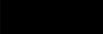


5 September 2018



Dear 

Official Information Act #18.037 – Unfair Contract Terms

1. We refer to your request of 8 August 2018, where you asked the Commerce Commission (Commission) for the following information relating to unfair contract terms (UCT) complaints:
 - 1.1 how many UCT complaints the Commission receives per year;
 - 1.2 how many of these does the Commission deem valid; and
 - 1.3 how UCT complaints are dealt with by the Commission.
2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

The Commission's complaints screening process

3. When a consumer contacts the Commission with a complaint or enquiry about a trader, this is logged in the Commission's database.
4. The Commission receives thousands of complaints every year. Every complaint is initially assessed by the Enquiries Team on the basis of the information provided. When conducting this initial assessment, the Enquiries Team considers:
 - a) the likelihood of a breach of the relevant legislation (Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003, and the Commerce Act 1986);
 - b) the Commission's Enforcement Response Guidelines;¹ and
 - c) the Commission's strategic priorities² and resourcing constraints.
5. The Commission has the power to act on complaints, but is not required to take action in relation to all possible breaches of the legislation that we enforce.

¹ <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

² <https://comcom.govt.nz/about-us/our-priorities>

6. In determining whether to act on a complaint, the Commission applies a set of publically available enforcement criteria.³ These criteria take into account the public interest, the seriousness of the conduct, the extent of the detriment and the Commission's resources.
7. If a complaint is deemed to meet certain criteria, it is considered and reviewed by a panel of managers from within the Competition and Consumer Branch. The panel decides which complaints are to be prioritised for further consideration.
8. This process enables us to identify complaints that best reflect our current enforcement priorities. The outcomes of the process are not final and we may revisit any complaint at a later stage, should we wish to reconsider the issues it presents.

Our response

9. We have decided to grant your request and have included the relevant information below.

How many UCT complaints the Commission receives per year

10. As at [3] above, when a consumer contacts the Commission with a complaint about a trader, this is logged in the Commission's database.
11. Complaints data is logged with reference to the legislation which appears most relevant to the conduct complained about. This information is added by the Enquires Team during their initial assessment.
12. The most relevant legislation or section of legislation may change as more information is obtained about a complaint during the screening process described above.
13. The fact that a complaint has been logged by reference to particular legislation is not an indication that the law has been broken.
14. Unfair contract terms are dealt with under section 26A of the Fair Trading Act 1986 (FTA). In total, **504** complaints are logged in our system against section 26A of the FTA. Some of these complaints may have raised other issues under the legislation we enforce.
15. 36 of these complaints were received between the date the Fair Trading Amendment Act 2014 was given royal assent and the date the section came into force but were identified as potentially relevant to the then-upcoming legislative change.
16. Broken down by calendar year,⁴ the complaints are as follows:
 - 16.1 2014: 25 complaints
 - 16.2 2015: 112 complaints

³ <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/>

⁴ The Commission's retention and disposal schedule requires us to keep complaints material for five years.

16.3 2016: 98 complaints

16.4 2017: 161 complaints

16.5 2018: 108 complaints (year to date)

How many UCT complaints are deemed valid

17. The Commission does not define complaints as valid (or invalid). Only a Court can decide whether a term is unfair.
18. As we have described at [6] above, our decision to proceed with a complaint is based on the public interest, the seriousness of the conduct, the extent of the detriment and the Commission's resources. Some complaints will not be investigated by the Commission because they are unfounded or outside our jurisdiction and some complaints that are investigated will not proceed to further action.
19. However, as a rough indication, our database shows that of the 504 complaints logged as relevant to the UCT provisions, **247** of them were referred for further assessment by the Commission. It is not known how many of the complaints were assessed further for issues relating to the UCT provisions and how many were assessed further for other reasons.
20. In our experience, when we contact a trader about their terms they tend to be receptive and will undertake to make changes to their terms and conditions that ensure a more balanced contractual relationship with their customers. As such, until very recently (see [23] below) we have not taken the step of seeking a declaration that a term is unfair.

How UCT complaints are dealt with by the Commission

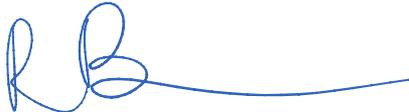
21. UCT complaints are dealt with under the screening process outlined at [3] to [8] above.
22. You have noted in your request that the Commerce Commission has yet to exercise its power under s 46H(1) of the FTA to bring a UCT case to court.
23. On 17 August 2018, the Commission initiated High Court proceedings seeking a declaration that mobile trader Home Direct Limited's consumer contracts contained unfair contract terms relating to its "voucher entitlement scheme".⁵ This marks the first time the Commission has sought such a declaration.
24. We have also recently indicated our intention to issue proceedings against Viagogo for breaches of the FTA. Those proceedings will allege that Viagogo's contract includes an unfair contract term.
25. In addition between 2016 and 2017, the Commission undertook reviews of consumer contracts in the gym, telecommunication and energy retail sectors. As a result of

⁵ <https://comcom.govt.nz/news-and-media/media-releases/2018/commission-seeks-first-declaration-that-contract-terms-are-unfair>

those reviews, businesses in these sectors made changes to the terms of their consumer contracts.

26. The reviews can be found here <https://comcom.govt.nz/business/your-obligations-as-a-business/unfair-contract-terms/unfair-contract-terms-reviews>.
27. The Commission also recently reviewed the terms of use of several pre-paid travel cards; a press release explaining the major changes made by public transport providers following the review is accessible on our website: <http://www.comcom.govt.nz/fair-trading/fair-trading-media-releases/detail/2018/fairer-contract-terms-for-public-transport-users-in-major-cities>.
28. Please note the Commission may publish this response to your request on its website. Personal details will be redacted from any published response.
29. If you have any questions in regards to this request, please do not hesitate to contact us at oia@comcom.govt.nz

Yours sincerely,



Rosie Brown
OIA Coordinator

Released under the Official Information Act 1982