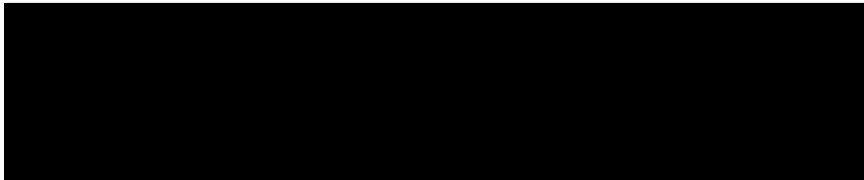


14 October 2019

The Director  
Home Direct Limited  
c/o Chapman Tripp  
23 Albert Street



Dear 

### **Fair Trading Act 1986: Warning in relation to Voucher Entitlement Scheme software errors**

1. The Commerce Commission has been investigating Home Direct Limited (**HDL**) under the Fair Trading Act (the **FT Act**) concerning its Voucher Entitlement Scheme (the **scheme**).
2. Under the scheme, HDL customers who repaid what they owed to Home Direct for previous purchases on their lifestyle account would continue to pay regular amounts to Home Direct which would be converted to HDL shopping vouchers (vouchers). The vouchers could only be redeemed through the purchase of HDL products, could not be refunded and expired after a period of time. The terms of the scheme allowed customers to purchase vouchers up to a maximum value of \$1,500.
3. This warning covers the Commission's investigation into the scheme's software design and processing errors which led to:
  - 3.1 some customers who had not opted-in to the scheme having credits in their accounts converted to vouchers without their authority and those vouchers were "expired" by HDL after a period of time (the **opt-in error**); and
  - 3.2 some customers who had opted-in to the scheme having more than the \$1,500 maximum limit for current vouchers deducted from their customer

accounts and converted to vouchers (the **voucher limit error**). Those vouchers also “expired” after a period of time.<sup>1</sup>

4. We have now completed our investigation and are writing to you to alert you to our concerns arising from this conduct. In summary, the Commission considers that:

4.1 In respect of the opt-in error:

4.1.1 HDL is likely to have breached s 13(i) of the FT Act by making a false and/or misleading representation that it had the contractual right to convert the customer’s credits into vouchers; and

4.1.2 HDL is likely to have breached s 13(i) of the FT Act by making a false and/or misleading representation that it had the contractual right to forfeit the value of those vouchers to HDL on their expiry.

4.2 In respect of the voucher limit error:

4.2.1 HDL is likely to have breached s 13(i) of the FT Act by making a false and/or misleading representation that it had the contractual right to convert customer credits into current vouchers in excess of \$1,500; and

4.2.2 HDL is likely to have breached s 13(i) of the FT Act by making a false and/or misleading representation that it had the contractual right to forfeit the value of vouchers purchased above the \$1,500 limit to HDL on their expiry.

5. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.

### **The investigation**

6. The Commission investigated the operation of the scheme as part of its assessment of whether HDL’s Terms and Conditions for its Lifestyle Accounts contained any unfair contract terms for the purposes of the unfair contract term provisions of the FT Act. The Commission subsequently filed proceedings against HDL in August 2018 seeking a declaration from the Court that the ‘no refund’ and ‘expiry and forfeiture’ clauses in the scheme’s terms and conditions were unfair contract terms.

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<sup>1</sup> For a period of time from 7 July 2018 to the closure of the scheme, the maximum limit was \$500. There may have been other customers whose total vouchers exceed the \$500 limit specified in HDL’s Amended Terms and Conditions for the scheme, which replaced the \$1,500 limit, in July 2017.

7. During the investigation HDL notified the Commission that it had discovered the opt-in and voucher limit errors. The errors had affected the scheme since its inception in September 2009.

*Opt-in error*

8. HDL advised that the opt-in error occurred when the scheme was introduced. HDL advised that the operating software for the scheme was designed to sweep any credits sitting on accounts where there was a zero-balance owing to HDL, and to then convert those credits to vouchers. It was assumed that only customers who wanted to join the scheme would have credits in their accounts after the account reached zero balance. The software was not designed to take notice of the customer's opt-in status.
9. The software design did not appear to consider that there might be credits in customer accounts because:
  - 9.1 the customer had not cancelled their automatic payments (HDL advises it is unable to cancel these and so the customer's credit balance could increase ad infinitum until cancelled by the customer);
  - 9.2 HDL had reversed fees;
  - 9.3 HDL had given refunds for faulty products; and
  - 9.4 HDL had given multiple small interest credits to customers as a result of the way HDL processes repayments that occur before the end of the monthly billing cycle.
10. Many of the vouchers, created in error because the customer did not opt-in to the scheme, expired after 365 days with their value forfeited to HDL.
11. HDL advised that at least 5,937 customers were affected by the opt-in error, and had unauthorised vouchers expired and forfeited to HDL, since the scheme was introduced.<sup>2</sup> The total dollar value of vouchers created in error, and subsequently expired and forfeited to HDL, was estimated at \$22,128.96.<sup>3</sup>

*Voucher limit error*

12. The voucher limit error occurred when HDL failed to apply its own maximum voucher accrual limits during the scheme. Under its Master Terms and Conditions, customers were not able to have a voucher balance that exceeded \$1,500. Once a customer's voucher balance reached the \$1,500 limit, HDL was to immediately refund the customer any additional funds received. That is, customers should not have been able to accrue more than the maximum permitted i.e. \$1,500 in vouchers in the period from 14 September 2009 to 6 July 2017 and \$500 from 7 July 2017 to the

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<sup>2</sup> HDL response 1 November 2018 to Commission Notice dated 4 October 2018.

<sup>3</sup> HDL response 1 November 2018 to Commission Notice dated 4 October 2018 Spreadsheet "expired and unexpired vouchers.xls".

closure of the scheme on 12 July 2018. This error also affected customers since the scheme was introduced.

13. HDL did not adhere to the voucher limit due to a software design error; HDL's software was not designed to stop issuing vouchers once customers had \$1,500 in current vouchers.
14. At least 23 customers had vouchers created over the scheme's \$1,500 current voucher limit; those excess vouchers totalled \$17,976.66.

#### *Closure of the scheme and remediation of errors*

15. HDL advised that the scheme ceased operation on 12 July 2018 and that on closing:
  - 15.1 all customers with *current* vouchers had the face value of the vouchers credited to their accounts; and
  - 15.2 all customers who HDL had determined had been affected by the opt-in error had the face value of *expired* vouchers also credited to their accounts.
16. We understand that on closure of the scheme, a total of \$133,376.06 was credited back to 14,112 customer accounts for both expired and unexpired vouchers. Of that amount, HDL credited \$111,247.10 to a total 8,175 customers for unexpired vouchers.<sup>4</sup> HDL was not able to determine which of those unexpired vouchers had been issued in error.
17. HDL has subsequently confirmed to the Commission that it has taken a number of steps to contact affected customers who had funds taken without their authority (either due to the opt-in error and/or voucher limit error). Once those steps were exhausted, HDL offered to make a donation representing the total of all affected vouchers not refunded to customers to a charitable organisation. These funds will still remain available to customers who subsequently contact HDL, notwithstanding the donation.<sup>5</sup> HDL has confirmed to the Commission that it now has made a donation of \$35,000 to a community organisation in the credit sector. This amount represents the total of all affected vouchers which have been unable to be refunded.

#### **The Commission's view**

18. The Commission's view is that it is likely that HDL's conduct breached s 13(i) of the FT Act. Section 13(i) provides:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

...

(i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy ...

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<sup>4</sup> Ibid.

<sup>5</sup> HDL letter to Commission dated 17 April 2019.

19. We have reached this view for the following reasons.

*Opt-in error*

20. In respect of the opt-in error, by issuing the vouchers and referring to those vouchers in customer statements, we are of the view that HDL breached the FT Act by making false and/or misleading representations that:

20.1 HDL had the contractual right to convert the customer's credits into vouchers (s 13(i)); and/or

20.2 HDL had the contractual right to forfeit the value of those vouchers to HDL on their expiry (s 13(i)).

*Voucher limit error*

21. In respect of the voucher limit error, by issuing current vouchers over the \$1,500 limit and referring to those extra vouchers in customer statements, we are of the view that HDL breached the FT Act by making false and/or misleading representations that:

21.1 HDL had the contractual right to convert the customer's credits over \$1,500 (or \$500 for the relevant period) into current vouchers (s 13(i)); and/or

21.2 HDL had the contractual right to forfeit the value of vouchers purchased above the maximum limit to HDL on their expiry (s 13(i)).

**HDL's response**

22. HDL advised the Commission on 17 April 2019 that it does not agree with the Commission's view's concerning its conduct and that it breached the FT Act, but has taken steps to remedy the opt-in and voucher limit errors (as set out [15] to [17] above).

**Warning**

23. This warning represents our opinion that the conduct in which HDL has engaged is likely to have breached the FT Act.

24. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.<sup>6</sup> We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against HDL.

25. This warning letter is public information and will be published on the case register on our website. We may make public comment about our investigation and conclusions, including issuing a media release or making comment to media.

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<sup>6</sup> Commission's published *Enforcement Response Guidelines* at [41].

### **The Commission's role**

26. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FT Act. The FT Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

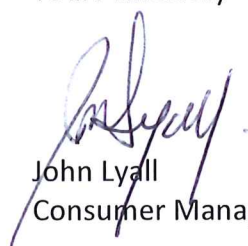
### **Penalties for breaching the FT Act**

27. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
28. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

### **Further information**

29. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
30. We have published a series of fact sheets and other resources to help businesses comply with the FT Act and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
31. You can also view the FT Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
32. Thank you for your assistance with this investigation. Please contact Catherine Butterworth on (09) 920 3485 or by email at [catherine.butterworth@comcom.govt.nz](mailto:catherine.butterworth@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



John Lyall  
Consumer Manager, Auckland