FACT SHEET

The Fair Trading Act

Pricing

This fact sheet provides an overview of the types of pricing techniques a business might use when promoting goods or services. It is designed to give both businesses and consumers an understanding of how the Fair Trading Act applies to pricing.

Businesses use a wide range of pricing techniques to market their goods and services. This can include offering savings and special offers, running sales promotions, making price comparisons with competitors and providing quotes or estimates to potential customers. These are all common and legitimate techniques.

But businesses must take care that consumers aren't misled or deceived. The Fair Trading Act covers all aspects of the promotion and sale of goods and services, and this includes pricing. Any representations a business makes about price must be clear, accurate and unambiguous.

Discounts

Businesses often discount goods and services and advertise the savings consumers can make by buying at the discounted price. A common technique is to compare the discounted price with the non-sale price of the good or service (often expressed as the "usual", "was", "normal" or "everyday" price) to highlight the bargain.

The 'usual', 'was', 'normal' or 'everyday' price all mean the same thing – they are a reference to the price at which a good or service is usually sold, or the price at which the good or service was offered before it was marked down.

A business that makes these types of claims might mislead consumers if:

- it has never charged the "usual" price
- it has a strategy of deliberately inflating the usual price of goods or services, knowing it will lead to no or few sales, so the business can attract customers by subsequently offering the goods or services at a discounted price
- the claimed usual price is one of many prices at which the business commonly sells the good or service

or

- the claimed usual price is out of date, in that the business no longer commonly sells the good or service at that price and it has been superseded by another price or prices.

A usual price will become out of date if it has not been charged for a reasonable period of time. There is no one-size-fits-all rule for when a usual price will become out of date – this will depend on a number of things such as what the good or service is and the market in which it is being sold. It is therefore important that businesses, particularly those who frequently discount their goods and services, take real care when claiming discounts off a usual price.

If a business continually sells products at a promotional price then the promotional price becomes the usual selling price. It would be misleading for a business to continue to claim it was discounting a price when that price had become the usual selling price.

EXAMPLES

A nationwide supermarket chain claimed customers could save "at least 20%" or "at least 25%" off all beer in a special promotion. However, it had been 32 weeks since the shelf price had been displayed for some products and the claimed saving of 20% off was misleading as the product had been sold at a lower price for that period. The Commission issued the company with a warning.

A camping and outdoor gear retailer advertised various items of clothing as being available at a discount of up to 50-60% off normal retail price during their nationwide sales. However, some of these items had already been available in store at this reduced price and, in some cases, were also available at the same "sale" price afterwards. The retailer was convicted and fined.

Any representations a business makes about price must be clear, accurate and unambiguous.

Businesses must also be very clear when making comparisons with earlier prices if they have been charging a lower price in the meantime. For example, if a business advertises a product as "was $15 now reduced to $10", but has more recently offered the product for $12, the "was" price may be misleading, even if the business previously sold the product at $15. This is because the actual saving is only $2 not $5. The business could instead advertise "originally $15, previously $12, now $10".

Likewise, an introductory special should be a genuine, short-term offer to sell an item for a lower price than the usual price. A business must genuinely intend to increase the price to the usual selling price once the introductory special period has finished. An introductory offer will be misleading if it continues beyond a period that the average consumer would consider to be introductory.

Recommended retail price

A recommended retail price (RRP) is the price a manufacturer suggests a retailer sell a good at, to try and standardise prices across locations. However, a retailer is under no legal obligation to sell a good at the RRP and will often sell below the RRP. Under the Commerce Act, it is illegal for a supplier of goods to enforce, or try to enforce, a minimum price at which a retailer must sell those goods.

You can read more in our fact sheet *Resale Price Maintenance* at **www.comcom.govt.nz/resale-price-maintenance-fact-sheet**

When consumers see an advertisement that compares an RRP with the price the good is available for sale, they may assume that if they buy the good they will be making a saving off the price they would otherwise pay for the good.

Because of this consumer perception, it may be misleading for a retailer to make a comparison with an RRP unless it is the genuine manufacturer's RRP and reflects a price at which the item is readily available in the local market or online.

EXAMPLE

An appliance retailer advertised a number of sales over a period of four months. Each good advertised had a stated recommended retail price, with the retailer's "sale" price which was significantly cheaper, and the percentage saving. The recommended retail prices were not the retailer's normal selling price; in fact the sale price was the normal selling price. The company was convicted and fined.

Comparisons with competitors

If a business compares its prices with a competitor's (for example, "Elsewhere $X, our price $Y"), the goods or services compared should be exactly the same, not just similar.

The business should also be able to identify where its customers can purchase those goods or services at that price. If those customers cannot readily purchase the competitor's good or service at the "elsewhere" price (such as from a nearby store or online), then the comparison is likely to be misleading. If a business is making a comparison with goods offered by a nearby store, for example, the two stores must be close enough to be in genuine competition with each other. In other words, the average consumer would travel to either store to buy the advertised good, depending on where they got the best deal. The distance consumers will travel will vary depending on the good being sold – people may be willing to travel further for a stereo system than they would for a packet of Easter eggs.

Businesses that advertise "elsewhere" prices in nationally distributed flyers, need to be sure that the "elsewhere" or "was" prices are valid for all the areas the flyers are delivered to. A business would mislead consumers if it used an "elsewhere" or "was" price in a flyer that didn't accurately represent the savings in the local area where the flyer was distributed.

EXAMPLE

A leather furniture retailer incorrectly claimed its leather lounge suites on sale for $3,000 were sold by other retailers for $6,000. The Commission's investigation found that the more expensive leather lounge suites sold by other retailers were better quality. The company was convicted and fined.

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Another type of price comparison businesses make is "lowest price" claims. These claims give consumers the impression that either:

- each product the business is selling is at a lower price than its competitors

or

- across its product range, the business' prices are generally lower than its competitors.

Consumers may be misled if either or both of these impressions is inaccurate.

If special conditions apply to lowest price claims, such as that a customer has to prove a product is available cheaper elsewhere to get the lowest price, those conditions must be clearly disclosed and not substantially alter the impression given to consumers.

You can read more in our fact sheet *Fine Print* at **www.comcom.govt.nz/fine-print**

EXAMPLE

A hardware store made lowest price representations in a range of advertising, giving the impression that everything it was selling was cheaper than its competitors. A Commission investigation found this wasn't the case for a number of products, and that the lowest price representations were only correct if certain conditions were met, which wasn't clearly disclosed in the advertising. The Commission issued the company with a warning.

Sales

In the mind of the ordinary consumer, the word "sale" means an opportunity to buy goods at reduced prices for a limited time.

There are many different types of sales. All sales, however, imply that a lower price than usual is being charged. Any goods or services a business promotes as part of a sale must be priced below normal levels. If a sale does not include stock already on sale or discounted, then this must be clearly disclosed. Likewise, unless a business clearly discloses that a sale is limited to certain products, consumers are likely to consider that most, if not all, of the business' stock is being offered at sale prices.

Businesses should also take care when promoting goods ordered specifically as sale stock. A business should not promote these goods using "was/now" prices, as they have not been sold prior to the sale.

Businesses must also be able to prove that how they have described a sale is truthful. "Liquidation" or "receivership" sales imply that the business running the sale is closing down.

If a business advertises a "closing down" sale, with no intention of closing, it will breach the Fair Trading Act.

EXAMPLE

A bicycle retailer advertised closing down sales at two of its stores but had no plans to close down either store. The retailer brought in extra stock for the sales and kept the sales running for several months. The Commission issued the company with a warning.

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A sale represents a special buying opportunity and consumers often change their ordinary shopping habits to take advantage of such an opportunity. A sale must be for a short duration and only for the period stated, unless unforeseen circumstances lead to the sale being extended or shortened. If a business advertises a sale as "last three days of the sale" for several weeks, consumers would be misled about the opportunity available to them.

Special offers

Businesses advertising "special offers" or "specials" must be offering something genuinely special – such as lower prices or additional features – or they risk misleading consumers.

Businesses may also mislead consumers if they advertise a special offer widely but only a few people are able to take it up. A business must clearly state any limitations or qualifications to a special offer, such as if:

- the offer only applies to cash purchases
- there are limits on the number of items per customer
- it applies only to purchases over a minimum value
- there is limited stock available
- the offer is only for a limited time.

Stating that "special conditions apply" will not protect a business when the conditions contradict the offer.

You can read more in our fact sheet *Fine Print* at **www.comcom.govt.nz/fine-print**

Price displays

Businesses must price goods clearly to make sure consumers are not misled. When a customer sees a price sticker on a good or a shelf price, it is reasonable for them to expect that that is the price they will be charged at the checkout.

A business that displays prices which are lower than the actual price at which they are selling goods or services is misleading consumers about the true cost of goods.

EXAMPLE

A supermarket charged higher prices for certain fruit and vegetables at the checkout than at their point of display. The supermarket was convicted and fined.

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Consumers are also likely to be misled if the displayed price is not expressed in New Zealand dollars. For example, a business that has New Zealand and Australian operations must ensure that the goods it sells in New Zealand are priced in New Zealand dollars.

Price ranges

Businesses must be careful not to mislead consumers when they advertise a range of prices. Claiming goods are on sale "from $9.99" or have "up to $50 off", when only a small proportion of the items are on sale at $9.99 or have $50 off, is literally true, but still potentially misleading. Consumers might believe the promotion is more attractive than it actually is.

In these situations, a business should give as much detail as possible, for example, "$10 off men's T-shirts, $20 off summer skirts". If there is not enough space to list individual prices, a business should give the most common saving, for example, "up to 50% off, most items 30% off".

Businesses should keep promotional material up to date to reflect changes in price ranges.

Price ranges are commonly used in property advertising to indicate the range in which the vendor is likely to accept an offer. While "price-banding" or price range representations can be a useful practice if done accurately, vendors and real estate agents need to take care not to mislead potential buyers.

Where price ranges are used in property advertising, a vendor must be prepared to seriously consider offers made at the bottom of the advertised price range.

A property advertisement must not use a misleading low price to attract potential buyers to a property they might not have otherwise considered and is not a price the vendor would consider selling for at the time of the advertisement.

EXAMPLE

A real estate agent advertised a property for sale on three separate occasions at "buyer enquiry over $380,000". However the agent was aware that the vendor was not willing to accept less than $400,000 for the property. The real estate company was convicted and fined.

Quotes and estimates

Businesses must not mislead potential customers when giving quotes and estimates. Consumers must be able to rely on a quote or estimate as it is on this basis that they decide whether to purchase the goods or services.

A quote is an offer to do a job for a certain price. If accepted, then there is a contract for the work to be done for that price, unless the parties agree to a change in the price to cover extra work not covered by the original quote.

An estimate is the nearest price, or range of prices, that a business can give based on past experience.

If there may be any significant variation from the estimated price, the business should make this, and the nature of the possible variation, very clear to the customer. All limits and conditions must be clearly spelled out. The business must make the estimate honestly, based on reasonable grounds.

It is good business practice to put quotes and estimates in writing, however, the Fair Trading Act makes no distinction between an oral or written quote or estimate.

A business must disclose any charge for giving a quote or estimate before agreeing to provide it and quotes or estimates should be inclusive of GST.

EXAMPLE

A septic tank cleaning company misled customers as to why final invoices for completed work were considerably higher than the original quote, in some cases up to 300% more. Reasons given for the increase were in some cases untrue or did not justify the significantly higher cost. The company and its director were convicted and fined.

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Reasons for price changes

Any representations a business makes about why the prices of its goods or services have changed should be accurate. Businesses should not attribute price increases for which they are either wholly or even partly responsible to other organisations such as regulators or their supplier.

Such practices are illegal under the Fair Trading Act because it is important that consumers are aware of the correct reasons for any price changes so that they can make informed purchasing decisions.

EXAMPLE

Several electricity companies incorrectly implied to their customers that increases in electricity prices were caused by increases in network charges for the use of electricity lines. In settlements with the Commission, the companies admitted they had breached the Fair Trading Act, advised the affected customers of the correct reasons for the price increases and, in some cases, paid compensation.

Practical tips for businesses using price to promote goods or services

- Make sure any conditions that apply to special offers are clearly disclosed and don't substantially change the offer.
- Don't refer to a "usual" price when discounting if it isn't what you commonly sell the good or service for or have most recently sold it for.
- Don't inflate your "usual" price to exaggerate the discounts available.
- If you're running a sale, make sure you describe it accurately and that it only runs for a limited period of time. Any "special" price that continues for longer than a short duration of the sale will become the regular or usual selling price.
- Don't compare your goods or services with competitors unless those goods or services are exactly the same.
- Only use an RRP as a comparison if it's the genuine manufacturer's RRP and is what the item is commonly sold for in the local market or online.
- Make sure any price displays or price stickers on goods or services are consistent with what you're charging customers at the checkout.
- Don't exaggerate the savings customers can make in a sale – if there are a range of savings on offer, or only some goods on sale, make this clear.
- If you're providing an estimate to a customer, make sure you clearly describe anything that might significantly change the price.
- Don't blame others for price increases that you're responsible for.

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