COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

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Mobile Trader 2014/2015 Project

August 2015

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Purpose of this project

1. In recent years the business practices of mobile traders, often referred to as truck shops, have become more prominent in complaints the Commerce Commission (Commission) has received from consumers and their advocates. They have also featured more prominently in intelligence we have gathered about issues affecting consumers and in discussions we have had with concerned community organisations and politicians.

2. Mobile traders are businesses that do not have fixed retail premises in the traditional sense. Some of these traders operate mobile shops, usually from trucks, while others employ sales staff who sell goods door-to-door using catalogues and brochures. Mobile traders use a variety of sales techniques, including uninvited direct sales (through door-to-door or telemarketing sales), parking mobile truck shops in prominent locations and using websites and Facebook. They sell predominantly or exclusively on credit, layby or other deferred payment terms.

3. We have acted on complaints about mobile traders as they have arisen in the past. But this approach did not appear to be resolving the most significant issues that were being reported to us.

4. The objectives of the Mobile Trader 2014/2015 Project have been to:

    4.1 better understand:

        4.1.1 how mobile traders operate;

        4.1.2 which business practices are causing difficulties for consumers (rather than relying exclusively on anecdotal reports);

        4.1.3 the extent to which the laws enforced by the Commission, the Fair Trading Act 1986 (FTA) and Credit Contracts and Consumer Finance Act 2003 (CCCFA), apply to mobile traders; and

        4.1.4 the extent to which mobile trader business practices comply with the FTA and CCCFA and the extent to which mobile traders were prepared for pending changes to these laws.

    4.2 monitor and improve mobile traders' compliance with consumer protection legislation. This included educating them about existing obligations and recent and upcoming changes to the FTA and CCCFA; and

    4.3 gather further intelligence that the Commission and the community can use to identify and address the most significant issues in the industry reportedly causing difficulties for consumers.

5. This report summarises our findings under each of these objectives. It also describes the Commission's strategy for extending the project into 2015/2016 to

review compliance by mobile traders and take appropriate enforcement action under the FTA and CCCFA in cases of continued non-compliance.

6. This report is intended as a general review of the mobile trader industry, based on the information we have obtained from a wide variety of sources, including:

   6.1 mobile traders;

   6.2 community and non-government organisations;

   6.3 consumer complaints;

   6.4 mobile trader customers; and

   6.5 observations of Commission staff.

7. This information has enabled us to identify a number of key business practices in the mobile trader industry in New Zealand. These key practices are discussed in this report in general terms. It is important to note that the extent to which each mobile trader engages in these practices varies.

Executive summary

8. We identified 32 mobile traders during the project. They operate throughout New Zealand, although the majority are based solely in the North Island, with a particular concentration in Auckland.

9. The size of these operations varies, from owner/operators to sizeable enterprises with more than 35,000 customers and more than $7 million in annual revenue. One group of three associated companies reported annual revenue of nearly $22 million in the 2013/2014 financial year.

10. The market is dynamic, with traders frequently entering and exiting the market. Some of the identified traders are no longer in business and we continue to identify new mobile traders.

11. Mobile traders offer a range of different products, including electronic goods, bedding, clothing, outdoor equipment, toys, bikes and food. The prices of these goods are usually substantially higher than the cash price for comparable goods at mainstream retail outlets.

12. Consumers appear attracted to mobile trader offerings for a number of reasons:

    12.1 they are often unable, or feel unable, to purchase the same goods in mainstream retail outlets. They do not have the money required to pay cash for the goods and cannot obtain credit from those stores;

    12.2 the goods offered are desirable for these consumers – eg, clothing, bedding, electronic goods, mobile phones and tablets;

12.3 although the total prices for these goods tend to be higher than available elsewhere, the amount of each periodic repayment is affordable - weekly or fortnightly payments can be as low $10 or $20;

12.4 it is convenient to use a mobile trader. Customers do not have to be able to travel any distance to purchase the goods they want;

12.5 the goods are supplied immediately or after a small number of payments; and

12.6 there are often no credit checks, so customers are not prevented from borrowing money if they have poor credit histories.

13. A number of these business practices were reported to us as causing difficulties for consumers. Our enquiries have identified a number of practices that do, to varying extents, exist within the mobile trader industry:

13.1 mobile traders do not have fixed retail premises. They take their goods directly to their customer base through mobile shops and/or door-to-door sales;

13.2 the customers are predominantly located in lower socio-economic areas, and may struggle to obtain credit or deferred payment terms through mainstream channels;

13.3 the prices charged are high compared with those charged by mainstream retail outlets;

13.4 they offer goods that are perceived as desirable by their target market, but are often of lower quality than comparable goods available in mainstream retail outlets;

13.5 documents provided to customers are often non-compliant in that important information required to be clearly disclosed by the CCCFA and FTA is often not adequately disclosed to customers;

13.6 the goods are sold on credit or layby, requiring customers to make weekly or fortnightly payments to purchase the goods;

13.7 there are often charges imposed in addition to the purchase price, including default fees for missed or cancelled payments, establishment fees and cancellation fees;

13.8 some mobile traders make misleading or confusing representations about the price of the goods they sell;

13.9 some mobile traders are difficult to contact making it difficult for customers to exercise their rights under the contract;

13.10 some mobile traders are reluctant to provide customers with information about their contracts;

13.11 some mobile traders consistently fail to deliver goods in the timeframes represented or, in some instances, at all;

13.12 some mobile traders require customers to complete multiple direct debit forms, which allow the trader to restart direct debits that the customer has chosen to end; and

13.13 some mobile traders continue to take money from customers despite the customer having paid all amounts owing under the contract.

14. Not all of the business practices observed and/or reported to us as causing problems for consumers, fall under the laws enforced by the Commission. For example there is no law that restricts the price that traders can charge for their goods. However, our enquiries highlighted that compliance with the FTA and CCCFA is inadequate across the industry. We considered that 31 of the 32 mobile traders visited did not, to varying extents, comply with all of their obligations under these Acts. We also found that many of the mobile traders did not appear to be sufficiently prepared for recent and upcoming changes to the FTA and CCCFA.

15. We have provided, or will shortly provide, compliance advice to 29 of these mobile traders. Our Enforcement Response Guidelines explain the circumstances in which we commonly consider compliance advice to be an appropriate enforcement response. Our letters advised mobile traders of the business practices that we consider breach the law. We have alerted traders to changes to their documentation and processes that we consider are required to comply with the law and we encourage them to seek legal advice.

16. There was only one mobile trader to whom we did not issue compliance advice. We are continuing to investigate two other mobile traders which we consider may have breached the laws that we enforce.

17. We expect the mobile traders to have adopted our compliance advice and made the necessary changes. We have started a new project and during the next 12 months we will re-visit the mobile traders which received compliance advice. We will again review their documents to check their compliance with the FTA and CCCFA, and review their advertising and lending processes. Where we see non-compliance we will take further appropriate enforcement action including criminal and/or civil proceedings in suitable cases.

Who are the mobile traders?

18. We have identified 32 mobile traders. Details of these traders are set out in Attachment A. We identified these mobile traders by:

    18.1 liaising with budget advisers and consumer advocates;

    18.2 obtaining information from other mobile traders;

    18.3 reviewing complaints received by the Commission; and

    18.4 reviewing the Financial Services Provider Register.

What information have we collected from mobile traders?

19. Mobile traders have voluntarily provided a significant amount of information to the Commission, including:

    19.1 templates of their customer contracts, including all CCCFA disclosure documents;

    19.2 marketing material, such as brochures and catalogues;

    19.3 a sample of contracts that have been entered into with customers; and

    19.4 recent financial statements.

20. We have also had a number of meetings with directors or, in some cases, a person nominated by the company to speak on its behalf. We have conducted numerous phone calls and sent many letters and emails to gather relevant information.

The mobile trader industry

21. The information we have obtained has enabled us to develop an understanding of a number of the key business practices of the mobile trader industry in New Zealand and to draw out some themes that exist in the industry.

Mobile traders operate nationwide

22. There are mobile traders operating throughout New Zealand. They operate mostly in the North Island, from the far north to Wellington. There appear to be only three mobile traders that operate in the South Island.

23. Most are based in Auckland. Of the 32 we identified, 30 mobile traders have head offices in Auckland. One is based in Tauranga and the other in Hamilton.

24. It appears that the mobile traders are mostly based in Auckland due, in part, to the proximity of wholesalers that supply the goods and the larger and more concentrated population base from which to draw customers living in Auckland and the wider North Island.

The size of these businesses varies

25. The size of the mobile trader operations varies.

26. Some of the larger, more established mobile traders have been in business for more than 20 years and have over 70 trucks and more than 35,000 customers with active accounts at any one time. The more established traders have multiple employees that have defined roles such as customer services, sales and purchase managers.

27. Others are much smaller, owner operated businesses, some of which employ a small number of staff.

28. Information received from a sample of 16 mobile traders shows annual revenue from sales ranging from approximately $150,000 to more than $7 million. One group of three related companies had annual revenue of nearly $22 million. The total amount of revenue for these 16 traders for the financial year ending 31 March 2014 exceeds $40 million.

It appears to be a growing business

29. There appear to be low barriers for entry into this market. On the smaller scale all that is required is a car, a brochure or catalogue, and a basic contract. Our enquiries show that at least 11 mobile traders have entered the industry since 1 January 2013.

30. Several of the mobile traders have a business model that does not require the storage of stock as they arrange delivery of products to customers directly from suppliers as soon as the required number of payments has been made. Therefore a large capital outlay is not necessary when entering this industry.

Repeat business is common

31. Some mobile traders appear to rely on repeat business with existing customers. Mobile traders have advised us that they keep track of existing customer accounts and frequently approach existing customers to sell additional goods when they are close to paying off the amount owed.

32. We have seen contracts that record that the customers agree to being approached by the mobile trader towards the end of the existing contract. Some charge for that visit.

What do mobile traders sell?

33. We have found the majority of the mobile traders who sell goods directly from trucks (truck shops) primarily supply clothing, bedding, perfumes and toys. They sometimes offer electronics, like mobile phones, but those who do so reported that they only do so when the company has bought in bulk and got a "good deal".

34. Companies that use brochures and catalogues when engaging in door-to-door sales tend to sell a wider range of goods including:

34.1 laptops, tablets and smart phones;

34.2 televisions and home theatre systems;

34.3 fridges, freezers and microwaves;

34.4 appliances such as kettles and toasters;

34.5 outdoor equipment such as lawnmowers and furniture;

34.6 children's toys including bikes and trampolines; and

34.7 furniture such as lounge and dining suites.

35. We found two companies that sell food. One supplies a variety of hampers that include dry and tinned food as well as meat and alcohol. These goods are not stored on the trucks. The second trader sells dry and tinned food as separate items such as powdered milk and boxes of cereal. This trader has recently started supplying hampers of dry and tinned food and meat.

Price of goods sold

36. Almost all products tend to be sold at prices which are significantly higher than the cash prices for a comparable product purchased from a mainstream retailer.

37. By way of example, in June 2015 we selected a few products advertised in mobile trader catalogues and compared them to the cash prices for those goods listed at pricespy.co.nz.[1] The results are set out below.

Product	Mobile trader price	pricespy.co.nz price
Samsung Galaxy S5 mobile phone	$1,950 to $2,152.80	$494 to $899
Russell Hobbs slow cooker	$135.07 to $148.20	$49 to $89.99
Playstation 3	$1,550	$390.99 to $529.99
Mitsubishi MR-385C refrigerator (white)	$2,400	$1,099.99 to $1,149
Acer Aspire E1 series laptop	$999	$345 to $499.99
Panasonic microwave	$399	$159.99 to $257.89

[1] Pricespy is an online price comparison website that compares online prices of household products with access to most of the major retail outlets in New Zealand.

What interest and fees do the mobile traders charge?

38. Generally, mobile traders do not charge ordinary interest. Four of the 32 mobile traders charged ordinary interest, at rates of between 6.5% and 19.5%. Seven charged default interest of between 3.5% and 28%. These interest charges are payable on top of the purchase price paid for the goods.

39. In addition to the purchase price of the goods sold, many mobile traders charge a range of different fees. The most common fees charged are:

39.1 cancellation fees. There are two common methods for calculating this fee:

39.1.1 a flat rate of between $20 and $90 no matter the price of the good(s); and

39.1.2 a flat rate of between $20 and $75 plus 10% to 20% of the purchase price.[2]

39.2 establishment fees of between $20 and $90;

39.3 monthly administration fees. Several mobile traders charge monthly administration fees. These range from $3 to $5 per month; and

39.4 default fees of between $10 and $40.

Why do customers use mobile traders?

40. Despite relatively high prices and interest rates, based on our enquiries and information we have received from community organisations, it appears that customers buy from mobile traders for a variety of reasons:

40.1 the goods offered are desirable for these consumers – eg, clothing, bedding, electronic goods, mobile phones and tablets;

40.2 they are often unable, or feel unable, to purchase the same goods in mainstream retail outlets. They do not have the money required to pay cash for the goods and cannot obtain credit from those stores;

40.3 although the total prices for these goods tend to be higher than available elsewhere, the amount of each periodic repayment is affordable – weekly or fortnightly payments can be as low $10 or $20;

40.4 it is convenient to use a mobile trader. Customers do not have to be able to travel any distance to purchase the goods they want;

40.5 the goods are supplied immediately or after a small number of payments;

40.6 there are often no credit checks, so customers are not prevented from borrowing money if they have poor credit histories;

2 For example, for a total purchase price of $500 the cancellation fee could be between $70 and $175

40.7 the customer does not want to approach a finance company or bank for a loan as they do not trust them or believe their application would be declined; and

40.8 mobile traders are often available to visit the customer when they require goods in a hurry or for a special occasion.

41. Some customers have told us they are satisfied with the service they receive. Repeat custom has been reported as common amongst the mobile trader business model.

The practices of concern with the industry

42. When we commenced this project we were aware of a number of business practices within the mobile trader industry that were reported to us as potentially causing difficulties for consumers. We have been able to confirm that most of the issues raised do, to varying degrees, exist. These include:

42.1 the prices charged are much higher than for comparable goods in mainstream retail outlets;

42.2 the mobile traders' customers are predominantly located in lower socio-economic communities. Many of the customers have limited financial literacy and are unable to obtain credit from any other source;

42.3 the goods can be of inferior quality, certainly when considering similar goods available at mainstream retail outlets and the price of the goods;

42.4 advertising often does not specify the:

42.4.1 actual cost to the customer (ie. pricing that is described only in "per week" terms); or

42.4.2 specifications or details of the product to be purchased.

42.5 many of the sales agreements and credit contracts do not comply with the disclosure requirements of the FTA and CCCFA. They often fail to detail the goods purchased, the exact payment terms, the total amount owed and an end date;

42.6 some of the smaller mobile traders fail to respond to customer enquiries or to provide information to consumers about their contracts, payments and delivery of goods;

42.7 some of the smaller mobile traders fail to deliver goods, or deliver them much later than represented;

42.8 some mobile traders use terms in contracts to ensure continued payment such as:

42.8.1 obtaining multiple signed direct debit forms;

42.8.2 having obscure terms in the contract that mean that customer payments continue after the item is fully paid, to build an account credit[3]; and

42.8.3 refund policies which require a home visit (and for which the customer is charged a home visit fee) prior to refund.

42.9 there is a general issue with customers being unable to exercise their statutory or contract rights to cancel their agreements, and particular issues with mobile traders failing to make prompt and full refunds. This problem predominantly exists with the smaller companies; and

42.10 some mobile traders were retaining the money paid by customers who stop making payments, despite no goods having been supplied to the customer.

Some issues do not appear to be as significant as reported

43. We have identified some issues that do not appear to be as significant as reported. We have been told of mobile traders commonly selling food, particularly fresh food such as bread, milk and meat directly from trucks at highly inflated prices. We found only two traders who sell food. Neither supplies fresh food directly from the trucks. All fresh food is supplied as part of a hamper that the customer agrees to purchase. We found that the food was highly priced when compared to the price of similar goods purchased from mainstream supermarkets. We have been told of mobile trader sales people selling on commission – meaning they were incentivised to engage in high pressure sales practices that would maximise sales. We found that this practice is not as prevalent as it first appeared. Some traders do pay their sales staff commission (including one sizeable mobile trader), however most mobile traders pay wages or salary.

3 For example, a mobile trader has the following clause; *"Ongoing debiting: by ticking the box on the face page of this agreement, the Customer agrees to allow [the company] to continue to direct debit their bank account indefinitely."*

Some issues fall outside the laws we enforce

44. A number of the business practices reported to us and observed through our enquiries may breach the laws enforced by the Commission. However, a number of others that have caused difficulties for consumers are not prohibited under the FTA or CCCFA.

    44.1 Prices and interest charges charged are high when compared with mainstream retail outlets. The FTA and CCCFA do not regulate prices or interests rates, except to the extent that the CCCFA requires that interest charges cannot be oppressive. Generally, the high prices and interest charges fall outside the scope of those Acts.

    44.2 The sale of food by mobile traders is not regulated by the FTA or CCCFA.

    44.3 Mobile traders are most prevalent in communities with high numbers of consumers who have limited financial literacy and who are unable or choose not to obtain credit from any other source. The FTA and CCCFA do not prohibit the sale of goods to vulnerable consumers. We expect the new Lender Responsibility Principles to improve practices associated with offering credit to those consumers, as they should ensure that mobile traders who offer credit do so responsibly. But the Lender Responsibility Principles do not prohibit sales to particular sectors of the community or sales practices other than those captured by the FTA.

The issues that fall within the laws we enforce

45. During the course of our project, changes were introduced to the CCCFA and the FTA which affect mobile traders' compliance with those laws. Changes to the FTA relating to layby sales and uninvited direct sales came into force on 18 June 2014 and applied to the mobile traders that we reviewed. However, further changes to the FTA relating to unfair contract terms came into force on 17 March 2015 and changes to the CCCFA which came into force on 6 June 2015 altered the disclosure obligations of mobile traders and introduced new rules relating to lender responsibility. We reviewed the documentation provided to us for compliance with both pre and post amendment legislation consistent with our project objectives.

46. As noted above, a number of the business practices reported to us and observed through our enquiries have been assessed against the legislation we enforce and potential breaches have been identified.

CCCFA non-compliance

47. Many of the issues of potential non-compliance relate to incomplete and misleading disclosure and irresponsible lending practices. Changes to disclosure requirements were introduced to the CCCFA on 6 June 2015 along with new requirements for responsible lending.

Non-compliance with disclosure requirements

48. Section 17 of the CCCFA requires creditors to disclose key information to borrowers at the start of the credit contract. Section 32 of the CCCFA requires that this information must be clear, concise and not be confusing or misleading.

49. The key information required for contracts entered into on or after 6 June 2015, includes:

    49.1 contact details for lender, including name and street address;

    49.2 the total price of goods purchased;

    49.3 interest rate charges;

    49.4 credit fees that may be payable under contract;

    49.5 details of the payments required including the amount of each payment, the number of payments, the total amount to be paid, when the first payment is due and the frequency of payments (whether weekly or fortnightly);

    49.6 default interest charges and default fees that may be payable under the contract;

    49.7 the debtor's right to cancel under section 27 of the CCCFA; and

    49.8 if the creditor is required to be registered as a financial provider, the creditor's registration number and the details of the disputes resolution scheme they are a member of.

50. Non-compliance with CCCFA disclosure requirements were identified using the legislation prior to the changes on 6 June 2015. However the majority will remain relevant for contracts entered into on or after this date and include:

    50.1 incorrect contact details are provided. For example, the credit contracts often provide a postal address instead of a physical street address;

    50.2 the initial unpaid balance is either not disclosed at all or fails to include fees that are payable which results in an incorrect total;

    50.3 the amount or the method of calculating credit fees that may be a payable under the contract may not be disclosed;

    50.4 the payment details often do not disclose the amount of the payments, their frequency, start and end dates for payments and/or the total number of payments required;

    50.5 a borrower's right to cancel is not properly disclosed; and

50.6 an additional requirement is that mobile traders may have to register as a financial provider and disclose their registration number or membership to a disputes resolution scheme.

General comment about the quality of documents used

51. We observed generally that the documents used by larger mobile traders tend to be more compliant than those used by smaller mobile traders. Larger traders reported more often seeking external legal advice when creating their documents. They also reported regularly checking to ensure the documentation is compliant with current legislation.

52. On the other hand, smaller traders appear to be much less compliant. We found some traders who use largely the same credit contract that they created many years ago, without modification to take account of subsequent law changes. In many cases these documents are not compliant with current laws.

53. We also found that the majority of new entrants to the industry have used templates that have been copied from competitors or previous employers. The level of compliance is therefore reliant on the quality of the source documents. Unfortunately, these documents may themselves be non-compliant and may be hard to understand as the content has simply been copied without thought given to whether the terms and conditions are relevant to the new business.

Lender Responsibility Principles

54. The contracts we looked at are not subject to the new Lender Responsibility Principles in the CCCFA, as those rules only apply to contracts entered into after 6 June 2015.

55. The Lender Responsibility Principles, set out in section 9C of the CCCFA, require lenders to, among other things:

55.1 make reasonable enquiries to determine whether the credit will meet the borrower's requirements and objectives and that the borrower can make repayments without suffering substantial hardship;

55.2 assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of the agreement, including by ensuring that:

55.2.1 any advertising is not misleading, deceptive or confusing; and

55.2.2 the terms of the contract are expressed in plain language in a clear, concise and intelligible manner.

55.3 treat the borrower and their property reasonably and in an ethical manner.

56. Although the Lender Responsibility Principles do not apply to these contracts, we identified numerous types of conduct that, if they continue, will now likely breach the Lender Responsibility Principles. These include:

56.1 failing to make adequate enquiries as to whether the credit will meet the borrower's requirements and objectives and that the borrower can make repayments without suffering substantial hardship;

56.2 failing to notify customers when they are close to making a final payment so they can cancel direct debits;

56.3 requiring multiple direct debit forms signed by customers and lodging additional direct debits without their consent;

56.4 continuing to receive payments from customers when the total amount has been paid;

56.5 advertising that fails to clearly describe:

56.5.1 the actual cost to the customer of the goods (ie, pricing that is described only in "per week" terms);

56.5.2 the details of the product that will be provided. This is particularly the case with mobile phones, tablets, televisions and other electrical items where brands and specifications are not disclosed. Often, customers have no clear idea of how much the item will cost or how many payments are required and are unclear about the product they have purchased.

56.6 failing to respond to customer enquiries or to provide information to customers about their contracts, payments and delivery of goods;

56.7 failing to deliver goods as promised; and

56.8 failing to make prompt and full refunds.

57. Again, the level of potential non-compliance is not consistent across the industry. Some mobile traders, particularly the larger traders, behave more responsibly than others. But, as a general comment, a number of practices we have seen in the mobile trader industry fall below the standard required by the Responsible Lending Principles.

FTA non-compliance

Layby sales/Uninvited direct sales

58. The documentation provided to us was subject to rules relating to layby sales and uninvited direct sales which came into force on 18 June 2014.

59. The information required by the disclosure requirements for layby sales[4] and uninvited direct sales[5] are generally similar. The documents must:

59.1 be in writing, expressed in plain language, legible and presented clearly;

59.2 contain:

59.2.1 a clear description of the goods to be provided;

59.2.2 a summary of the consumer's right to cancel the agreement under the FTA[6] must be disclosed on the front page of an agreement;

59.2.3 the trader's name, street address, telephone number and email address; and

59.2.4 the total price payable under the agreement.

60. We found that many mobile traders were not complying with these requirements. For example:

60.1 many of the agreements did not clearly describe the goods to be supplied. For example, an item may be described as a 42" TV, but there are no other identifying features specifying a product number or brand;

60.2 in most cases, the summary of the consumers' right to cancel was either not present, contained incorrect information or was not on the front page of the agreement;

60.3 in many cases the traders did not disclose their full contact details as required, and omitted their street address and/or their email address from the contract; and

60.4 the total price payable was consistently missing from some trader's documents or it was found to be incorrect due to fees not being included in the calculation.

Unfair contract terms

61. The FTA was amended in March 2015 to include provisions that prohibit unfair contract terms in standard form consumer contracts. The new rules apply to all contracts entered into or varied after 16 March 2015.

62. An unfair contract term is one that:

62.1 causes a significant imbalance in the parties' rights and obligations under the contract;

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[4] Section 36C of the FTA

[5] Section 36L of the FTA

[6] Section 36F(1) for layby sales and 36M(1) for uninvited direct sales

62.2 causes detriment; and

62.3 is not reasonably necessary to protect a legitimate business interest of the party who relies on the term.

63. Although each of the contracts we looked at predate the unfair contract term rules, we identified numerous terms that, if included in contracts after 16 March 2015, may breach the unfair contract term rules.

64. We identified the following contract terms which are relatively common practice amongst mobile traders that we think maybe unfair:

64.1 requiring customers to sign multiple direct debit forms to allow the trader to reload direct debits without obtaining consent from the account holder; and

64.2 having terms in the contract that mean the trader continues to debit the customer's account after any debt is fully paid.[7]

What action have we taken?

Compliance advice

65. We have provided, or will shortly provide, compliance advice to 29 of these mobile traders. Our Enforcement Response Guidelines explain the circumstances in which we commonly consider compliance advice to be an appropriate enforcement response. Our letters advised mobile traders of the business practices that we consider breach the law. They alerted them to changes to their documentation and processes that we consider are required to comply with the law and we encourage them to seek legal advice. Only one mobile trader was not issued with compliance advice.

66. The compliance advice issued includes:

66.1 information that focuses on areas of concern that are identified during the review and are specific to the trader. An example is attached to this report as Attachment B; and

66.2 an attachment containing summary information about the changes to the consumer and credit legislation. The summary information is attached to this report as Attachment C.

[7] For example, a truck shop has the following clause; *"Ongoing debiting: by ticking the box on the face page of this agreement, the Customer agrees to allow [the company] to direct debit their bank account indefinitely."*

Ongoing investigations

67. We are continuing to investigate two other mobile traders who we consider may have breached the laws that we enforce.

Engagement with other agencies

68. In addition to using our enforcement powers, we have worked with other agencies to share our work on this project.

69. We provided submissions to MBIE on the Responsible Lending Code and referred to some of the conduct by mobile traders that we considered could be addressed by the responsible lending code. The Code specifically addresses some of the issues identified during this project. We have also briefed the Minister of Consumer Affairs on the issues identified.

70. We have also met with and discussed our work with Auckland Council, MBIE and community groups such as Citizen's Advice Bureaux, the New Zealand Federation of Budget Advisors and Community Law offices.

71. We have also responded to multiple media enquiries specifically relating to mobile traders.

72. We have identified that 16 mobile traders are not on the Financial Services Provider Register (FSPR), and are not members of a dispute resolution scheme. We have advised traders that if they are providing financial services then they must be registered on the FSPR. We have written to the Financial Markets Authority (FMA) notifying them of these traders.

Mobile trader reaction

73. Most of the mobile traders have been receptive to the Commission's action and advice, and have indicated an interest in the information provided to them and a willingness to comply with the law. However, some of the traders (about 20%) have been reluctant to assist our enquiries and less receptive of the Commission's approach. These traders will be a particular focus of our ongoing work.

What will we do next?

74. This project is just the first phase of our plan to improve compliance in the mobile trader industry. It was focused on better understanding the industry issues reported to us and monitoring and improving compliance with existing and changing consumer protection laws.

75. We expect the mobile traders to have adopted our compliance advice. During the next 12 months we will re-visit the mobile traders who received compliance advice, as part of a second mobile trader project.

76. One of our main focus areas will be compliance with the Lender Responsibility Principles. We will be working to ensure that mobile traders are complying with

their obligations under the Principles, with a particular focus on the processes followed by the mobile traders when customers enter into credit contracts.

77. We will also be actively monitoring advertising for behaviour or activity that breaches one of the laws that we enforce particularly where it is likely to cause harm to customers of mobile traders. We will particularly focus on mobile traders who use catalogues and websites and any failure to disclose the full price of the goods, which we consider is likely to be misleading, deceptive or confusing in breach of the lender responsibility principles of the CCCFA or FTA.

78. We will also review the current mobile trader contracts, websites and catalogues to ensure that the traders have adopted our compliance advice.

79. The Commission will use the Enforcement Response Guidelines to determine the appropriate enforcement action to in any case of non-compliance. We will consider warnings, and may issue infringement notices for breaches of the disclosure requirements of the uninvited direct sales provisions of the FTA or the CCCFA initial disclosure requirements. In some cases, criminal prosecutions and/or civil proceedings may be appropriate.

80. We expect that we will identify further mobile traders during the next phase of the project.[8] These traders will be subject to the same reviews that we have conducted in relation to the 2014/2015 project.

81. We will also continue to work with other government and local body organisations as well as NGO's to identify and take action where breaches or irresponsible behaviour is reported within the industry.

[8] As noted previously, the barriers to entry are low and there are regular new entrants to the industry

Attachment A: List of traders identified

Company Name	Head Office	Areas targeted
Ace Marketing Limited	Hamilton	North Island
Best Buy Limited	Auckland	North Island
Betterlife Corporation Limited	Auckland	North Island
Buy4less Limited	Tauranga	North Island
Carmont Fashions Limited	Auckland	North Island
Deals 4 U 2012 Limited	Auckland	North Island
Dreamz Trading & Logistics Limited	Auckland	North Island
Elite Shopping Limited	Auckland	North Island
Fashion Traders 2011 Limited	Auckland	North Island
Flexibuy Limited	Auckland	North Island
Gadgets Plus Limited	Auckland	North Island
GKI Trading Limited	Auckland	South Auckland
Goodring Co Limited	Auckland	North Island
Home Direct Limited	Auckland	Nationwide
Home Shop Limited	Auckland	North Island
Home Zone Catalogue	Auckland	North Island
Layaway Depot Limited	Auckland	Nationwide
Lync (NZ) Co Limited/Easydeal	Auckland	North Island
Macful International Limited	Auckland	North Island
Mobile Shop Limited	Auckland	North Island
NZ Shop at Home Limited	Auckland	North Island
Sales Concepts Limited	Auckland	North Island
Shop at Home Services Limited	Auckland	North Island

Shop Direct Lifestyle Limited	Auckland	North Island
Shop in Trucks Limited	Auckland	North Island
Shoppers Stop Lifestyle Limited	Auckland	North Island
Smart Shop Limited	Auckland	North Island
The Christmas Catalogue Company Limited	Auckland	North Island
The Good Guys Limited	Auckland	Nationwide
The Good Shop Limited	Auckland	North Island
TNP Investments PVT Limited	Auckland	North Island
U Buy Limited	Auckland	North Island

Attachment B: An example of Compliance Advice issued to Mobile Traders

The Commerce Commission (Commission) is currently reviewing the sales contracts and business practices of traders engaged in door-to-door selling of goods on credit. As part of this project, we have reviewed contract documentation used by “THE TRADER”. The objective of our review is to check for compliance with the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the Fair Trading Act 1986 (FTA), as applicable.

We have now completed our review. In our opinion, the contracts used by “THE TRADER” do not comply with the disclosure requirements of the CCCFA and the uninvited direct sales provisions of the FTA. You therefore need to review your contracts to ensure that they comply with the CCCFA and FTA.

Please note that further changes to credit laws come into force on 6 June 2015 and it is your responsibility to ensure that your contracts comply. If you are unsure about your obligations you should seek legal advice.

The Commission’s role

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA and CCCFA. The FTA prohibits unfair conduct and practices in relation to trade and provides for the disclosure of consumer information relating to the supply of goods and services. The CCCFA is designed to protect consumers when they are borrowing money and enable them to make informed choices about using credit.

The review

“THE TRADER” sells electronic goods, homeware, clothing and other goods on a deferred payment arrangement.

Customers are provided with a copy of the invoice at the time of entering into the contract. The terms and conditions are on the reverse of the invoice.

You have provided us with 32 “THE TRADER” contracts that were entered into during October 2013. You’ve advised that there have been no changes to the contract and the version provided continues to be used by ”THE TRADER”.

If a customer cancels a contract 10 days after entering into the agreement a $20 cancellation fee is payable plus an additional amount if the goods are not returned in new condition.

There is an account maintenance fee of $10 charged quarterly. The default fees payable are a missed payment fee of $15 and a field visit fee of $65.

“THE TRADER” appear to sell mostly to existing customers and new customers are obtained by door-knocking.

The law

Credit Contracts and Consumer Finance Act 2003

The CCCFA sets out rules relating to disclosure, interest and fees that apply to consumer credit contracts.

As noted, the CCCFA is changing on 6 June. New lender responsibility principles are being introduced, and this means that there will be new rules relating to lending conduct.

Fair Trading Act 1986 – Uninvited Direct Sales

Credit sales agreements (whether consumer credit contracts or not) entered into before 18 June 2014 as a result of door-to-door selling were required to comply with the Door to Door Sales Act 1967 (DTDSA). However the DTDSA has now been repealed. Uninvited direct sales are now covered by the FTA and now include negotiations that take place by telephone.

Sales of goods and services over $100 that are negotiated at the consumer's home or workplace, and where the consumer did not invite the supplier to come for that purpose, are regarded as uninvited direct sales. Contracts that arise from door-knocking and telephone sales are likely to fall into that category.

Fair Trading Act 1986 - Unfair Contract Terms

New rules relating to unfair contract terms came into force on 17 March 2015, for contracts entered into on or after that date. The Unfair Contract Terms provisions apply to clauses in standard form consumer contracts ie. contracts where the goods or services are of a personal or domestic kind and where the contract is offered on a "take it or leave it basis". The FTA gives the Commission the right to apply to a Court to have terms in a contract declared unfair. Terms can be declared unfair if the term:

- causes a significant imbalance to the parties' rights and obligations under the contract, and
- is not reasonably necessary to protect the legitimate interests of the party advantaged; and
- would cause detriment (financial or otherwise) to a party.

If a Court finds a term unfair, it has a wide discretion as to what it may do.

The Commission's view

Credit Contracts and Consumer Finance Act 2003 – Disclosure

The Commission is of the opinion that "THE TRADER" contracts are consumer credit contracts as defined by section 11 of the CCCFA. Therefore section 17 requires that the contracts are to disclose relevant key information set out in schedule 1 of the CCCFA.

In the Commission's opinion, "THE TRADER" disclosure does not meet the requirements of the CCCFA. There appear to be failings in a number of areas. You need to review your documentation. Some of our concerns include:

Schedule 1(a) full name and address of the creditor

"THE TRADER" contracts do not provide a physical address on any of its disclosure documents.

Schedule 1(b) initial unpaid balance

The CCCFA requires you to disclose the initial unpaid balance at the date of disclosure, and the amount and a description of each amount making up that balance. There is a concern that when existing customers enter into new contracts with "THE TRADER" that the initial unpaid balance does not include any outstanding amounts.

A total price was not disclosed at all on eight of the contracts provided and three total amounts were incorrect. For example, invoice 36791 disclosed a total price of $305, however when all of the individually priced items are added together the true total price is $334.

Schedule 1(o) payments required

The CCCFA requires that the creditor disclose details of payments. Information required to be disclosed is the amount of each payment, the number of payments, their frequency, and the start and end date. The total amount of all payments is also required to be disclosed.

The information disclosed in the "THE TRADER" contracts relating to payments is insufficient. The majority of the contracts do not state:

- the amount of each payment;
- the number of payments;
- the payment start and end dates;
- the frequency of payments.

New disclosure obligations

From 6 June 2015, there is a requirement that lenders disclose their registration number on the Financial Services Provider Register (FSPR), and the dispute resolution scheme of which they are a member (amongst other new disclosure obligations).

You need to check whether "THE TRADER" needs to be registered, and complete the registration process if it does. Please note that the Financial Markets Authority (FMA) enforces the register. As part of this project, we will be contacting the FMA for them to follow up unregistered traders.

Information about the registration process is available on the website
http://www.business.govt.nz/fsp/about-the-fspr/how-do-i-register-an-fsp

Credit Contracts and Consumer Finance Act 2003 – Lender Responsibility Principles

Lender responsibility principles (principles) are not law yet, and will only apply to contracts entered into after 6 June 2015.

The Commission considers that re-activating direct debit authorities to receive payments from customers who have defaulted on payments without discussing that with the borrower may not be treating the borrower reasonably or ethically. We note that paragraph 12.1(a) of the Responsible Lending Code specifically states that a lender should not lodge another form without the borrower's consent.

"THE TRADER" contract has a term called "ongoing debiting" that allows "THE TRADER" to continuing debiting customer's indefinitely. Paragraph 12.1(c) of the Responsible Lending Code states that a lender should not continue to receive money from a borrower by direct debit "after the lender should have reasonably realised" the total amount had been fully paid.

Fair Trading Act 1986 – Uninvited Direct Sales

The provisions relating to uninvited direct sales are set out in sections 36K to 36S of the FTA. Additional information is required to be disclosed in uninvited direct sales contracts. This is set out in section 36L of the FTA. We have concerns that "THE TRADER" contracts do not disclose all of the required information.

Section 36L(2) requires certain information to be included in the contract. We have concerns some information that is required is not disclosed. In particular:

- Section 36L(2)(a)(ii) requires a summary of the customer's right to cancel the agreement under section 36M be set out on the front page. This is not present on "THE TRADER" contracts.
- Section 36L(2)(a)(iii) requires the supplier's name, street address, telephone number, and email address be set out on the front page. "THE TRADER" contracts do not include a street address or email address.
- Section 36L(2)(b)(i) requires the total price payable to be set out on the front page, however this was not recorded on eight and is stated incorrectly on three of the contracts provided to the Commission.

Fair Trading Act 1986 – Cancellation

Section 36M(1)(a) of the FTA allows consumers to cancel an uninvited direct sale contract within *"within 5 working days after the day on which the consumer receives a copy of the agreement."*

"THE TRADER" contracts allow cancellation within 10 days of the date of the agreement rather than the five working days required by section 36M(1)(a) of the FTA.[9]

Fair Trading Act 1986 – Unfair contract terms

The "THE TRADER" contracts have the term "ongoing debiting" that states "THE TRADER" will continue to debit customer bank accounts indefinitely or until the customer cancels payments. The Commission considers this is the type of term that is a high risk of being an unfair term. The Australian Competition and Consumer Commission (which is the Commission's equivalent in Australia) has applied to the Federal Court in Australia alleging continued debiting after full payment has been made is unfair.[10]

Impact of breaching the CCCFA and FTA

Please note that the matters raised above may not be an exhaustive list of issues where there may be areas of concern or non-compliance with the CCCFA and the FTA.

It is your responsibility to ensure that your documentation and processes meet the requirements of the CCCFA and FTA, and you may need to take legal advice to ensure that you comply.

If your contracts have not met the CCCFA disclosure requirements, then you are prohibited from enforcing a consumer credit contract until compliant disclosure is made. Note that from 6 June 2015, disclosure has to be made before a consumer credit contract is entered into, and if a consumer credit contract entered into after that date does not comply with the disclosure requirements, the creditor cannot recover any interest or fees for the period of non-compliant disclosure.

Breaches of the uninvited direct sales disclosure provisions are infringement offences. The Commission can issue infringement notices with a fine of $1,000 for each offence if a business fails to comply with disclosure requirements. Alternatively, a company or individual that breaches these provisions can be prosecuted in court. If a court decides there has been a breach of these provisions it can impose fines of up to $30,000 for a company and up to $10,000 for an individual for each offence.

If a court decides there has been a breach of other provisions of the FTA it can impose severe penalties. A company that breaches the FTA can be fined up to $600,000 and an individual up to $200,000 per offence. Penalties under the CCCFA include fines of up to $30,000. These penalties will increase to equate with those under the FTA from 6 June 2015. Note that only the courts can decide if there has actually been a breach of an Act.

You should be aware that our decision to issue this compliance advice letter does not prevent any other person or entity from taking their own private action.

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9 A trader may give a greater cancellation period than that required by law, and we accept that most of the time, 10 days will be more than the 5 working days required by the FTA. However, this may not be the case over the Christmas period as there are no working days between 25 December and 2 January.

10 https://www.accc.gov.au/media-release/accc-takes-action-against-chrisco-over-lay-by-agreements

Information about consumer and credit laws

Consumer protection and credit laws have changed. Further changes come into force in June 2015. We have provided a broad overview of some of the changes in **Appendix 1**. However it is your responsibility to ensure that your documentation and business practices comply with relevant laws.

We have published a series of fact sheets and other resources to help businesses comply with the CCCFA, FTA and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We include copies of our fact sheets on CCCFA disclosure and uninvited direct sales for your reference. Our website also includes sample compliance programmes to help businesses comply with the FTA.

The CCCFA and FTA are available (free) on the website www.legislation.govt.nz

Conclusion

Thank you for your cooperation and assistance. Please contact me on [ ] or by email at [ ] if you have any questions in relation to this matter.

Yours sincerely

[ ]

Encl.

Attachment C: Appendix attached to Compliance Advice Letters sent to truck shop traders

This letter was changed slightly over time as the implementation dates for law changes passed.

Changes to consumer and credit laws

We have set out below a summary of some of the changes to consumer laws which may be applicable to you. This information is intended to alert you to recent and upcoming changes to those laws. It is not intended to be legal advice. It is your responsibility to ensure that you understand how changes to the Fair Trading Act 1986, Financial Service Providers (Registration and Disputes Resolution) Act 2008 and Credit Contracts and Consumer Finance Act 2003 (CCCFA) impact your business. You may need to consult a lawyer to ensure your business complies with the law.

Fair Trading Act

The Fair Trading Act has recently been updated and amended to include some new provisions, which may be relevant to your business.

Laybys Sales

Rules relating to layby sales, which used to be included in the Layby Sales Act, are now contained in the Fair Trading Act.

The definition of a layby sale agreement has changed. Mobile traders/catalogue sellers need to be aware that if they allow a customer to pay goods off over time and charge interest or fees (apart from a cancellation fee), the arrangement will not be a layby sale agreement. It is highly likely that the arrangement will be a consumer credit contract and the seller will need to comply with rules relating to disclosure, fees, payments and interest contained in the CCCFA.

See our fact sheet on laybys http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/layby-sales/

If your contract is not a layby sale agreement and is a consumer credit contract you should be complying with the CCCFA as it exists now. However, you should also be aware that the CCCFA is changing (see below). Most changes will take effect from 6 June 2015.

Uninvited direct sales

Rules relating to door to door sales and telemarketing sales (some of which were previously included in the Door to Door Sales Act) are now included in the Fair Trading Act. The rules now apply to sales of goods or services for more than $100 where the negotiations occur at the consumers’ house or business or over the telephone where the consumer has not invited the supplier to visit or to call about the supply of those goods.

See our fact sheet on uninvited direct sales http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/door-to-door-and-telemarketing-sales/

Unfair contract terms

The Unfair Contract Term provisions apply to clauses in standard form consumer contracts ie. contracts where the goods or services are of a personal or domestic kind and where the contract is offered on a "take it or leave it basis". The Fair Trading Act gives the Commission the right to apply to a Court to have terms in a contract declared unfair. Terms can be declared unfair if the term:

- causes a significant imbalance to the parties' rights and obligations under the contract, and
- is not reasonably necessary to protect the legitimate interests of the party advantaged; and
- would cause detriment (financial or otherwise) to a party.

See our draft guidelines on unfair contract terms http://www.comcom.govt.nz/fair-trading/guidelines/draft-unfair-contract-term-guidelines/ . These provisions come into force for contracts entered into on or after 17 March 2015.

Credit Contracts and Consumer Finance Act (CCCFA)

Credit laws are changing. The Credit Contracts and Consumer Finance Amendment Act (Amendment Act) was passed on 6 June 2014. Some aspects of the law change are already in force, but most of the changes do not come into force until 6 June 2015. This gives traders time to understand their new responsibilities and obligations and make changes to their processes. The majority of the changes apply only to new contracts entered into on or after 6 June 2015.

Responsible lending

Lenders will be required to comply with Lender Responsibility Principles. The principles include that:

- Lenders must exercise the care, diligence and skill of a responsible lender in any advertisement for credit, before entering into an agreement to provide credit, and in all subsequent dealings with the borrower.
- Lenders must make reasonable enquiries before a borrower enters in to the agreement so as to be satisfied that the credit meets the borrower's objectives and the borrower can make the payments without suffering substantial hardship
- Lenders must assist the borrower to reach an informed decision whether or not to enter the agreement, and to be reasonably aware of the full implications of entering the agreement. Advertising, and indeed any information provided by the lender, must not be misleading, deceptive or confusing. All terms of the agreement must be expressed clearly, concisely and in plain language.

This list is not exhaustive. The Ministry of Business, Innovation and Employment is developing a Responsible Lending Code to provide guidance to lenders on how to comply with the principles. The draft Code is likely to be issued for consultation in November/December and will be published in March/April next year. The principles come into force on 6 June 2015.

Initial disclosure

From 6 June 2015 Creditors will be required to make disclosure of key information and terms of the contract to every debtor and guarantor **before** the contract is entered into.

The key information is set out at Schedule 1 of the CCCFA and, from 6 June 2015, will include:

- the creditor's registration number under the register of financial service providers and

- the name and contact details of the creditors' dispute resolution scheme.

Continuing disclosure

From 6 June most creditors will be required to provide continuing disclosure (statements) to debtors at least every 6 months (or every 45 days for revolving credit).

Fees

Fees are required to be reasonable. This key principle has not changed, although there is some further clarity around how reasonableness is assessed.

Repossession

The CCCFA will, from 6 June 2015, contain rules relating to repossession of consumer goods. Creditors should be aware that there are new rules relating to:

- the type of consumer goods that can be repossessed under a security agreement;

- when a creditor can exercise a right of repossession;

- how a creditor exercises that right.

Financial Service Providers (Registration and Disputes Resolution) Act 2008 (FSP Act)

Financial service providers are required to be registered and a member of a dispute resolution scheme. From 6 June 2015, the definition of a financial service provider is being broadened. It will now include traders who enter into credit contracts where interest and/or credit fees[11] are payable.

You can find out how to register on the Financial Services Provider Register at the website http://www.business.govt.nz/fsp/. Compliance with the FSP Act is enforced by the Financial Markets Authority (FMA).

Further information

This document is intended to alert you to recent and upcoming law changes that may affect your business. It is your responsibility to determine how the law changes affect your business. We invite you to take advantage of the period before this date to understand any new or changed obligations you have.

The Amendment Act is available at http://www.legislation.govt.nz/act/public/2014/0033/latest/DLM5146306.html.

It should be read in conjunction with the existing CCCFA, which is available at www.legislation.govt.nz.

The Commission will produce further information about the law changes over the next year, and it will be available on our website www.comcom.govt.nz.

11 Credit fees include account set-up fees, monthly administration fees, cancellation fees and other fees charged in accordance with a credit agreement. Credit fees do not include default fees.