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Commerce Commission
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Unfair Contract Terms Guidelines

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Commerce Commission's *Draft Unfair Contract Terms Guidelines, July 2014*. In particular the Law Society supports the early release of this document in its final version, to enable traders to assess and modify their consumer contracts before the provisions come into effect on 17 March 2015. The illustrations and examples provide helpful guidance as to how the new provisions might be applied.

Comments from the Law Society's Commercial and Business Law Committee are set out below.

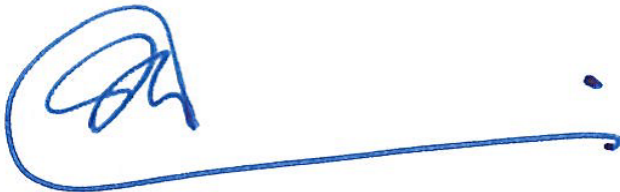
| Paragraph | Suggested change/comment |
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| 5 | It would be helpful to emphasise or highlight the fact that the whole of a contract varied after the commencement date will come under the unfair contract terms regime, as this is not well understood. |
| 8 | Other examples might be self-storage facilities and rental of appliances and goods. |
| 19 | The Law Society suggests a reference to "false representations" be included to capture breaches of section 13. |
| 24 | It may be helpful to explain in slightly more detail how the Fair Trading Act definition applies to businesses, for example: "A business will therefore come within the definition of "consumer" when it acquires consumer goods for its own use. It will not be a "consumer" with respect to those goods it acquires for resupply or consumption in the course of the goods and services it provides, or where it acquires goods that are not ordinarily acquired by consumers." |
| 41 | This paragraph could provide a contrary perspective. For example, "On the other hand, where a term is merely a normal response to consumer action it is unlikely to be considered unfair. An example would be debt collection where a consumer has failed to pay a bill." |
| 49 | Example: the Commission may want to consider adding to the end: "and remains proportionate considering that he is half way through his contract." |

| Paragraph | Suggested change/comment |
|-----------|--|
| 53 | The Law Society suggests adding after “implications”: “or whether the contract term had been varied to the consumer’s detriment post-formation.” |
| 54 | The Law Society suggests changing the reference to “misleading and deceptive” to “misleading or deceptive”. |
| 55 | The Law Society suggests that the Commission reconsiders this paragraph in light of <i>Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd</i> [2014] NZCA 418 and in particular the comments made at [43] in respect of the term “average” and the potential for confusion. It may be better to use the Court of Appeal’s formulation or at least refer to the “typical consumer”. |
| 57 | The Law Society suggests adding after “webpage”: “, with a mouseover or link to further information,”. |
| 61 | Example: The Law Society suggests adding to the 3 rd sentence after “Other contract terms allow the gym to change location” the words “(including, for instance, to a distant suburb)” – to emphasise the contractual imbalance between the parties. |
| 67 | <p>In this paragraph the Commission suggests that consumers should have the right to cancel a contract without penalty where disclosed and anticipated variations are made that are “materially detrimental”. This does not take into account the key statutory requirement that the variation not be reasonably necessary to protect the legitimate business interests of the contracting party. In addition, as a general approach this would be contrary to business efficacy and would be likely to have a negative effect upon those markets which rely on long term consumer standard form contracts for financial stability.</p> <p>The Law Society suggests that, rather than making this statement, it would be in the interests of both consumers and businesses to indicate that when an unsignalled variation is made which significantly and unexpectedly affects consumers, businesses should offer the opportunity to terminate the contract.</p> |
| 67 | <p>First example, third paragraph: The Law Society suggests that the Commission add after “provided”: “by any amount it chooses” or similar.</p> <p>Last sentence: The Law Society suggests that the Commission add after “penalty”: “or tied the price increase to the Consumers Price Index in an upfront manner,”.</p> |
| 67 | Second example, last sentence: The Law Society suggests the Commission add after “penalty”: “or choose to be given a price reduction in compensation”. (In this example Marama might not want to cancel but should be given her money’s worth.) |
| 68 | First example: The Commission should take a consistent approach in the Guidelines to whether it is going to identify all the ways in which an example may involve a breach or whether it is going to confine commentary on examples to the point that is being made. The former approach is taken in the example at [69]. If this is the approach taken, the Commission should consider adding that the clause is likely to mislead consumers as to their rights in the first example at [68]. |

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| 68 | Second example: The Law Society suggests that further thought be given to simplifying this example so that it does not cause confusion. The application of the Fair Trading Act to goods purchased over the internet is not straightforward, so the example could make it clear that the country of supply is New Zealand (i.e. s 3 applies). If the Act does apply, then it is not possible to contract out of it (s 5C) unless an exception applies (s 5D). It is not clear whether the example is making the point that the term is unfair because it is misleading consumers as to their rights, because it is effective in limiting their rights or because, even though it is not effective in limiting their rights, in practice it is likely to do so because many consumers will not realise that it is not effective. |
| 82 | Example: The Commission may want to consider using the facts of the Australian <i>Jetstar</i> case. In that case, the fee might well have exceeded the <i>value</i> (but not necessarily the <i>cost</i>) of the service (changing a booking by introducing a new traveller) but it was upheld by the Court because the consumer had knowingly chosen the cheap fare which did not include the option to change. |
| 83 | It would be helpful to include a reference to upfront price meaning consideration contingent upon the occurrence or non-occurrence of a particular event providing it is transparent: section 46K(2). |

We hope these comments will be of assistance. If you have any questions or wish to discuss the matters raised, please contact the Commercial and Business Law Committee convenor Stephen Layburn through the committee secretary Vicky Stanbridge (ph 04 463 2912 ddi or vicky.stanbridge@lawsociety.org.nz).

Yours faithfully,



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