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ENERGY RETAIL CONTRACTS REVIEW

Unfair contract terms



Contents

Purpose	3
Relationship between this Report and the Telecommunications Report	3
Introduction	4
Purpose of the Energy Retail project	4
Background - Summary of UCT law	5
What is a standard form consumer contract?	5
When is a term unfair?	5
What types of terms are unfair?	6
Some terms are exempt	6
What action can the Commission take?	6
The companies involved	7
The contracts reviewed	8
Potential unfair terms identified	9
Steps taken by the Commission	11
The companies' response	11
Common terms identified	12
Automatic renewal clauses accompanied by early termination fees	12
Terms that limit the liability of the company	13
Terms that limit the liability of electricity distribution companies	15
Terms that exclude liability for consequential loss and limit rights under consumer protect law	16
Terms that allow the trader to unilaterally vary the price of the service	17
Terms that allow the trader to unilaterally vary terms of the contract	17
Other potentially unfair terms	19
Conclusion	19

Report on Commerce Commission review of energy retail contracts for compliance with Unfair Contract Terms rules

Purpose

- 1 In March 2015, the Fair Trading Act 1986 (**the Act**) was amended to include new provisions that prohibit unfair contract terms in standard form consumer contracts (**the UCT provisions**).
- 2 Since May 2015 the Commerce Commission (**Commission**) has reviewed standard form contracts across the New Zealand energy retail sector for compliance with the UCT provisions.
- 3 This report summarises:
 - 3.1 Aspects of the new unfair contract terms laws;
 - 3.2 The engagement the Commission had with energy retail companies;
 - 3.3 The types of terms the Commission found in the energy retail standard form contracts;
 - 3.4 The Commission's views on those terms; and
 - 3.5 The positive changes made as a result of this engagement.
- 4 The Commission anticipates that this report will provide guidance to other industries, and their advisers, as to the effect of these new laws, particularly as to the types of terms that may be unfair and the steps a business can take to remedy any potential unfairness.
- 5 It is important to note that the guidance in this report is specific to its context. For more general guidance on the UCT provisions, we suggest you refer to the Commission's Unfair Contract Terms Guidelines.¹

Relationship between this Report and the Telecommunications Report

- 6 In February 2016, the Commission published a report on its review of the telecommunications sector for compliance with the UCT provisions.²
- 7 The purpose of our reports into the telecommunications and energy retail sectors is to provide clear guidance to business on the effect and application of the UCT provisions – with industry specific examples.
- 8 Although there are similarities in many of the types of term identified, there are also important differences between the reports, particularly in the nature of some of the terms relied on in each sector. We recommend that interested readers refer to both reports and to the Commission's Unfair Contract Terms Guidelines to obtain a wider understanding of the Commission's views.

1. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>

2. See the Commission's report on the telecommunications sector at: <http://www.comcom.govt.nz/the-commission/consumer-reports/uct-teleco>

Introduction

- 9 The UCT provisions have wide reach. They affect every standard form contract entered into between a business and a New Zealand consumer.³
- 10 The Commerce Commission (**Commission**) has sole responsibility for enforcing the UCT provisions.⁴
- 11 The Commission has received many complaints over the years about potentially unfair terms in standard form contracts that give companies significant rights at the expense of their customers. Before the UCT provisions were introduced, notwithstanding that these terms might cause significant consumer harm, there was little the Commission could do about the potential imbalance created by those contract terms, and consumers were also unable or unlikely to take action on their own account. The UCT provisions now give the Commission the tools to investigate these contracts.
- 12 Similar UCT provisions have existed in overseas jurisdictions, including the United Kingdom and Australia, for a number of years. The Commission has spoken to the regulators in the United Kingdom and Australia to understand their experience in enforcing these laws.
- 13 The Commission has also spoken with the Electricity Authority to understand what terms in energy retailer contracts may be causing concern to New Zealand consumers.
- 14 As a result of our discussions with other regulators, past complaints we have received (including those referred to us by the Electricity and Gas Complaints Commissioner) and our assessment of the consumer harm that could be caused by unfair terms in this sector, we decided that the energy retail sector would be one of the sectors we focussed on.
- 15 The Commission has also prioritised a review of contracts in the telecommunications, credit and gym sectors, for similar reasons. We have completed our assessment of the telecommunications sector. Our work in the credit and gym sectors is on-going.

Purpose of the Energy Retail project

- 16 The overall breadth of the UCT provisions (and the fact that only the Commission can take proceedings) provides the Commission with a broad remit to investigate potentially unfair terms and to take action.
- 17 The purpose of the energy retail project was to exercise that enforcement remit in a sector that the Commission had identified as having a high potential for unfair terms and attendant consumer harm.
- 18 The Commission's goal was to ensure, as best it could, that the standard form consumer contracts used in the energy retail sector comply with the new laws.
- 19 To achieve this goal, we have reviewed the standard form consumer contracts used in the energy retail sector, discussed with companies their position in relation to the terms, encouraged the companies to comply with the law and, where appropriate, looked to take court proceedings to address any remaining unfair terms.
- 20 As with our work in the telecommunications sector, ultimately the Commission has achieved its goal without having to take court proceedings to achieve compliance with the UCT provisions. As a result of this project, the companies have either justified their terms, or have amended, or will shortly amend, their contracts to address the terms that the Commission considered to be potentially unfair.

3. Consumer is defined in section 2(1) of the Act as a person who acquires goods of a kind ordinarily acquired for personal, domestic or household use.

4. Fair Trading Act 1986, section 46H(1)

Background – Summary of UCT law

- 21 The UCT provisions came into force on 17 March 2015. The UCT provisions have been inserted into the Act at section 26A and under Part 4A at sections 46H to 46M.
- 22 Under the UCT provisions, unfair terms are prohibited in all standard form consumer contracts entered into after 17 March 2015 and those contracts (except insurance contracts) that are renewed or varied after that date.

What is a standard form consumer contract?

- 23 Section 46J of the Act sets out the definition of a standard form consumer contract. There are two key parts to this definition.
- 24 First, the contract must be a “consumer contract”, which means that it must be between a supplier and a consumer, and must relate to the supply of goods or services of a kind ordinarily acquired for personal, domestic or household purposes.⁵
- 25 Second, the contract must be a standard form contract. The factors to be taken into account in determining whether the consumer contract is a standard form consumer contract are set out in section 46J of the Act, and include whether:
 - 25.1 one party has all/most of the bargaining power;
 - 25.2 the contract is prepared by one party before discussion relating to the transaction occurred;
 - 25.3 one party is in effect required to accept or reject the terms in the form presented;
 - 25.4 the extent to which parties had an effective opportunity to negotiate the terms; and
 - 25.5 the extent to which the terms proposed take into account specific characteristics of any party.

When is a term unfair?

- 26 Under section 46I of the Act, a court may declare a term in a standard form consumer contract unfair if it is satisfied that the contract concerned is a standard form consumer contract and the term is unfair as described in section 46L of the Act.
- 27 Section 46L of the Act provides that a court may only give a declaration if it is satisfied that the term:
 - 27.1 would cause a significant imbalance in the parties’ rights and obligations; and
 - 27.2 it is not reasonably necessary in order to protect the legitimate business interests of the party advantaged by the term; and
 - 27.3 would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
- 28 The court can take into account any matters it thinks relevant in determining whether a term is unfair but must take into account the extent to which the term is transparent. The definition of transparent in the Act includes whether it is expressed in reasonably plain language, is legible, is presented clearly, and readily available to the party affected by the term.⁶
- 29 The court must also take account of the contract as a whole. This means that terms that appear to be unfair may be balanced by rights and obligations contained in other clauses of the contract.

5. See section 2(1) of the Act for definition of ‘consumer contract’.

6. See section 2(1) of the Act for definition of ‘transparent’.

What types of terms are unfair?

- 30 Section 46M of the Act provides a non-exhaustive list of 13 examples of the kinds of contract terms that may be unfair. These are terms that permit (or effectively permit) one party but not the other to:
- 30.1 avoid/limit performance of the contract;
 - 30.2 terminate the contract;
 - 30.3 penalise one party for a breach/termination of the contract;
 - 30.4 vary the terms of the contract;
 - 30.5 renew or not renew the contract;
 - 30.6 allow one party to vary upfront price without right of the other party to terminate;
 - 30.7 allow one party to unilaterally vary the characteristics of the goods/ services to be supplied (including an interest in land);
 - 30.8 unilaterally determine whether a contract has been breached or to interpret its meaning;
 - 30.9 limit one party's vicarious liability for its agents;
 - 30.10 permit one party to assign the contract to the detriment of another party without their consent;
 - 30.11 limit the evidence one party can adduce in proceedings relating to the contract; and
 - 30.12 impose the evidential burden on one party in proceedings relating to the contract.

Some terms are exempt

- 31 Section 46K of the Act provides that some terms cannot be declared unfair by the Court. These are terms that:
- 31.1 define the main subject matter of the contract;
 - 31.2 set the upfront price payable under the contract; and/or
 - 31.3 are required or expressly permitted by any enactment.
- 32 Insurance contracts and any renewals are largely exempted from consideration under the UCT provisions (section 46L(4) of the Act). This is because significant terms, which may otherwise have raised issues under the UCT provisions, have been deemed to be reasonably necessary to protect the legitimate business interests of the insurer.

What action can the Commission take?

- 33 Under section 46H of the Act, the Commission can apply to either the High Court or District Court for a declaration under section 46I that a term in a standard form consumer contract is an unfair contract term. Only the Commission can apply for a declaration although any person who is a party to a standard form consumer contract may ask the Commission to apply to court for a declaration.
- 34 The effect of a declaration made under s46I is that under s26A of the Act, a person must not:
- 34.1 include the unfair term in a standard form contract unless included in a way that complies with the terms (if any) of the decision of the court; or
 - 34.2 otherwise apply, enforce or rely on the unfair contract term.

- 35 If the Commission has obtained a declaration that a term is unfair, and a trader continues to use or rely upon that term, the Commission can take a criminal prosecution under section 40 of the Act. In addition the Commission can seek civil orders in a civil proceeding on the contravention of section 26A, seeking the civil remedies set out at sections 41 to 43 and section 46C of the Act, including injunctions, corrective advertising and management banning orders. These remedies will only be available once a declaration has been obtained and section 26A has been contravened.
- 36 The Commission can also use the court enforceable undertaking provisions of the Act on any settlement reached with a business, as an alternative to taking declaration proceedings. The remedies available to the court for a breach of the undertakings under section 46B of the Act are comprehensive in their own right to address the harm arising from the breach.
- 37 The Commission can also use its other enforcement tools to encourage compliance. In this project, the Commission has sought to encourage the traders to comply with the UCT provisions by removing or amending unfair terms. As a result, the Commission has not had to apply to the court for declarations or require enforceable undertakings to achieve compliance.

The companies involved

- 38 We reviewed the standard form contracts of nine energy retail businesses:
- 38.1 Mercury Energy Limited (**Mercury**)
 - 38.2 Contact Energy Limited (**Contact**)
 - 38.3 Meridian Energy Limited (**Meridian**)
 - 38.4 Powershop New Zealand Limited (**Powershop**)
 - 38.5 Trustpower Limited (**Trustpower**)
 - 38.6 Genesis Energy Limited (**Genesis**)
 - 38.7 Pulse Energy Limited (**Pulse**)
 - 38.8 Nova Energy Limited (**Nova**)
 - 38.9 The Lines Company Limited (**The Lines Company**).⁷
- 39 This was an extensive, industry wide, review. These companies together make up a significant proportion of the electricity and gas retail market in New Zealand.



7. The Lines Company is an electricity distribution business, rather than a retailer. However, it contracts directly with consumers, so we have included the company in our review.

The contracts reviewed

- 40 We reviewed 30 separate standard form consumer contracts, listed below. These contracts affect millions of energy retail consumers.

Company	Contract
Mercury	Mercury Energy's Standard Terms and Conditions for Residential Customers in conjunction with terms and conditions relating to the following plans: <ul style="list-style-type: none"> • 2 Year Fixed • 2 Year Fixed – Refix • 2 Year Fixed Price Plan – Special Rate End • 3 Year Fixed • 3 Year Fixed Extension • 3 Year Fixed – Auto Renew.
Contact	Terms and conditions for residential and business customers effective 17 March 2015
Meridian	Meridian Energy's General Terms and Conditions in conjunction with Meridian Energy's Fixed Rate Plan Terms and Conditions.
Powershop	Customer Terms and Conditions
Trustpower	<ul style="list-style-type: none"> • Customer Service Agreement • Terms and Conditions for a Fixed Term Agreement • Terms for the supply of LPG • Phone and Internet terms and conditions
Genesis	Genesis Energy's Terms and Conditions, in conjunction with the following terms and conditions: <ul style="list-style-type: none"> • Genesis Energy – Self-Service Saver Plan Terms and Conditions • First Month Free Terms and Conditions (Electricity and Gas) • Control-a-Bill Acquisition Offer Terms and Conditions. Genesis Energy LPG Terms and Conditions.
Pulse	<ul style="list-style-type: none"> • Pulse Energy Residential Agreement • Just Energy Residential Agreement • Grey Power Electricity Residential Agreement
Nova	Nova Energy General Terms and Conditions for Residential Customers (the General Terms) together with the terms and conditions for Nova's: <ul style="list-style-type: none"> • Home Freedom Plan • Home Advantage Plan • Home LPG Plan • Faringdon Home Energy Offer • LPG Hot Water Package • Natural Gas Hot Water Package.
The Lines Company	Domestic and Commercial Terms and Conditions 2009

Potential unfair terms identified

- 41 As with the telecommunications companies, the majority of the energy retailers appeared to have made real efforts to comply with the UCT provisions after they were introduced and before they came into effect. The Lines Company was using a contract that had been in use since 2009. Its contract was generally sound though, with only one term identified as being potentially unfair.
- 42 Although the companies had made genuine efforts to comply with the UCT provisions, each of them continued to rely on terms that the Commission considered to be potentially unfair terms.
- 43 In total the Commission identified 59 terms that it considered to be potentially unfair.

Company	Number of potentially unfair terms identified	Nature of the potentially unfair terms identified
Mercury	6	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> • Allowing Mercury to unilaterally determine when the contract had been breached. • Limiting Mercury’s liability to its customers, where its customers have no such limitation to their liability. • Limiting the liability of electricity distribution companies. • Allowing Mercury to unilaterally vary the price of services, without providing a corresponding right for the customer to terminate the agreement. • Allowing Mercury to vary the terms of the contract without a corresponding termination right. • Allowing Mercury to automatically renew fixed term contracts for a further term unless the customer opts out of the renewal.
Contact	2	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> • Limiting Contact’s liability to its customers, where its customers have no such limitation to their liability. • Limiting the liability of electricity distribution companies.
Meridian	6	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> • Allowing Meridian to unilaterally determine when the contract had been breached. • Limiting Meridian’s liability to its customers, where its customers have no such limitation to their liability. • Limiting the liability of electricity distribution companies. • Allowing Meridian to unilaterally vary the price of services, without providing a corresponding right for the customer to terminate the agreement. • Allowing Meridian to vary the terms of the contract without a corresponding termination right. • Allowing Meridian to automatically renew fixed term contracts for a further term unless the customer opts out of the renewal.

Powershop	2	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> Contracting out of liability for consequential loss under the Fair Trading Act and Consumer Guarantees Act. Limiting the liability of electricity distribution companies.
Trustpower	17	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> Allowing Trustpower to retain a customer's credit balance following termination. Limiting Trustpower's liability, where customers have no such limitation to their liability. Allowing Trustpower to unilaterally vary the price of its services, without providing a corresponding right for the customer to terminate the agreement. Allowing Trustpower to unilaterally vary the terms of its contracts, without providing a corresponding right for the customer to terminate the agreement. Allowing Trustpower to contract out of consequential loss, where it cannot, under the CGA, do that. Indemnifying the electricity network owner for loss arising from the supply of electricity. Allowing Trustpower to assign contracts, without providing customers a corresponding right to exit the contract if the assignment caused detriment to the customer. Granting Trustpower the right of first opportunity to negotiate with customer following termination. Limiting a customer's rights to the maximum extent permitted by the Personal Property Securities Act 1999.
Genesis	7	<p>Terms that had the effect (or potential effect) of:</p> <ul style="list-style-type: none"> Limiting Genesis' liability, where customers have no such limitation to their liability. Allowing Genesis to unilaterally vary the price of its services, without providing a corresponding right for the customer to terminate the agreement. Allowing Genesis to unilaterally vary the terms of its contracts, without providing a corresponding right for the customer to terminate the agreement. Allowing Genesis to automatically renew fixed term contracts for a further term unless the customer opts out of the renewal.
Pulse	9	<p>Terms that had the effect (or potential effect) of:</p> <ol style="list-style-type: none"> Requiring customers to pay an early termination fee when they exit a contract without giving Pulse 30 days' notice. Allowing Pulse to reverse any credit previously given to a customer when they terminate a contract within 12 months. Limiting Pulse's liability to its customers, where its customers have no such limitation to their liability. Limiting the liability of electricity distribution companies. Limitation on the time in which customers can bring a claim against Pulse.

Nova	9	<p>Terms that had the effect (or potential effect) of:</p> <ol style="list-style-type: none"> Limiting Nova’s liability to its customers, where its customers have no such limitation to their liability. Allowing Nova to unilaterally vary the price of services, without providing a corresponding right for the customer to terminate the agreement. Allowing Nova to vary the terms of the contract without a corresponding termination right. For some of Nova’s “special plans”, penalising customers who terminate contracts before the expiry of minimum fixed terms by charging early termination charges that exceed Nova’s losses arising from the termination.
The Lines Company	1	A term that made customers who purchased a property with an existing installation to pay outstanding lines charges as a condition of continuing to allow the connection.

Steps taken by the Commission

- 44 Once the Commission identified the terms that it thought were potentially unfair, it wrote to each of the companies identifying potentially unfair terms and seeking their views on the fairness of these terms. In particular the Commission sought comments on:
 - How these terms are reasonably necessary to protect a legitimate interest of the company.
 - If such a legitimate interest exists, whether there are fairer means by which the interest could be protected.
 - Whether there are any other matters, including the transparency of the terms and the contract as a whole, which they consider relevant to our consideration of the fairness of these terms.
- 45 The Commission held a number of meetings and teleconferences with the energy retailers to discuss the matters raised in the letters. The Commission also met with the Electricity Authority to discuss matters that we had identified.

The companies’ response

- 46 The companies’ responses to the Commission’s investigation were positive.
- 47 As mentioned earlier, the general attitude of the companies to compliance with the UCT provisions was excellent. This positive attitude to compliance was further reflected in the companies’ subsequent engagement with the Commission. As illustrated by examples below, the companies each demonstrated a desire to comply with the law and have either justified their terms or have amended, or will shortly amend, their contracts to address the Commission’s concerns.



Common terms identified

- 48 The Commission identified a wide range of potentially unfair terms across the contracts. Some of those terms have been unique to a particular contract or small group of contracts. However, many of the potentially unfair terms were included in more than one of the contracts assessed, including terms allowing the energy retailer to:
- Automatically renew fixed term contracts for a further term unless the customer opts out of the renewal.
 - Limit its liability to its customers for breach of contract or negligence without providing a corresponding limitation to the customer's liability.
 - Avoid liability for consequential loss.
 - Vary the price of services without providing a corresponding right to terminate the contract without penalty.
 - Vary the terms of the contract without providing a corresponding right for the customer to terminate the contract without penalty.
 - Limit the liability of electricity distribution businesses.
- 49 We analyse these terms below, using selected examples from the contracts we reviewed. These examples are illustrative only, and are not intended to suggest that the particular term was in any way the most unfair or problematic term identified. Also, the examples used are not intended to suggest that the amendments made are the only amendments that could have satisfied our concerns. Each term must always be reviewed with reference to the criteria in the Act and the particular relationship between a business and its customers.

Automatic renewal clauses accompanied by early termination fees

- 50 Three of the energy retailers relied on an automatic renewal clause that enabled the company to unilaterally renew a fixed term contract for a further term unless the customer opted out of the renewal.
- 51 Automatic renewal clauses are not unfair per se. In the context of the energy retail contracts we reviewed, the Commission considered that potential unfairness arose where the automatic renewal clause was accompanied by a requirement that the customer pay a termination fee to exit the renewed contract.
- 52 Each of the three companies sought to justify the terms. Common justifications included:
- 52.1 The terms are transparently disclosed, both in the contract and in other material provided to customers.
 - 52.2 Shortly before renewal of the contract, customers are notified of their ability to opt-out and given a period of time (for example, 30 days) in which to opt-out.
 - 52.3 Customers appreciate the convenience of an automatic renewal.
- 53 After considering information provided by the companies, the Commission reached the view that the automatic renewal clauses, when accompanied by termination fees, are unfair.

- 54 These automatic renewal clauses create a significant imbalance in the parties' rights and obligations:
- a. The term grants the energy retailer a beneficial option. The energy retailer had the right (at its election) to automatically extend the length of the contract, on new, un-negotiated, terms (including potentially higher price). The customer had no right to automatically renew the contract.
 - b. The term imposes a disadvantageous burden on the consumer. The customer must accept the terms of the renewed contract, unless it takes the positive step of opting out. This requirement to opt-out exists even where the terms of the renewed contract may differ substantially (eg, increased price) from the contract agreed to. Where the customer does not opt-out within the required time, it must accept the revised terms or pay a termination charge to exit the contract.
 - c. There is no corresponding benefit to customers arising from the term sufficient to mitigate the disadvantageous burden.
 - i. The energy retailers argued that customers have the benefit of fixed energy prices for a further fixed term. This benefit does not arise because of the automatic renewal clause. Customers could enter into a new fixed term agreement at their own election, and after considering the suitability of those prices for their circumstances.
 - ii. The energy retailers also argued that the automatic renewal is convenient for customers. That might be the case for some customers, but we are not satisfied that the convenience benefit would be sufficient to balance the disadvantage caused.
- 55 The automatic renewal clauses also cause detriment:
- a. Customers may be locked into fixed term contracts they do not want; or
 - b. Customers are required to pay a termination fee to exit the further fixed term contract.
- 56 The Commission is also concerned that these terms rely on customer inertia, in that customers could be locked into extended contracts, which they did not necessarily want, because they were not sufficiently engaged to take the positive action to opt out of the contract. These clauses can constrain competition, by inhibiting a customer's ability to switch from one provider to another at the end of a fixed term contract.
- 57 The Commission advised the companies that the automatic renewal clauses, accompanied by termination fees, were likely to be unfair. The Commission advised that the potential unfairness would be alleviated if customers were entitled to exit automatically renewed contracts without paying a termination fee.
- 58 In response to the Commission's concerns, the companies have all amended, or agreed to amend, their automatic renewal clauses.
- 59 Two of the companies will continue to automatically renew fixed term contracts, but will now allow customers to exit the renewed contract without paying a termination charge. The other company will no longer automatically renew fixed term contracts.
- 60 Those proposed amendments have addressed the Commission's concerns.

Terms that limit the liability of the company

- 61 Section 46M of the Act sets out a list of examples of terms that may be unfair contract terms. Section 46M(l) provides that terms that limit or have the effect of limiting one party's right to sue the other may be unfair contract terms.

- 62 The Commission considers that terms that limit or exclude liability can be unfair where:
- 62.1 The terms are imbalanced, in favour of one of the parties;
 - 62.2 The terms seek to limit or exclude liability that cannot be fairly limited or excluded; or
 - 62.3 The amount of the liability cap is insufficient to cover reasonably foreseeable losses that may arise under the contract.
- 63 The Commission's review showed that most of the companies relied on imbalanced liability clauses that sought to limit and/or exclude the companies' liability, while providing their customers with no corresponding limitation to their liability for any loss they may cause to the company.
- 64 For example, one of the companies sought to limit its liability for any loss caused to customers to \$10,000.
- 65 Customers had no corresponding limited liability. Under the contract, customers agreed to accept an unlimited liability for any breach of contract or negligence.
- 66 This type of limitation of liability clause can lead to a significant imbalance in the rights and obligations of the parties under the contract. Under the term, the company has limited liability (including in some instances where it has been negligent or has breached the contract), but the customer has no corresponding limitation to their potential liability.
- 67 As noted above, each of the companies relied to varying extents on this type of limitation of liability clause. The Commission asked each of the companies to explain why these clauses were necessary to protect their legitimate business interests.
- 68 Common justifications were that:
- 68.1 the limitation of liability was reasonable, as it was likely to be sufficient that customer losses would not exceed the liability cap;
 - 68.2 it is reasonably necessary not to limit the customer's liability as the company has no way of quantifying the loss the customer might cause to it; and
 - 68.3 notwithstanding the limitation of liability clause, the customer still had recourse to consumer protection legislation and dispute resolution schemes (such as the Electricity and Gas Complaints Commissioner), under which they could recover greater amounts.
- 69 The Commission did not agree that these justifications necessarily made the clauses fair. The Commission was concerned that customers were significantly disadvantaged by the imbalance created by these terms, which were invariably drafted for the benefit of the company.
- 70 The Commission's observation was that these clauses were similar to the type of boilerplate limitation of liability clauses often used in commercial contracts to protect the interests of one of the parties.
- 71 Although the Commission had concerns with the clauses relied upon by the companies, it does accept that limitation of liability clauses may be legitimate in some circumstances, particularly where:
- 71.1 the amount of the limitation is sufficient to ensure that customers are not left out of pocket when loss occurs; and
 - 71.2 customers have the same or similar limitation to their liability as the company.

- 72 In response to the Commission's concerns, the companies have all amended, or agreed to amend, their limitation of liability clauses. A common approach adopted has been to make the limitation of liability clauses more balanced, by providing that the company and consumer each have similar reasonable limitations to their liability.
- 73 Those proposed amendments have addressed the Commission's concerns. The Commission considered that the amended terms:
- 73.1 are sufficiently balanced;
 - 73.2 do not attempt to limit or exclude the company's liability for matters that should not be limited or excluded;
 - 73.3 have liability caps that are likely to be sufficient to cover reasonably foreseeable losses that may arise under the contract (bearing in mind there can be no limitation for losses caused by breaches of the Fair Trading Act and Consumer Guarantees Act).

Terms that limit the liability of electricity distribution companies.

- 74 Nearly all of the contracts we reviewed contained a clause which limited the liability of electricity distribution companies to customers for any loss arising from the supply of electricity. Most electricity distribution companies do not contract directly with consumers, so rely on these clauses to limit their liability to consumers.
- 75 The Commission was concerned that these clauses caused a significant imbalance between the parties' rights and obligations under the contract – customers had no corresponding limitation of liability to electricity distribution companies.
- 76 The Commission asked each of the companies who relied on this type of term to explain why these clauses were necessary to protect their legitimate business interests.
- 77 The companies explained that the terms that limited the liability of electricity distribution companies were a requirement of the Use of Service Agreements between the energy retailer and all 29 electricity distribution companies, and a term of this nature appeared in the Model Use of Service Agreement authorised by the Electricity Authority.
- 78 The Commission met with the Electricity Authority to discuss terms that limit the liability of electricity distribution network companies.
- 79 Following those discussions, the Commission is satisfied that the clauses in energy retailer contracts limiting the liability of electricity distribution companies in relation to the supply of electricity are reasonably necessary to protect the legitimate interests of the energy retailers.
- 80 This is because the limitation of liability:
- 80.1 relates only to liability that the electricity distribution company might have in relation to the supply of electricity – which is liability that should rest with the retailer, who supplies the electricity. The electricity network company does not supply electricity; it provides the network over which the electricity is transmitted, so limitation of this liability is unlikely to be unfair;
 - 80.2 does not limit or exclude the liability of the electricity distribution company for any other loss or damage it might cause to consumers.

- 81 Further, the limitation does not affect consumers' rights to seek recourse under the Consumer Guarantees Act. Under the Consumer Guarantees Act, consumers have a right to an energy supply that is of an acceptable quality.⁸ The electricity distribution companies have liability to energy retailers under section 46A of the Consumer Guarantees Act, where the energy supplied was not of an acceptable quality (ie, the supply is not safe, reliable or of sufficient quality) and the failure of the acceptable quality guarantee was due to gas or electricity network.
- 82 Under that section, the electricity distribution company is required to indemnify the retailer for that cost or loss. Effectively, this means consumers can take action against retailers, who in turn can seek recourse from electricity distribution companies.

Terms that exclude liability for consequential loss and limit rights under consumer protect law

- 83 Both the Fair Trading Act⁹ and the Consumer Guarantees Act¹⁰ recognise that customers are entitled to recover compensation for consequential loss arising from a breach of those Acts.
- 84 A number of the contracts the Commission reviewed contained clauses that had the potential effect of limiting the customer's right to recover consequential losses caused by the business. For example, two of the companies sought to exclude liability for consequential loss, or for any indirect or consequential loss.
- 85 The Commission was concerned that this type of clause creates a significant imbalance in the parties' rights and obligations under the contract. The business purports to avoid potential liability that it would otherwise have under two important pieces of consumer protection legislation, the Fair Trading Act and the Consumer Guarantees Act. At the same time, the customer appears to lose the significant right to seek that compensation.
- 86 Each of the companies acknowledged that they were not intending to exclude liability under consumer protection legislation, and have or will amend their contracts to ensure that customer's rights under those Acts are maintained.
- 87 The Commission is also concerned about terms that purport to, or could be interpreted by a reasonable consumer as purporting to, exclude or limiting consumer rights under the Consumer Guarantees Act and Fair Trading Act. For example, we found contract terms that purported to exclude or limit liability "as much as the law allows." We have also seen terms, in other industries, where liability is limited "to the maximum extent permitted by law".
- 88 The Commission is concerned that these types of clauses risk misleading consumers about the existence or extent of their statutory rights; rights that cannot be excluded or limited in any way.
- 89 If that is the case, the terms are likely to be misleading and deceptive conduct in breach of section 13(i) of the Fair Trading Act.
- 90 To ensure that businesses do not make misleading claims, we recommend that businesses make it clear in their contracts that consumers have statutory rights that cannot be excluded or limited, and that any limitation or exclusion of liability does not affect these rights.
- 91 As with the limitation of liability clauses discussed above, the Commission's observation is that clauses that purport to exclude statutory rights appear to be boilerplate clauses, similar to those often used in commercial contracts to protect the interests of one of the parties.

8. See section 7A of the Consumer Guarantees Act 1993.

9. Fair Trading Act 1986, section 43.

10. Consumer Guarantees Act 1993, section 18(4).

- 92 The Commission expects that, as the UCT provisions are better understood, businesses and their advisers will become more cautious in their use of these types of commercial boilerplate clauses in standard form consumer contracts.

Terms that allow the trader to unilaterally vary the price of the service

- 93 Section 46K(2) identifies terms that permit, or have the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract, as being potentially unfair.
- 94 The Commission considers that a term that allows the business to unilaterally vary the price of a service – requiring customers to accept unanticipated costs – has the potential to be unfair. This is particularly the case for fixed term contracts where the customer is required to pay a termination fee if they seek to exit the varied contract before the expiry of the fixed term.
- 95 Unfairness is less likely to arise under non-fixed term contracts, as customers can ordinarily exit without paying a termination charge. However, to ensure fairness customers must be given adequate notice of the price change, to enable them to exercise their right to terminate before the price increases.
- 96 Many of the contracts we reviewed contained clauses that allowed the business to unilaterally vary the price of services provided under fixed term contracts.
- 97 The Commission was concerned that these terms created a significant imbalance between the parties' rights and obligations under the contract because customers did not have a corresponding right to:
- 97.1 vary the price of the services; or
 - 97.2 in all possible circumstances, cancel a fixed term contract under which the price has been varied to their detriment, without paying an early termination charge.
- 98 This type of term was present in many of the contracts reviewed. The Commission asked each of the companies who relied on this type of term to explain why these clauses were necessary to protect their legitimate business interests.
- 99 The companies acknowledged that, although their contracts were capable of being interpreted as permitting unilateral price variation, they had no intention of changing the price of fixed term contracts. The companies advised that they would make this clear in amendments or future versions of their contracts.
- 100 These proposed changes have addressed the Commission's concerns.

Terms that allow the trader to unilaterally vary terms of the contract

- 101 Another potentially unfair term identified in section 46M of the Act is a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract.
- 102 The Commission considers that a term that requires customers to accept new requirements or reduced benefits has the potential to be unfair. This is particularly the case for fixed or minimum term contracts where the customer is required to pay a termination fee if they seek to exit a varied contract.

- 103 As with price variation clauses, unfairness is less likely to arise under non-fixed term contracts, as customers can ordinarily exit without paying a termination charge. However, to ensure fairness customers must be given adequate notice of the variation, to enable them to exercise their right to terminate before the variation affects them.
- 104 Many of the contracts we reviewed contained clauses that allowed the business to unilaterally vary the terms of the contract. For example, some of the companies were able to amend the standard terms and conditions at any time with at least 30 days' notice.
- 105 The Commission was concerned that these terms created a significant imbalance between the parties' rights and obligations under the contract because customers did not have a corresponding right to:
- 105.1 vary the terms of the contract; or
 - 105.2 in all possible circumstances, cancel a fixed term contract that has been varied to their detriment, without paying an early termination charge.
- 106 Each of the companies provided an explanation as to why they needed the ability to vary the terms of their contracts. Justifications included that the term was necessary to take account of operational, legal and regulatory requirements.
- 107 The Commission accepted that there may be legitimate reasons to allow the unilateral variation of the terms of a contract, including variation of the service being provided. The Commission acknowledges that unilateral variation clauses can be legitimate. For example, we acknowledge that it is not always practical for large business to agree all variations with their customers – particularly where those variations relate to relatively minor matters. Further, unilateral variation resulting from a matter entirely outside the control of the energy retailer (eg, a law change) is likely to be legitimate.
- 108 However, the Commission remained concerned with the terms relied up by the companies because:
- 108.1 many of the clauses were drafted too broadly, in that they allowed the companies to vary the contracts in circumstances where there was no legitimate reason to do so; and
 - 108.2 customers who suffered detriment as a result of a legitimate variation may still be required to pay a termination charge to exit a fixed term contract.
- 109 In response to the Commission's concerns, the companies have all agreed to make amendments to their standard form consumer contracts to make the variation clauses more balanced. In particular, the contracts should now be clearer that customers on fixed term contracts can exit without penalty where a contract variation causes detriment – except in limited circumstances where the business can justify a unilateral variation that should not result in a right to cancel (eg, the variation results from a change in the law or in regulatory requirements).
- 110 These proposed changes have addressed the Commission's concerns.



Other potentially unfair terms

- 111 In addition to the potentially unfair terms we found to exist across more than one contract, we also saw potentially unfair terms in particular contracts that raised unique issues that we note below.

Liability for debt of previous homeowner

- 112 One of the companies relied on a term that made customers who purchased a property with an existing electricity installation liable to pay outstanding lines charges as a condition of continued use of the connection.
- 113 This term was, in the Commission's view, inherently unfair. The term created a significant imbalance because it gave the company a right that it otherwise would not have under contract law or the common law – ie, the right to recover money from a person who has no legal responsibility for that debt.
- 114 The company has agreed to remove the term from its standard form contracts.

Right of first opportunity to negotiate with departing customer

- 115 Another company relied on a term that gave it the right of first opportunity to negotiate with customers following termination. Any customer who gave notice of termination without first providing the company the opportunity to negotiate was deemed to be in breach of the contract.
- 116 The Commission was concerned that the term potentially caused a significant imbalance in the parties' rights and obligations under the contract. It gave the company the right to attempt to "save" a departing customer, while constraining the customer's ability to terminate the contract – the customer was deemed to be in breach of the contract if it did not allow the company to negotiate with it.
- 117 There was also no corresponding benefit for the customer that could offset the potential unfairness of the term.
- 118 The company did not attempt to justify the term and agreed to remove this term from its contract.

Conclusion

- 119 The energy retail companies have now addressed each of the clauses that the Commission considered to be potentially unfair by either:
- 119.1 amending, or agreeing to amend, their standard form consumer contracts to make them fair; or
 - 119.2 providing information to the Commission that shows that the term is necessary to protect the legitimate business interests of the company.
- 120 As a result, the Commission has closed its investigation and has issued compliance advice letters to each of the energy retail companies. Those compliance advice letters remind the companies of their obligations under the law and caution them to be careful to ensure that their standard form consumer contracts remain compliant with the law. The Commission has also preserved its right to revisit the terms and conditions of the contracts at a later date to review whether they are being implemented in a way that is unfair to consumers.
- 121 This review, and the work previously done in the telecommunications sector, has generated positive outcomes for New Zealand consumers. Most New Zealand families have contracted to acquire energy retail services from one or more of the companies. The majority of those are likely to be standard form consumer contracts. Those contracts have now been, or soon will be, amended to make them fairer and more consistent with the UCT provisions.

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