

# Order Entered

No: (P)VID301/2013

Federal Court of Australia  
District Registry: Victoria  
Division: General

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**  
Applicant

**BYTECARD PTY. LIMITED**  
Respondent

## ORDER

**JUDGE:** Justice Jessup

**DATE OF ORDER:** 24 July 2013

**WHERE MADE:** Melbourne

### THE COURT DECLARES BY CONSENT THAT:

1. Section 1.7 of the Terms and Conditions (**T&Cs**) (which is set out in the schedule hereto) of the contracts under which the Respondent offered to supply and supplied internet access services (**NetSpeed Contracts**) is an unfair term of a standard form consumer contract, as it:
  - 1.1 entitles the Respondent unilaterally to vary the amount payable by a consumer under an existing NetSpeed Contract without providing:
    - 1.1.1 prior notice;
    - 1.1.2 an opportunity to negotiate varied terms; or
    - 1.1.3 consumers whose contract period has not yet expired, a right to terminate to avoid the obligation to pay the varied amount, save for the limited right provided by Section 6.2 of the T&Cs;
  - 1.2 creates a significant imbalance in the parties' rights and obligations arising under the NetSpeed Contract;

- 1.3 is not reasonably necessary to protect the Respondent's legitimate interests;  
and
  - 1.4 if applied or relied upon by the Respondent, the term would cause financial detriment to a consumer;  
and is therefore void pursuant to s 23 of the *Australian Consumer Law* consisting of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL).
2. Sections 4.1 and 4.2 of the T&Cs (which are set out in the schedule hereto) are unfair terms of a standard form consumer contract, as:
  - 2.1 the terms require the consumer to indemnify and hold harmless the Respondent in any circumstances, even where:
    - 2.1.1 there may have been no breach of the NetSpeed Contract, negligence or other wrongful act on the part of the consumer;
    - 2.1.2 any liability, loss, claim, judgment or damage may have been caused or contributed to by the Respondent's own breach of the NetSpeed Contract, negligence, wilful misconduct or other wrongful act;
  - 2.2 there is no corresponding term of the NetSpeed Contract that requires the Respondent to indemnify its customers, in any circumstances;
  - 2.3 the terms create a significant imbalance in the parties' rights and obligations arising under the NetSpeed Contract;
  - 2.4 the terms are not reasonably necessary to protect the Respondent's legitimate interests; and
  - 2.5 if applied or relied upon by the Respondent, the terms would cause financial detriment to a consumer;  
  
and are therefore void pursuant to s 23 of the ACL.
3. Section 6.5 of the T&Cs (which is set out in the schedule hereto) is an unfair term of a standard form consumer contract, as:
  - 3.1 it gives the Respondent a right to terminate at any time without cause or reason and without giving compensation to the consumer (save for prorated refunds for terminated prepaid periods);

- 3.2 conversely, the consumer's right to terminate a NetSpeed Contract, as provided by Sections 6.2, 6.3, 6.4, 6.6 and 6.7 of the T&Cs of the NetSpeed Contracts, is conditional upon the consumer:
- 3.2.1 providing notice to the Respondent in writing:
- (a) before the 25th of each month (Section 6.2 of the T&Cs);
  - (b) in the case of a "Wireless service", 30 days prior to termination (Section 6.6 of the T&Cs).
- 3.2.2 paying all accounts in full (Section 6.4 of the T&Cs);
- 3.2.3 in the case of a "Wireless service", paying a cancellation fee of the lesser of \$500 or the remainder of the contract (Section 6.6 of the T&Cs); and
- 3.2.4 in the case of an "ADSL connection", paying for the specified minimum contract period (Section 6.7 of the T&Cs).
- 3.3 it creates a significant imbalance in the parties' rights and obligations arising under the NetSpeed Contract;
- 3.4 it is not reasonably necessary to protect the Respondent's legitimate interests; and
- 3.5 if applied or relied upon by the Respondent, the term would cause detriment to a consumer, including from the unexpected cessation of internet connectivity and the unexpected loss of an email address account;
- and is therefore void pursuant to s 23 of the ACL.

**THE COURT ORDERS BY CONSENT THAT:**

4. The Respondent pay the Applicant's costs of and incidental to the proceeding, fixed at \$10,000.
5. Orders 5 and 6 made by the Court on 28 June 2013 be vacated.

Date that entry is stamped: 24 July 2013

Deputy District Registrar

## **SCHEDULE**

### Section 1.7 of the T&Cs:

NetSpeed reserves the right to change prices or services at any time without prior notice to customers or the public, except when the service is an Australian Broadband Guarantee Service. Price changes will not be retroactive for existing prepaid customers. It is the User's responsibility to check this online.

### Section 4.1 of the T&Cs:

The User agrees to indemnify and hold NetSpeed, its affiliates, its licensors, its contractors or their respective employees harmless against any and all liability, loss claim, judgment or damage. This indemnity includes, but is not limited to an indemnity against all actions, claims and demands (including the cost of defending or settling any actions, claims or demands) which may be instituted against us, as well as all expenses, penalties or fines (including those imposed by any regulatory body or under statute).

### Section 4.2 of the T&Cs:

The User agrees to indemnify NetSpeed for any expenses including, but not limited to:

- a. attorney's fees and cost of litigation,
- b. its licensors,
- c. its contractors or their respective employees as the result of any and all use of User's account whether authorised or not authorised or as a result of the negligence,
- d. wilful misconduct, or

- e. breach of any of the terms of this Agreement by User, (including but not limited to claims, liabilities, losses, damages, judgments and costs),
- f. disruption to User's telephone services during the installation of an ADSL Service.

Section 6.5 of the T&Cs:

With the exception of obligations under the Broadband Guarantee Program, NetSpeed reserves the right to terminate any account at any time with or without cause or reason. In the event that NetSpeed would choose to take this action the User understand and agrees that the Users (sic) only compensation would be a prorated refund for the current period that User has already paid.