

Unfair consumer contract terms under the Fair Trading Act 1986

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The High Court declares that New Zealand's largest online trader used unfair contract terms in its standard form consumer contract.

On 12 November 2019, the High Court declared that certain terms used by New Zealand's largest mobile (or online) trader were unfair under the Fair Trading Act 1986 ("FTA") and therefore unenforceable, ordering it to refund customers hundreds of thousands of dollars.¹

Background

Home Direct Limited ("**Home Direct**") is New Zealand's largest mobile trader. It employs over 250 staff and operates nationwide selling consumer goods online, over the phone and via mobile shops. The types of goods sold include clothing, toys, electronics, furniture and whiteware.

Home Direct operated a Voucher Entitlement Scheme ("**Scheme**"). Under the Scheme, when a customer had repaid what they owed to Home Direct for previous purchases made on a "layby" arrangement, Home Direct would continue to debit regular amounts from the customer's bank account, with each of those payments converted into a "voucher entitlement". Customers could then use their vouchers to make future purchases from Home Direct.

The Scheme included two terms alongside the standard consumer contract that were allegedly unfair:

- a. customers could not have their vouchers refunded or exchanged for cash; and
- b. the vouchers expired after 12 months.

More than \$644,000 was forfeited in this way over several years of the Scheme's operation. The issue before the Courts was whether these terms were unfair.

The Commerce Commission ("**Commission**") is responsible for enforcing the unfair contract terms regime in the FTA. The Commission may apply to the High Court or the District Court (at the choice of the Commission) for a declaration that a term in a standard form consumer contract is an unfair contract term and therefore unenforceable.²

High Court judgment

As well as taking into account the whole contract and the extent to which the terms are transparent,³ section 46L of the FTA provides factors the Court must consider when deciding whether a term in a consumer contract is unfair. If the term:

- a. would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- b. is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the

term; and

c. would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on, then the term may be deemed unfair and may no longer be used, enforced or relied upon.⁴

Justice Muir held that under the FTA, the terms and conditions of the Scheme relating to refunds and expiry of vouchers were “insufficiently clear”.⁵ This lack of transparency around the Scheme also added “a further layer of unfairness”.⁶ The Scheme did not provide a corresponding benefit to customers (such as a discount on the purchase of goods) and Home Direct did not have any countervailing obligations (such as paying interest on accrued balances or discounts on future purchases),⁷ which led His Honour describing the Scheme as “one-way traffic”.⁸ In accordance with sections 46H to 46L of the FTA, the Court declared that the terms were unfair.

Comment

Home Direct no longer operates the Scheme and co-operated with the Commission throughout its investigation, and consented to the declarations being made. It has credited customers over \$133,000 and has agreed to refund any customers who were part of the Scheme.

This is the first unfair contracts term declaration by a Court in New Zealand and is a further example of the Government’s crackdown on mobile traders. Earlier this month, the Credit Contracts Legislation Amendment Bill (“Bill”) passed the select committee stage, which proposes a certification requirement for all lenders under consumer credit contracts. The Bill extends the certification requirement to mobile traders, who might also have to register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Given the increase in number of consumer complaints in 2018/2019, click here, we foresee that the Commission will strengthen their enforcement regime on unfair contract terms and is a timely reminder to businesses to review your consumer contracts.

To read a copy of the judgment, please click here. If you would like to know more about the High Court’s decision, please contact us.

Please also read our previous article on the recent proposed amendments to the Fair Trading Act.

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1. *Commerce Commission v Home Direct Limited* [2019] NZHC 2943.↩

2. Fair Trading Act 1986, section 46H.↩

3. Section 46L(2).↩

4. Section 26A(1)(b).↩

5. At [50].↩

6. At [56].↩

7. At [58].↩

8. At [58].↩

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