

17 December 2018

The Good Guys Limited (In Liquidation)
7th Floor
Southern Cross Building
59 High Street
Auckland 1010

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 The Good Guys Limited (In Liquidation) (**Good Guys**) 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 Good Guys 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 Good Guys' 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 Guidelines¹, we have decided to conclude this investigation by issuing this warning letter.

The investigation

4. The Commission opened an investigation into Good Guys in March 2016 as part of a wider investigation into the mobile trader industry reviewing compliance by traders

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

with their disclosure and other obligations under the CCCF Act and the FT Act (together the **Acts**).

5. During the investigation Good Guys 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 Good Guys was a mobile trader selling consumer goods (mostly clothing, manchester and footwear) from trucks. Good Guys operated throughout New Zealand as part of the Good Guys Group of companies which also includes Home Zone Catalogue Company Limited (In Liquidation).
 - 6.2 Customers received possession of the goods at the point of sale and paid the purchase price to Good Guys by weekly or fortnightly instalments.
 - 6.3 Customers opened an account with Good Guys by signing a credit application containing contract terms and conditions. The details of each purchase were recorded on an invoice provided to the customer containing a further copy of the contract terms and conditions (the application and invoices together, the **customer contract**). Customers were not able to negotiate the terms and conditions of the customer contract with Good Guys.
 - 6.4 The versions of Good Guys customer contract in use from October 2015 to December 2017 contained the following clause (**ongoing debiting clause**):

The Customer asks The Good Guys 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 The Good Guys Ltd can be used to make further purchases or refunded if requested in accordance with clause 14.
 - 6.5 The version of Good Guys customer contract in use from October 2015 to July 2016 contained the following clause (**direct debit clause**):
 4. The Customer is required to sign more than one direct debit authority. Each payment authority can be used by The Good Guys 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 The Good Guys Ltd by the time specified following notification by The Good Guys Ltd to the Customer at his or her last known address.

The discretion given to The Good Guys Ltd under clause 4b includes amending the payment day or frequency. The Good Guys Ltd is not responsible for any bank fees incurred by the Customer as a result of any changes in payments.

- 6.6 The customer contract was a consumer credit contract and a revolving 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.
- 6.7 During the period 1 October 2015 to July 2016 Good Guys' template customer contract failed to disclose or accurately disclose :
 - 6.7.1 the credit limit (Schedule 1 CCCFA, paragraph (f));
 - 6.7.2 a clear description of the security interest (Schedule 1 CCCFA, paragraph (q)(i), (iii) and (iv));
 - 6.7.3 a statement of the debtor's right to apply for relief on grounds of unforeseen hardship (Schedule 1 CCCFA, paragraph (sa)); and
 - 6.7.4 a statement of the debtor's cancellation rights under section 27 of the CCCF Act (Schedule 1 CCCFA, paragraph (s)).
- 6.8 The customer contract was also a standard form consumer contract for the purposes of the unfair contract term provisions of the FT Act.
7. After being contacted by the Commission, Good Guys revised its customer contract, introducing a new contract in July 2016. The revised contract contained the ongoing debiting clause but did not contain the direct debit clause.
8. Good Guys advised the Commission that the ongoing debiting clause was intended to allow for the customer to increase their purchasing power. It said any credit built up by the customer would be added to the customer's credit limit to determine the total value of goods the customer could purchase and take delivery at any one time.
9. It also advised that 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 Good Guys to agree to changes to payments over the phone with customers in circumstances where many of its customers live in remote locations. It said that it did not use the second direct debit without authority of the customer.
10. During the investigation Good Guys confirmed to the Commission that it was ceasing to operate the business. However, it was apparent to the Commission that it was continuing to receive money from its customers under the ongoing debiting clause. In light of its advice that it was ceasing operation, in late 2017 the Commission requested that Good Guys cease ongoing direct debiting of customers' accounts

once goods have been paid for in full, and asked that Good Guys return any positive balances held to customers.

11. On 17 November 2017 Good Guys advised the Commission that it had ceased the ongoing direct debiting of customers' accounts after payment of the goods and that Good Guys held approximately \$23,000 in credits relating to 220 accounts. Good Guys advised the Commission on 2 January 2018 that all but three of the customers had either purchased goods utilising their credit balance or had their credit balance refunded to their bank account.
12. Good Guys ceased selling goods on or about December 2017 and was placed into liquidation in March 2018.

The Law

CCCF Act disclosure

13. 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 terms

14. 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:
 - 14.1 the term is in a consumer contract;
 - 14.2 the consumer contract is a standard form contract (as determined in accordance with section 46J);
 - 14.3 the declaration is not prohibited by section 46K(1); and
 - 14.4 the term is unfair in the sense described in section 46L.
15. The test for unfairness is set out in 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:
 - 15.1 would cause a significant imbalance in the parties' rights and obligations arising under the contract;
 - 15.2 is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - 15.3 would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.

16. 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

17. The Commission's view is that Good Guys 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

18. 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.
19. We have formed the view that the ongoing debiting clause was likely an unfair contract term because:
- 19.1 The term created a significant imbalance in the rights and obligations of the parties. Good Guys obtained the use and benefit of holding the customer's money in the customer's Good Guys account up to a maximum of \$200 without paying interest to the customer or providing any other benefit.
- 19.2 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.
- 19.3 There is no reason why this term would be reasonably necessary to protect Good Guys' legitimate interests.
- 19.4 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.
20. We have formed the view that the direct debit clause was likely an unfair contract term because:
- 20.1 The term creates a significant imbalance in the rights and obligations of the parties as Good Guys 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 Good Guys. Good Guys also reserved for itself the right to unilaterally determine

whether the customer had responded “satisfactorily” to it where the customer had stopped payments.

- 20.2 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 Good Guys. The customer may also have incurred bank fees if they had inadequate funds in their account as a result of Good Guys lodging a replacement direct debit.
- 20.3 There is no reason why this term would have been reasonably necessary to protect Good Guys’ legitimate interests.
- 20.4 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

- 21. 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

- 22. 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

- 23. 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.
- 24. Creditors who breach section 17 of the CCCF Act may:
 - 24.1 be unable to enforce the contract or any right to recover property or any security interest;
 - 24.2 have to refund money or pay compensation;
 - 24.3 have to pay statutory damages;
 - 24.4 be fined up to \$30,000 per offence for companies and \$10,000 for individuals; and/or
 - 24.5 be banned from operating within the finance industry.

25. 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.
26. 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

27. We have published a series of fact sheets, videos and other resources to help businesses comply with the Acts including provisions relating to unfair contract terms, and the other legislation we enforce. These are available on our website at 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.
28. You can also view the Acts and other legislation at www.legislation.co.nz.
29. Thank you for your assistance with this investigation. Please contact Mark Atwell on 09 9203492 or by email at mark.atwell@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



John Lyall
Auckland Consumer Manager
Competition and Consumer Branch