IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2008
[2022] NZHC 3156

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CALLPLUS SERVICES LTD First Defendant
	ORCON LIMITED Second Defendant
	SWITCH UTILITIES LIMITED Third Defendant

Hearing:	23 November 2022
Appearances:	S M Hunter KC and D S Houghton for Plaintiff J C L Dixon KC, M C Sumpter and G C Spittle for Defendant
Judgment:	29 November 2022

JUDGMENT OF LANG J
[on determination of separate question]

This judgment was delivered by me on 29 November 2022 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors:
Meredith Connell, Auckland
Chapman Tripp, Auckland

[1] The defendants in this proceeding provide broadband and electricity services to customers in New Zealand. One of their marketing strategies involves sales staff contacting members of the public by telephone and seeking to persuade them to enter into fixed-term contracts for the provision of services they offer. The contracts are for terms of either 12 or 24 months.

[2] Approaches to potential customers in this way are unsolicited. This means the defendants are subject to the obligations imposed in Part 4A of the Fair Trading Act 1986 (the FTA), which regulates uninvited direct sales agreements. These include an obligation under 36L(1) of the Act to provide customers with an agreement containing specified information about the terms on which the defendants offer their services. After receiving the information customers have five working days as a "cooling-off period" within which they may withdraw from the transaction without penalty.[1] Customers may also cancel the agreement if the supplier fails to provide them with the information required under s 36L(1).

[3] The Commerce Commission (the Commission) is the agency responsible for administering and enforcing the provisions of the FTA. In this proceeding it alleges the defendants breached their obligations under Part 4A. The Commission contends the defendants failed to advise customers of the fees they may have been required to pay if they ceased using the defendants' services prior to the expiration of the contract's nominated term. It seeks orders requiring the defendants to repay any fees they have collected from customers who terminated their contracts with the defendants before the expiration of the nominated term.

A preliminary question

[4] A single issue lies at the heart of the dispute between the Commission and the defendants. This is whether s 36L of the FTA required the defendants to advise customers of the fees they would be required to pay if they terminated their contracts early. These are known as "Early Termination Fees" (ETF's). The parties therefore agreed that this issue should be determined as a preliminary question.

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1 Fair Trading Act 1986, s 36M(1).

[5] Rule 10.15 of the High Court Rules 2016 permits the Court to determine a question separately regardless of whether the decision would dispose of the proceeding. Ordinarily, however, the Court approaches the determination of separate questions with caution because experience has shown that the process can produce significant problems. One of the principal concerns in this context is that the final resolution or determination of a proceeding may be delayed by appeals against decisions made on separate questions.

[6] The Court was not asked to turn its mind to this issue before the separate question in the present case was set down for hearing. I therefore convened a telephone conference with counsel on the day before the hearing. This led them to file a joint memorandum confirming the parties had agreed on a settlement framework that means determination of the separate question will also determine the outcome of the proceeding. I agreed to determine the question on that basis.

[7] The question I am required to determine is whether s 36L(2)(b) of the FTA required the defendants' fixed-term contracts for the provision of utility services to disclose the quantum of the ETF's payable on early cancellation as part of the total price payable or any other consideration to be given under the agreement.

The legislative regime

[8] Part 4A of the FTA is headed "Consumer transactions and auctions". Section 36A provides that the purpose of this part of the FTA is to set out in one place the rules applying to layby sale agreements, uninvited direct sale agreements, extended warranty agreements and auctions. It is common ground that the agreements that are the subject of the present proceeding are uninvited direct sale agreements as that term is defined in s 36K of the Act.

[9] Subpart 1 of Part 4A deals with layby sales agreements. In broad terms these agreements permit a customer to purchase goods by making two or more payments until either the goods have been paid for in full or a specified proportion of the

purchase price has been paid. The purchaser is unable to take possession of the goods until this occurs.[2]

[10] Subpart 2 of the FTA applies to uninvited direct sales. Section 36L sets out the disclosure requirements imposed on a provider of services in this context. It relevantly provides:

> **36L Disclosure requirements relating to uninvited direct sale agreements**
>
> (1) A supplier must ensure that—
>
> (a) every uninvited direct sale agreement entered into by that supplier—
>
> (i) is in writing; and
>
> (ii) is expressed in plain language; and
>
> (iii) is legible; and
>
> (iv) is presented clearly; and
>
> (v) complies with the requirements of subsection (2); and
>
> (b) a copy of the agreement is given to the consumer—
>
> (i) at the time the agreement is entered into; or
>
> (ii) in the case of an agreement entered into over the telephone, within 5 working days after the date on which the agreement was entered into.
>
> (2) The requirements referred to in subsection (1)(a)(v) are that—
>
> (a) the following information is set out on the front page of the agreement:
>
> (i) a clear description of the goods or services to be supplied under the agreement; and
>
> (ii) a summary of the consumer's right to cancel the agreement under section 36M(1); and
>
> (iii) the supplier's name, street address, telephone number, and email address; and
>
> (iv) the consumer's name and street address; and
>
> (b) either—

[2] Fair Trading Act 2986, s 36B(1)(a).

> (i) *the total price payable, and any other consideration to be given, under the agreement is disclosed in the agreement; or*
>
> (ii) if the total price or consideration is not ascertainable at the time at which the agreement is entered into, the method by which the total price or consideration will be calculated is disclosed in the agreement; and
>
> (c) the agreement is dated.
>
> (3) The supplier must give the consumer oral notice, before the agreement is entered into, of—
>
> (a) the consumer's right to cancel the agreement within 5 working days after the date on which the consumer receives a copy of the agreement; and
>
> (b) how the consumer may cancel the agreement.
>
> …
>
> (Emphasis added)

[11] As I have already observed, s 36M(1)(a) permits a consumer to cancel an uninvited direct sale agreement by giving notice of cancellation to the supplier within five working days after the date on which the consumer receives a copy of the agreement containing the information required to be provided under s 36L. A consumer may also give notice of cancellation where the supplier fails to comply with the disclosure obligations imposed on it by s 36L.[3]

[12] Section 36N provides that a supplier may not enforce an uninvited direct sale agreement unless it has complied with its obligations under s 36L and the so-called "cooling-off period" has expired.

The agreements

[13] The defendants use a variety of different forms of agreement for sales concluded by telephone. Some of these make no reference to the fact that an ETF may apply if the customer terminates the contract before the expiry of the nominated term. Others refer to the fact that this may occur and direct the customer to a website where information about the ETF's may be found. Others simply refer to the fact that an ETF

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[3] Section 36M(1)(b).

may apply if the customer terminates the contract early. It is common ground, however, that none of the agreements specifies the amount the customer may be required to pay if the agreement is cancelled before the end of the nominated term. Nor did any of the agreements state that an ETF would always be charged if the customer terminated the contract before the end of its term. Each stated that an ETF "may be charged", making it clear that this was a matter for the defendants' discretion.

[14] It is also common ground that the defendants had in all cases fixed the ETF that would apply to individual contracts. These ranged between $149 and $250 depending on the nature and duration of the contract. The same fee would be applied regardless of the point during the term of the contract when termination occurred. In other words, the same fee would be charged regardless of whether termination occurred after one month, 11 months or 23 months.

[15] The rationale for the imposition of an ETF is that the defendants can offer their services at a cheaper rate if they know the customer will be using those services for a fixed period. Where this does not occur, the fee provides the defendants with compensation to reflect the fact that they have provided services at a reduced rate and will lose the benefit of payments they would have received during the balance of the term of the contract.

[16] Mr Dixon suggested on behalf of the defendants that the ETF's were a form of liquidated damages to recognise the fact that customers would be in breach of the contracts if they terminated early. However, many of the agreements refer to the fact that customers may be charged ETF's if they "choose to cancel" the agreements before the expiry of the fixed term. I consider this suggests customers had the right to terminate the contracts early provided they paid an ETF if the defendants required them to do so.

The arguments

[17] The Commission contends that s 36L(2)(b)(i) imposes an obligation on the defendants to provide customers with information about the ETF's they may be required to pay if they terminate the contract before the expiry of the nominated term. It says the obligation went further than to alert customers to the fact that an ETF may

be imposed for early termination. The Commission contends the defendants were also required to advise customers of the amount they would be required to pay if they chose to terminate the contract early.

[18] The Commission points out that the obligations imposed by s 36L underpin the protection that Subpart 2 of the FTA offers to customers who have agreed to purchase goods through unsolicited direct sales. In order to make an informed decision whether to cancel an agreement during the five-day cooling-off period customers need to know not only what monthly payments they will be required to make but also what they will be required to pay if they elect to terminate the contract early. The Commission points out that it would not be difficult for the defendants to provide this information because they know what the amount of the ETF will be for every agreement from the outset.

[19] The Commission says the obligation to disclose the amount that may be charged by way of an ETF arises in two ways. First, the obligation to pay an ETF amounts to valuable consideration that falls within the broad definition of "price" contained in s 2 of the FTA, which relevantly provides:

> **Price** includes valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing

[20] Secondly, the Commission points out that s 36L(2)(b)(i) refers not only to the total price payable" but also to "any other consideration to be given under the agreement". The Commission contends that, if ETF's do not form part of the total price payable under the agreement, they are captured by the phrase "other consideration to be given under the agreement".

[21] The defendants disagree. They contend that, properly construed, the definition of price relates to the consideration the customer is required to pay to acquire the services from the defendants. The ETF does not relate to the acquisition of services. Rather, it is the price the customer agrees to pay to cease using those services before the expiry of the term of the contract. It says that the phrase "other consideration to be given under the agreement" must be construed in the same way.

Does the obligation to pay an ETF fall within the definition of "price"?

[22] The definition of "price"[4] is undoubtedly broad because it includes "valuable consideration in any form, whether direct or indirect". Given the breadth of the definition I consider a promise to pay a fee in the future on the happening of a specified event would fall within it. However, the words that follow restrict the consideration to that which "in effect relates to the acquisition or supply of goods or services" even though it may ostensibly relate to any other matter or thing. The concluding words of the sentence appear to be designed to capture consideration provided under a collateral agreement.

[23] It can undoubtedly be argued that a promise to pay a fee if the contract is terminated early may be regarded as consideration provided for the supply of services. The defendants require customers to make that promise in exchange for the supply of services at a cheaper rate. However, the defendants rely on the manner in which the courts have approached the meaning of "price" in other contexts. They say these demonstrate that the courts have focussed on consideration provided for the acquisition of goods and services rather than to reflect subsequent events such as cessation of supply.

[24] The case most analogous to the present is *Ben Rumble Communications Ltd v Commerce Commission.*[5] That case involved an appeal against conviction on charges alleging breaches of the FTA through misleading advertising. The appellant advertised cellphones for sale at a set price. However, the cellphones could not be used without a connection to a service provider. Any customer wishing to purchase a cellphone was therefore required to enter into both a purchase agreement with the appellant and a service connection agreement with the service provider. The latter involved the one-off payment of a service connection fee to the service provider. The appellant had advertised the cellphones for sale at a price that did not include the service connection fee.

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[4] Set out above at [19].

[5] *Ben Rumble Communications Ltd v Commerce Commission* (1999) 9 TCLR 204 (HC).

[25] This Court held that the obligation to pay the service connection fee was an obligation incurred at the time the cellphone was purchased.[6] This was sufficient to bring it within the wide statutory definition of "price" in the FTA. The Court held, however, that other ongoing fees the customer was subsequently required to pay to the service provider did not fall within the definition of price. Of relevance for present purposes, the Court upheld a finding in the District Court that a contractual obligation to pay other fees, including an ETF, to the service provider did not relate to the supply of goods. Rather, such obligations related to the subsequent use of those goods and were owed to the service provider rather than the seller of the goods.[7]

[26] Earlier in the judgment, after referring to several authorities, Chisholm J noted that the following observations can be made about the definition of "price" contained in the FTA:[8]

> (1) By virtue of its inclusive nature the ordinary dictionary meaning of the word "price", namely, "money or other consideration for which a thing is bought or sold" (see *Shorter Oxford Dictionary*) also applies.
>
> (2) It is intended to be, and is, an extremely wide definition. Amounts payable in the future and obligations incurred as a result of the acquisition or supply of the relevant goods or services can constitute part of the "price" whether they arise from the principal contract or by virtue of a collateral contract.
>
> (3) When determining the "price" it is necessary to examine the whole of the relevant transaction or package with reference to the particular goods or services in question.

[27] This Court had earlier considered the same issue in *Cellphone Warehouse Ltd v Commerce Commission.*[9] As in *Ben Rumble,* this was an appeal against conviction on charges of making false or misleading statements by failing to refer to a mandatory connection fee when advertising the sale of cellphones. Williams J held that these constituted false or misleading representations.[10]

[28] In *Commerce Commission v Telecom Corporation of New Zealand Ltd* the District Court was required to determine whether an advertised price was false or

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6 Above n 5, at 217.
7 At 217.
8 At 213.
9 *Cellphone Warehouse Ltd v Commerce Commission* HC Auckland AP181/96, 13 September 1996.
10 At 9.

misleading when it omitted to disclose the goods and services tax (GST) payable on rental charges for a landline telephone.[11] The defendant had argued that GST was not part of the valuable consideration for the supply but was instead an impost added to and calculated upon that consideration. Judge D A Ongley held that GST was part of the valuable consideration provided for the supply of the services in question because it was a payment that had to be made as a condition of the supply.[12] The fact that it was a tax and that the supplier had to account for it to the Commissioner of Inland Revenue made no material difference.

[29] In *Mouat v Betts Motors Ltd*, one of the cases referred to in *Ben Rumble,*[13] the Privy Council considered the definition of "price" under the Control of Prices Act 1947 (the CPA).[14] This was cast in similar terms to the definition of "price" in the FTA. In that case a motor vehicle dealer had sold a new vehicle for the maximum price permissible under the CPA at that time. The dealer required the purchaser of the vehicle to enter into a covenant, mandated by the Board of Trade, under which the purchaser undertook not to sell the car within two years without first offering it back to the dealer at the original price less depreciation. The issue was whether this covenant formed part of the price paid in relation to the sale of the vehicle.

[30] The Privy Council accepted that the covenant could amount to consideration but held that it did not relate to the sale of goods. Lord Denning explained the Board's reasoning as follows:[15]

> The special covenant was, in a sense, valuable consideration–just as any collateral contract is consideration for the making of a main contract–but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer: and a valuable consideration only relates to the sale if it is given as the inducement–or one of the inducements–for the transfer of the property. In this case the sole and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different. It was given for the privilege of being allowed to buy a new car. It was not expected to yield any benefit to the seller. Its purpose was to stop the purchaser taking advantage of his privileged position contrary to the interest of the trade and the public. It was a pre-requisite to the transfer of the property and not part of

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11 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (1990) 4 TCLR 1 (DC).
12 At 6.
13 *Ben Rumble Communications Ltd v Commerce Commission*, above n 5, at 213.
14 *Mouat v Betts Motors Ltd* [1959] NZLR 15 (PC).
15 At 19.

> the consideration for it. In these circumstances their Lordships think it cannot properly be said to form part of the "price" within the statutory definition.

[31] It is important to bear in mind that the cases referred to above relate to the supply of goods rather than the provision of services. It is understandable that the focus in such cases is on the consideration provided at the time goods are supplied. As *Ben Rumble* and *Cellphone Warehouse* demonstrate, it will not matter in such cases whether part of the consideration must be paid to a third party rather than to the supplier of the goods.[16] Furthermore, as *Ben Rumble* also demonstrates, obligations that become owing subsequently as a result of the use of goods, as distinct from their acquisition, will not form part of the price paid for those goods.

[32] However, I consider the position to be different in relation to contracts for the supply of services. In such cases the customer will usually pay either a fixed sum at the commencement of the contract or make periodic payments during the term of the contract. The total price payable for the purposes of s 36L(2)(b)(i) of the FTA therefore comprises either the fixed sum or the amount of the periodic payments.

[33] The contracts used by the defendants constitute a hybrid option. They provide for periodic payments on the condition these are maintained for the duration of the contract. If the customer chooses to terminate the contract before the expiry of the nominated term, the defendants may replace the obligation to make future periodic payments with an obligation to pay a fixed sum. In that event the total price payable under the contract will be the periodic payments that have already been made together with the fixed sum comprising the ETF. I therefore consider the ETF forms part of the total price payable under the contract even though it may never be charged. For the same reason it also constitutes consideration payable under the contract.

[34] Such an outcome is consistent with the policy underpinning this section of the FTA. Subpart 2 is obviously designed to ensure that customers who have agreed to enter into unsolicited direct sale agreements are able to make an informed decision during the cooling-off period as to whether they wish to cancel the agreement. Customers need to know what they may be required to pay under the contract in order

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[16] *Ben Rumble Communications Ltd v Commerce Commission*, above n 5; and *Cellphone Warehouse Ltd v Commerce Commission*, above n 9.

to make an informed decision. This obviously includes the obligation to make periodic payments if the agreement remains in force for the full term. However, it must also logically extend to the potential liability to pay an ETF if they choose to terminate the agreement before the nominated expiry date.

[35] This conclusion is sufficient to answer the question I am required to determine. However, in defence to the careful argument advanced by Mr Dixon on behalf of the defendants, I propose to deal with the other issues he raised.

The defendants' other arguments

The structure used in Subpart 1

[36] The strongest argument against the interpretation I have adopted is the manner in which Parliament has chosen to structure Subpart 1 of Part 4A, which relates to layby sales. This contains s 36C, which prescribes the disclosure obligations of a vendor of goods sold under a layby sale agreement. Section 36C provides as follows:

> **36C Disclosure requirements relating to layby sale agreement**
>
> (1) A supplier must ensure that—
>
> (a) every layby sale agreement entered into by that supplier—
>
> (i) is in writing; and
>
> (ii) is expressed in plain language; and
>
> (iii) is legible; and
>
> (iv) is presented clearly; and
>
> (v) complies with the requirements of subsection (2); and
>
> (b) a copy of the agreement is given to the consumer at the time the agreement is entered into.
>
> (2) The requirements referred to in subsection (1)(a)(v) are that—
>
> (a) the following information is set out on the front page of the agreement:
>
> (i) a clear description of the goods to be supplied under the agreement; and

(ii) a summary of the consumer's right to cancel the agreement under section 36F(1); and

(iii) whether or not a cancellation charge will be imposed; and

(iv) if a cancellation charge is to be imposed, either the amount of the charge (if a fixed charge is to be imposed) or a clear description of how the charge will be calculated; and

(v) the supplier's name, street address, telephone number, and email address; and

(b) the total price payable under the agreement is disclosed in the agreement; and

(c) the agreement is dated.

(3) This section and section 36D do not apply to a layby sale agreement that is a consumer credit contract to which subpart 2 of Part 2 of the Credit Contracts and Consumer Finance Act 2003 applies (which relates to required disclosure).

(Emphasis added)

[37] Subpart 1 and Subpart 2 were added to the FTA at the same time. Mr Dixon submits that, if suppliers under unsolicited direct sale agreements were required to disclose cancellation fees, it would have been a simple matter for Parliament to have included an equivalent provision to s 36C(2)(a)(iii) and (iv) in Subpart 2.

[38] This argument overlooks the difference between layby sale agreements and unsolicited direct sale agreements. The former applies only to the supply of goods, whereas the latter applies to the supply of both goods and services. Section 36F of the FTA provides the purchaser under a layby sale agreement with an unrestricted right to cancel the agreement at any time before taking possession of the goods. However, the supplier under such an agreement may only cancel it in three situations. These are when the purchaser breaches a material term of the agreement, when the supplier has ceased trading and where the goods in question are no longer available and no satisfactory substitute goods can be reasonably obtained.[17]

[39] Cancellation of a layby sale agreement by either the purchaser or supplier will generally occur in circumstances where the purchaser has made payments under the agreement but has not yet received the goods. Where that occurs, the vendor will have

[17] Fair Trading Act 1986, s 36G.

received the benefit of those payments but will not have been required to do more than store the goods on the purchaser's behalf. This explains why s 36F(4) of the FTA limits the quantum of any cancellation charge to the supplier's reasonable costs arising directly from the agreement. Section 36F(5) gives the following examples of the types of loss or expense that will fall within the scope of the vendor's reasonable costs:

> **36F Cancellation of layby sale agreement by consumer**
>
> …
>
> (5) In subsection (4), **reasonable costs arising directly from the agreement** includes, for example,—
>
> (a) the loss in value of the goods between the date of the agreement and the date of the cancellation of the agreement:
>
> (b) the reasonable costs incurred in storing and insuring the goods while the agreement was in force:
>
> (c) the reasonable administration costs of the agreement (for example, office expenses, salaries, or wages directly attributable to the agreement).

[40] The position is different in relation to uninvited direct sale agreements governed by Subpart 2. The cancellation regime contained in Subpart 2 relates only to the consequences that follow where the consumer exercises the right under s 36M to cancel the agreement during the five-day cooling-off period or where the supplier fails to provide the information required by s 36L. There is no corresponding provision to s 36G, which permits the supplier to cancel a layby sale agreement in certain circumstances.

[41] When an unsolicited direct sale agreement is cancelled other than in accordance with s 36M the consumer will generally have already received the goods or begun receiving the services that form the subject of the agreement. Subpart 2 does not prescribe what should occur in such situations. Nor does it restrict the ability of the parties to provide for the consequences that will follow cancellation of an unsolicited direct sale agreement for reasons unconnected with s 36M. The right to cancel such an agreement may also arise through legislation such as the Consumer

Guarantees Act 1993[18] and the Contract and Commercial Law Act 2017.[19] In the present case the parties elected to deal with the issue by permitting the defendants to charge a cancellation fee if the consumer terminated the agreement prior to the expiry of the nominated term.

[42] I therefore consider that there are good reasons why Subpart 1 of the FTA expressly requires any cancellation charge to be displayed on the front page of a layby sale agreement. In a similar vein Subpart 2 expressly permits consumers to cancel an unsolicited direct sale agreement without penalty under s 36M. The fact that Subpart 2 does not go on to prescribe the consequences of cancellation other than in accordance with s 36M does not assist the defendants. If they sought to impose consequences that affected the amount of the price or consideration the consumer was required to provide, the defendants were obliged to disclose that amount under s 36L.

The Door to Door Sales Act 1967

[43] Mr Dixon also relies on the fact that the predecessor to the FTA, the Door to Door Sales Act 1967, expressly excluded from the definition of "total purchase price" any sum payable as a penalty, or as compensation or damages for breach of the agreement.[20] This submission is obviously based on the premise that the ETF is a form of liquidated damages for breach of the agreement. This is arguably incorrect because, as its title demonstrates, it is a fee payable to exercise the right of early termination rather than a penalty or compensation for breach of the agreement. More importantly, however, Parliament elected not to keep this exclusion in the definition of "price" under the FTA. I consider this supports the argument that any fee payable to exercise a right of early termination may form part of the total price payable under an unsolicited direct sales agreement.

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18 Sections 32 and 37 of the Consumer Guarantees Act 1993 provide consumers with a right to cancel a contract for the acquisition of goods or services where they do not comply with the guarantees imposed by that Act.

19 Subparts 2 and 3 of the Contract and Commercial Law Act 2017 provide rights of cancellation where there has been a breach of a material term of a contract or where parties have been induced to enter into the contract by a misrepresentation or mistake.

20 Door to Door Sales Act 1967, s 2.

Guidelines published by the Commission

[44] Finally, Mr Dixon relies on the fact that guidelines published by the Commission do not state that cancellation fees should be included in the information provided to consumers under s 36L. There are two answers to this submission. First, the Commission does not determine the scope of the obligations imposed by s 36L. Where this is in dispute it is determined by the courts. Secondly, the guidelines are very general in nature. It is not surprising that they do not descend to the level of detail that would include reference to cancellation fees as forming part of the total price payable under the agreement.

Result

[45] For the reasons I have given I am satisfied the ETF's formed part of the total price payable under the agreements that the defendants entered into with consumers. They also formed part of the consideration to be given by consumers under the agreements. Section 36L(2)(b)(i) therefore required the defendants to disclose the amount of the fee that may be payable if the consumer elected to terminate the agreement before the expiry of the nominated term.

Costs

[46] The Commission has succeeded and is entitled to an award of costs and disbursements in its favour. In the unlikely event that the parties cannot reach agreement regarding quantum, they may file concise memoranda and I will determine that issue on the papers.

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Lang J