
International developments

From the United Kingdom

Unfair contract terms in the mobile phone industry

The ACCC is currently concerned with complaints from consumers about the mobile phone industry, particularly in relation to the terms and conditions of standard personal contracts, and alleged misrepresentations in advertising and by dealers. It keeps abreast of how other countries have dealt with the same issues. The following article discusses unfair contract terms legislation in the UK, especially as it relates to the mobile phone industry. It was prepared for the Commission by Lisa Santin, ACCC Legal Unit.

The UK legislation

The UK has specific legislation covering unfair terms in consumer contracts.

The Unfair Terms in Consumer Contracts Regulations, which came into force on 1 July 1995, implemented an EC Directive (EC Directive 93/13) in the UK. The Regulations apply to standard contract terms to be used in contracts with consumers made after 1 July 1995. They say that a consumer is not bound by a standard term in a contract with a seller or supplier if that term is unfair. The Regulations also give the Director General of the Office of Fair Trading (OFT) powers to stop the use of unfair standard terms by businesses and to prevent anyone recommending such terms by, if necessary, obtaining a court injunction. The OFT has had significant success in addressing

unfair terms in consumer contracts, especially in the mobile phone industry.

In order to comply with European Law, the Regulations must be read in conjunction with the Directive and interpreted to give effect to the Directive's purposes as set out in the preliminary note of explanation, the recital. The recital sets out in detail what is meant by the general requirement of good faith.

On receiving a complaint, the OFT scrutinises not just the offending term, but the whole contract, commenting on all terms that appear unfair. This comprehensive approach is considered by the OFT to secure the best result for consumers.

The Regulations confer on the OFT:

- a duty to consider complaints about standard terms;
- a power to take court action against anyone using or recommending an unfair term;
- a power to accept appropriate undertakings in lieu of going to court;
- a duty in each case to give reasons for taking or not taking proceedings; and
- a power to give information and advice about the Regulations.

Parties to whom the Regulations apply

It is clear that the Regulations are intended to protect individual consumers only. A consumer is defined as 'a natural person who, in making a contract..., is acting for purposes which are outside his business'.

The Regulations do not apply to all contracts between sellers or suppliers and consumers, but

International developments

only those in respect of which the terms have not been individually negotiated. A contractual term is regarded as not having been individually negotiated where it is drafted in advance and the consumer has not been able to influence its substance, such as in standard form contracts.

Unfairness

The Unfair Terms in Consumer Contracts Regulations are aimed against 'any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'; in other words, if there is undue weight in the contract against the consumer and in favour of the business.

To assist in the assessment of whether or not a term satisfies the requirements of 'good faith', particular regard is to be had to the matters in Schedule 2 to the Regulations, including the strength of the bargaining positions of the parties.

The test of unfairness also takes into account whether the imbalance is 'contrary to the requirement of good faith', which includes whether the supplier's behaviour was fair and equitable. Schedule 3 to the Regulations contains an 'indicative and non-exhaustive list' of terms which may be considered unfair, including examples of hidden terms (which bind the consumer to terms they did not know about), penalty clauses (for breach of contract) and the right to increase the price of what is supplied.

The definition of unfairness does not require proof that detriment has occurred. The OFT can take action wherever there is a real possibility of harm to consumers.

Any term which is drafted in obscure language or whose meaning is otherwise unclear might also be considered 'unfair', as outlined below.

Plain and intelligible language

The use of terms which consumers are likely to find difficult to read and understand is a potential source of unfairness in its own right.

Regulation 6: A seller shall ensure that any written term of a contract is expressed in **plain,**

intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

The standard of 'plainness' and 'intelligibility' of contract terms must normally be within the understanding of ordinary consumers **without legal advice.** Legal and other jargon must be avoided and everyday words used. Where specialised terms are unavoidable, they must be clearly defined.

Consideration should also be given to the style and structure of the contract. The contract should use positive and direct language with short sentences. Use of explicit headings and sub-headings increase the level of understanding. Cross references and double negatives should be avoided.

The opportunity to examine contract terms

The use of plain language forms part of the wider requirement that consumers be given the opportunity to examine all written terms before entering into the contract (schedule 3, para 1(i)). In enforcing the Regulations, the OFT considers whether explanatory pre-contractual brochures and leaflets have been provided to the consumer to allow them to evaluate the contract, and whether a reasonable 'cooling off' period has been inserted into the contract.

Core terms

Under Regulation 3(2), those terms which define the main subject matter of a contract or the price to be paid for it (known as the 'core terms') are exempted from the test of fairness — but only if they are in plain and intelligible language. A core term must be central to how the consumer perceives the contract.

Small print

The Regulations say nothing about print size; however, the document must be reasonably legible. There is no good reason for failure to use print and ink that the ordinary consumer can read without difficulty. There is no excuse for shrinking the print used in contracts to a size which discourages consumers from reading them.

Conclusion

It appears that the OFT has had considerable success in implementing the Regulations, converting mobile phone agreements into consumer contracts that are more easily understood, and eliminating the terms that have been causing consumer detriment.

The OFT has investigated about 3000 complaints under the Regulations since they came into force. Around 75 per cent have required action of some sort. No trader has yet fought a case all the way to court, but over 1200 terms have been dropped or revised.

From New Zealand

The following items were extracted from the New Zealand Commerce Commission's newsletter Fair's Fair, January 1999.

Commission clears electricity acquisition

On 10 December 1998 the Commerce Commission cleared Contact Energy Limited to acquire the assets comprising the gas retailing business of Enerco New Zealand Limited. The decision included a change in the way that the Commission views electricity markets.

Previously the Commission's view was that there was a nationwide market for the relatively few, larger consumers only, with smaller consumers in regional markets. Each regional market was defined by the electricity distribution network owned by the local power company. The increasing level of competition in electricity retailing that has followed the Electricity Reform Act has led the Commission to view electricity retailing as one, nationwide market.

The Commission concluded in this case that competition would remain in the national electricity retail market and in the North Island gas wholesale market, preventing Contact acquiring a dominant position in either.

The Commerce Act prohibits business acquisitions that result in dominance being acquired or strengthened in any market. But it does not prohibit what it describes as 'bare

transfer of market dominance', that is business acquisitions that involve dominance being transferred to a new owner but not being strengthened.

The Commission concluded that Enerco is dominant in relevant retail gas markets (encompassing sales of gas to small consumers in the Hawkes Bay and Horowhenua regions) and that the proposed acquisition would involve that dominance being transferred to Contact, but with no strengthening occurring.

Commission considers merger in the educational sector

On 24 December 1998 the Commission cleared the merger of the assets and business of Massey University and the Auckland College of Education. This is the first time the Commission has adjudicated on an issue in the education sector.

The Auckland College of Education, one of four Colleges of Education, is the largest institution for teacher education in New Zealand.

Massey University, one of New Zealand's seven universities, provides a wide range of internal and distance education courses. Massey's main campus is in Palmerston North, with another campus at Albany which includes teacher training programs in its course offerings.

The Commission concluded that there were three relevant product markets. They were for the provision of programs of study leading to:

- secondary school teaching qualifications;
- primary school teaching qualifications; and
- in-service teaching qualifications.

The Commission accepted the applicant's geographic market definition of the greater Auckland area including Northland.

The Commission concluded that the aggregation which would result from the proposal would result in market shares that were outside the Commission's safe harbours in each of the three markets. However, it concluded that the current and potential future competition from other market participants would provide sufficient constraint to prevent the merged institution from becoming dominant in these markets.

International sweep for bogus health products

On 10 September 1998 the International Marketing Supervision Network held its second annual International Internet Sweep Day, which targeted Internet websites promoting 'miracle cures' and products or treatments that claim to radically improve certain health conditions.

The ACCC coordinated the sweep day, which involved more than 60 law enforcement agencies and health associations from 28 countries.

The international Internet sweep day concept is based on the Internet surf days carried out by the US Federal Trade Commission to target Internet scams. The first international Internet sweep day, organised by the ACCC, was held in October 1997 and targeted 'get-rich-quick' schemes.

Once suspicious sites were identified, the site operators were sent educational email messages outlining the fact that the activities they appeared to offer may be regulated in some countries. They were also referred to the ACCC homepage, which contains information on how to comply with the relevant Australian legislation, and how to obtain more information about the legislation applicable in other countries.

More than 1100 suspicious websites were identified, of which 28 per cent were removed or altered within a month, giving a good indication of the success of the educational messages sent to website operators.

The 1998 sweep day saw participating agencies 'surfing' the Internet for websites making claims concerning the treatment or prevention of serious diseases such as heart disease, cancer, HIV/AIDS, diabetes, arthritis and multiple sclerosis. Specifically, participants looked for miracle cure claims, exaggerated efficacy claims, testimonials to promote a product or treatment, 'establishment' claims, and terms like 'scientific breakthrough', 'secret ingredient' and 'ancient remedy'.

Over 1400 suspicious sites were identified and sent email messages, easily outnumbering the

previous year's result. When these sites were revisited about one month later, over a quarter had been amended or removed.

Besides identifying suspicious sites and educating website operators on what is illegal on the Net, the sweep also benefited consumers, with some participating agencies including 'Consumer Beware' tips and 'Slam-a-Scam' facilities on their homepages.

Another positive outcome of the sweeps is international cooperation, with excellent links being established between enforcement agencies worldwide. These will be maintained and enhanced in ongoing cooperative efforts. In the future, scammers will face a combined global front of consumer affairs enforcement efforts to make the Internet a safer place for consumers.

