

Unfair commercial practices – First High Court declaration and stronger laws to come

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The High Court recently made its first declaration that the terms of a standard form consumer contract are unfair under the Fair Trading Act 1986 (FTA) in the case *Commerce Commission v Home Direct Limited* [2019] NZHC 2943 (*Home Direct* case). The judgment is particularly timely, as it comes shortly after the Government's announcement of new measures to target unfair commercial practices. This update outlines the key points and implications of the *Home Direct* case, including both in the context of the current unfair contract terms (UCT) regime in New Zealand and the new measures proposed.

The current UCT regime

The current UCT regime protects consumers where they acquire goods or services under a standard form contract offered on a 'take it or leave it' basis. Under the FTA a term in such contracts may be declared by a Court to be 'unfair' if it:

- Would cause a significant imbalance in the parties' rights and obligations
- Is not reasonably necessary in order to protect the supplier's legitimate interests
- Would cause detriment to the customer if it were applied, enforced, or relied on.

When it considers whether to make a declaration, the Court must take into account the extent to which the term is transparent and consider the contract as a whole. If the Court decides a term is unfair, it cannot be relied on or included in any standard form contract.

Home Direct case

In this case, Home Direct Limited was operating a 'voucher entitlement scheme' targeting customers who bought goods on deferred payment terms. Customers who opted into the scheme, continued to be automatically debited after they had fully paid off their previous purchases, with each of those further payments being converted into a 'voucher entitlement' which could only be used for future purchases from Home Direct.

The Commerce Commission submitted (and Home Direct accepted) that two terms under the scheme, in combination, were unfair:

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

The combined effect of these terms was that sums debited from customer's bank accounts and not used to purchase goods from Home Direct within the 12-month expiry period, were forfeited to Home Direct (amounting to \$644,000 in total over the scheme's duration). The terms also created the potential for a customer's bank accounts to be debited indefinitely.

As might be expected given the similarity of Australia's equivalent regime, the Court looked to a number of Australian cases for guidance on interpreting and applying our UCT provisions. The Court found that the terms in question, when operated in combination, were unfair under the FTA. This decision was based on the following:

- The terms would cause a significant imbalance in the parties' rights and obligations because they conferred significant benefits on Home Direct with no corresponding benefit to customers as they did not accrue interest on balances nor did they receive discounts on future purchases
- The terms were not reasonably necessary to protect the legitimate interests of Home Direct
- The terms would cause a significant detriment to customers if they were applied, enforced or relied on because customers were either locked in to purchasing goods from Home Direct or risked losing their money to Home Direct if they did not use their voucher entitlements within the 12-month expiry period
- There was a lack of transparency in the scheme itself and the way it was presented to customers. The lack of transparency identified by the Court included unclear drafting of the relevant terms and small font (among other closely typed clauses) at the bottom of a page

- Together, the factors above meant that the terms were unfair, taking into account the contract as a whole.

As a result of the Court's decision, Home Direct must not apply, enforce or rely on the terms in the event customers seek to use, or request refunds of, their voucher entitlements. Home Direct has already credited customers over \$133,000 and has agreed to refund any customers who had vouchers which were forfeited to Home Direct under the scheme after the UCT regime came into force.

Implications and reform

This case represents a starting point in establishing a body of case law in relation to the UCT regime in New Zealand. The extent to which we can rely on this case for guidance is somewhat limited given that the Court's starting point was that Home Direct accepted that its terms were unfair and the Court's analysis was very fact-specific. However, this case shows that the New Zealand courts are willing to look to Australian cases for guidance on interpreting our UCT laws, which will provide some added assistance for New Zealand businesses.

The case also highlights the importance of drawing customers' attention to key terms in a clear and transparent manner in standard form contracts. Although transparency will not necessarily save a term from being unfair, it will be taken into account – with the Court stating that “the absence of transparency adds a further layer of unfairness to the overall analysis” and that transparency will always be a factor, and potentially an important factor, in the overall assessment.

The implications of this case should be considered in conjunction with the proposed reform to the FTA (see our earlier [update](#) in relation to the discussion paper which was released by the Ministry of Business, Innovation and Employment in December 2018). Following a three-month consultation process, the Government has now announced its [proposed measures](#) including:

- Prohibiting conduct that is 'unconscionable'
- Extending the current UCT protections for standard form consumer contracts to apply to business contracts with a value below \$250,000 (or \$250,000 per year for multi-year contracts).

This means that the UCT regime will now apply to **standard form business-to-business** contracts offered on a 'take it or leave it' basis. The changes are aimed at addressing the imbalance of bargaining power that small businesses may face, but the changes will not be limited to small business contracts (in contrast to Australia). Businesses will therefore need to review all standard form business contracts that fall below the value threshold, regardless of whether the likely counterparties are small or large businesses.

The Government stated that it expected to introduce changes through a Fair Trading Amendment Bill by early next year. While the amendment bill has not yet been introduced in parliament, we would expect the changes to be made before the next election. The changes will generally be modelled on the approach taken in Australia meaning case law from across the Tasman will likely provide some useful guidance.

If you would like to find out more about the UCT regime and proposed changes, or need assistance reviewing standard form contracts to identify potentially unfair terms, please contact one of our consumer law team members.

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