

10 December 2020

[REDACTED] The Warehouse Group
Noel Leeming Group Limited
BDO Spicers
Level 4, 4 Graham Street,
Auckland 1010

By email only: [REDACTED]
Copy to: [REDACTED]

Dear [REDACTED],

Fair Trading Act 1986: Warning for accepting payment without reasonable grounds and/or unsubstantiated delivery representations

1. The Commerce Commission (**Commission**) has been investigating Noel Leeming Group Limited (**NLG**) under the Fair Trading Act 1986 (**FTA**). We have now completed our investigation and are writing to inform you about our views.
2. The Commission considers that NLG is likely to have breached sections 12A and/or 21(c) of the FTA by:
 - 2.1 making delivery representations, in connection with the supply or possible supply of particular goods (Amazon Kindle and DJI Control Cable), which it did not have reasonable grounds for; and/or
 - 2.2 accepting payment for these goods when, at the time of acceptance, it did not have reasonable grounds to believe it could deliver the goods within a reasonable time.
3. We have decided in this instance to issue NLG with a warning regarding this conduct. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.¹

¹ Commission's published *Enforcement Response Guidelines* at [41].

4. However, we recommend that you take action to address our concerns so that, if similar circumstances should arise in future, NLG can be confident that its processes are robust and that consumers can rely on information provided to them.

Background to the investigation

5. On 25 March 2020, New Zealand entered Alert Level 4. For the duration of Alert Level 4 to 28 April 2020, only essential businesses were permitted to operate. NLG closed its stores and ceased online sales at midnight on Tuesday 25 March. It recommenced online trading at 7.30pm on Tuesday 31 March, offering household and electronic products deemed to be essential.
6. From early April 2020, the Commission started to receive a significant number of enquiries about NLG. The enquiries were from consumers who had not received products within the delivery timeframes NLG had represented, were experiencing difficulties in contacting NLG to discuss the delivery delays and were not receiving a refund for delayed deliveries, when requested.
7. On 20 April, the Commission contacted NLG about the increasing number of enquiries, at that stage around thirty. Consumers continued to contact the Commission throughout June 2020, typically with concerns arising from orders placed on NLG's website during Alert Level 3 or 4.
8. As at 30 September 2020, the Commission had received approximately 100 enquiries in total.

Conduct investigated

9. During our investigation, we focussed on a sample of eleven enquiries relating to seven individual products. The Commission also requested information on two further products identified through online advertising history. The information was requested in order for the Commission to assess whether at the time NLG sold the products it had reasonable grounds for making the representations and/or accepting payment for the products. From these, we identified the following evidence:
 - 9.1 Between 2 and 4 April 2020, NLG had accepted orders for 70 Amazon Kindles which it had in stock but were unavailable to be distributed during Alert Level 4 to fulfil online orders. On 5 and 6 April 2020, NLG accepted payment for 37 "Amazon Kindle 4GB 2019" products which were described as "*Approved essential items – will be shipped during lockdown period*". At this time, NLG had no remaining stock to fulfil these orders. NLG removed this product from sale on 6 April, it then informed its customers of the situation and offered a refund on 16 April.
 - 9.2 On 30 May 2020, NLG accepted payment for a "DJI Ronin-SC Control Cable" product advertised with a 1-2 week expected delivery representation. At this time, NLG did not hold any stock of this product; it relied on a long-standing agreement with its supplier to hold sufficient stock or to advise otherwise. NLG did not seek additional assurance from its supplier during this period of

disruption to delivery services domestically and internationally, and did not contact its supplier after accepting the order or when the expected delivery timeframe was not met; and

- 9.3 On 26 June and 2 July 2020 NLG continued to advertise the same DJI Cable product with a 1-2 week delivery representation, despite having an overdue existing order and having been contacted by the customer concerned about the delay. From 14 June (when the initial order timeframe was not met) NLG did not take any steps to establish with its supplier the reasons for delay, availability of the product or expected delivery timeframe.

The relevant Law

10. Section 12A of the FTA prohibits the making of unsubstantiated representations, i.e. where the person making the representation does not have reasonable grounds.
11. Section 21(c) of the FTA prohibits the acceptance of payment for goods unless that person has reasonable grounds to believe that they will be able to supply the goods within a specified time or, if not specified, a reasonable time.

NLG's response

12. NLG has fully co-operated with the Commission's investigation. It has supplied information requested and staff have attended a voluntary interview.
13. NLG has highlighted a number of extenuating circumstances which provide some context to the level of enquiries received by the Commission and to the conduct identified:
- 13.1 NLG, like other businesses operating during Alert Levels 3 and 4, was required to meet the challenge of remote working and staffing;
- 13.2 NLG encountered an unprecedented level of demand during this time. It sold 62,075 products in the first week of online lockdown trading, 58,015 more than the equivalent week a year prior.
- 13.3 Delivery services were significantly impacted during this time as a result of both significantly increased demand, and the logistical and staffing challenges associated with lockdown.

The Commission's view

14. In this case, and having fully considered the relevant information received, the Commission's view is that NLG's conduct is likely to have breached the FTA.
15. The Commission considers that:
- 15.1 In respect of the Amazon Kindle 4GB, NLG did not have reasonable grounds to believe it could deliver the products during the specified time or a reasonable time because, notwithstanding the initial stock allocation error, it had

insufficient stock to fulfil the further 37 orders which it accepted. That is likely to have breached s12A and/or s21 of the FTA; and

- 15.2 In respect of the DJI Cable, NLG relied entirely on its past relationship and supply history with its supplier to provide stock within the specified timeframe. The Commission considers that this may have been unreasonable (particularly so during a period of acknowledged disruption to delivery services domestically and internationally). In our view, the delivery representations made on 26 June and 2 July 2020 were not made on reasonable grounds because they were made in the knowledge that an existing order was outstanding, and no steps had been taken to determine the cause of the delay. That is likely to have breached s12A and/or s21 of the FTA.

Warning

16. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.
17. The nature of the “essential” goods being sold at this time meant that the scope for consumer harm through failure to deliver was high. During Alert Level 4, consumers were unable to visit stores to pick-up goods and had a reduced ability to shop around for available or alternative products. Consumers were, therefore, heavily reliant on representations about availability and delivery times.
18. The Commission does acknowledge that NLG encountered an unprecedented level of demand during Alert Levels 3 and 4; supply and delivery services were significantly impacted during this time; and all businesses were faced with logistical and staffing challenges associated with Alert Level 4 restrictions.
19. However, the decision to re-open online on 31 March 2020 was a voluntary, commercial decision. NLG should have taken a more cautious approach to the representations it made about product availability and delivery timeframes at this time.
20. This warning represents our opinion that NLG is likely to have breached the FTA and that legal action remains available to the Commission in future if the conduct continues or is repeated.
21. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against NLG.
22. This warning letter is public information and will be published on the case register on our website. We will be making public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

23. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. The FTA prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the FTA

24. As indicated above only the courts can decide if there has actually been a breach of the FTA. The court can impose penalties where it finds the law has been broken. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000 per offence.
25. You should be aware that our decision to issue this warning letter does not prevent the Commission from taking action in the future, or any other person or entity from taking private action through the courts.

Further information

26. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
27. We have published a series of fact sheets and other resources to help businesses comply with the FTA and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
28. You can also view the FTA and other legislation at www.legislation.co.nz.
29. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



Kirsten Mannix

Wellington Consumer Manager