

17 December 2018

Home Zone Catalogue Company Limited (In Liquidation)  
7<sup>th</sup> Floor  
Southern Cross Building  
59 High Street  
Auckland 1010

[www.comcom.govt.nz](http://www.comcom.govt.nz)

By post and email: [REDACTED]

Dear Liquidator

### **Credit Contracts and Consumer Finance Act 2003 - Fair Trading Act 1986: Warning**

1. The Commerce Commission (**Commission**) has been investigating Home Zone Catalogue Company Limited (In Liquidation) (**Home Zone**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**) and the Fair Trading Act 1986 (**FT 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:
  - 2.1 Home Zone is likely to have breached section 17 of the CCCF Act by failing to disclose to customers key information applicable to consumer credit contracts as set out in Schedule 1 of the CCCF Act; and
  - 2.2 terms in Home Zone's customer contact requiring that the debtor sign multiple direct debit authorities and providing for ongoing direct debiting of customers' accounts after customers have finished paying for goods were likely to be unfair contract terms for the purposes of section 46L of the FT Act.
3. After weighing up the factors set out in our Enforcement Response Guidelines<sup>1</sup>, we have decided to conclude this investigation by issuing this warning letter.

### **The investigation**

4. The Commission opened an investigation into Home Zone in March 2016 as part of a wider investigation into the mobile trader industry reviewing compliance by traders with their disclosure and other obligations under the CCCF Act and the FT Act (**the Acts**).

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<sup>1</sup> The Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

5. During the investigation Home Zone provided the Commission with a number of completed customer contracts which we reviewed for compliance with initial disclosure obligations under the CCCF Act and for terms that have the potential to be declared unfair contract terms under the FT Act.
6. The information that we gathered established to our satisfaction that:
- 6.1 Home Zone was a mobile trader selling consumer goods to customers utilising a catalogue. Home Zone sold electronics, furniture, white-ware and other house-hold goods.
- 6.2 Customers paid for goods by instalment, receiving delivery of the goods after payment of a deposit, typically 20% of the purchase price.
- 6.3 Home Zone ceased making new sales in about December 2016 but continued to collect payments on existing contracts after then.
- 6.4 Home Zone sold goods throughout New Zealand and as part of the Good Guys Group of companies which group also includes The Good Guys Limited (In Liquidation).
- 6.5 During the period 1 October 2015 to 26 May 2016 Home Zone used a form of customer contract (**customer contract**) containing:
- 6.5.1 a clause in the terms and conditions requiring the customer to agree to ongoing debiting of their account (**ongoing debiting clause**):
- The Customer asks Home Zone Catalogue Company Ltd to continue to debit their account, until requested to stop (subject to all amounts due and owing have [sic] been paid) or until such time as they have a credit balance of \$200.00 on their account. The current balance of the Customers account with Home Zone Catalogue Company Ltd can be used to make further purchases or refunded if requested in accordance with clause 18.
- 6.5.2 a clause in the terms and conditions requiring the customer to sign more than one direct debit authority (**direct debit clause**):
8. The Customer is required to sign more than one direct debit authority. Each payment authority can be used by Home Zone Catalogue Company Ltd for the following purposes:
- a. To amend the payment date or amount over the telephone if agreed by both parties;
- b. To recover any amounts outstanding where payments have been stopped and the customer has not satisfactorily responded to Home Zone Catalogue Company Ltd by the time specified following notification by Home Zone Catalogue Company Ltd to the Customer at his or her last known address.
- The discretion given to Home Zone Catalogue Company Ltd under clause 8b includes amending the payment day or frequency. Home Zone Catalogue Company Ltd is not

responsible for any bank fees incurred by the Customer as a result of any changes in payments.

- 6.6 Customers were not able to negotiate the terms and conditions of the customer contract with Home Zone.
- 6.7 The customer contract was a consumer credit contract under the CCCF Act and the disclosure provided to customers when entering into the consumer credit contract did not include all of the key information applicable to the contracts as set out in Schedule 1 of the CCCF Act.
- 6.8 From 1 October 2015 to 26 May 2016 Home Zone's template customer contract failed to disclose:
  - 6.8.1 a clear description of the security interest (Schedule 1, paragraph (q)(iii) and (iv));
  - 6.8.2 a statement of the debtor's right to apply for relief on grounds of unforeseen hardship (Schedule 1, paragraph (sa));
  - 6.8.3 the frequency with which continuing disclosure statements will be provided (Schedule 1, paragraph (t));
  - 6.8.4 the name and contact details of the dispute resolution scheme of which the creditor is a member (Schedule 1, paragraph (ua)); and
  - 6.8.5 the creditor's registration number under the register of financial service providers and the name under which creditor is registered on that register (Schedule 1, paragraphs (ub) and (uc)).
- 6.9 In addition all 20 sample contracts reviewed by the Commission also failed to accurately disclose:
  - 6.9.1 the amount of the payments (Schedule 1, paragraph (o)(i)); and
  - 6.9.2 the number of the payments (Schedule 1, paragraph (o)(ii)).
- 6.10 The customer contract was also a standard form consumer contract for the purposes of the unfair contract term provisions of the FT Act. The Commission is satisfied that the ongoing debiting clause and the direct debit clause are likely to be considered unfair contract terms under the FT Act.
7. After being contacted by the Commission Home Zone revised its customer contract, introducing a new form of customer contract on 27 May 2016. The revised contract did not contain the ongoing debiting clause or the direct debit clause.
8. Home Zone advised the Commission that:



- 8.1 The ongoing debiting clause was intended to allow for the customer to build up a deposit after paying off one order so that delivery would not be delayed on a subsequent order.
  - 8.2 The way the direct debit clause worked in practice was that it only ever required two direct debit authorities to be signed by a customer and that the second direct debit provided flexibility for Home Zone to agree to changes to payments over the phone with customers in circumstances where many of its customers live in remote locations.
- 9. It also advised that it was committed to refunding customers where positive customer balances were held when funds became available.
  - 10. Home Zone was placed into liquidation on 31 March 2018.

## **The Law**

### *CCCF Act disclosure*

- 11. Section 17 of the CCCF Act requires creditors under a consumer credit contract to disclose to the debtor all of the information required by Schedule 1 to the CCCF Act as applies to the contract before the contract is entered into.

### *Unfair contract term*

- 12. Under section 46I of the FT Act the High Court or a District Court may on application of the Commission declare that a term in a standard form consumer contract is an unfair contract term. In making a declaration the court must be satisfied that:
  - 12.1 the term is in a consumer contract;
  - 12.2 the consumer contract is a standard form contract (as determined in accordance with section 46J);
  - 12.3 the declaration is not prohibited by section 46K(1); and
  - 12.4 the term is unfair in the sense described in section 46L.
- 13. The test for unfairness is captured by section 46L of the FTA. Under section 46L the court can declare a term in a consumer contract unfair if the court is satisfied that the term:
  - 13.1 would cause a significant imbalance in the parties' rights and obligations arising under the contract;
  - 13.2 is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

- 13.3 would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
14. In determining if a term is unfair, the court may take into account any matters it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole.

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

#### *CCCF Act disclosure*

15. In this case, the Commission's view is that Home Zone is likely to have breached section 17 of the CCCF Act by failing to disclose to debtors all of the key information required by Schedule 1 to the CCCF Act as applies to their contract before the contract is entered into.

#### *Unfair contract terms*

16. The Commission's view is that the ongoing debiting clause and the direct debit clause are likely to be considered unfair contract terms for the purpose of section 46L of the FT Act.
17. We have formed the view that the ongoing debiting clause was likely an unfair contract term because:
- 17.1 The term created a significant imbalance in the rights and obligations of the parties. Home Zone obtained the use and benefit of taking the customer's money out of their account up to a maximum of \$200 without paying interest to the customer or providing any other benefit.
- 17.2 The term may have caused detriment to the customer. Although the money could be refunded if requested, the term exposed the customer to the risk of being an unsecured creditor for those funds and losing the opportunity to earn interest on their funds or put them towards different purposes. There was a risk that the customer may not be aware that funds were continuing to be debited and may not have sought a refund.
- 17.3 There is no reason why this term would be reasonably necessary to protect Home Zone's legitimate interests.
- 17.4 The term was not transparent or sufficiently prominent. It was contained in the fine print terms of the terms and conditions on the reverse of the order form.
18. We have formed the view that the direct debit clause was likely an unfair contract term because:
- 18.1 The term creates a significant imbalance in the rights and obligations of the parties as Home Zone could have lodged a second direct debit authority as a

“self-help” remedy to collect a debt in circumstances where the customer may have cancelled the first direct debit as a result of a genuine dispute with Home Zone. Home Zone also reserved for itself the right to unilaterally determine whether the customer had responded “satisfactorily” to it where the customer had stopped payments.

- 18.2 The term could have caused detriment to the customer by impeding their ability to cancel the payment instruction where they had a genuine dispute with Home Zone. The customer may also have incurred bank fees if they had inadequate funds in their account as a result of Home Zone lodging a replacement direct debit.
- 18.3 There is no reason why this term would have been reasonably necessary to protect Home Zone’s legitimate interests.
- 18.4 The term was not transparent or sufficiently prominent. It was contained in the fine print of the terms and conditions on the reverse of the order form.

### **Warning**

- 19. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

### **The Commission’s role**

- 20. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Acts. The CCCF Act is designed to protect consumers when they are borrowing money and enable them to make informed choices about using credit. The FT Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

### **Penalties for breaching the Acts**

- 21. Only the courts can decide if there has actually been a breach of the CCCF Act and/or if a term is an unfair contract term under the FT Act. The court can impose penalties where it finds laws have been broken.
- 22. Creditors who breach section 17 of the CCCF Act may:
  - 22.1 be unable to enforce the contract or any right to recover property or any security interest;
  - 22.2 have to refund money or pay compensation;
  - 22.3 have to pay statutory damages;

- 22.4 be fined up to \$30,000 per offence for companies and \$10,000 for individuals; and/or
- 22.5 be banned from operating within the finance industry.
23. Under section 26A of the FT Act, if a contract term is declared unfair by a court under the FT Act then a person must not include that term in a standard term contract or apply, enforce or rely on that term.
24. 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. However, only the Commission can take action for a declaration in respect of unfair contract terms.

#### Further information

25. We have published a series of fact sheets, videos and other resources to help businesses comply with the Acts, including the unfair contract term provisions and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz) and at <https://comcom.govt.nz/business/your-obligations-as-a-business/unfair-contract-terms>. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Acts.
26. You can also view the Acts and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
27. Thank you for your assistance with this investigation. Please contact Mark Atwell on 09 9203492 or by email at [mark.atwell@comcom.govt.nz](mailto:mark.atwell@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



John Lyall  
Auckland Consumer Manager  
Competition and Consumer Branch