

AUGUST 2017

Gym contracts review

Unfair Contract Terms



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Report on Commerce Commission review of gym contracts for compliance with Unfair Contract Term rules

Purpose

- 1 In March 2015, the Fair Trading Act 1986 (**the Act**) was amended to include provisions that prohibit unfair contract terms in standard form consumer contracts (**the UCT provisions**). The Commerce Commission (**Commission**) can apply to the Court for a direction that a term is unfair, and if a term is declared to be unfair, it is then an offence if it is subsequently included in a contract or relied upon.¹
- 2 The Commission has now completed a review of consumer contracts in the gym/fitness industry. This included reviewing contracts from large and small New Zealand gyms and fitness centres (“gyms”)² for compliance with the UCT provisions.
- 3 This report identifies the Commission’s concerns about aspects of the contracts we reviewed in the gym sector and summarises:
 - 3.1 the unfair contract terms laws;
 - 3.2 our engagement with the gyms;
 - 3.3 the types of terms we found in the gym contracts;
 - 3.4 our views on those terms; and
 - 3.5 positive changes made as a result of this engagement.
- 4 The Commission intends that this report will provide guidance to other gyms that were not part of the review about the kinds of terms and practices that may be unfair.

Relationship between this report and the Telecommunications and Energy Retail Reports

- 5 Since the introduction of these provisions, the Commission has undertaken two other sector reviews, to assess terms in standard form consumer contracts in various industries. In 2016 the Commission published reports on its reviews of the Telecommunication and Energy Retail sectors.³
- 6 The purpose of our reports is to provide guidance to business on the effect and application of the UCT provisions with industry-specific examples. They are also intended to educate consumers about the kinds of terms the Commission considers may be unfair under the Act.

1. Fair Trading Act 1986, Sections 46H-L, 26A, and 40(1).

2. We use the word “gyms” as a generic term to define the group of businesses in the fitness sector that were reviewed and this includes a reference to one health and lifestyle club reviewed.

3. See the Commission’s report on the telecommunications and energy retail sectors at <http://www.comcom.govt.nz/the-commission/consumer-reports/uct-reviews/>.

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

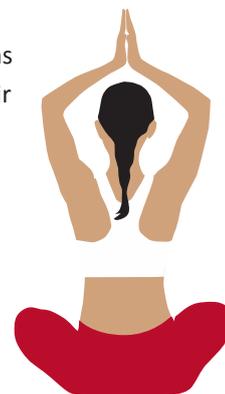
- 7 However, while there are similarities in the types of terms identified as potentially unfair across the Gym, Telecommunications, and Energy Retail sectors, the guidance provided in each report is specific to the particular context. The nature of the terms relied on (and the circumstances in which they apply) in each sector is different. For more detailed guidance on the UCT provisions, please refer to our published Unfair Contract Terms Guidelines.⁴

Introduction

- 8 The Commission has received many complaints over the years about terms in standard form contracts that give companies significant rights at the expense of their customers. Before the UCT provisions were introduced, there was little the Commission could do about the imbalance created by those terms even though the terms might cause consumer harm if relied on. Consumers were also practically unable to take action on their own account. The introduction of the UCT provisions provided the Commission with tools to investigate these terms.
- 9 The UCT provisions apply to every standard form consumer contract entered into between businesses and consumers in New Zealand.⁵ Only the Commission is able to commence proceedings under the UCT provisions.⁶
- 10 The UCT provisions provide the Commission with a broad ability to investigate standard form contractual terms entered into with consumers, and take action where these are unfair.

Purpose of the Gym Sector Review

- 11 Over 700,000 New Zealand consumers use gym services. The Commission has reviewed the standard form contracts of a sample of gym operators nationwide, including major corporate-owned clubs and some smaller franchises, in response to the following:
 - 11.1 Complaints received by the Commission;
 - 11.2 Analysis of the experience of overseas regulators; and
 - 11.3 The Commission's assessment of the significant consumer harm that could be caused by unfair terms in this sector.
- 12 Through its review, the Commission aimed to check compliance by gym operators, and educate businesses on the UCT provisions. This was to ensure standard form consumer contracts used in the sector do not contain unfair terms.
- 13 We informed the gyms of the UCT provisions, and provided our views on potentially unfair contract terms, including our concerns about terms relating to renewal, cancellation, variation and liability. We also sought justifications from gyms as to why they considered particular terms to be necessary to protect their legitimate interests.
- 14 As a result of this process, the majority of gyms have either justified, amended, or will shortly amend the terms in their contracts to address the Commission's concerns.



5. "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 house hold use.

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

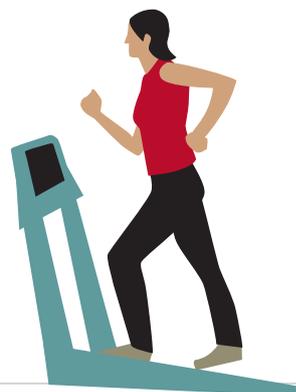
- 15 There are instances where the Commission’s concerns about the fairness of specific terms have not yet been completely addressed, for example, in the areas of termination fees and notice periods for cancellation. This report provides guidance in these areas to all gyms, and the Commission will continue to keep the issues under consideration.

Background – The Unfair Contract Terms provisions

- 16 The UCT provisions came into force on 17 March 2015. The provisions have been inserted into the Act at section 26A and under Part 4A at sections 46H to 46M. Under the 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.
- 17 Where the Commission is concerned that a contractual term is unfair, it may seek a declaration from the Court that it is unfair. Only the Commission can apply for a declaration, however any person who is a party to a standard form consumer contract may ask the Commission to apply to the Court for a declaration.
- 18 Under section 46I, a court may declare a term to be unfair where it fulfils the statutory requirements (as explained below), and is not exempt from assessment.

What is a standard form consumer contract?

- 19 Section 46J of the Act sets out the definition of a standard form consumer contract. There are two key parts to this definition.
- 20 First, the contract must be a “consumer contract”. This means it must be a contract 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.⁷
- 21 Second, the contract must be a “standard form” contract. The following considerations are relevant when determining whether a contract is a standard form consumer contract:⁸
- 21.1 whether one party has all or most of the bargaining power;
 - 21.2 whether the contract was prepared by one party before discussion relating to the transaction that occurred;
 - 21.3 whether one party was, in effect, required to accept or reject the terms in the form presented;
 - 21.4 the extent to which parties had an effective opportunity to negotiate the terms; and
 - 21.5 the extent to which the terms proposed take into account specific characteristics of any party.
- 22 In our experience, gym contracts are likely to be standard form consumer contracts in accordance with these definitions.



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

8. See section 46J.

When is a term unfair?

- 23 Section 46L of the Act provides that a court may only declare a term to be unfair if it is satisfied that the term:
- 23.1 would cause a significant imbalance in the parties' rights and obligations; and
 - 23.2 is not reasonably necessary in order to protect the legitimate business interests of the party advantaged by the term; and
 - 23.3 would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
- 24 In deciding whether a term is unfair, the Court can take into account any matters it thinks relevant but it must take into account the effect of the contract as a whole.⁹ This requires the Court to consider whether terms that appear to be unfair are balanced by the rights and obligations contained in other clauses of the contract.
- 25 The Court must also have regard to whether terms are transparent. If a term is 'transparent' it means it is expressed in reasonably plain language, is legible, is presented clearly, and is readily available to the party affected by the term.¹⁰
- 26 A term is presumed not to be reasonably necessary to protect business interests unless the business proves to the Court's satisfaction that it is.¹¹

What types of terms are unfair?

- 27 Section 46M of the Act provides a non-exhaustive list of 13 examples of the types of terms that may be unfair. These are terms that permit one party (but not the other) to:
- 27.1 vary the contract;
 - 27.2 to avoid/ limit performance of the contract;
 - 27.3 terminate the contract;
 - 27.4 penalise another party for breaching or ending the contract;
 - 27.5 renew or not renew the contract;
 - 27.6 vary the upfront price payable under the contracts without the right of another party to terminate the contract;
 - 27.7 vary the characteristics of the goods or services to be supplied;
 - 27.8 assign the contract to the detriment of another party without that party's consent;
 - 27.9 determine whether a contract has been breached or to interpret its meaning.
- 28 The examples also include terms:
- 28.1 that limit, or have the effect of limiting:
 - (a) one party's legal liability for its agents;
 - (b) one party's right to sue another party;
 - (c) evidence one party can present in any proceedings relating to the contract.
 - 28.2 that impose the evidential burden on one party in any court proceedings relating to the contract.

9. Section 46L(2).

10. See section 2(1) of the Act for definition of 'transparent'.

11. See section 46L(3) of the Act.

Exempt terms

- 29 Section 46K of the Act provides that some terms cannot be declared unfair by the Court, to the extent that the terms:¹²
- 29.1 define the main subject matter of the contract;
 - 29.2 set the upfront price payable under the contract, to the extent that the price term is transparent, or
 - 29.3 are required or expressly permitted by any enactment.

Consequences of a declaration

- 30 Once a term has been declared to be unfair, a person or business must not:¹³
- 30.1 include the unfair term in a standard form contract unless the term can be included in a way that complies with the Court's decision; or
 - 30.2 apply, enforce or rely on the unfair contract term.
- 31 If a business continues to use or rely upon the term, the Commission can commence criminal proceedings. In addition, the Commission can seek court orders for statutory remedies including injunctions, corrective advertising and management banning orders.
- 32 The Commission can also accept court enforceable undertakings from a business, as an alternative to taking declaration proceedings. If a business does not comply with enforceable undertakings the courts have the ability to grant orders to address any harm arising from the breach.

Other enforcement tools

- 33 The Commission can also use other tools to encourage compliance. These are set out in our published Enforcement Response Guidelines¹⁴ and responses can include Compliance Advice Letters and Warning Letters.
- 34 In this project, the Commission has encouraged operators to comply with the UCT provisions by removing or amending unfair terms.

The review and the gyms involved

- 35 The gyms reviewed were selected either as a result of complaints received from the public, or by the Commission, with the aim of reviewing a sample of membership agreements in the sector. Complaints about the sector included one from Consumer NZ, which wrote to the Commission raising concerns about a variety of terms present across various gyms' contracts.



12. Section 46K.

13. Section 26A.

14. The Commission's Enforcement Criteria and Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/>.

36 We reviewed the standard form contracts of 10 providers nationwide. This sample included large and small national and local franchise operations,¹⁵ corporate-owned clubs, and one company that manages gym membership contracts on behalf of gyms:

- 36.1 Anytime NZ Limited (**Anytime Fitness**)
- 36.2 City Fitness Group Limited (**CityFitness**)
- 36.3 Club Physical Holdings Limited (**Club Physical**)
- 36.4 Configure Express Limited (**Configure Express**)
- 36.5 Debitsuccess Limited (**Debitsuccess**)
- 36.6 Jetts Fitness New Zealand Limited (**Jetts**)
- 36.7 Les Mills New Zealand Limited (**Les Mills**)
- 36.8 Loft 45 Limited (**Loft 45**)
- 36.9 Next Generation Clubs NZ Limited (**Next Generation**)
- 36.10 NZ Equipment 24/7 Limited (**Snap Fitness**)

The contracts reviewed

37 In each case we reviewed the standard membership agreements of the gyms which were either available on the gyms' website or were provided to us by the gym. In combination, these 10 gyms had contracts with hundreds of thousands of New Zealand consumers. We looked at both 'fixed term' and 'flexible' contracts. The types of membership contracts we reviewed are discussed in more detail below at [54] - [58].

38 Where gym contracts incorporated Club Rules or other documents such as Privacy Agreements, gyms were advised that they needed to review these documents to ensure they did not impose any unfair terms. We advised the gyms of concerns where we found these sources included terms that could be potentially unfair.

39 Unlike in our Telecommunications and Energy sector reports, we do not here provide a table of the specific terms reviewed and our outcomes. This report samples only a segment of the market, and we value the cooperation of the gyms that supplied us with information. As this is an incomplete market survey, we have provided a general discussion of the kinds of terms reviewed for the benefit of all market participants.



15. We dealt with the head franchisor in New Zealand for the gyms where it was a franchised operation.

Potentially unfair terms identified

- 40 The Commission identified a wide range of terms across the gym contracts that we considered could potentially be unfair, and which resembled those described in the 'grey list' at section 46M of the Act. While each term was unique to a particular contract, similar terms were present in a number of the contracts assessed.
- 41 Potentially unfair terms related to:
- 41.1 **Duration** of the contract, specifically;
 - (a) terms relating to the minimum membership period and of any automatic renewal.
 - 41.2 **Cancellation** of the contract, specifically;
 - (a) terms that required the gym to accept or acknowledge a members' request to cancel the contract before it is treated as effective;
 - (b) the length of notice periods for cancellation (30 days);
 - (c) termination fees; and
 - (d) terms that allowed gyms to unilaterally exclude members.
 - 41.3 **Variation** of the contract, specifically;
 - (a) terms that allowed gyms to unilaterally change the upfront price, characteristics of services, or terms of the contract, without notice or without a right to terminate without cost.
 - 41.4 **Liability** under the contract, specifically;
 - (a) terms that limited the gym's liability for breach of contract and civil wrongs (such as negligence and deliberate damage causing loss to a member's property);
 - (b) terms that appeared to contract out of the Consumer Guarantees Act or the Fair Trading Act or that potentially misled members about their rights under these laws; and
 - (c) 'Entire Agreement' clauses.

Steps taken by the Commission

- 42 The Commission wrote to each of the gyms identifying the potentially unfair terms, seeking the gyms' views on their fairness and requesting further information. In particular the Commission sought comments on the following topics:
- 42.1 How terms were reasonably necessary to protect a legitimate interest of the gym;
 - 42.2 If the gym had a legitimate interest to protect, whether the interest could be protected by other fairer terms;
 - 42.3 Whether there were any other matters, including the transparency of the term and the contract as a whole, which they considered relevant to the fairness of the terms.

The gyms' response

- 43 The gyms generally responded positively to our review of their contracts. Although some gyms disagreed with our views, all gyms demonstrated a desire to comply with the law and proposed to make some changes to their contracts to address our concerns. Some gyms justified terms in a way that sufficiently addressed our concerns.
- 44 We have now provided compliance advice to all the gyms whose contracts we reviewed, giving advice about any outstanding concerns and confirming any changes proposed.

The need for accessible and 'plain English' contracts

- 45 The review highlighted that many contracts contained complex language or legal jargon and were in small font with dense and closely formatted text. This will make it difficult for consumers from a range of educational backgrounds and ages to easily understand the content of the terms.

- 46 For example a dense and confusing liability clause stated:¹⁶

Assumption of risk of injury and waiver of claims: I assume all risks of injury and waive all rights to pursue money damages or any other relief of any kind as a result of anything occurring at or near the Club Location or any other Club Location. In the event that I am injured while on Club property or during a Club sponsored event, I will hold harmless Club Owner, the Club itself and all of their owner, employees, agents, successors and assigns from all claims or any sort for damages or for other relief, including but not limited to claims for contribution. I understand and agree that the Club Location and all Club Locations are unsupervised fitness centres and no employee is on site to help me use the equipment or exercise in the manner that I choose to exercise. I acknowledge there is possible danger connected with any physical activity (including the dangers of physical injury and death) and knowingly and voluntarily waive my right to make a legal or equitable claim of any sort against the Club Owner or the Club itself and all of their owners, employees, agents, successors and assigns from all claims or any sort for damages or other relief including but not limited to claims for contribution. The assumption of risk and waiver of liability applies to my family members, successors, heirs and assigns.

- 47 We do not consider that this exclusion clause is suitably worded for a consumer contract because many ordinary consumers would have difficulty interpreting a term of this nature and understanding its meaning.
- 48 We recommend that all gyms review their contracts to ensure they communicate in 'plain English' and have accessible formatting, such as numbered terms and highlighting of key terms, to assist members to understand the contract.

16. Following correspondence with the Commission, the Gym agreed to remove the broad clause above.

- 49 Gyms should make sure that their contracts are clear and transparent, easily accessible and understood. They should ensure their staff draw attention to key contractual terms to prospective members before the contract is signed, including:
- the length of the contract;
 - the cost of the membership fees;
 - whether there is a minimum period, and what will happen when it comes to an end;
 - whether they will receive notice that their minimum term is coming to an end;
 - whether the contract will automatically renew unless they cancel their membership;
 - when and how the member can end the contract;
 - what, if any, notice period they have to give if they want to end the contract;
 - whether a fee will be charged if they want to cancel during their minimum period;
 - what will happen if the gym changes location or some of its services;
 - what will happen if the member breaks the gym rules or does not pay their membership fees;
 - what the gym's rights are regarding the termination of the member's gym membership, or recover any overdue membership fees;
 - whether there are any other fees payable, and what happens if there is a problem with payments of fees.
- 50 Explaining these terms and making them transparent in contracts will help ensure gym members understand their contracts better and reduce the risk that the terms are unfair.
- 51 In addition, consumers have suggested that it can be difficult to get copies of standard form contracts when they are thinking about joining a gym, want to terminate their membership, or when a dispute arises over the terms.
- 52 We also recommend gyms promptly make membership contracts available to existing and prospective members when requested.



Common terms identified

- 53 We describe below the types of terms which we identified as being potentially unfair, and provide examples of the changes that were made by gyms in response to our concerns. This is not an exhaustive list of the terms assessed, but is provided for illustrative purposes.

Duration of the contract

- 54 A contract term that states how long the membership will last is important for consumers because it sets the period they commit to pay for. During our review we identified gym membership contracts of varying duration.
- 55 **Minimum term** contracts are where members commit to paying for a fixed period in return for discounted or cheaper weekly or fortnightly membership fees. Minimum terms range from 1-3, 6, 12, 18 or 24 months in most instances. Usually, the longer the term the member commits to, the greater the discount. Generally these contracts come to an end at the conclusion of the minimum term or the membership automatically renews as a month-by-month contract.
- 56 Some membership agreements are expressed as **ongoing subscriptions** for gym services. These memberships have no prescribed end date and, for example, run week-to-week or month-to-month. Some have an “initial price period”, which is similar to a minimum term.
- 57 Lastly there are memberships that are described as **no contract** memberships. These have no fixed minimum period, and are advertised at a weekly price. Despite their description as “no contract” memberships, they are still subject to terms and conditions in the form of a standard form consumer contract, and may have a notice period which must be given before the member can end the membership. These memberships are usually more expensive per week than the minimum term memberships offered.
- 58 Our view is that the “no contract” description may be misleading particularly when a consumer has to give notice beyond the current payment period.

Automatic renewal clauses in minimum term contracts

- 59 The Commission has concerns about the potential unfairness that results from lack of clarity in some contracts about what happens to the membership at the end of an agreed minimum term.
- 60 While some contracts are clear that the fixed-term contract will automatically renew for another fixed term, or becomes an “ongoing subscription”, we found others were ambiguous about what would happen at the end of the minimum term.
- 61 It is apparent from consumers’ complaints to the Commission, and from information provided by Consumer NZ, that many New Zealanders do not understand how automatically-renewing minimum term memberships work. Consequently they do not appreciate that they are invariably required to provide notice to the gym before they can exit the contract, once it has automatically renewed.
- 62 The Commission considers that automatic renewal terms may be unfair where the contract does not give the member a choice about whether the contract will automatically renew, where the automatic renewal is not transparent, or where the member does not receive sufficient notice of the renewal with time to cancel before it automatically renews.

- 63 We consider that consumers should have the option to choose whether or not their contract automatically renews. Gyms may be able to address the potential for unfairness of automatic renewal clauses by ensuring that the contract is clear, and by informing members about the automatic renewal towards the end of the minimum term. This will give members the chance to end the contract before the renewal takes effect.
- 64 If the contract is renewed automatically without informing the member, gyms should allow members to exit the contract after the renewal has taken effect easily, promptly and without paying termination fees.

Cancellation of the contract

Notice periods for cancellation

- 65 The length of cancellation notice periods in gym contracts regularly featured in complaints to the Commission. In this review we examined the gyms' justification for the notice periods, and whether the terms may be unfair.
- 66 The gym contracts we reviewed had varied terms requiring members to give notice when they wanted to cancel, whether during fixed minimum term membership periods, or when the contract had automatically renewed following the expiry of the minimum term.
- 67 Out of the 10 gym contracts the Commission reviewed, eight required a 30-day or four-week notice period for cancellation. Of the remaining two gyms, one large national chain had a 7 day notice period, and another large gym required just 48 hours' notice to cancel.
- 68 The Commission asked the gyms with 30-day notice periods why they considered that term to be reasonably necessary. The reasons provided by gyms included:
 - 68.1 the notice period was necessary to allow the gyms to process the termination, including advising overseas international gym partners;
 - 68.2 the notice period permits budgeting and planning for classes or fitness programmes;
 - 68.3 a four week notice period is common in other consumer contracts, including telecommunications contracts;
 - 68.4 the four week notice period was part of the gym business model and to reduce the period would lead to an increase in overall pricing to compensate for cash flow loss to the detriment of its large membership base.
- 69 Some gyms considered the notice periods to be justified for the following reasons:
 - 69.1 members still had full use of the facilities during the notice period;
 - 69.2 the notice period did not need to extend the Minimum Term period as the notice could be given before the end of the Minimum Term;
 - 69.3 the notice period was part of the main subject matter of the contract and could not be assessed for unfairness;¹⁷
 - 69.4 the notice period was balanced, as the gym also had to give four weeks' notice of termination if it was exercising its power to terminate the member's contract.

17. We do not think that the notice period will usually form part of the main subject matter of a gym contract. Giving notice of termination is not one of the member's primary obligations under the contract.

- 70 As several large gyms operate with shorter notice periods it was not clear whether 30 days was reasonably necessary in every case for gyms to undertake the administrative tasks required to cancel the membership and any direct debit arrangements. For example one gym advised they could process cancellation due to death or illness within 48 hours, but a 30-day notice period was required for all other members.
- 71 Following our engagement with the gyms, many of those that we spoke with proposed to reduce their notice periods from 30 days or one month, to between 7 and 14 days.
- 72 The reduction of notice periods represents a major shift, which will have a direct financial impact for thousands of New Zealanders who are members of these gyms, and who will now be able to exit their gym contracts more quickly and at lower cost. We have appreciated the gyms' efforts to work constructively with the Commission to address our concerns around these terms.
- 73 These reductions are suggestive that lengthier notice periods may not be necessary to protect the legitimate interest of gyms. However, whether a notice period is reasonably necessary will depend on the particular gym's business model, structure and the interests they are seeking to protect.
- 74 Since the UCT provisions places the burden on the business to establish by evidence that a term is reasonably necessary, gyms should ensure that they can provide evidence supporting the need for their particular notice requirements.
- 75 One of the gyms reviewed did not reduce its notice period, but did propose to make the length of the notice period more transparent before the contract is entered into, by highlighting it further on its website and contracts. This is certainly an improvement, but as identified above, a notice term of this duration must also be reasonably necessary to protect the gym's legitimate business interests.



Cancellation processes

- 76 Our review also questioned the fairness of provisions relating to cancellation processes.
- 77 Some of the contracts we reviewed required consumers to go through a complicated process to cancel their contract. For example one gym required the customer to:
complete the home club's 30 day membership cancellation form, which is to be filled out over the counter at [my] home club and is to be countersigned by [my] club's CM/ACM before taking effect.
- 78 Another contract included a requirement that:
receipt of [the] notice of termination from your [Club] must be received within 12 hours of termination date. If you do not receive the receipt of notice, then your request is deemed not to be received by your [Club] and you are responsible for re-sending the request for it to be actioned. Until such time that the receipt of notice of termination is received you are responsible for all financial obligations under the agreement on and from the date of the initial written notice, that are required to be paid under this agreement. No refunds will be permitted.

- 79 These cancellation processes put obstacles in the way of a member who wants to cancel and may cause a significant imbalance in the rights of the parties to the contract.
- 80 Gyms can reasonably require a member to cancel their membership agreement in writing and to communicate that cancellation to the gym. However we consider it potentially unfair for that cancellation to be on a specific form.
- 81 Gyms should establish processes that ensure cancellations are not delayed through internal system failures. For the avoidance of uncertainty or disagreement it may be practical for a gym to include a term that requires acknowledgment that the cancellation has been received before it takes effect. In these cases we would expect that any acknowledgment must be given by the gym within a very short period.

Early termination fees

- 82 Early termination fees are charged by gyms when a member wants to cancel their gym membership before the end of their contracted minimum period. These fees may be unfair if the gym is recovering more than it needs to recover in order to protect its legitimate business interests.
- 83 Early termination fees can operate in a way that unfairly penalises the member. In the unfair terms examples listed in section 46M(c) of the Act, terms which penalise or have the effect of penalising one party to the contract for a breach or termination of the contract, but not the other party, may be unfair.¹⁸
- 84 The gyms we reviewed capped their early termination fees at either a percentage of the total remaining payments or a dollar amount. However, in some cases the fees were potentially large. We asked the gyms to justify their fees.
- 85 Most gyms claimed early termination fees were reasonably necessary to protect their legitimate interest in recovering the costs or losses caused by the early termination of a membership. Justifications for the fees included:
 - 85.1 Fixed overheads for the remainder of the member's term;
 - 85.2 Employee time in administering unscheduled terminations;
 - 85.3 The cost of recouping a fixed-term discount;
 - 85.4 Liquidated damages for early termination of the contract;
 - 85.5 Costs associated with getting a new member to replace the member who was leaving;
 - 85.6 The cost of the termination transaction;
 - 85.7 The cost of providing facilities and services for the period of the minimum term, including exercise equipment, parking facilities, changing rooms and other facilities.

18. Section 46M(c).

- 86 These are types of costs that could legitimately be recovered through termination fees, although we would not expect a gym to recover all of these costs. For example if a gym mitigates its loss by replacing the member, it cannot also claim fixed overheads for the remainder of the member's term.
- 87 Ultimately the fairness of early termination fees will depend on the size of the fee, the way it is calculated and the business model of the particular gym concerned.
- 88 What gyms may not do is charge a fee so high it amounts to a penalty for cancelling early. This is explained in our UCT guidelines.¹⁹
- 89 During the course of our review, one gym introduced a new early termination fee provision that set a flat cancellation fee of \$500 if the cancellation occurred in the first half of the minimum term or \$250 if less than half of the minimum term remained.
- 90 If the gym's loss was the amount the customer had to pay for the remainder of the term, this fee could penalise those customers who wish to exit the contract in the final eight weeks of their minimum term. For those customers the fee would exceed the balance of their membership fees.
- 91 We have advised the gym of our concerns about this. Early termination fees should not exceed the unpaid balance of the membership.
- 92 Gyms have been advised that, where an early termination fee is disproportionate to the losses incurred as a result of the termination, the fee is at risk of being unfair. As a result of our review, some of the gyms have amended their termination clauses, and/or reduced their termination fees.
- 93 On the information available we are not persuaded that the remaining gyms' fees are disproportionate to their likely losses, and we will not be taking any further action at this time.

Unilateral determination of a breach of the contract

- 94 Some terms we reviewed allowed gym management to decide whether a member had breached the contract or club rules. They could immediately terminate the member's contract, without any requirement to contact the member or to act reasonably. Some of these provisions potentially allowed gyms to terminate a membership for trivial or minor breaches.
- 95 We agree it is necessary for gyms to take steps to ensure members follow the gym's rules to ensure the safety and wellbeing of both staff and members. However, in some instances, terms were drafted very broadly, and caused significant imbalance between the rights of the member and the rights of the gym.
- 96 We have provided advice to some of the gyms to introduce a requirement for the gym to act reasonably in deciding to terminate the membership; for instance by consulting the member before deciding whether to terminate for breach of contract.
- 97 We consider it may be unfair that a member should have his or her membership terminated immediately where a minor breach has occurred.

19. Our view is that where an early termination fee is a penalty it is not part of the upfront price, as is discussed in our Unfair Contract Terms Guidelines at [95] – [106].

Unilateral contract variation

- 98 Section 46M(d) of the Act identifies that a term that permits one party (but not another party) to vary the terms of the contract may be unfair. Section 46M(f) of the Act also identifies that terms permitting one party to vary the upfront price payable under the contract without giving the other party the right to terminate the contract, are also likely to be unfair.

Variation of services

- 99 Our review revealed terms that permitted gyms to change the service they provided. These terms create an imbalance in parties' rights where the member does not have a corresponding right to renegotiate the price of the contract, or to exit the contract without cost.
- 100 Fixed-term contracts provide certainty, for both the consumer and the gym. They ensure uniform cash flow for the business; the consumer benefits from stable terms, services, and a discounted price for the commitment period.
- 101 Gyms can ensure that any variation of services terms is not unfair by giving members early and clear notice of the variation, and the ability to terminate the contract without paying a termination fee if they are dissatisfied with the variation.
- 102 Terms that allow gyms to change the contract are less likely to be unfair in month-by-month contracts than fixed-term contracts, because members can usually exit without paying a termination fee.

Variation of price

- 103 Some of the contracts we reviewed contained clauses that allowed gyms to change the price of membership during a fixed term contract.
- 104 A fixed term contract typically provides a discounted price in return for a guaranteed membership for a fixed duration, with fixed terms. Variation terms can be unfair if members are forced to accept unanticipated price rises when they believed they were committing to a fixed price.
- 105 Price increase provisions during a fixed term contract should seldom be necessary. A gym should be able to price its memberships to include the possibility of increased costs arising during the fixed term of the contract.
- 106 The Commission considers these terms create a significant imbalance between the parties' rights and obligations under the contract where members do not have the right to terminate their fixed-term membership without cost, following an increase in price.
- 107 We have advised gyms that a term may be unfair if it enables them to alter the upfront price of the contract, without giving members a corresponding right to terminate without cost, and which cannot be evidenced to be reasonably necessary to protect the legitimate interest of the gym.



108 One price variation term regarding a weekly price stated that:

We may vary the subscription price at any time without your prior consent. You will be given no more than one month's written notice of any price variation of your subscription. If you are paying by lump sum you are not subject to Subscription variations until the next-reoccurring anniversary of the Membership Start date. If you are paying by instalments you must pay the varied subscription from the next fortnightly instalment payment date following the expiry of our notice period unless your Subscription increases by more than 10% in any calendar year, in which case you may terminate your membership by giving written notice to us prior to the expiry of our notice period in accordance with clause 5c of this Membership Agreement.

109 During the course of our correspondence the gym suggested that it would amend this clause to give the member the right to terminate the contract where the subscription increased by 5% a year, instead of 10%. We do not consider that consumers should be subject to any price increase under a fixed-term contract without the right to terminate without cost.

110 Another price variation term stated:

Your Membership Fees may change from time to time during the Term to include:

an annual CPI increase (of an amount equal to the increase in CPI during the most recent 12 month period for which figures are published and available) which increase shall (if applied by the Club) take effect on 1 January each year during the term of your membership... .

111 We advised this gym that although CPI (Consumer Price Index) is not usually a significant increase, the term undermines certainty of price for the consumer, and is unlikely to be necessary to protect the gym's interest. The gym should be able to price the memberships in order to accommodate any CPI increases that occur.

Variation of terms of membership

112 Many of the contracts we reviewed contained clauses that allowed gyms to vary the standard terms and conditions, including policies and club rules, at any time without direct notice to the member.

113 These terms give the gym significant power, which leads to an imbalance in the rights of the gym member and the gym; particularly where a breach of club rules or policies gives rise to a right for the gym to terminate a member's contract, or where the changes cause detriment to a consumer who is locked in to a fixed-term contract, and cannot exit without paying a termination fee.

114 In particular, unfairness may exist where members are not given the right to either:

114.1 renegotiate the price when the gym services have been altered to their detriment; or

114.2 cancel a fixed-term contract that has been materially changed to their detriment without cost.

115 Unilateral variation clauses may be legitimate in some circumstances as it is not always practical for large businesses to agree all variations with their customers, particularly where those variations relate to relatively minor matters, or where variations result from matters outside the control of the gym. Accordingly, when examining such terms, we considered all relevant information supplied by the gyms.

- 116 By way of example, during our review we identified a term permitting the particular gym to suspend services (for example access to gym facilities) when circumstances outside the gym's control made provision impossible. However, members were still required to pay membership fees during the period of suspension.
- 117 Following correspondence, the gym agreed to amend this provision so that following such a suspension, the member's next payment would be discounted to reflect the lost value.
- 118 In another case, a term allowed the gym to vary the location of the premises, without giving fixed-term members the right to terminate the contract without cost:
No reasonable change of location of not more than 4km, change of ownership or change of the name of the Facility shall relieve the Customer of his responsibilities under the [gym] Contract.
- 119 A gym's location is a fundamental characteristic of the contract, as convenience of the location is generally a key determining factor in a member's selection of a gym. We considered this term created a significant imbalance in the parties' rights and obligations.
- 120 While there may be business reasons why a gym may need to change its location, a shift in location may create significant detriment for members, for example if they walk to the gym and there is no convenient public transport. Balance is created where members can exit the contract without cost if the change is to their detriment.
- 121 The above term was amended by introducing a qualification to state that:
"a reasonable relocation of the premises where the services are ordinarily provided (to the extent that such relocation is within a 4 km radius) does not affect the Customer's obligations under the Contract **except to the extent that such change disadvantages the Customer.**"
- 122 Under this clause we would expect a customer to be entitled to exit the contract without penalty if their overall distance travelled to the gym was significantly increased.
- 123 We consider gyms should always give adequate notice of any proposed variation so as to ensure members have sufficient time to consider the effect of the proposed changes on their membership, and take steps to cancel the contract or negotiate a discount, where the change will cause detriment.

Liability

- 124 Our review revealed potentially unfair terms relating to the gyms' liability to their members. Several contracts included widely drafted exclusion or limitation of liability clauses, or had clauses which imposed financial obligations on members to 'indemnify' or compensate the gym in the event of a particular event.
- 125 These clauses are unbalanced as they limit and/or exclude the gyms' liability, while providing their members with no limitation to their liability for any loss that they may cause to the gym.

Terms relating to the gym's liability for loss or damage

- 126 Some gym contracts limited the gym's liability to members for loss or damage to their property in circumstances where the gym may have some responsibility. Under s 46M (i) of the Act, terms that limit or have the effect of limiting one party's vicarious liability for its agents may be unfair.
- 127 The Commission accepts that gyms wish to encourage members to be responsible for their own property, as there is always a risk that the member's property may be damaged, lost or stolen.
- 128 However, terms in gym contracts that seek to completely exclude the gym's liability for loss or damage to property are likely to be unfair, as it may cover situations where the gym's staff or contractors are responsible for the loss or damage. In these circumstances it would be unfair if the gym was not liable to the gym member.
- 129 An example of a limitation of liability term stated:
Release: You use the facilities provided by [the gym] at the club at your own risk and acknowledge that the use of the equipment may involve risk of injury, whether cause (sic) by you or another party. You release, to the fullest extent permitted by law, [the gym], and [the gym] staff against all expenses, damages, costs, liabilities, claims, actions, proceedings, damages, judgments and losses of any kind whatsoever arising out of or caused by, attributable to or resulting from any accident, damage, loss, damage to property, injury or death to any person.
- 130 In the Commission's view, gyms should not incorporate terms excluding their liability for all breaches of contract and civil wrongs (such as negligence or deliberate damage) causing loss to a member's property. This would create a significant imbalance between parties, and detriment to the consumer.
- 131 A clause or term in a contract which seeks to exclude all liability is more likely to be fair if it is qualified so that liability is restricted only where the gym has not caused or contributed to loss or harm, for example, where a property was stolen by another member. We have advised the gym concerned that the above term is likely to be unfair.
- 132 Another example term stated:
[The gym] is not liable to you for any personal property that is damaged, lost or stolen while on or around the facility, including but not limited to, vehicle or its contents or any property left in an Open locker...
- 133 We advised the gym concerned to qualify this provision to address the situation where property was intentionally damaged, lost or stolen by a staff member. We have also given general advice to other gyms to amend terms to ensure that liability for deliberate damage to property caused by gym personnel is not excluded.



Terms that affect liability for consequential losses

- 134 Consumers are provided with important protections under the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. Gyms cannot contract out of these Acts. However, our review revealed terms purporting to exclude or limit protections provided by these statutes.
- 135 For example, both the Fair Trading Act and the Consumer Guarantees Act recognise that consumers are entitled to recover compensation for ‘consequential loss’ arising from a breach of those Acts.²⁰
- 136 Consequential losses include all reasonably foreseeable losses that someone may suffer as a result of a breach of contract or as a result of negligence. They may also arise under the Fair Trading Act or as a result of a failure to meet the statutory guarantees under the Consumer Guarantees Act.
- 137 A number of the gym contracts reviewed contained clauses that had the effect of limiting the customer’s right to recover consequential losses caused by the gym. These types of clauses create a significant imbalance in the parties’ rights and obligations under the contract, and undermine statutory protection.
- 138 Confusingly, some contracts stated that terms were subject to the Consumer Guarantees Act (and sometimes there was reference to the Fair Trading Act). But other contractual terms in those contracts purported to override the protections and remedies provided by these Acts, or gave contradictory information about member’s rights.
- 139 One term in a contract stated:
- The Club shall not be liable for any loss or damage of any kind whatsoever suffered by the Member or any other person and whether in contract or tort (including negligence and/or **consequential loss** or damage) or otherwise and irrespective of whether such loss or damage arises directly or indirectly from the Member’s use of the Facility.
- 140 The term was removed by the gym after the Commission’s advice.
- 141 We also identified some provisions that sought to exclude or limit the gym’s liability “to the maximum extent permitted by law”.²¹ In our view the use of expressions such as “to the extent permitted by law” or “to the maximum” or “fullest extent permitted by law” is unsatisfactory in standard form consumer contracts like gym contracts.
- 142 These expressions are confusing for consumers who have no legal training or advice to understand what the gym’s liability might ordinarily be and what rights they have at law which prevail in the event of inconsistency with the contract. We have advised gyms that use these terms that they should consider further changes to make the members rights clearer.
- 143 To ensure that gyms do not make misleading claims about the rights of consumers, we recommend that they make it clear in their contracts that consumers have statutory protections that cannot be excluded or limited. They should also state what those consumer rights are, and make it clear that any limitation or exclusion of liability does not affect these rights.

20. Fair Trading Act 1986, section 43; Consumer Guarantees Act 1993, section 18(4).

21. The Commission is concerned that these types of terms may mislead consumers that they do not have rights when those rights are statutory rights that cannot be excluded or limited in any way. Including such a term is likely to amount to a misleading representation in breach of section 13(i) of the Fair Trading Act.

- 144 Gyms should remember that the Commission looks at the contract as a whole, so even if the contract states “nothing in the contract is intended to limit consumers rights under the Consumer Guarantees Act and Fair Trading Act”, but other terms seem to negate rights given to consumers through these Acts, terms may be unfair or the contract misleading.
- 145 The Commission’s observation is that clauses that seek to exclude statutory rights appear to be standard ‘boilerplate’ or stock clauses, similar to those often used in commercial contracts to protect the interests of one of the parties.
- 146 The Commission expects that, as the UCT provisions are better understood, businesses and their advisers will avoid the use of these types of commercial clauses in standard form consumer contracts.

‘Entire Agreement’ clauses

- 147 Our review revealed the use of “Entire Agreement” clauses, which are terms that state that the contract represents the whole agreement between the parties and seek to prevent the parties from relying on any previous agreements, negotiations or discussions that are not reflected in the contract document. It will in our view be unfair to state that the contract document records the whole agreement where any pre-contractual representations have occurred.
- 148 One entire agreement clause stated:
You acknowledge that neither [the gym] nor any other party has made any representations or promises upon which you have relied when entering this agreement. This document contains the entire agreement between you and [the gym] and replaces any oral or other agreement....
- 149 This type of clause seeks to limit the evidence that a member may bring in relation to any court proceedings about the contract, by excluding pre-contractual statements or representations made by the gym staff or agents that may have led to the consumer entering into the gym contract. It also has the effect of limiting the gym’s vicarious liability for its staff members’ or agents’ statements. Such a term may be unfair as illustrated by the examples in the Act, most relevantly sections 46M (i) and (l). It may also be an attempt to contract out of the Fair Trading Act.
- 150 Another clause in a gym contract stated:
Entire Agreement. These Terms and Conditions, the Direct Debit Request (DDR) & Membership Payment Contract and the Direct Debit Authority (together the [gym] contract)) and any membership agreement entered into between the Customer and the Facility (the “Facility Membership Agreement”) constitutes the entire agreement, understanding and arrangement (express and implied) between the Customer, the Facility and [the gym]. This [gym] Contract and the Facility Membership Agreement shall supersede and cancel any previous agreement, understanding and arrangement between the Customer, the Facility or [the gym] whether written or oral.
- 151 The clause was removed by the gym after the Commission raised concerns with the fairness of the term.

Conclusion

- 152 Many of the gyms have now addressed the clauses that we considered were potentially unfair, either through amending or agreeing to amend the contracts, or by providing us with evidence that the term is necessary to protect the legitimate business interests of the gym.
- 153 We are pleased with the changes that have been made by the gyms involved, as it represents meaningful progress towards fairer contract terms for New Zealand consumers.
- 154 In order to ensure contracts remain fair to consumers, the Commission has advised gyms that their contracts must continue to comply with the law, and that we will in future revisit or broaden our own gym enquiries if we consider it necessary to do so.



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