



Unfair Contract Terms: High Court issues its first declaration

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On 12 November 2019 the High Court issued its first declaration under the Fair Trading Act 1986 (FTA) that terms in a standard form consumer contract are unfair.¹ The Commerce Commission (Commission) commenced proceedings against Home Direct Limited (Home Direct) seeking a declaration that certain terms in Home Direct's standard form contract were unfair, pursuant to s 46(1) FTA.

The judgment is available [here](#).

The Unfair Contract Terms Regime

A prohibition against unfair contract terms was included in the FTA from 17 March 2015. The Commission has jurisdiction to seek declarations for consumer contracts which are in standard form. This is on the basis that the contract is presented to a consumer on a "take it or leave it" basis. A term that is unfair must meet three requirements:

- The term would cause a significant imbalance in the parties' rights and obligations under the contract;
- The term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it; and
- The term would cause detriment to a party if it were applied, enforced, or relied on.

A term is exempt from these requirements if it describes the subject matter of the contract, sets an up-front price under the contract, or is expressly permitted by legislation.

The Commission has previously undertaken reviews and issued advice at an industry level in relation to standard form consumer contracts including reviewing the gym industry, energy retail contracts, and telecommunications contracts. The proceeding against Home Direct represents the first judgment obtained by the Commission declaring a contractual term unfair.

The Home Direct Decision

Home Direct is New Zealand's largest mobile trader. It operated a Voucher Entitlement Scheme targeting customers who repaid amounts owing to Home Direct. Under the scheme, if these customers continued to make regular payments to Home Direct after their initial debt was repaid, these payments could then be used to make future purchases from Home Direct. The Commission alleged two terms, in combination, were unfair (the Particular Terms):

- Customers could not have their voucher entitlements refunded or exchanged for cash; and
- Any voucher entitlements expired after 12 months.

The Court accepted that the Particular Terms in combination amounted to unfair contract terms. The Particular Terms had the result of requiring customers who had their account debited for vouchers either to purchase further goods from Home Direct, or to forfeit those vouchers. The Court further found the Particular Terms did not provide a corresponding benefit to consumers, and were not necessary to protect Home Direct's legitimate interests.

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

The Court granted the declaration sought by the Commission (and consented to by Home Direct) declaring the Particular Terms unfair in accordance with the FTA. The Court also noted that it found Home Direct's terms and conditions were not sufficiently clear. This lack of transparency contributed to the unfairness of the Particular Terms.

The Court directed that the Particular Terms could not be applied, enforced or relied upon. As a result of this direction, any affected consumers will be entitled to apply to Home Direct to use their vouchers, or to seek refunds for the vouchers. Consumers may be entitled to refunds totalling \$644,000 for the duration the Particular Terms were in operation.

What does the decision mean?

The decision represents an important step in establishing a body of case law in relation to unfair contract terms in New Zealand. This will provide valuable judicial guidance to assist businesses in reviewing their contracts to ensure they comply with the FTA. The decision will also assist the Commission with its investigations or prosecutions of businesses seeking to rely on potentially unfair contract terms.

The decision also highlights the consequences of seeking to rely on unfair contract terms. Home Direct has already credited \$133,000 to customers, and is required to make refunds to as many as 14,000 affected customers. The judgment also states the Commission's intention to "broadly publicise" the decision to alert as many consumers as possible to the right to seek refunds. Such wide publicity can also be expected in future cases.

Reform is on the way

The Government has recently announced significant proposed changes to the FTA. The proposed changes will bring the FTA more in line with prohibitions applying in Australia. This will include an extending the reach of these provisions to include standard form business-to-business contracts with a value not exceeding \$250,000.²

The Government is also considering amending the legislation so that private parties would be able to seek declarations from the Court. At present, the Commerce Commission is the only body able to seek such declarations, which means that an individual consumer or business is required to make a complaint to the Commerce Commission in order to seek redress.

The government intends to introduce amending legislation in 2020. There will be opportunities for parties to make submissions through the select committee process early next year.

What should businesses be doing?

Businesses can take some guidance from the Court's decision in determining the types of clauses that may be found to be unfair, and the analysis the Court will undertake when considering whether a term creates a significant imbalance in the parties' rights and obligations under a contract. All businesses should carefully review any standard form consumer contracts in use in order to ensure they are compliant and to avoid the risk of terms being found to be unenforceable.

The decision is also a timely reminder for businesses who use standard form contracts in their business dealings to review their contractual processes in advance of likely change next year.

If you would like assistance in reviewing your standard form contracts or how upcoming reform may affect your business, please get in touch.

² <https://www.mbie.govt.nz/dmsdocument/7112-review-of-consumer-law-fair-trading-act-evaluation-report>