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New Zealand commerce commission starts 2015 with a focus on consumer rights

NEW ZEALAND

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New Zealand's new 'unfair contract terms' regime comes into force

New Zealand's new 'unfair contract terms' regime came into force on 17 March 2015, further aligning New Zealand's consumer laws with its Australian counterparts. From that date, the New Zealand Commerce Commission (NZCC) has the power to seek a declaration from the District Court or High Court that a term in a 'standard form consumer contract' (SFCC) is unfair. A term in a SFCC that has been declared unfair by a court will be unenforceable, and a person must not either include the unfair contract term in a SFCC, or apply, enforce or rely on that term. A person who does so could face a penalty of up to NZD200,000 (for an individual) or NZD600,000 (for a body corporate), for each contravention.

The NZCC's initial focus will be on industries it sees as greater risk of falling foul of the new regime, including telecommunications, car parking, utilities, gym membership, airlines and car rentals. Participants in these or similar industries can expect the NZCC to be knocking on their door from mid-March. The Commission will also pay particular attention to terms that limit competition, with Dr Mark Berry (chair of the NZCC) noting that:

> 'The types of terms that concern us include those that have the effect of limiting competition, such as automatic "rollover" or renewal terms and terms that lock consumers into contracts that they wish to exit, preventing them switching to a competitor. We will also look closely at any term that allows a business to increase the price it charges for goods or services without the customer being allowed to terminate the contract with no penalty.'

While the unfair contract terms regime may, on its face, appear straightforward, it requires the courts to undertake a relatively complex analysis of the relevant circumstances, including as to the nature of the parties to the contract (ie, whether the disadvantaged party is a 'consumer' for the purposes of the Fair Trading Act – the definition of which is broad enough to cover a business purchasing goods of a kind 'ordinarily acquired for personal, domestic, or household use or consumption').

For a term in a SFCC to be declared unfair, a court must determine that: (i) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; (ii) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by it; and (iii) it would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on. The court may take into account any matter that it considers relevant, but it must take into account the contract as a whole and the extent to which the relevant term is 'transparent'. Certain terms, for example those that define the main subject matter of the contract, cannot be declared unfair.

Unlike the Australian regime, only the NZCC may apply to the courts for a declaration that a term in a SFCC is 'unfair' – although third parties may request the NZCC to seek such a declaration. Ultimately, the decision whether or not to test the case in the courts is at the NZCC's sole discretion. Despite theoretical concerns that third parties may have abused the process by engaging in 'tit-for-tat' allegations that their competitor's terms were unfair, if they had that power (a factor in legislating for the NZCC to be the 'gatekeeper'), there seems to be no substantive evidence suggesting that this has been the case in Australia.

NZCC's investigation into Air NZ's 'opt-out' insurance results in a win for consumers

The NZCC's Fair Trading Act investigation into Air New Zealand's (New Zealand's national flag carrier) practice of offering travel insurance on an 'opt out' basis has concluded, with the NZCC issuing a formal warning on 5 March 2015, and Air New Zealand agreeing to change its pricing practices. The NZCC's investigation outcome comes as a warning to other traders who have adopted 'opt-out' pricing practices (or have other hidden costs), where the headline prices may be inflated later in the purchasing process.

In December 2014, media reports emerged that the NZCC was investigating Air New Zealand in relation to this pricing practice, a fact that was subsequently confirmed by the NZCC. The practice essentially involves an Air New Zealand customer making an airfare enquiry for which they are quoted a 'headline' price, after which Air New Zealand pre-selects the travel insurance option – increasing the headline price by the value of the insurance charge. An unsuspecting customer would then need to actively de-select the travel insurance option – otherwise they may inadvertently purchase travel insurance when they may not in fact need it.

While Air New Zealand considered it had a legitimate reason for pre-selecting travel insurance because it believed its customers 'expected to be able to buy travel insurance and valued the convenience of pre-selection', this did not persuade the NZCC who considered that the practice was likely to breach the Fair Trading Act by 'misleading customers as to the nature of the services offered by Air NZ' and 'misleading customers as to the price of its services'.

'Drip pricing', where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges (which may be unavoidable) are then incrementally added or 'dripped' to the headline price, has been the target of regulators worldwide, and this is not the first time that airlines' pricing practices have been scrutinised. In June 2014, the Australian Competition and Consumer Commission (ACCC) issued separate proceedings against Virgin Australia Airlines and Jetstar Airways alleging the airlines each engaged in misleading or deceptive conduct and making false or misleading representations in relation to particular airfares by failing to adequately disclose additional booking and service fees for payments by credit card. The NZCC, Air New Zealand and Jetstar (which also operates in New Zealand) will no doubt be following those proceedings with interest.

NZCC settles for over NZD25m with three major banks in relation to interest rate swaps

On 17 February 2015, the NZCC announced it had reached a NZD2.97m settlement with Westpac in relation to Westpac's marketing, promotion and sale of interest rate swaps to rural customers between 2005 and 2012.[1] The NZCC's investigation, which concluded in December 2013, primarily related to whether interest rate swap products were marketing in ways that may have misled customers as to their true risk, nature and suitability, in breach of the Fair Trading Act.

Westpac was the third and final bank to enter into a settlement agreement with the NZCC following the completion of its Fair Trading Act investigation, bringing the total settlements to over NZD25m. The NZCC previously announced that it had reached a NZD19m settlement with ANZ Bank and NZD3.2m settlement with ASB Bank (both in relation to the marketing, promotion and sale of interest rate swaps to rural customers between 2005 and 2009) on 3 December 2014 and 24 December 2014, respectively.

Following the completion of its investigation, the NZCC announced that it had advised the banks that in its view it had sufficient foundation for commencing proceedings against the banks in relation to the alleged conduct. However, subsequent discussions led to the settlement agreements and proceedings were never issued. Neither of ASB, ANZ or Westpac admitted that their interest rate swap products breached the Fair Trading Act.

Note

1 An interest rate swap is essentially a financial derivative product that allows a borrower to manage the interest rate exposure on their borrowing.