

Commercial eSpeaking

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Welcome to the mid-Winter issue of Commercial eSpeaking and the introduction of our new look newsletter.

In this issue we have articles on:

Time to Review your Terms of Trade?

Vital in poor economic times

Consumer Credit Test Case

Early repayment fees

Business Briefs

Disputes Tribunal finding: implications for consumer warranties – The Securities Disclosure and Financial Advisers Amendment Bill 2009 – Government timing on broadband proposals – Holidays Act 2003 to be reviewed.

If you would like more information on any of the topics covered in this issue of Commercial eSpeaking, please don't hesitate to contact us. The next issue will be published in October.

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Time to Review your Terms of Trade? Vital in poor economic times

This article is a continuation of the recent themes in Commercial eSpeaking of encouraging business owners to ensure their business forms and procedures are up to date.

In the last issue of *Commercial eSpeaking* (February 2009) we included some material on the Personal Property Securities Register (PPSR) and credit control. This article provides an overview of important aspects that should be covered in the general Terms of Trade for your business.

Signed Terms

The first most crucial point is even if you have the best Terms of Trade containing all the necessary clauses, they are useless unless they form part of your contract with your customers. Your Terms of Trade should be provided to your customer *before* they commence trade with you. If they are not provided to your customer early on, there is scope for argument to say that your customer was not aware of the Terms of Trade and therefore they do not apply. It is very difficult for a customer to argue that your Terms will not apply if you have on file a signed credit application form incorporating your Terms of Trade. You can still insist your Terms form part of your contractual arrangements with your customer where customers have not signed your Terms, but it can be more difficult to prove.

It is ideal to have your customer sign a credit application form which incorporates your written Terms. The benefit of doing this is the credit application form will give you an opportunity to obtain detailed information about your customer so you can carry out reference checks and other similar important steps before you agree to them becoming a credit customer.

Up to date?

Make sure your business Terms of Trade are up to date and comply with the current law. Adding to the comments in the February issue of *Commercial eSpeaking* on the requirements of the Personal Property Securities Act, simply having a retention of title clause in your Terms without registering a security interest is no longer enough to guarantee that you will retain title to your unpaid goods.

Also consider including provisions such as contracting out of the Consumer Guarantees Act 1993 in respect of business customers and including the relevant compliance clauses where you wish to disclose personal information about customers (covered by the Privacy Act 1993).

Liability

Have you included necessary exclusions of liability and limitations of liability in your Terms of Trade? These clauses are very important if a claim is brought against you for a defective product or service. Exclusion of liability clauses and limitation of liability need to be well drafted as the courts review these clauses carefully and usually interpret any ambiguity against you, the defendant.

Debt recovery

Your business should ensure you have the right to recover costs incurred enforcing debt recovery against your customer. Debt recovery costs can be significant and may be a deterrent to a customer from 'stringing you along' if they are going to have to eventually pay for those recovery costs. A customer will think twice if they are liable for their own legal representation as well as your own lawyer's costs.

Any business should consider including a guarantee and indemnity provision from directors and shareholders if you believe you can obtain one from a company customer. These provisions can either be included in your Terms of Trade or in the credit application form.

In summary, in these difficult economic times good contractual documentation is vital. Check that your business has up-to-date credit application forms and Terms of Trade. Most importantly, make sure your procedures with your customers are correct so that you can be sure those Terms of Trade form part of your contract. At the very time you wish to rely on your contractual documentation you will not want to find out that you cannot.

Consumer Credit Test Case

Early repayment fees

The Credit Contracts and Consumer Finance Act 2003 (the Act) replaced the Hire Purchase Act 1971 and the Credit Contracts Act 1981. Intended to protect borrowers by imposing strict requirements on lenders, the Act covers contracts including those under which money is loaned or where goods are sold and the purchase price is paid later (such as a hire purchase contract). The Act also provides provisions for lenders to calculate fees when a loan is repaid early. This article discusses a recent case and the implications for lenders.

The Act limits, amongst other things, the fees lenders can charge when borrowers repay a loan in full before repayment is due. The lender must calculate a *reasonable estimate of its loss* [our italics] arising from full early repayment by using either a formula set out in the Act (known as the 'safe harbour' formula) or the lender's own formula (which must be set out in the relevant credit contract).

The High Court recently considered the formula a lender, Avanti Finance Limited, included in its contracts with borrowers in *Commerce Commission v Avanti Finance*¹. The Commerce Commission took issue with Avanti's formula and appealed an earlier District Court decision in Avanti's favour.

The Commerce Commission's main argument was that Avanti's formula should operate broadly in the same way as the Act's safe harbour formula (which Avanti chose not to use), and should have been based on the assumptions that:

- » Avanti would immediately re-lend the funds and decrease its loss (even though Avanti had a surplus of funds to lend), and
- » The repaid funds would be lent at then prevailing interest rates.

Avanti would not have received an early repayment fee under the safe harbour formula, but did receive repayment fees under the formula in its credit contracts. Avanti's supply of funds for lending exceeded demand, so it could not reduce its loss by re-lending the repaid funds. Avanti's formula capped the fee Avanti could claim at 90 days' interest.

The High Court agreed with the District Court and found that:

- » An early repayment fee must not exceed a *reasonable estimate* of the creditor's loss,
- » A reasonable estimate does not have to be perfect,
- » 'Reasonable estimate of loss' is an estimate based on informed analysis at the time of entering the credit contract that only compensates the creditor for the actual losses it could expect to sustain in the event of an early repayment. An estimate will only be unreasonable if the creditor stands to recover significantly more than the actual loss that arises,
- » The reasonableness of the estimate is to be considered at the time the contract was made (not at the time of the early repayment), and
- » In preparing its own formula for calculating an early repayment penalty, Avanti was not required to assume it would immediately re-lend the funds at then prevailing rates.

If you are in the business of providing credit, particularly to individual consumers, it is important that you understand the requirements of the Act. In addition to restricting early loan repayment fees, the Act regulates the disclosure you must make to consumers, how interest and other fees are calculated and charged, and how credit contracts can be varied.

There are serious implications for breaching the Act. If the required information is not disclosed, you may not be able to enforce the contract against a debtor until correct disclosure is made. Also, the Commerce Commission has wide investigation powers and can prosecute creditors for breaching the Act. Prosecutions can lead to criminal convictions and fines of up to \$30,000 for each offence. The Commerce Commission can also seek remedies on behalf of borrowers.

¹ Unreported, 28 April 2009, High Court, Auckland, CRI-2008-404-210, Asher J

Business Briefs

Disputes Tribunal finding: implications for consumer warranties

Under the Consumer Guarantees Act 1993 (CGA), consumer goods are required to last for a 'reasonable time'.

A consumer has successfully argued at the Disputes Tribunal that Dell should have paid for repairs to his computer, which broke down five years after purchase, even though the manufacturer's warranty had expired. The Disputes Tribunal referee said five years was a reasonable time period to expect a computer to last.

The Disputes Tribunal ruling does not set a legal precedent that must be followed by other tribunals/courts. However, it does indicate that warranties and guarantees in the CGA may be enforceable after the manufacturer's warranty runs out. Retailers selling 'extended warranties' may in fact be offering nothing more than a consumer would already be entitled to under the CGA.

The Securities Disclosure and Financial Advisers Amendment Bill 2009

Introduced in February this year, the Bill contains a number of proposed amendments to the Securities Act 1978 the aim of which is to ease compliance costs on businesses that are looking to raise capital by the offer of securities.

The proposals in the Bill include the introduction of a simplified disclosure prospectus regime. This regime will allow listed issuers to provide a simplified disclosure prospectus to investors, instead of a full prospectus or investment statement. The content required in a simplified disclosure prospectus will be set out in regulation. Draft regulations were released for consultation and all submissions were due by 27 May 2009.

The Bill also endeavours to improve the workability of rules relating to 'eligible persons' and 'non-public' persons to whom issuers can offer securities without the need to produce a full prospectus and investment statement.

Government timing on broadband investment proposal

In February 2009 the government announced a commitment to deliver ultra-fast broadband to 75% of New Zealanders over the next 10 years. The roll-out will be supported by government investment of up to \$1.5 billion via a crown-owned investment company (Crown Fibre Investment Company/CFIC).

The government has announced a short timeframe to undertake initial set up, with the CFIC to be appointed about mid-June this year. The CFIC will then run a contestable process to select private sector investment partners by releasing a request for proposals in mid- August. Dates beyond this are said to be indicative only, and include:

Proposals due	Mid-October 2009
Initial decisions by CFIC	January 2010
Further requests for proposals released by CFIC	To be determined by CFIC

More information and copies of the draft proposal and submissions on it can be found at www.med.govt.nz.

Holidays Act 2003 to be reviewed

The Minister of Labour, Kate Wilkinson, has established a working group of five members (including two nominations each from the Council of Trade Unions and Business New Zealand) to review the Holidays Act 2003. The Group has been formed to provide recommendations to the Minister that will make the Act easier for businesses and employees to understand and apply and that will reduce compliance costs. In particular, the Group will review:

- » The calculations for holidays and leave under the Act,
- » Trading in some part of an employee's annual leave for cash, and
- » Allowing employers and employees to agree to transfer the observance of a public holiday to another day.

The Group's report is due in December this year.