trading Act*. Part 2B provides that unfair terms in consumer contracts are void. A term is 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" (s.32W). Matters which can be taken into account in determining if a term is unfair, include whether the term has the object or effect of (s.32X):

- "(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;
  - (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;
- and

(m) imposing the evidential burden on the consumer in proceedings on the contract."

The amendments followed extensive consultation and a working group process of which the Centre was a member and provide valuable new consumer protection. The Minister for Consumer Affairs, John Lenders, is to be congratulated on the introduction of the Act. The Centre anticipates that the unfair contract terms provisions will serve as a model of best practice consumer protection legislation for other States and Territories, and the Commonwealth Government, to consider.

If you would like further information about our work to achieve national unfair contract terms legislation, please contact Chris Field on [chris@clcv.net.au](mailto:chris@clcv.net.au) or (03) 9629 6901.

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##### 1 What have we been doing?

##### 1.1 Late payment fees on the agenda - Review of the Victorian Energy Retail Codes

On 16 June 2003, the Essential Services Commission released the Draft Energy Retail Code calling for submissions from interested parties by 25 July 2003. The draft Code is the outcome of a consultation process that took place in the first half of 2003 with respect to the Essential Services Commission's review of the Electricity and Gas Retail Codes. The draft Code can be found at [www.esc.vic.gov.au/electricity](http://www.esc.vic.gov.au/electricity).

As we have reported previously (*e-bulletin no. 25*, February 2003), the initial purpose of the review was to ensure consistency across both fuels and to make certain that the terms and conditions of the Codes have the capacity to accommodate 'dual fuel' offers. On 30 January 2003, the ESC announced that the terms of the review had been expanded in response to stakeholder feedback (primarily from the retailers). Accordingly, the draft Code addresses a number of issues raised in the consultation phase beyond dual fuel, including national consistency, bills, merchant service fees, grounds for disconnection and additional retail charges.

While the draft Code has retained many of the consumer protections contained in the Codes, there are some proposals of serious concern, in particular the proposal in clause 7.1(d) of the draft Code to introduce late payment fees. Under this clause, a retailer may, at the same time as giving a customer a disconnection warning, charge the customer the 'fair and reasonable costs of recovering late payment from the

customer', unless the customer is entitled to a concession; has agreed with the retailer to a shorter billing cycle; has agreed to an instalment plan and is making payments in accordance with the plan; or the retailer has disconnected the customer as the result of non-payment of a bill.

It is the view of the Centre that the proposed clause may result in customers being charged unlawful penalties by retailers. For a late payment fee to be lawful, the retailer attempting to recover the fee must show that it has made a bona fide attempt to estimate in advance the actual cost to the retailer if the customer does not pay a bill on time. The CLCV queries whether retailers will be able to prove that their actual cost for recovering late payment is reflected in the amount to be charged for late payment, which if clause 7.1(d) is retained, is expected to be around \$10 to \$15.

Putting this legal view aside, the Centre is opposed to the introduction of late payment fees on social policy grounds. Whilst the Centre generally supports the operation of a fair, competitive market to allocate costs on a basis that reflects customers' behaviour, experience in other deregulated markets suggest that late payment fees are not necessarily borne by those who create cost, but by those "unattractive" in a competitive market place, namely, low-income consumers.

The CLCV will be making a submission in relation to the draft Energy Code, in which we will be discussing the legality of late payment fees (as well as other issues) in detail. If you would like further information about the work of the Centre in relation to the review of the gas and electricity Retail Codes, please contact Anna Stewart on (03) 9629 6300 or [anna@clcv.net.au](mailto:anna@clcv.net.au).

## 1.2 Consumer Representatives' Forum

Between 27 and 29 May 2003, Melbourne was host to the Consumer Representatives' Forum. The Forum was organised by leading private dispute resolution schemes (including the Australian Banking Industry Ombudsman, the Energy and Water Ombudsman Victoria, the Financial Industry Complaints Scheme, the Insurance Brokers Dispute Facility, the Insurance Enquiries and Complaints Ltd and the Telecommunications Industry Ombudsman), the Consumer Law Centre Victoria, Consumer Credit Legal Service and the Consumers' Federation of Australia. The Schemes generously sponsored the Forum, in addition to the Australian Securities and Investment Commission, the Australian Competition and Consumer Commission, the Commonwealth Consumer Advisory Committee and Consumer Affairs Victoria. Over 100 people from consumer and community organisations, industry and government attended the Forum, which provided an invaluable opportunity for consumer advocates from around Australia to meet face-to-face.

The main purpose of the Forum was to:

- • enable the schemes to provide information to consumer advocates;
- • assist consumer representatives to have a better understanding of their role and relevant issues; and
- • provide feedback to the ADR schemes from consumer advocates.

One of the highlights of the Forum was a 'hypothetical', facilitated by Terry Laidler, that explored the day to day relevance of dispute resolution benchmarks through a scenario in which a consumer had his problem dealt with by a fictional financial services dispute resolution scheme. There were also a number of opportunities over the three days for consumer advocates to assess the past achievements of the consumer movement and to plan strategically for the future. A number of issues were identified as 'priorities', including the development of national unfair contract terms legislation and national legislation covering debt collection and credit reporting.

If you would like further information about the Forum please contact Anna Stewart on (03) 9629 6300 or [anna@clcv.net.au](mailto:anna@clcv.net.au) or visit the new CFA website at [www.consumersfederation.com](http://www.consumersfederation.com).

## **2. Representing the consumer interest in the development of product and service standards**

The following committees require consumer representatives:

First priority/urgent:

- • **Automotive occupant restraints**
- • **Automotive child restraints**
- • **Children's nightclothes**
- • **Valves for use in warm and hot water systems**
- • **First aid kits**
- • **Safe handling of chemicals**

Second priority:

- • **Safety of electrical equipment for measurement and laboratory use**
- • **Safety of private swimming pools**
- • **Spa pools**
- • **Sterile hypodermic syringes for manual use**
- • **Conformity assessment**
- • **Conformance marking to regulatory requirements**
- • **Vehicle stamps and ramps**
- • **Car jacks and trolley jacks**
- • **Caravan and light trailer components**
- • **Motor vehicle frontal protection systems (bull bars)**
- • **Quality and performance of household electrical appliances (energy conservation)**
- • **Quality of service - education**

Consumer representatives on Standards Australia committees are entitled to have their travel expenses of attending committee meetings, including interstate meetings, reimbursed through the Standards Co-ordinator.

A draft standard on the storage and handling of flammable and combustible liquids has been released for public comment.

If you would like to make comment on any of the above draft standards, would like to join a committee, or simply require further information, please contact the Standards Co-ordinator on (03) 9629 6300 or [fran@clcv.net.au](mailto:fran@clcv.net.au).

Following more than four years with the Centre, Fran Macdonald has resigned as Standards Co-ordinator due to family commitments. We take this opportunity to thank Fran for the significant contribution she has made to the success of the Consumer Representatives on Standards Australia Committees Project over that time.

### **3 Next Edition: August 2003**

The e-bulletin, produced once every two months, is designed to keep our stakeholders up to date on the work of the Centre. We welcome your comments on the e-bulletin. If you would like to be added to the Centre e-bulletin mailing list, please contact Jane Douglas on [jane@clcv.net.au](mailto:jane@clcv.net.au) or (03) 9629 6300.