

THE FAIR TRADING ACT

Introduction

If you are in business, it is important that you understand how the Fair Trading Act affects your day-to-day operations.

The Act applies to all aspects of the promotion and sale of goods and services - from advertising and pricing to sales techniques and finance agreements.

This document aims to provide guidance on how to operate your business without breaking the law. It gives examples of unlawful trade practices, which breach the Act, and explains the role of the Commerce Commission in enforcing the Act and product safety and consumer information standards.

Compliance with the Act benefits consumers. It also protects traders who ensure they comply with the Act. In addition to any action the Commerce Commission might take in relation to a breach, consumers and competitors can take their own legal action against a trader breaching the Act.

The Fair Trading Act came into force on 1 March 1987, replacing earlier laws relating to misleading and deceptive conduct, unfair trading practices and consumer information.

When making claims about products you manufacture or sell, you must remember that your audience will include some people who are more easily misled than others.

The courts have said the Act is there to protect everyone, including those who may be gullible, of less than average intelligence or poorly educated.

Certain groups, by reason of language difficulties, age or lack of education, may be susceptible to being misled or deceived. If your customers include such people, you must take this into account and be especially careful when preparing your advertising.

The Fair Trading Act

- prohibits people in trade from engaging in misleading or deceptive conduct generally (section 9);
- prohibits certain types of false or misleading representations about employment (section 12), goods or services, including false claims that goods or services are of a particular price, standard, quality, origin or history or that they have particular uses or benefits or that they have any particular endorsement or approval (section 13);

- prohibits certain unfair trading practices (sections 17 to 24); and
- provides for consumer information and product safety standards (sections 27 to 33).

In practice, if you are found to have breached the Fair Trading Act, it is likely you have breached both the misleading and deceptive conduct provisions and the false or misleading representations provisions of the Act.

Important points to note about the Act are:

- it protects both consumers and law-abiding traders;
- in most cases it is not relevant whether a trader intended to deceive or mislead, rather the issue is whether their actions did or could deceive or mislead;
- it does not need someone to suffer or be directly affected by the trader's behaviour for action to be taken, as the Act applies not only to conduct which has actually misled or deceived somebody, but also to conduct likely to mislead or deceive; and
- both companies and individuals can be prosecuted for breaching the Act. Where a company acts unlawfully, the directors, managers and employees can be held liable. Anyone else who aided and abetted the offending conduct may also be held liable. This includes, for example, advertising agents who design and prepare misleading or deceptive advertisements for their clients, or wholesalers and retailers who sell misleadingly or deceptively labelled goods.

Definitions of terms used in the Fair Trading Act

In trade

This term has a broad meaning, and covers all commercial activities. Few undertakings except "one off" private transactions - for example, selling your own car - escape the jurisdiction of the Act.

Mislead

This means "to lead astray in action or conduct; to lead into error; to cause to err". A representation may be true but misleading: for example, "This product has been tested to the New Zealand Standard" implies the product passed the test. If the product had failed the test it would be a misleading representation.

Deceive

This means "to cause to believe what is false as to a matter of fact, to lead into error; to impose upon, delude, take in.

False

This means "contrary to fact". Incorrectly believing a false representation to have been true may in many circumstances not be a defence for the trader.

Representations

A representation is anything said about a product or service, either orally or in writing. A representation may also be an impression given by pictures, advertisements, promotional material or a sales pitch, or by something which is not said- that is, by critical information being omitted. It includes:

- TV, radio, newspaper and other advertisements
- brochures and flyers
- point of sale and other display material
- mail drops
- sales pitches

Commission Publications

The Commission publishes a series of detailed guidelines on the Fair Trading Act, including:

- The Commerce Commission - A General Guide
- Investigative Powers of the Commerce Commission
- The Fair Trading Act - A Guide for Advertisers and Traders
- Comparative Pricing and the Fair Trading Act
- Place of Origin and the Fair Trading Act
- Deceptive Packaging and the Fair Trading Act
- Environmental Claims and the Fair Trading Act
- Compliance Programmes and the Fair Trading Act
- Safety of Children's Night Clothes

- Travel Promotions and the Fair Trading Act
- Interest Free and Free Credit Promotions
- Fish Labelling and the Fair Trading Act
- Safety Standards for Bicycles
- Safety Standards for Toys
- Car Sales and the Fair Trading Act
- Care Labelling and the Fair Trading Act
- Fibre Content Labelling and the Fair Trading Act
- Food Labelling and the Fair Trading Act
- Debt Collecting and the Fair Trading Act
- Fair Trading Act 1986: A Guide for the Real Estate Industry
- Refunds, Returns, Guarantees and Warranties

The Commission also publishes a wide range of guidelines about the Commerce Act. These are available free of charge.

Comparative Pricing Checklist

Was or \$xxxx

Have the goods I'm advertising been sold by our store at the previous price for a reasonable period of time immediately before this offer? (As a guide a reasonable period should be around 30 days but this will depend on the sales volume for the product).

Elsewhere

Can I prove that goods the same as those I'm advertising are currently being sold by another trader in our local market for the elsewhere, price I'm stating in my advertising? (As a guide the local market should only include those areas where an average person would normally shop for the item advertised. For example if advertising electric jugs in Auckland you should not state an elsewhere price that is being charged in Whangarei.)

Recommended Retail Price

Can I prove that the Recommended Retail Price is the actual Recommended Retail Price suggested by the manufacturer?

If yes then:

Can I prove that the Recommended Retail Price has been charged by my store for a reasonable period of time prior to this offer?

Worth

Can I prove that the item is worth the advertised value in the current market?

Save \$X

Are consumers actually saving the stated amount?

Are we or one of our competitors currently charging the higher price?

Sale Price

Are the goods advertised genuinely reduced from their normal selling price?

If advertising a storewide sale have we got a substantial proportion of our stock at prices, which are lower than before the sale started?

Is the reason for the sale genuine? (eg We need to have had a fire to advertise a 'fire sale').

Regulations setting safety standards for certain products, bicycles, children's night clothes and children's toys, are also enforced by the Commerce Commission.

Section 3 2 of the Fair Trading Act gives the Minister of Consumer Affairs the power to order the compulsory recall of goods which do not comply with a relevant safety standard, or which may cause injury. Such a recall will be at the trader's expense. Traders may also be required to publicise the recall, and replace or repair the goods or provide refunds.

Major Standards include:

- Bicycle safety standard
- Children's night clothes safety standard
- Toy safety standard
- Unsafe goods notices

Bicycle Safety Standard

Everyone who sells a pedal bicycle must comply with the Product Safety Standards (Pedal Bicycles) Regulations 1991. This includes importers and retailers of both new and second-hand bicycles as well as those selling bicycles privately.

The standard applies to all types of bicycles and sub-assemblies of bicycles for normal road use having a wheelbase of 640mm or greater. (Wheelbase is defined as the distance measured horizontally between the centres of the front and back axles. Bicycles with a wheelbase of less than 640mm are considered to be toys and are covered by another standard.)

A bicycle is defined as "a two-wheel pedal vehicle that is solely human-powered".

The safety standard:

- requires that where a bicycle is sold either in a kitset or partially assembled, the parts or the packaging containing the parts must be labelled as follows -

"WARNING. In the interests of safety it is recommended that you have this cycle assembled by a skilled mechanic."

The lettering of the word "WARNING" shall be in block capitals at least 20mm high and the other words shall be in lettering at least 10mm high;

- sets out the performance requirements which bicycles (including children's bicycles and sub-assemblies) need to meet when the specified tests are carried out; and
- requires an owner's manual to be provided for any bicycle or partially assembled bicycle sold.

The owner's manual must contain instructions on use and maintenance. For partially assembled bicycles, instructions on assembly must be included to ensure the assembled bicycle conforms with the standard. For maintenance and adjustments

beyond the capability of the consumer, advice on where such service can be obtained must also be supplied.

Example

A trader had been warned by the Commission to improve its checking systems after 9 out of 16 bikes inspected at one shop did not appear to comply with the bicycle safety standard. Three weeks later Commission investigators bought three bikes at different stores of the same trader. All three were tested and all failed the bicycle safety standard. The trader was fined \$25,000.

Want more information?

Reference material:

- the Commission's publication, Safety Standards for Bicycles: A Guide for Manufacturers, Importers and Retailers
- the Product Safety Standards (Pedal Bicycles) Regulations 1991 in conjunction with AS 1927 - 1989

Children's night clothes safety standard

The Children's Night Clothes (Product Safety Standard) Regulations 1990 apply to all businesses involved in the manufacture, distribution and sale of children's night wear.

The standard is designed to protect children from the dangers of wearing flammable, loose fitting or flowing garments around fires or heaters.

The standard defines children's night clothes as any garments suitable for night wear for children aged between six months and 14 years.

This definition includes:

- pyjamas and pyjama-style over-garments,
- sleep suits;
- night dresses and night shirts; dressing gowns; bathrobes;
- infants' sleeping bags; infants' "stretch and grows".

The definition is not exclusive. Garments, which may be used as nightwear should conform to the standard, even if they were not designed for that use.

All garments covered by the standard must have warning labels permanently attached and clearly visible. If the garment consists of two or more pieces, such as pyjamas, then both pieces must be labelled.

Nightwear must be made in a form-fitting style if it is not made of low fire danger fabric.

Category 1 garments (made from low fire danger fabrics) must be labelled:

**LOW FIRE DANGER
FABRIC
NZS 8705**

The words must be in upper case, medium width characters not less than 3mm high, printed in black on an orange background. The colour must be 557 Light Orange as specified in NZS 7702, or a close approximation.

Category 2 garments (form-fitting styles not made of low fire danger fabric) must be labelled:

**WARNING:
FLAMMABLE FABRIC
STYLED TO REDUCE
FIRE DANGER
SNZS 8705**

The words must be in upper case, with "**WARNING: FLAMMABLE FABRIC**" printed in bold characters not less than 3mm high, and the other words in medium width characters not less than 3mm high. The words must be printed in black on a red background. The colour must be 537 Signal Red as specified in NZS 7702, or a close approximation.

Example

A trader had a range of nightgowns and pyjamas, which were labelled as low fire danger fabric. This was not the case. The trader was told by the Commission that the night clothes had failed the flammability tests and agreed to tighten its quality controls. However, one month later a romper suit being sold in the nightwear section of the shop was purchased which had no fire warning label sewn into it. The company was convicted and fined \$6,500 plus costs of \$1,295.

Want more information?

Reference material:

- the Commission's brochure, Safety of Children's Nightclothes
- the Children's Nightclothes (Product Safety Standard) Regulations 1990 in conjunction with NZS 8705 1989 and NZS 8704 1989

Toy safety standard

All businesses involved in the manufacture, distribution and retail of toys for children under three must comply with Product Safety Standards (Children's Toys) Regulations 1992.

This covers the sale, exchange, lease, hire and hire purchase of toys, as well as "giveaways", such as toys given away as prizes at side-show stalls and toys in breakfast cereal packets. Private sales of second-hand toys are not covered.

The safety standard states toys should not:

- be of a size that creates a hazard if swallowed or inhaled
- have small parts designed to be removed from the toy that create a hazard if swallowed or inhaled
- have pieces that can break off in normal use or during reasonably foreseeable abuse that create a hazard if swallowed or inhaled.

The standard refers to a cylinder for measuring whether toys or toy parts are too small. If a toy, or a part of a toy, can fit completely into the cylinder, then it is too small and does not meet the standard. Generally, anything smaller than a 35mm film canister will not meet the standard.

Measuring cylinders are available free of charge from the Commission.

The standard also sets out in detail tests designed to simulate "use and reasonable abuse" of toys by children and to discover if any small parts will break off and become a hazard if swallowed or inhaled.

The safety standard applies to children under three years old because up to that age children do not have a coughing reflex when they choke. If they swallow or inhale an object which sticks in their throat, they do not cough and must be helped or they can choke to death.

The safety standard excludes the following things:

- balloons, marbles and records;
- books and other articles made of paper;
- writing materials including crayons, chalk, pencils and pens;
- finger paints, water colour paints and other paints;
- modelling materials, including clay, plasticine and play-dough;
- flotation aid toys;
- bicycles having a wheelbase of not less than 640mm;
- toys that are made wholly from highly porous fabric material such as cheese-cloth;
- playground equipment for park, school and domestic use, including swings, see-saws, slides, agility apparatus, climbing, swinging, rotating and rocking apparatus, play houses, sand pits, apparatus for use in sand, sliding poles and ladders;
- goods supplied in a kitset or partially assembled state for later assembly by an adult, provided that when assembled (according to written instructions supplied with the goods) the goods comply with the standard.

Examples

A toy manufacturer was prosecuted for supplying toy wooden puzzles for children under three years, which had pieces that were an ingestion or inhalation hazard. About 2,500 toys were supplied, and although the manufacturer undertook a product recall resulting in the return of about 1,000 puzzles and pleaded guilty, it was fined \$15,000 with costs totalling \$3,000.

A supermarket sold a baby rattle which did not meet the toy safety standard. The company said it relied on its supplier to ensure the toys met the safety standard and said this was common practice in the industry. This was rejected by the court. The company was convicted and fined \$8,500 plus costs of \$2,055. In setting the fine the Judge took into account the cost of recalling the rattles and the adverse publicity from the recall.

Want more information?

Reference material:

- the Commission's publication *Safety Standards for Toys: A Guide for Importers, Manufacturers and Retailers*
- the Product Safety Standards (Children's Toys) Regulations 1992 in conjunction with NZS 5822 1992

Unsafe goods notices

Importing, supplying or advertising goods declared by the Minister of Consumer Affairs to be unsafe is an offence under the Fair Trading Act. The Minister may declare any goods unsafe where it appears they may cause injury. "Ninja Pistol Crossbows" have, for example, been prohibited from sale as a potentially lethal weapon sold as a toy.