I am submitting for appeal the ruling made in GEN 17/26210. I feel this ruling was inherently unfair and failed to uphold key provisions of Australian Consumer Law. I also feel that it was made against the weight of evidence, was not fair or equitable and fails to acknowledge key facts pertaining to the case.

The respondent has not disputed the way their contract terms or damage claims process work: they hold consumers liable for any damage to the vehicle while it is in their possession regardless of whether or not they are at fault and that is how this $5,500 charge originated. They are relying on contract terms which hold consumers liable for any single vehicle accident or damage to the undercarriage of the vehicle, regardless of the cause. From a legal aspect, this ruling has allowed contract terms and a damage claims process that are inherently unfair to be upheld.

Australian Consumer Law defines any term or condition to be unfair if it “would cause a significant imbalance in the parties’ rights and obligations under the contract” and “would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.” The respondent’s damage claims process and the contract terms they are relying on fit this definition: in this case they were applied to automatically charge me $5,500 based solely on the premise that there was new damage to the vehicle without any effort to determine whether I was responsible for causing this damage. It then enabled them to hold onto this money for an indefinite amount of time and subsequently decide, through their own inspection, carried out on their own terms, on their own time frame from parties known to them, based solely on speculation about an incident which none of them were present to witness, that they believed I breeched the rental agreement and caused the damage myself. They have subsequently failed to provide any clear, credible and reliable evidence to back up this claim. This has created a significant imbalance between my rights and obligations and theirs and has caused me great financial detriment.

The Member’s ruling on this case also contradicts and undermines a legal precedent set by a Federal Court. In April 2016 in the case of ACCC vs. CLA Trading Pty Ltd (operating as Europcar), a Federal Court ruled that contract terms holding consumers liable for any damage to the vehicle regardless of fault, or “no fault liability terms” are unfair and cause a significant imbalance between the rights and obligations of consumers and those of rental car providers. Section 55 of the ruling lists the contract terms being ruled on, which are quite similar to the terms in question in this particular case. Europcar relied on terms stipulating, amongst other things, that “the customer must always pay (for)… Overhead Damage or Underbody Damage and any Damage linked to that Underbody Damage caused by contact between the underside of the Vehicle and any part of the road way” (section xii Part A).

In this case, Europcar chose not to contest the fact that its contract terms were unfair and chose to cooperate with the ACCC to amend them in exchange for a reduced, $100,000 fine. When commenting on “no fault liability terms” in section 66, the judge presiding over the case writes that “With ‘no fault’ liability, all the risk up to $3,650 is allocated to the customer. It arguably applies even when the damage is Europcar’s fault.” The same is true with the contract terms used by the respondent in this case. I was charged for damage which I have argued was caused by a mechanical failure resulting from the respondent’s failure to properly maintain and inspect the vehicle. The respondent insisted their contract terms permitted them to hold me liable anyway. Their contract terms permitted them to charge me $5,500, only investigate my claim of mechanical failure at a later point in time after already taking this money from my account and again, only to do so on their own terms.

In section one of the ruling in this case, the Tribunal Member writes that:

“The applicant signed both the contract and the damage claims form and has provided no compelling reason or substantiating evidence as to why he should not be bound by those documents he signed.”

I feel this disregards the many reasons I did give as to why I should not be bound by these documents. I believe the fact that the contract terms and damage claims process were unfair and in violation of Australian Consumer Law are sufficient grounds for why I should not be bound by these documents, particularly since I was unaware of my legal rights at the time I signed them. Furthermore, I was required to sign the rental agreement before picking up the vehicle, and I made it clear during the hearing that since I had already paid for the rental, I felt I had little choice. At the time I signed the damage claim form, I had just spent two hours stranded and blocking traffic on a busy roadway, trying to retrieve the vehicle and was still suffering from whiplash from the incident. I was not given a chance to think things through, get a medical check-up or get legal advice prior to signing this form. I subsequently revoked my signature within 24 hours once I regained my composure and was able to think more clearly about it, but the respondent nevertheless proceeded to process the charge and take the money from my account.

In section two, the Member writes that “immediately upon starting to drive the vehicle he ‘sensed it was not in the best condition’ and ‘felt in his own mind’ that the vehicle was not roadworthy.”

I would like to clarify that while it is true that I said I felt it was “not in the best condition” I never felt it was not roadworthy prior to the incident and never used the term “not roadworthy” to describe how I felt about it while driving it. I have only used the term “not roadworthy” to describe how I feel about it now, in hindsight, given what happened. I was aware of some minor problems with the vehicle, which in hindsight I believe were indicative of more serious problems than I was able to detect at the time, but was not aware of anything serious that made it not roadworthy or unsafe to drive until the incident in question occurred. I made this point clear during the hearing and in my written statement.

In section three, the Member writes that:

“In any event, not withstanding these claims, the applicant did not return immediately to the premises but continued to drive the vehicle upon leaving those premises in Mascot until he reached Anzac Parade, where the incident occurred.”

I want to emphasize here that Australian Consumer Guarantees do not require me as the consumer to diagnose major problems with the vehicle on my own. ACCC guidelines on the rental car industry clearly state that “the examination does not require the consumer to find hidden defects or ones that are difficult to detect or would require expert knowledge; for example, engine faults or a damaged undercarriage.” This quote is from Document 6 in my evidence, under the section outlining consumer guarantees. I made it clear in the hearing and in my written statement that since I was not aware that any of the problems I noticed, all of which seemed quite minor, were indicative of a more serious problem, I did not think it was worth it to take it back. The Member’s argument, if upheld, would exempt the rental car provider from their obligation under Australian Consumer Guarantees to provide me with a vehicle that is, amongst other things, “safe, durable and free from defects.” It would instead shift the entire burden onto me, the consumer, to determine on my own whether the vehicle is fit for its purpose, and to do so immediately upon starting to drive the vehicle.

I have argued that clauses B and D of the respondent’s damage waiver form are unfair and should be struck down as they cause a significant imbalance between my rights and obligations and theirs. Clause B reads that “a $5,500 liability for loss arising from a single vehicle accident applies.” Clause D reads that “Damage resulting from hail, flooding, overhead and underbody accident is the full responsibility of the hirer.” These are listed on the damage waiver form, which is page 3 in my evidence and Annexure B in the respondent’s. The respondent has highlighted both these contract terms in their evidence and clearly stated during the hearing that they are relying on them to hold me liable for this incident and used them to charge me solely on the grounds that there was new damage to the vehicle, regardless of the cause.

These facts are not in dispute by either party. Nonetheless, in section 4 of the ruling, the Member writes that “Yet on my reading these clauses, as far is relevant here, only apply when there is a ‘single vehicle accident’ or an ‘underbody accident.’” It is unclear to me what exactly is meant by this, but it sounds as though the Member is saying that based on their interpretation of these clauses, they are not applicable in this case. When asked during the hearing if they had a definition for what constitutes a “single vehicle accident” or an “underbody accident” the respondent made it clear that they did not. It is clear, however, that they considered this incident to be both.

Regardless of how these clauses may read at face value or be interpreted by a third party, it is clear they have been interpreted and applied by the respondent in a way that holds consumers liable for any damage to the vehicle, regardless of fault, and do apply in this case. In section 61 of the ruling on ACCC vs. CLA Trading PTY LTD, the Judge presiding over the case writes that certain terms and conditions “do not expressly state that they operate regardless of fault but it is agreed by both parties, correctly in my view, that in the context of the contract as a whole they had that effect.” It is not simply how a term and condition is worded that makes it unfair, it is the way it operates and has been applied and interpreted by the rental provider. Since the respondent is relying on these clauses and made it clear in the hearing that they are “no fault liability clauses” which were used to charge me solely on the grounds that there was new damage to the vehicle, I argue that they should be struck down and that this $5,500 charge was invalid.

In section 5 of the ruling, the Member writes that:

“While I agree with the applicant’s argument that cl 3 (ix) of the contract appears unfair in that, on its face it attaches liability irrespective of cause, the respondent is not relying on that clause and as such it is not necessary for me to make any ruling on it.”

There appears to be some ambiguity about whether or not the respondent is relying on that clause, but I believe the fact they have highlighted it in their rental agreement indicates that they are. When asked in the hearing if they were relying on that clause, the respondent first answered “yes,” then switched his answer to “no, not at this time.” This indicates that regardless of whether or not they are relying on this clause to hold me liable for the incident, they could chose to do so at any time. I argue that the fact that it has been highlighted in their evidence and that the respondent was not able to provide a clear answer as to whether they are relying on it means it should be assumed that they are, and that since the Member agrees that this term is unfair, it should be struck down.

In addition to the $5,500 charge, I am also asking to be refunded for the $275 I had to pay to get the vehicle towed back to the rental office. I have highlighted section 5a of the Rental Contract, which reads that “free roadside assistance is provided for inherent mechanical faults in the vehicle but fees apply for all other faults or driver induced errors.” I have argued that this clause guarantees free roadside assistance for mechanical problems and roadside assistance with a subsequent fee for driver induced errors. By leaving me stranded in the roadway for 2 hours and forcing me to arrange for the towing on my own, I have argued that the respondent has failed to honor this part of their rental agreement, regardless of fault or liability.

But in section 14 of the ruling, the Member writes that “CL 5 of the contract, on which the applicant relies in seeking a refund for the towing costs he paid, confines free roadside assistance where there are ‘inherent mechanical faults’. For the reasons already given, the applicant has failed to show that this was the case.”

First, I feel this fails to take into account my argument that by leaving me stranded for two hours and forcing me to arrange for the towing myself, the respondent breeched their contract by failing to provide me with roadside assistance, free or not, and for this reason I should be refunded the $275 I had to pay for this. Second, I feel this interpretation of the contract term places an undue burden on me, as the consumer, as it would force me to prove to the respondent at the time of the incident that this was a mechanical failure before I would be eligible for roadside assistance. It is simply not possible for a consumer to do this when they have broken down and are stranded on a major road and this interpretation would effectively render this clause mute.

The only way for this clause to operate is for the customer to receive roadside assistance and for the provider of this service to decide for themselves if the incident was due to a mechanical failure or driver error. I argued during the hearing that if this had been done, the vehicle could have been inspected by a neutral third party who would have seen for themselves what had happened. I have argued that this was the best way to determine the cause of the incident and that by failing to honor this part of their rental agreement and taking it upon themselves to conduct their own inspection once the vehicle was returned to the rental office instead, the respondent has created a further imbalance of rights and obligations which further advantaged them at my expense.

In section 12, the member writes that:

“While the Landau, Rockdale Kia and alliance documents may not be quite ‘at arms length’ in the sense that these entities are known to the respondent, there is nothing to substantiate the applicant’s claims of bias.”

I feel this fails to acknowledge the evidence that I did provide. I emphasized during the hearing that these inspections were not conducted until a month after the incident, and only came about following my email threatening legal action. Specifically, the time when the respondent claims to have commenced the inspection in the timeline was “approximately 2 weeks into April” which perfectly coincides with the date I sent this email on April 14th. I subsequently received notice of this inspection and its findings on April 18th. I also feel that the fact these inspections were conducted only after the respondent had already charged me and held onto the money further substantiates my claims of bias. The Member has provided another reason why this inspection should be considered bias in that the parties that carried out the inspection were “not at arms length” and were known to the respondent. It is not necessary for me to prove my claim of bias beyond all reasonable doubt and is not possible, as it would have required me to see the inspection take place and know how the parties conducting it were thinking. I do believe, however, that I have provided clear proof to substantiate this claim. I believe I have effectively cast substantial doubt over the credibility of the respondent’s inspection.

In section 13, the Member writes that:

“While in an ideal world, it may be preferable for those opining on the vehicle to see it as soon as possible after the event, as the applicant claims, there is no evidence to show that the opinions provided, given the state and type of damage in issue, would have been any different.”

I feel this also ignores the evidence I provided on this matter. It fails to take into account a key point I made toward the end of the hearing, which is that the respondent has made it clear that the first party to inspect the vehicle after the incident was their smash repairer, who provided a quote for the costs of repair. This was done soon after the incident, but then a month passed before any action was taken to investigate the cause of the damage. Since the damage assessment carried out by the smash repairer would have required them to remove or shift damaged components to get a better look, it means none of the parties who subsequently inspected the vehicle would have seen the original damage. It would have been impossible to carry out an accurate inspection. I believe this, along with my previous claim of bias provides clear proof that the delay of the inspection did play a major role in affecting the outcome.

I feel this ruling has placed an undue burden of proof on me in a way that further treats me as an unequal partner. The Member has affirmed my view that the respondent has failed to provide satisfactory evidence to verify their claim that I breeched the rental agreement and caused the damage out of negligence, writing that “What is controversial is whether the separation of the wheel from the axle occurred as a result of mechanical failure (as alleged by the applicant) or as a result of the applicant having an accident while driving (as alleged by the respondent).” Nonetheless, the Member has ruled that the respondent still has the right to charge me and hold me liable for the incident simply because I have failed to prove that I did not hit anything to cause the damage. Essentially, I have been deemed guilty until proven innocent.

I feel this has increased the imbalance between my rights and obligation and the respondent’s. Under Australian Consumer Law, if one party is accusing the other of breaching the contract, the burden of proof is on them. In this case, the burden of proof should be on the respondent to prove I breached the contract, which they have failed to do. Shifting this burden of proof onto me to prove that I did not breach the rental agreement disadvantages me further to the benefit of the respondent.

The Member has also written that I have failed to provide proof that is simply not possible for me to provide. In sections 9-12, the Member claims that I have failed to provide evidence to counter the evidence provided by the respondent. I believe this highlights the way the respondent’s damage claims process rendered me an unequal partner and disadvantaged me, as it made it impossible for me to provide such proof. This would have required me to conduct my own inspection of the vehicle, which was not possible since the vehicle was in the respondent’s possession. By carrying out their own inspection on their own terms behind closed doors, they were able to ensure that there was no way for me to directly counter the claims made by their mechanics or provide any evidence to directly refute them.

Furthermore, by retaining possession of the vehicle and carrying out their own inspection on their own terms, the respondent has been free to do as they wish to it. There was no way for me to ensure that the vehicle was not tampered with while in their possession or to prevent them from rearranging the damage to make it look like it was caused by an accident if they wished to do so. I believe this is a very important point that I did not make during the hearing but am asking for leave for it to be considered by the appeals panel. Upon further review of the photographs provided by the Respondent in their evidence, I have noticed that major components of the damage were indeed rearranged. This becomes apparent when comparing the photographs from Annexure E (1,2 and 3) to the photographs in Annexure J, the Alliance Report. It is best to compare them side by side.

The Respondent has acknowledged in their evidence and during the hearing that the photographs in Annexure E were the first ones taken by the rental staff as soon as the vehicle was returned to the rental office in Mascot. I have repeatedly said in my testimony and written statement that the wheel had separated from the axle and become lodged under the vehicle, twisted at a sideways angle. The photographs shown here confirm this. The wheel is twisted sideways, the tire has been shredded from when the vehicle skidded to a stop and has partially separated from the wheel.

However, in the photographs in the Alliance Report, which were taken as part of the respondent’s inspection nearly a month after the incident, following my threat of legal action and only done after the damage was taken apart by the smash repairer, the wheel has been moved to a completely different position. Not only has it been straightened and moved to a forward facing position, but the tire has been fully reattached and the wheel has been rotated to obscure the fact the it has been shredded. These photographs make it appear as though the tire has been punctured and flattened by an impact and create the appearance that the vehicle struck an object and went over a bump, which corroborates with what the respondent claims to have determined through their inspection. Despite the fact that it is a dramatically different position from its original one, the respondent has taken great pains to emphasize this and has taken many photographs highlighting the wheel from many different angles, suggesting that this new position was intentional and part of their evidence against me.

I may not be a certified mechanic, but I believe these are basic observations that are self-evident and easily apparent to any casual observer, regardless of their automotive expertise. I believe this provides clear proof that the respondent’s inspection of the vehicle was inaccurate, unreliable and subject to bias at best and deliberately fraudulent at worst. Furthermore, I note that although I did not mention this in the hearing, my comments about the damage being taken apart by the smash repairer prior to the inspection hit quite the nerve with the representative for the respondent, which to me implies an admission of guilt on this matter. Again , however, the most important point here is that the respondent’s damage claims process advantaged them in a way that left them free to do this if they so wished, which makes it inherently unfair and disadvantageous to me as the consumer.

I feel this argument gave undue weight to evidence provided by the respondent even though the Member has acknowledged it was not sufficient to prove their case against me. I feel my arguments were cast aside and ignored in this ruling and that the Member held me to a much higher standard of proof than the respondent, despite the fact that they are the ones accusing me of breaching the contract. I certainly hope that the fact I have made all my claims under oath, and that I have made the same claims under oath in complaints I filed with NSW Fair Trading, Queensland Fair Trading and the ACCC, and the fact that I hope to have demonstrated that I have enough character to put forth such claims honestly and in good faith, and that the respondent has failed to provide any evidence to refute them, would all constitute sufficient grounds for me to be taken at my word.

Most importantly, I feel there is a key public interest at stake here, and that it is in the best public interest for this ruling to be overturned, as it sets a number of dangerous precedents. Such a ruling, if upheld, would give rental providers the right to apply and rely on contract terms that hold consumers liable for damage regardless of fault. It would give rental providers the right to make accusations of negligence and breach of contract against a consumer and hold them liable without any clear and credible evidence and instead require the consumer to clearly refute their claims. But perhaps most importantly, it would nullify the legal precedent already set by a Federal Court that such actions are inherently unfair, unlawful and violate the rights of consumers.