

FS31 “Fines” from Private Car Parks

Use this fact sheet if you:

- You have received a ‘fine’ after parking in a private car park.
- You want to know whether or not to challenge the lawfulness of that ‘fine’.

PRIVATE CAR PARKING FINES

A number of car parks operated by private companies operate in Victoria, usually attached to shopping centres. Generally they allow consumers to park for free for up to a certain time period, for example two hours, if they display a ticket on the car. They then charge the extra time in the car park, at around \$3 per hour.

The companies have been issuing “fines” to consumers who fail to display a ticket on their car. The amount of the fine is usually around \$66. This amount increases \$88 if the consumer fails to pay within 14 days. Should the consumer continue to ignore the requests for payment, the companies instruct solicitors and/or debt collectors and further sums are demanded. Eventually court action is threatened for a sum in the region of \$300.

No statutory authority to issue fines

The actions of private car park operators in 'fining' consumers are based on alleged breach of contract. That is, the consumer enters into a contract to park their car in a company's car park, where it is a term of the contract to display a ticket. The company alleges that the consumer has breached the contract by not displaying a ticket and the fine represents the loss suffered by the company. While the legal position is complicated, we take the view that if there is a binding contract - which may or may not be the case - the terms of that contract are unfair and the amount demanded is a penalty rather than a genuine assessment of the company's loss.

What to do?

Consumers who are being pursued for payment of 'liquidated damages' as a result of allegedly breaching the terms of operation of a private car park have a number of options:

1. **Do nothing.** If you do nothing and do not write and provide your personal contact details to the company, it will need to apply to the Magistrates Court to obtain your details from Vic Roads. It may be that this extra step will deter the private car park operator from taking action against you. However, we are aware that some companies have taken such steps and obtained details of drivers in this manner.
We are not aware of any companies issuing proceedings in Victoria against individuals, despite the threats to do so. In the unlikely event that you are sued, you should contact us for help.
2. **Write to the company.** If you were not the driver when the fine was allegedly incurred, you can write to the company claiming the 'fine' and disclose this fact and identify the driver of the vehicle at the time. The company will then pursue that person for payment.

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Denying liability on this ground is of course not likely to be successful unless you identify the other driver.

- 3. Issue legal proceedings in VCAT.** If you want to get on the front foot, you can issue proceedings in the Victorian Civil and Administrative Tribunal (VCAT). By taking your dispute to VCAT, you allow the matter to be litigated in a cost-free jurisdiction, but this also has the disadvantage of bringing the dispute to a determination when you may never be sued.

Consumer Action has taken one test case to VCAT, which settled before hearing by the car park operator refunding the entire amount of the 'fine' paid.

We have received reports from numerous consumers who have issued in VCAT and refused to pay that the companies involved waive the 'fine' rather than risk a hearing.

A VCAT template pleading is set out below . We believe the arguments contained in this template are founded on strong legal argument, but note they have not been considered by a judge or member of VCAT and we cannot be certain that you would succeed if a hearing were to eventuate. Care must be taken in completing this template, which will need to be amended to suit particular circumstances.

If the "fine" was issued before January 1 2011, please refer to the sample pleading template, marked "A".

If the "fine" was issued on or after January 1 2011, please refer to the sample Pleading template, marked "B".

For more information about VCAT, and how to issue a claim please refer to www.vcat.vic.gov.au where you will find a Civil List application form and guideline. VCAT's free telephone number is: 1800 133 055.

- 4. Pay the debt.** To avoid any risk of legal proceedings you can pay the amount demanded in full.

Alternatively, you could offer a partial payment by way of full and final settlement – e.g. a cheque for an amount you are happy with. If you wish to pursue this course of action you must state clearly in a letter (note that you will be volunteering your personal contact details) to the company that acceptance of the sum proffered constitutes full and final settlement of the dispute. If you neglect to write this, you may still be chased for the remainder of the debt. If the operator refuses to accept the compromised settlement, you always have the option of finalising the matter by paying the remaining balance of the full amount owing, or proceeding in VCAT.

In addition, you are encouraged to write a letter of complaint to:

Director of Consumer Affairs
Consumer Affairs Victoria

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GPO Box 123 Melbourne 3001

You are also encouraged to write to your local Council, and to the shopping centre management (if any).

How will your credit rating be affected?

A debt owed due to breach of contract is not a debt which can appear on a consumer's credit report.

What should you do if proceedings are filed in the Magistrates Court against you?

We repeat that this is not something we are aware of any of the companies having done to date.

It is of course the right of any consumer to defend such proceedings by filing a Defence within 21 days. However there are some costs consequences of having the matter heard in the Magistrates Court. If you are sued in the Magistrates' Court, you can either contact us for further assistance, or you can take advantage of a transfer procedure available under s 112 of the Fair Trading Act 1999 (Vic), whereby the proceedings in the Magistrates Court can be transferred to VCAT, provided you first pay the sum claimed to VCAT in trust.

If the proceedings in VCAT are resolved in your favour, the money will be refunded to you.

FURTHER ADVICE & ASSISTANCE

Consumer Action Law Centre

Legal Advice line

Telephone: (03) 9629 6300, or 1300 881 020 for country callers.

Email: advice@consumeraction.org.au

Mon – Fri 10.00 am – 5.00pm

Free telephone and email advice regarding credit and debt and consumer law matters

ACKNOWLEDGMENTS

This fact sheet is part of a series produced by Consumer Action Law Centre. Other fact sheets in this series are available at the Consumer Action Law Centre website or by phoning us on (03) 9629 6300 or 1300 881 020.

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SAMPLE PLEADING (Pre January 2011) "A"

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
AT MELBOURNE

CIVIL CLAIMS LIST

/2011

B E T W E E N:

[YOU]

Applicant

and

[PRIVATE CAR PARK OPERATOR]
(ABN)

Respondent

APPLICATION

1. On [date] at approximately [time] the Applicant entered the [name of car park] at [address] in [suburb] in the State of Victoria (***the Car Park***) in a motor vehicle, and parked that vehicle in the Car Park.
2. To the extent that the Applicant thereby entered into a contract, which is not admitted, there were terms of that contract (***the Contract***) that the Applicant must pay liquidated damages to the Respondent in the event that the Applicant breached the Contract.
3. Upon returning to the vehicle at approximately [time], the Applicant found a „[describe the ticket, eg „Payment notice and tax invoice for claim of liquidated damages”]“ [ticket number] (the “Payment Notice”) placed on the windscreen of the vehicle. A copy of the Payment Notice is attached to this application.
4. The Payment Notice alleges that the Applicant [insert relevant details relating to your actions that led to a breach of the Contract; for example:] failed to obtain and display a parking ticket on the dashboard of the vehicle while the vehicle was parked in the Car Park **OR** obtained but failed to display a parking ticket on the dashboard of the vehicle while the vehicle was parked in the Car Park.
5. The Payment Notice further constitutes a demand by the Respondent that the Applicant pay the sum of \$[x] by way of liquidated damages for breach of the Contract (***the Amount Claimed***).
6. The Applicant removed the vehicle from its parking space and drove it out of the Car Park at [time].

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7. The Applicant denies liability for the Amount Claimed. **OR** On [date] the Applicant paid the Amount Claimed to the Respondent under protest.
8. The Amount Claimed is a penalty and is therefore void.

PARTICULARS

The Applicant refers to and relies upon the general law and says further that the Respondent seeks to recover damages in excess of a reasonable pre-estimate of loss suffered as a result of breach.

9. Further or in the alternative, the Contract is a “consumer contract” within the meaning of that term in the Fair Trading Act 1999 (Vic) (**the Act**).
10. Any term of any contract which holds the Applicant liable to pay the Amount Claimed is an unfair term within the meaning of section 32W of the Act.

PARTICULARS

- a) The Applicant refers to and relies upon sections 32W and 32X(c) of the Act.
 - b) Further, or in the alternative, as a result of the Conditions being inadequately displayed, it was not reasonably practicable for the Applicant to read the Conditions prior to entering the Car Park.
 - c) Further, or in the alternative, the Respondent knew or ought to have known that it was not reasonably practicable for persons using the facilities of the car park to read the Conditions prior to entering the Car Park.
11. Thus, any term of any contract which holds the Applicant liable to pay the Amount Claimed is void pursuant to section 32Y(1) of the Act.
 12. Therefore, the Respondent has received and retained the Amount Claimed from the Applicant as money had and received, and is indebted to the Applicant for that amount **OR** Therefore, the Applicant is not liable to the Respondent for the Amount Claimed or any other amount.

AND THE APPLICANT SEEKS:

- A. A declaration under section 124 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) that any term of any contract which holds the Applicant liable to pay the Amount Claimed is void.
- B. An order that the Applicant is not liable to the Respondent for the Amount Claimed or any other sum. **OR** An order that the Respondent repay the Applicant the Amount Claimed.
- C. Such other orders as the Tribunal deems fit.

Dated:

Signed:.....

THE APPLICANT

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SAMPLE PLEADING (Post January 2011) "B"

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
AT MELBOURNE

CIVIL CLAIMS LIST

/2011

B E T W E E N:

[YOU]

Applicant

and

[PRIVATE CAR PARK OPERATOR]
(ABN)

Respondent

APPLICATION

1. On [date] at approximately [time] the Applicant entered the [name of car park] at [address] in [suburb] in the State of Victoria (***the Car Park***) in a motor vehicle, and parked that vehicle in the Car Park.
2. To the extent that the Applicant thereby entered into a contract, which is not admitted, there were terms of that contract (***the Contract***) that the Applicant must pay liquidated damages to the Respondent in the event that the Applicant breached the Contract.
3. Upon returning to the vehicle at approximately [time], the Applicant found a „[describe the ticket, eg „Payment notice and tax invoice for claim of liquidated damages”]“ [ticket number] (the “Payment Notice”) placed on the windscreen of the vehicle. A copy of the Payment Notice is attached to this application.
4. The Payment Notice alleges that the Applicant [insert relevant details relating to your actions that led to a breach of the Contract; for example:] failed to obtain and display a parking ticket on the dashboard of the vehicle while the vehicle was parked in the Car Park **OR** obtained but failed to display a parking ticket on the dashboard of the vehicle while the vehicle was parked in the Car Park.
5. The Payment Notice further constitutes a demand by the Respondent that the Applicant pay the sum of \$[x] by way of liquidated damages for breach of the Contract (***the Amount Claimed***).
6. The Applicant removed the vehicle from its parking space and drove it out of the Car Park at [time].

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7. The Applicant denies liability for the Amount Claimed. **OR** On [date] the Applicant paid the Amount Claimed to the Respondent under protest.
8. The Amount Claimed is a penalty and is therefore void.

PARTICULARS

The Applicant refers to and relies upon the general law and says further that the Respondent seeks to recover damages in excess of a reasonable pre-estimate of loss suffered as a result of breach.

9. Further or in the alternative, the Contract is a “consumer contract” within the meaning of that term in The Australian Consumer Law (The ACL)
10. Any term of any contract which holds the Applicant liable to pay the Amount Claimed is an unfair term within the meaning of section 24 of The ACL.

PARTICULARS

- a) The Applicant refers to and relies upon sections 24 and 25(c) of the ACL.
 - b) Further, or in the alternative, as a result of the Conditions being inadequately displayed, it was not reasonably practicable for the Applicant to read the Conditions prior to entering the Car Park.
 - c) Further, or in the alternative, the Respondent knew or ought to have known that it was not reasonably practicable for persons using the facilities of the car park to read the Conditions prior to entering the Car Park.
11. Thus, any term of any contract which holds the Applicant liable to pay the Amount Claimed is void pursuant to section 23(1) in The ACL.
 12. Therefore, the Respondent has received and retained the Amount Claimed from the Applicant as money had and received, and is indebted to the Applicant for that amount **OR** Therefore, the Applicant is not liable to the Respondent for the Amount Claimed or any other amount.

AND THE APPLICANT SEEKS:

- A. A declaration under section 124 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) that any term of any contract which holds the Applicant liable to pay the Amount Claimed is void.
- B. An order that the Applicant is not liable to the Respondent for the Amount Claimed or any other sum. **OR** An order that the Respondent repay the Applicant the Amount Claimed.
- C. Such other orders as the Tribunal deems fit.

Dated:

Signed:.....**THE APPLICANT**