

11 December 2018

Auckland Christian Fellowship & Recreations (Inc.)  
T/A New Zealand Badminton Centre and Li Ning NZ Badminton Centre  
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By email: [admin@badmintonnz.co.nz](mailto:admin@badmintonnz.co.nz)

Dear Sir,

### **Fair Trading Act 1986: Warning for unfair contract terms**

1. The Commerce Commission (**Commission**) has been investigating Auckland Christian Fellowship & Recreations (Inc.), trading as NZ Badminton Centre or Li Ning NZ Badminton Centre (collectively **NZBC**) under the Fair Trading Act 1986 (the **Act**). We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that certain of NZBC's terms and conditions set out in the enrolment, review and withdrawal documents entered into by members of NZBC's Junior Development Squads during 2013 and 2017 are likely unfair contract terms. Under the Act, unfair contract terms are prohibited in all standard form consumer contracts.
3. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred.<sup>1</sup>
4. NZBC has confirmed that it has stopped using the contractual terms that the Commission has identified as likely to be unfair.

#### **The investigation**

5. NZBC operates a badminton centre in East Tamaki Auckland. The centre employs 1-2 individuals at any one time who act as badminton coaches and has volunteers (guardians, club members and others) who assist with the centre's operations.
6. Between 2013 and 2017, NZBC offered selected junior club members who it identified as showing special promise, the opportunity to join its junior development squads.

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<sup>1</sup> Commission's published *Enforcement Response Guidelines* at [41].

7. As part of junior development squad membership NZBC formerly “sponsored” the enrolled members by providing free services and subsidised membership fees. The subsidies offered to the members were made in return for a commitment by each member to minimum general membership requirements. This commitment and other requirements of junior squad membership were recorded in a contract. The contract was required to be signed by the guardian, player and NZBC upon enrolment in the squad or, in the case of the withdrawal form, when leaving the squad.
8. During our investigation, we assessed the renewal, cancellation and liability provisions (collectively the Terms) in the contract.
9. Our assessment of the Terms was based on the information provided in NZBC’s response of 1 December 2017, information provided at interview on 24 January 2018, and information provided by complainants.

#### **The Unfair Contract Terms provisions in the Act**

10. The unfair contract term provisions are set out in sections 46H to 46M of the Act.
11. Under these provisions, the Commission may apply to the Court for a declaration that a term in a standard form consumer contract is an unfair contract term. If the Court declares a term of a standard form consumer contract unfair, a person can no longer include it in its standard form contracts or enforce it, and is liable for prosecution by the Commission if it does so. Criminal penalties for breaching the Act can include fines of up to \$600,000 for a body corporate and \$200,000 for an individual, along with other remedies such as injunctions, corrective advertising and banning orders where applicable.
12. When deciding if a term is unfair, the Court will take account three key criteria:
  - 12.1 whether the term would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
  - 12.2 whether the term is not reasonably necessary to protect the legitimate business interests of the party who would be advantaged by the term; and
  - 12.3 whether the term would cause detriment (whether financial or otherwise) to a party **if** the term were applied, relied on or enforced.
13. The court can also consider any other matters it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole.
11. Section 46M of the Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract, may be unfair contract terms. The Court may reach a view that other types of terms are unfair, if the criteria referred to above are considered.

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

12. In this case, the Commission's view is that the Terms entered into by members of NZBC's Junior Development Squads are likely unfair contract terms.
13. The Commission's view is based on its assessment that the Terms appear to:
  - 13.1 display a significant imbalance in the parties' rights and obligations;
  - 13.2 not be reasonably necessary in order to protect the legitimate business interests of NZBC; and
  - 13.3 cause detriment (financial and otherwise) to former members if applied, enforced or relied on by NZBC.
14. We also note that the Terms contain similar characteristics to the example terms contained in section 46M of the Act (kinds of contract terms that may be unfair) where they appear to permit (or effectively permit) one party (in this case NZBC) but not the other (in this case Members) to:
  - 14.1 avoid/ limit performance of the contract;
  - 14.2 terminate the contract;
  - 14.3 penalise one party for breach/termination of the contract;
  - 14.4 renew or not renew the contract; and
  - 14.5 unilaterally determine whether a contract has been breached or to interpret its meaning.

### *Renewal and length of the enrolment forms*

15. The enrolment forms do not specifically refer to a year or particular timeframe for which the contract applies. However, the terms below read as extending beyond a year of squad membership:
  - 15.1 "training is a long term commitment for the duration for the player's junior career [sic]."
  - 15.2 "Acceptance into the squad is limited to members who agree to train with NZBC for the duration of their junior career (under 13 through to under 19)."
16. Complainants have told the Commission that they believed the contract was for a year of squad membership and did not appreciate that they were committing their child for the entire length of their junior career.

17. We consider that these particular terms are unlikely to be sufficiently transparent under s 46L(2) of the Act and that such a long contractual term is unlikely to be reasonably necessary to protect the business interests of NZBC.

*Cancellation of the contract*

18. The Terms allow NZBC to unilaterally decide whether a squad member or their guardian has breached the contract or NZBC policies and rules and allow immediate termination of the contract. The contracts do not apply any requirement for NZBC to act reasonably in exercising its decision to terminate the contract or any right for the members to dispute this decision. The Terms are:

18.1 "I [Junior Development Squad member] may be removed from the squad anytime if & when I fail to meet the requirements & expectations of the squad."

18.2 "If the player moves to a non-affiliated club of NZBC for any reason during the player's junior career or ceases membership of the Scholarship Squad without genuine reason such as injuries or things beyond control of player (**solely determined by NZBC**) or ceases membership for disciplinary reasons..."

19. The Terms as drafted appear to cause significant imbalance between the rights of the members and the rights of NZBC given costs are payable by members on termination of the contract.

*Liability under the contract*

20. The Terms giving NZBC the right to recover certain costs on termination of the contract are likely unfair because they appear to seek to recover more than NZBC's likely costs in providing the subsidised services to members.

20.1 "If the player moves to a non-affiliated club of NZBC for any reason during the player's junior career or ceases membership of the Scholarship Squad without genuine reason such as injuries or things beyond control of player (**solely determined by NZBC**) or ceases membership for disciplinary reasons, then the Guardian will reimburse NZBC for the value of the subsidy provided for the duration of player's squad membership during both future & advanced squads along with the costs incurred by NZBC in providing the player with additional benefits under this junior development program including extra facilities, court hire provided at no charge with any legal/collection fees."

20.2 "Having had squad training if I chose to move to another club or drop out of the squad without a genuine reason, there will be no refund at all and I will pay NZBC for all the training sessions at the casual rate of \$10/session regardless of my attendance and reimburse the free courts used."



- 20.3 “I do not, & will not, belong to any outside club, organization or group coaching session without the written approval from NZBC.”
- 20.4 “If I misuse the scholarship to train at NZBC in order to play or represent at another club/association, chose another sport over Badminton, decide not to meet the requirements, or drop out of the squad without a genuine reason during my junior career, I will reimburse NZBC for all the FREE Squad training session at the rate of \$10/session regardless of my attendance and cost of courts used for my personal training from the time I commenced the squad including collection fees.”
21. In our interview of 24 January 2018 you advised that payment of the costs on termination was principle based (ie. to demonstrate that members recognise NZBC’s provision of services and are also an attempt to address issues that NZBC has had with a small minority of its members). The Terms appear to give NZBC the ability to charge members for more than the proprietary interests of NZBC they intend to protect, including by allowing NZBC to charge members at a casual rate rather than a member rate and to charge regardless of attendance.

#### **NZBC’s response**

22. NZBC has confirmed that the Terms are no longer being used. We understand that when NZBC joined Auckland Badminton Association it notified its members that the former junior development squad contracts were no longer binding.
23. NZBC states that it used a professional law firm to draft its contractual documents. It believes it was acting in the way that it saw as necessary to protect the business.

#### **Warning**

24. After considering our Enforcement Response Guidelines, we have decided it is appropriate to finalise our investigation by issuing you with a warning to ensure you understand your obligations under the Act.
25. While we will not be taking any further action against NZBC at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against NZBC.
26. This warning letter is public information and will be published on our website. We may make public comment about our investigations and conclusions.
27. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies

**The Commission's role**

- 28. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.
- 29. 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**

- 30. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. In particular, we have published Unfair Contract Terms Guidelines dated February 2018 and videos and quick guides about unfair contract terms which we recommend your review. 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 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 me on [REDACTED] if you have any questions about this letter.

Yours sincerely

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