

Contracts

Complaints we receive about telecommunications contracts include claims that:

- a consumer denies giving consent to enter a contract
- a consumer did not have capacity to enter into a contract
- a provider has not given a consumer a readable copy of the terms and conditions of their product
- a consumer is being held to terms and conditions that are unfair in the circumstances
- a provider has changed terms in a contract after the contract was entered into
- a provider has charged a consumer for cancelling a contract but the exit fee does not appear to be a genuine estimate of the provider's loss.

Most providers set out the terms and conditions for the supply of their telecommunications products in a **standard form of agreement**. Providers may also set out additional terms and conditions in other documents such as application forms, websites, brochures and product packaging. Together these form the contract between the consumer and the provider.

Telecommunications contracts or standard forms of agreement are examples of **standard form contracts** for the purposes of consumer protection laws.

In this position statement, when we use the term **product** we are referring to both telecommunications goods and services.

For complaints involving advertising, selling practices or lack of informed consent see our position statement [Pre-sale information or conduct](#).

For complaints involving a transfer of service see also our position statement [Transfer of services](#).

Laws and codes of practice

Some laws and codes of practice relevant to telecommunications contracts are:

- [Telecommunications Act 1997](#)
- [Competition and Consumer Act 2010, Schedule 2 The Australian Consumer Law](#)
- The common law of contracts
- Various state based legislation dealing with contracts entered into by minors
- [Telecommunications Regulations 2001](#)
- [Telecommunications Consumer Protections \(TCP\) Code 2015](#)
- Industry Guideline: [Customer Authorisation 2015](#)

This position statement provides broad guidance on the law, good industry practice, and what the TIO may consider to be fair and reasonable in general circumstances. It is not a full statement of the law or good industry practice. The TIO considers each matter brought to it on its own particular merits.

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Our approach

The law

When we deal with complaints about telecommunications contracts we consider the law, good industry practice, and fairness in all the circumstances.

Standard form of agreement

By law, a provider is entitled to set out the terms and conditions for most of its telecommunications products in its standard form of agreement.

Part 23 of the [Telecommunications Act](#) sets out the regime for standard forms of agreement. This includes that if the consumer and provider do not agree to terms, and the provider has formulated a standard form of agreement, then the terms and conditions of the standard form of agreement will apply.

Enforceability of a contract

When a consumer, at the time of making a contract, is incapable of understanding the terms of the contract, and the provider knew or should have known about this, the consumer can choose to end the contract with no exit fees.

For a person under the age of 18 (a minor), a contract cannot generally be enforced unless it is for a necessity. Whether or not a telecommunications service is a necessity will depend on matters such as the nature of the service provided and how it is used. The situation is different in New South Wales, where the general rule is that a minor who enters a contract that is for their benefit is bound by it.

In some cases the enforceability of a contract may be affected by factors such as:

- duress
- undue influence, or
- unconscionability.

Unfair contract terms

Rules in the [Australian Consumer Law](#) make void any contract term that is unfair.

A term of a consumer contract is unfair if:

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

The extent to which the term is transparent and the contract as a whole will be taken into account when assessing if a term is unfair. Examples of the kinds of terms that may be unfair include terms that permit, or have the effect of permitting one party (but not another party) to avoid or limit performance of the contract, vary the terms of the contract, renew or not renew the contract, and terminate the contract. Another example is a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract.

Good industry practice

The [Telecommunications Consumer Protections Code](#) includes the following rules:

Availability of standard forms of agreement

A provider must make its standard forms of agreement available and give copies to consumers on request, at no charge. A standard form of agreement must be in plain language, clear, and consistent, and contain all the terms of the product in a logical order.

A provider must keep records of the terms of all its products available from 1 September 2012 onwards for as long as those products continue to be in use.

Additional rules apply if the contract involves a transfer of service. See our position statement [Transfer of services](#) for more information.

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TIO view

Standard forms of agreement on websites

If the consumer is applying for a product online, without a representative of the provider present, the application process should include a link to the product's critical information summary that the consumer can access before completing the application. See our position statement [Pre-sale information or conduct](#) for more information about critical information summaries and telecommunications offers.

Providing a service for the full length of a contract

A provider should enter into a fixed term contract of a particular length with a consumer only when it has reasonable expectations that it can provide the service for the full term of the contract. If a provider can no longer provide what it contracted to provide, it should release the consumer with no exit fee, or offer another service that suits the need of the consumer.

Disputes between legitimate occupiers and property owners

Installing a service is a private arrangement between a provider and the legitimate occupier of a property. When a tenant enters a contract to install a service the provider is not required to contact the owner of the property. Any dispute about failure to notify the property owner should be resolved by the legitimate occupier and property owner.

Consent and verbal explanation of terms and conditions

Providers should be aware that when we handle a complaint about consent in contracts we take available evidence into account. If a provider wants to rely on terms and conditions it explained verbally to a consumer and chooses not to keep a full and accurate audio recording of the conversation, we may not be able to accept a claim that certain information was explained verbally to a consumer and that the consumer gave informed consent to the contract. See our position statement [Pre-sale information or conduct](#) for more information about informed consent.

Varying a contract

A contract term may permit the provider but not the consumer to vary the contract. This is called **unilateral variation**.

A unilateral variation term may be more likely to be acceptable when:

- the circumstances when the contract may be changed are clearly expressed
- the change is reasonably necessary to protect the legitimate interests of the provider
- the consumer has a right to cancel the contract without an exit fee if the change is detrimental to the consumer
- the provider has given sufficient notice of the variation.

Charges for terminating a contract

A contract term may permit the provider to impose a charge for terminating a contract.

A term that imposes a charge on the consumer for termination of a contract when the provider has not complied with its obligations is likely to be considered unfair.

Any charge for terminating a contract should reflect a genuine loss to the provider. A fixed amount charged by the provider irrespective of the remaining period of the contract is unlikely to reflect a genuine loss to the provider.

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Dealing with a dispute

When dealing with a dispute about a telecommunications contract, we will ask the parties to provide information and documentation to demonstrate their respective positions. This may include:

- for claims about what was agreed or if there was any agreement: copies of the relevant contract, including any voice recording of an agreement made by phone
- for claims about lack of capacity: supporting documentation, for example assessments by relevant professionals
- for claims that a term is unfair: details of why the term is necessary for the legitimate interests of the provider, any detriment to the consumer and notification details
- for claims that a termination charge is unfair: details of how the charge is calculated.

Outcomes

When, in our view, a provider has not followed the rules for informing consumers about terms and conditions, outcomes will depend on the circumstances, but may range from providing a copy of the full terms and conditions of a product, to cancelling the contract with no exit fee.

If a provider wants to rely on terms and conditions it says were explained verbally to a consumer and it cannot or will not provide a full and accurate recording of the conversation, we may not be able to accept a claim that certain information was explained verbally to a consumer where the consumer says the information was not provided.

When, in our view, a contract term is unfair, for example, because by application of the [Australian Consumer Law](#) the term is unfair, we expect the provider not to rely on that term.

When, in our view, notice of variation of a contract is not provided or is insufficient or inappropriate, we expect the provider to give the appropriate notice and address any detriment caused to the consumer by the deficient notice.

When, in our view, a charge for terminating a contract does not reflect a genuine loss to the provider, the provider will not be able to enforce the charge.

Effective date: 11 March 2016

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