



GUIDE TO THE FAIR TRADING ACT

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WHAT IS THE PURPOSE OF THE FAIR TRADING ACT?

The purpose of the Fair Trading Act (the “Act”) is to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety.

WHO DOES THE ACT AFFECT?

The Act applies to anyone involved in trade, including the Crown to the extent it is engaged in trade.

WHAT DOES THE TERM “TRADE” COVER?

“Trade” is defined in the Act and includes any business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

WHAT AMOUNTS TO SUPPLY?

The Act defines “supply” as:

- In relation to goods, including supply (or re-supply) by way of gift, sale, exchange, lease, hire, or hire purchase; and
- In relation to services, includes provide, grant, or confer.

In other words, goods may be “supplied” by sale, exchange, lease, hire, or gift. Services may be “supplied” if they are provided, granted, or conferred.

WHAT IS MEANT BY “GOODS”?

The Act defines “goods” as personal property of every kind (whether tangible or intangible); and includes:

- Ships, aircrafts, and vehicles
- Animals, including fish
- Minerals, trees, and crops, whether on, under, or attached to land or not
- Gas and electricity
- Water and computer software

WHAT IS MEANT BY “SERVICES”?

“Services” include any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred. This includes any rights, benefits or privileges conferred by contracts for:

- The performance of work;
- The provision of, or use of facilities for accommodation, amusement, care of persons or animals or things, entertainment, parking or recreation;
- The supply of electricity, gas, telecommunications or water;
- A contract of insurance;
- A contract for the lending of money or granting of credit.

However it does not include rights or benefits in the form of supply of goods or the performance of work under an employee/employer contract.

WHAT ARE SOME OF THE TRADE PRACTICES COVERED BY THE ACT?

The Act controls the selling of goods, price setting, advertising and promotion and making the final sale. The Act prohibits people in trade from engaging in misleading or deceptive conduct generally (Section 9). The Act also:

- Prohibits certain kinds of false or misleading representations about employment (Section 12), including false claims as to availability, nature, terms of conditions or any other matter in relation to that employment;
- Prohibits certain kinds of false or misleading representations about the supply of goods or services, including false claims in relation to price, standard, quality, origin or history or that they have particular uses or benefits (Section 13); and
- Prohibits certain kinds of false or misleading representations about the sale, grant or associated promotion of any interest in land, including in relation to price, location, and characteristics or possible uses of land (Section 14),
- Prohibits certain unfair trading practices (Sections 17-24); and
- Provides for consumer information and product safety standards (Sections 27 - 33).

If you are unsure whether a proposed advertising campaign will comply with the provisions of the Act, we recommend you contact your lawyers to discuss.

FALSE OR MISLEADING ADVERTISING

You must be careful when you advertise goods to ensure:

- you are able to supply the goods; and
- any comparisons with other goods or services are accurate; and
- you convey a true description of the goods and their condition.

The range of matters covered in the Act may surprise you. For example, you may be found liable for misleading or deceiving conduct if you have failed to provide enough information in your advertisements. Fine print to conceal important information or which modifies “big print” information is not advised.

CONSUMER INFORMATION AND SAFETY STANDARDS

If you are a manufacturer or retailer of certain goods such as clothing, or if you provide certain services, you may have additional obligations to comply with consumer information and product safety standards.

Currently there are four consumer information standards regulations. They are for:

- Country of origin labelling for clothing and footwear;
- Care labelling;
- Fibre content labelling; and
- Used motor vehicles.

There are currently six product safety standard regulations. They are for:

- baby walkers;
- children's nightwear;
- children's toys;
- household cots;
- cigarette lighters; and
- pedal bicycles.

It is a breach of the Act to fail to comply with the requirements of the standards regulations. Failure to comply may also mean you have to recall the goods at considerable expense, on top of an additional penalties imposed.

MISREPRESENTATIONS ABOUT PRICE

Particular care is needed when making a representation as to the price of goods or services. If goods are offered at a reduced price, the goods must have been offered at the 'usual' price for a reasonable time. If the 'usual' price is an artificially inflated price or is out of date, this can be considered misleading. Comparisons with other traders' prices must be based on current prices charged in that market.

SALES TECHNIQUES, FINANCE AGREEMENTS, AND UNFAIR PRACTICES

Customers may be misled by the wording of a finance agreement. Your customer may not know the difference between "interest free" and "free credit" terms. All terms should be clear and unambiguous.

When recovering debts, you may also be found liable of misleading conduct if you demand late payment fees when there is no contractual entitlement to do so, or if you make false statements about the legal consequences that will follow if payment is not made. It is advisable to seek legal advice before commencing debt recovery procedures.

A number of specific practices are also prohibited by the Act on the grounds of unfairness. For example, "pyramid selling" practices and "referral selling" are prohibited. These are defined in the Act.

WHAT HAPPENS IF I BREACH THE FAIR TRADING ACT?

The Act is typically enforced by the Commerce Commission. However civil action can also be brought under the Act.

If the Court finds that a breach of the Act has occurred this may result in fines of up to \$60,000 for an individual and \$200,000 for a company. Frequently the Commission prosecutes both the company and the individuals involved in a breach. The Court can also grant remedial relief for which the trader has to bear the cost.

Other options available to the Court, in addition to fines are to:

- Declare the contract void or vary it as it deems fit;
- Order the refund or return of property to person who suffered loss;
- Order payment of loss or damage sustained;
- Order the repair of, or provision of parts to person who suffered the loss;
- Order the supply of specific services.

A person who promotes or operates a pyramid selling scheme is also liable for a fine for up to \$200,000. They can also be liable for any additional penalty that the Court may impose to the value of any commercial gain made which is deemed to have resulted from the contravention and to have incurred in the course of producing that gain.

ARE THERE ANY DEFENCES TO A BREACH?

It is a defence to a prosecution for an offence if the defendant proves that the contravention was due to:

- a reasonable mistake;
- reasonable reliance on information supplied by another person;
- an act or default of another person, or to an accident or some cause beyond the defendant's control and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

The term 'another person' does not include a servant or agent of the defendant or a director, servant or agent of the defendant if the defendant is a body corporate.

COMPLIANCE PROGRAMME

It is recommended that people involved in trade and the supply of goods and services establish a Fair Trading compliance programme. A compliance programme is an in-house checking system designed to ensure that businesses and their staff do not breach the Act. In most cases it is irrelevant whether conduct which did or was likely to deceive or mislead your customers was accidental or intentional. The issue is rather whether your actions did mislead or deceive or were likely to. A compliance programme can help avoid the possibility of this occurring.

SUMMARY

The Fair Trading Act controls how you may produce, advertise, market and sell your goods and services in trade. If you are unsure of your obligations under the Act, we can assist you to understand the Act's requirements and achieve compliance.

HOW WE CAN HELP YOU

Govett Quilliam is Taranaki's largest law firm. We have the people, the experience and the resources to assist you, whatever your case may be.

We have prepared this guide as a guideline to The Fair Trading Act. If you require further information, or have any questions about this guide please contact us.

Our Partners with experience in achieving compliance with the Fair Trading Act are:



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Please call our office if you would like further information on any guides prepared by our firm. Copies are also available on our website.

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