

25 August 2022

MinterEllisonRuddWatts  
PWC Tower  
15 Customs Street West  
Auckland 1010

Attention: [REDACTED]

By email only: [REDACTED]

Copy: [REDACTED]

Dear [REDACTED],

### **Fair Trading Act 1986: Warning for asserting right to payment for unsolicited goods and services**

1. The Commerce Commission (**Commission**) has been investigating Greenfingers Garden Bags Limited (**Greenfingers**) and related companies. Our investigation concerned allegations that Greenfingers has breached the Fair Trading Act 1986 (**FT Act**) by asserting, or appearing to assert, a right to payment for unsolicited goods and services during its spare garden bag trial.
2. We have now completed our investigation and are writing to inform you about our views.
3. We are issuing you with this warning letter because the Commission considers that Greenfingers is likely to have breached the FT Act in that between October 2020 and January 2021, it delivered unsolicited garden bags to existing customers' properties, with a letter and/or email sent separately, stating "If you choose to keep the bag after 29<sup>th</sup> March 2021, the annual rental fee of \$26.00 will apply."
4. In our view, this is in likely breach of section 21C of the FT Act because we consider the trial was an unsolicited service and the bag was an unsolicited good, and as such Greenfingers was prohibited from asserting or appearing to assert, a right to payment in stating that an "annual rental fee of \$26.00 will apply".

5. 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>1</sup>
6. Greenfingers has advised the Commission that it is improving its processes to help minimise the risk of the conduct occurring again. This includes putting in place an improved internal review process of all marketing material, and contracting an external lawyer to review its marketing material and run a compliance training programme for staff.

### **The investigation**

7. Between November 2020 and March 2021, the Commission received 20 complaints about the spare garden bag trial, 15 of those from customers of Greenfingers. The complainants expressed various concerns about garden bags being dopped outside their properties without being requested and being signed up to a service without their prior consent.
8. Greenfingers and its related companies provide garden waste services under various retail brands to approximately 80,000 properties in the Auckland, Bay of Plenty, Marlborough and Wairarapa regions. The services provided consist of the supply of wheelie bins and/or garden waste bags with regular waste collections, as well as one-off garden bag collections.
9. The spare garden bag trial was launched in early 2020. The trial involved customers paying a one-off bag drop off charge of \$10, a \$26 annual service charge and a charge per collection as needed. Greenfingers advised that it was initially offered to customers who contacted it to request a one-off extra garden bag and agreed to participate in the trial.
10. Between October 2020 and January 2021, Greenfingers and related companies expanded the spare garden bag trial to their wider customer base, approximately 40,000 properties. As part of this trial, Greenfingers supplied:
  - 10.1 unsolicited garden bags to its whole customer base;
  - 10.2 a separate letter to the address of each customer with the following representations:
 

We normally have a small charge to hold spare bags on site – but we are waiving this fee until 29<sup>th</sup> March 2021.

There will be no Spare Bag Delivery (save \$10) or Rental Fee until 29<sup>th</sup> March 2021. After this date you can return the Spare Bag or keep it to maximise your flexibility.

If you choose to keep the Spare Bag after 29<sup>th</sup> March 2021, the annual rental fee of \$26.00 will apply.

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

If you do not want to keep the spare bag [...] you can return this to us by logging in to your online account and Click on and follow the prompts to schedule your spare bag removal.

- 10.3 a follow-up email (together with the letter, the **Communications**) to each customer who had provided an email address, containing the same information.
11. In March and April 2021, Greenfingers sent two separate follow-up letters and/or emails. Those communications contained a different message, in that the bags dropped were theirs to keep and they did not need to do anything if they did not want the spare garden bag trial. In our view, the follow-up communications did not raise concerns under the FT Act.
12. The investigation established to our satisfaction that none of the customers who were offered the spare garden bag trial in late 2020 to early 2021 were charged the \$26 annual service fee, unless they had actively signed up to the spare bag service.

### The relevant Law

13. Section 21C of the FT Act prohibits businesses from asserting, or appearing to assert, that they have a right to payment for unsolicited goods and/or services.
- 13.1 Unsolicited goods are defined at section 21A as meaning *goods that have been sent or delivered to a recipient without any request for those goods having been made by, or on behalf of, that recipient*; and
- 13.2 Unsolicited services are defined at section 21B as meaning *services that have been provided to a recipient without any request for those services having been made by, or on behalf of, that recipient*.

### Greenfingers' response

14. Greenfingers responded to the Commission's enquiries by stating that:
- 14.1 Greenfingers and two related companies offered the spare garden bag trial;
- 14.2 all services, including operations, customer management and customer services are operated by Greenfingers regardless of the brand/company that the customer is signed under and billing arrangements for the customers;
- 14.3 there was no intent nor mechanism to charge anyone unless they actively opted into the spare garden bag trial; and
- 14.4 in November 2021, Greenfingers and related companies changed ownership and became wholly owned subsidiaries of Karakiri Group Holding Limited. [REDACTED] remains General Manager.

15. Following engagement with the Commission, Greenfingers advised that it has carried out a review of the processes of its joint operations team to ensure compliance with consumer protection legislation. This led Greenfingers and related companies to implement the following processes:
  - 15.1 improved internal reviews of marketing material involving management sign off;
  - 15.2 external legal review at both the conceptual and implementation stages of marketing initiatives; and
  - 15.3 a compliance training programme for staff led by external lawyers.
16. We understand that the external training for staff of Greenfingers on the Fair Trading Act has been completed.

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

17. In this case, and having fully considered relevant information received, the Commission's view is that it is likely that Greenfingers' conduct breached the FT Act.
18. The Commission considers that Greenfingers' is likely to have breached section 21C of the FT Act by asserting, or appearing to assert, that it had a right to payment for unsolicited goods and services by stating in the letters/emails to customers "If you choose to keep the bag after 29<sup>th</sup> March 2021, the annual rental fee of \$26.00 will apply." In our view, this \$26.00 rental fee is asserting, or appearing to assert, a right to payment for both the good and the service because the ongoing collection service is predicated on the provision of the bag.
19. The Commission considers that:
  - 19.1 the spare bag is an unsolicited good because it was sent to recipients without any request for the spare bag;
  - 19.2 the offer of the spare bag service for additional green waste collection (on top of the usual regular collection service) was also unsolicited as the recipient did not request an additional green waste collection service; and
  - 19.3 the Communications asserted a right to payment even though there was an option for the customer to log in to their online account and sign out of receiving the service.
20. We note that the follow-up communications, which stated that the recipients of the spare garden bag did not 'need to do anything' if they did not want the spare garden bag service, were sent in March and April 2021 after the Commission had started engaging with Greenfingers and related companies. The Commission's view is that the follow-up communications are unlikely to breach the FT Act.

**Warning**

21. 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.
22. This warning represents our opinion that the conduct in which Greenfingers has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
23. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Greenfingers.
24. This warning letter is public information and will be published on the case register on our website. We will be making public comment about our investigations and conclusions, including issuing a media release or making comment to media.

**The Commission's role**

25. 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**

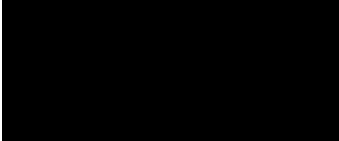
26. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
27. The Commission notes that individuals can also be found liable for breaches of the FT Act and fined up to \$200,000 per offence.
28. Greenfingers 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 Greenfingers seeks legal advice and encourage Greenfingers to regularly review its 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 Greenfingers to visit our website to better understand its obligations and the Commission's role in enforcing the Act.
31. Greenfingers 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 Sophie Ridoux on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Kirsten Mannix  
Fair Trading Investigations and Compliance Manager