

UNFAIR TERMS IN CONSUMER CONTRACTS: WHAT THEY ARE AND WHY YOU NEED TO KNOW

UNFAIR TERMS AND THE LAW

Amendments made in 2003 to Victoria's *Fair Trading Act* prohibit the use of "unfair terms" in consumer contracts.

The Act defines "unfair terms" as terms in a contract which (i) are contrary to the requirements of good faith, and (ii) cause significant imbalance in the rights and obligations arising under the contract to the consumer's detriment.

"Good faith" is defined under guidelines as "playing fair" when one party is in a position of dominance over another party.

If a term of a contract is unfair in breach of the Act, the term will be void but the remainder of the contract will bind the University and the consumer. The University may also be fined \$2000.00 for each contract which uses the unfair term and may be publicly "named and shamed" by the Minister or Consumer Affairs Victoria.

WHY IS THE UNIVERSITY AFFECTED – WHEN DO WE DEAL WITH CONSUMERS?

The University's students are consumers. The University enters into contracts with its students by accepting students' enrolments. The terms of those contracts are the various statutes, regulations, rules and procedures which govern students' study at the University, even those which are not in writing.

WHAT KIND OF TERMS ARE LIKELY TO BE CONSIDERED UNFAIR?

The Act specifically identifies a number of unfair terms. Including any of these in a consumer

contract is automatically bad news for the University:

- terms which allow the University to unilaterally vary the cost or the characteristics of goods or services being delivered (degrees etc.).
- terms which penalise the student but not the University for breach, or which unreasonably prevent or restrict students' options regarding dispute resolution.
- terms which prevent students recovering prepayments made under a contract that never commences.

Consumer Affairs Victoria has published guidelines which include examples of terms which are likely to be considered unfair according to the definition discussed above. They include clauses which impose unreasonable penalties on consumers (for eg. penalties which are over and above the amount necessary to recover lost expenses), clauses which prohibit students from recovering at least a reasonable portion of enrollment fees if they are expelled or suspended, and terms which purport to bind consumers to hidden terms and conditions.

WHY ALL THE FUSS?

It is clearly in the University's best interests to avoid imposing unfair terms on its students – this would be the case even without the threat of fines, litigation and public naming. The University's students are its core business and we need to protect our reputation in the student market.

FOUND A SUSPECT TERM?

If you're amending student rules and procedures ones or reviewing old ones and you discover a statement or a requirement that you believe could be an "unfair term" under the Act please contact Legal Services and provide us with a copy of the suspect term.

Otherwise, if you have any doubts about new rules and procedures you must them run them past us before finalising or publishing them.

This article is intended as a general guide. Please contact Legal Services on 9479 2495 if you would like any further information regarding unfair terms in consumer contracts or if you require advice regarding a specific issue.