

21 May 2018

Apple Sales New Zealand
c/o Simpson Grierson
88 Shortland Street
Auckland Central 1010

For the attention of: [REDACTED]

By email only: [REDACTED]

Dear Mr [REDACTED]

Fair Trading Act 1986: Warning

1. The Commerce Commission (**Commission**) has been investigating Apple Sales New Zealand (**Apple**) under the Fair Trading Act 1986 (the **FTA**). We have now completed our investigation and are writing to you about our concerns.
2. In summary, the Commission considers that Apple is likely to have breached the FTA by making misleading representations to consumers about:
 - 2.1 the existence, exclusion, or effect of any guarantee, right or remedy available under the Consumer Guarantees Act 1993 (the **CGA**); and
 - 2.2 the nature of the products supplied to consumers as replacements for faulty Apple products.
3. If this behaviour is continuing, we recommend that you take immediate action to address our concerns and seek legal advice about complying with the FTA.

The scope of our investigation

4. We have investigated complaints from consumers about statements made to them by Apple when seeking a remedy for faulty Apple products.
5. We have also considered information on Apple's website, in its sales and refund terms and conditions for Apple Store purchases (**online terms and conditions**), and on the documents provided with replacement Apple products to consumers.
6. Apple has cooperated with the Commission throughout the investigation by providing information, including about its repair and replacement processes for faulty products, and attending an interview with Commission staff.

The Commission's view

7. During our investigation we obtained evidence that has, in our view, established that Apple made representations that are likely to have breached sections 13(i) and 13(d) of the FTA.
8. After considering the factors set out in our Enforcement Response Guidelines¹, we have decided to issue this warning letter to assist Apple in meeting its statutory obligations.
9. Further explanation of the conduct we have investigated and our view on the representations are set out below.

Misleading representations about the existence, exclusion, or effect of any guarantee, right or remedy available under the CGA

10. Section 13(i) of the FTA prohibits a person in trade from making false or misleading representations concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including in relation to any guarantee, right, or remedy available under the CGA.

Representations that Consumer Law Coverage is limited to a period of two years from purchase

11. We have obtained evidence concerning instances where Apple has told consumers that products are only covered by New Zealand consumer law for a period of two years. When Apple discusses 'New Zealand consumer law' we understand it is referring to the statutory guarantees provided, and remedies available, to consumers under the CGA.
12. In our view, a representation that the CGA guarantees are provided for a set period of 2 years after the date a product is purchased is misleading.
13. We consider the representation misleading because when a good is supplied to a consumer it comes with a statutory guarantee that it is of an acceptable quality. How long the item would normally be expected to last based, on its type and cost, any statements made about the good, and how the product is used by the consumer, is part of assessing whether it is of acceptable quality. The period of time an item is expected to last (ie. its durability) will likely vary from good to good.
14. The Commission acknowledges that traders may internally assess how long it reasonably expects each of its products to last and, therefore, the likely length of time during which consumers may have legitimate CGA claims.

¹ Available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

15. However, traders must not make representations that mislead consumers into believing that the CGA has a legally defined term of, in this case 2 years from the date of purchase. Implying a statutory timeframe may have the effect of deterring consumers from exercising their statutory right to challenge Apple's application of the CGA through the Disputes Tribunal.

Representations about Apple's liability under the CGA

16. We have reached the view that Apple's online terms and conditions contain provisions that are likely to mislead consumers about their rights under the CGA. Specifically the provisions in which Apple purports to exclude or limit its liability for defective products.
17. In our view, it is not sufficient for Apple to include a general condition in its online terms and conditions stating that conditions do not apply if they are inconsistent with the CGA. This general condition is discussed further at paragraphs 26 - 28.

Conditions 16.2 and 23 relating to non-Apple branded products

18. Two of the provisions we have concerns with are conditions 16.2 and 23 which state:

"Condition 16.2:

If you discover what you believe is a product defect for any third-party product, please contact the manufacturer directly for information regarding the manufacturer's warranty.

Products sold through this web site that do not bear the Apple brand name are serviced and supported exclusively by their manufacturers in accordance with terms and conditions packaged with the products.

Condition 23:

"Non-Apple-branded/Third-party products are sold "AS IS" by the Apple Store, but may be accompanied by their manufacturers' standard warranties. "AS IS" products are sold by Apple as is, where is and with all faults, and without express or implied warranties from Apple."

19. We consider that Apple is likely to be misleading consumers by trying to exclude its liability for non-Apple branded products. Under the CGA when a consumer purchases a product ordinarily bought for personal, domestic or household use from a supplier it comes with a series of guarantees set out in the CGA. The guarantees do not need to be in writing and if they are not, they are implied into the sale contract.
20. Apple is the supplier of all of the products it sells on its website. If a guarantee is not met and, if requested by the consumer, Apple as the supplier is obliged under the CGA to provide a remedy for the defective product. It cannot seek to avoid its responsibilities under the CGA by referring the consumer to the manufacturer to remedy.

21. The guarantees provided in the CGA to a consumer by a supplier are separate from those provided to the consumer by the manufacturer of the product under a manufacturer's warranty. Consumers can seek a remedy from the supplier who sold them the goods under the CGA whether or not they also seek a remedy under the CGA from the manufacturer and/or if the manufacturer's warranty still applies.
22. By making representations to consumers that the manufacturer and not Apple is liable for defective non-Apple branded products, Apple is likely to have breached section 13(i) of the FTA.

Excluding warranties implied by statute and consequential loss

23. We also have concerns with condition 24 of the online terms and conditions where we consider Apple is likely to be misleading consumers by attempting to exclude warranties implied by statute and limiting its liability for consequential loss. Condition 24 states:
 - 24.1 Subject to Condition 24.2, these terms and conditions set out the full extent of our obligations and liabilities in respect of the supply of the Products and performance of the Services and **there are no warranties, conditions or other terms that are binding on us except as expressly stated in the Contract. Subject to Condition 24.2, any warranty, condition or other term concerning the Products or Services which might otherwise be implied into or incorporated in the Contract by statute, common law or otherwise (including without limitation any implied term as to quality or fitness for purpose) is hereby expressly excluded.**
 - 24.2 Subject to Condition 24.6, nothing in the Contract excludes, restricts or modifies any condition, warranty, right or liability implied into this Contract (including any condition, warranty, right or liability imposed by the Consumer Guarantees Act 1993) where to do so is illegal or would render any provision of this Contract void.
 - 24.3. Nothing in the Contract shall limit or exclude our liability for death or personal injury caused by our negligence.
 - 24.4. **Subject to Conditions 24.2 and 24.3, we will not be liable under the Contract for any loss of income, loss of profits, loss of contracts, loss of data or for any indirect or consequential loss or damage of any kind howsoever arising and whether caused by tort (including negligence), breach of contract or otherwise.**
 - 24.5 Subject to Conditions 25.2, 25.3 and 25.4, **our maximum aggregate liability under the Contract** whether in contract, tort (including negligence) or otherwise **shall in no circumstances exceed the amount payable by you to us in respect of the Product(s) in question.**
 - 24.6 If you are a consumer (as defined in the Consumer Guarantees Act 1993):
 - (a) and you are acquiring or holding yourself out as acquiring the Products or Services for a business purpose, the Consumer Guarantees Act 1993 will not apply; and

(b) we do not guarantee that repair facilities and spare parts for the Products will be available.”

24. We consider condition 24 likely to be misleading because it states that Apple is not liable for any indirect or consequential losses, and limits Apple’s liability to the amount payable for the products for direct losses the consumer incurs. In our view the provisions are misleading because, under the CGA, consumers can recover from the supplier costs that were reasonably foreseeable as a result of a good’s failure. Compensation of that kind is not capped at a particular amount of money.
25. Apple is also likely to be breaching the FTA by excluding, at condition 24.1, any warranty, condition or other term which might otherwise be implied into or incorporated in the sales contract by statute because traders cannot contract out of the CGA. Section 43(4) of the CGA deems any attempt to do so (other than in the limited circumstance provided for in that Act) a breach of section 13(i) of the FTA.
26. Conditions 24.1, 24.4 and 24.5 state they are “subject to condition 24.2”. Condition 24.2 is a general provision in which Apple seeks to qualify the provisions where Apple limits its liability. Condition 24.2 provides that nothing in the contract excludes, restricts or modifies any condition, warranty, right or liability implied into the contract (including any condition, warranty, right or liability imposed by the Consumer Guarantees Act 1993) where to do so is illegal or would render any provision of the contract void.
27. The Commission’s view is that this general provision is not sufficiently clear to qualify the representations in condition 24 that conflict with the provisions of the CGA.
28. We consider that many consumers do not have the level of legal expertise required to correctly interpret these terms and understand what rights they have at law, when there are provisions in the contract that conflict with statutory rights.
29. We recommend that Apple consider amendments to its online terms and conditions to make it clear that consumers have statutory protections that cannot be excluded and state what those consumer rights are. We acknowledge that Apple has a page on its website titled “consumer law” but this is not currently cross referenced or referred to in the online terms and conditions.

Representation that a consumer must accept a defined number of replacement goods before Apple will consider providing an alternative remedy

30. We obtained a statement from a consumer who requested redress from Apple after three iPhone 6 Plus’s had failed in three different ways. He was told by an Apple representative that Apple had a policy of providing four replacements before it would look at an alternative remedy.
31. The CGA contains no requirement for a number of faults to occur before a remedy is offered. The relevant assessment is whether or not the failure can be remedied or is of a substantial character. Apple is likely to have breached section 13(i) of the FTA by

telling the consumer that four replacement devices must be provided before Apple would consider an alternative remedy.

Representations about the availability of spare parts and repair facilities

32. The CGA provides that unless reasonable action is taken to notify consumers otherwise, there is a guarantee that the manufacturer will take reasonable action to ensure spare parts and repair facilities will be reasonably available to consumers for a reasonable time after the goods are supplied.
33. Apple states at 24.6(b) of its online terms and conditions that it does not guarantee the availability of spare parts and repair facilities. However, Apple's website states:

"For Apple- branded goods... we also guarantee that we will take reasonable action to ensure that facilities for repairs and spare parts are reasonably available for a reasonable time..."
34. The products Apple sells are expensive items and it is not uncommon for electronic items to experience faults and damage. In our view, this increases the importance of having spare parts and repair facilities, or being clear about the processes for the return and remedy of faulty goods.
35. We consider that the conflicting information on Apple's website is likely to breach section 13(i) of the Act because it is not clear to consumers whether Apple is contracting out of its obligations to guarantee spare parts and repair facilities or not.
36. If Apple decides to do that, it would need to make a clear statement to potential purchasers, at or prior to their decision to purchase, that repair facilities and parts would not be available. Consumers could then take that factor into account in their purchasing decision.

Misleading representations about the nature of replacement goods provided by Apple

37. We consider that Apple is likely to have breached the FTA by making misleading representations to consumers that replacement products for faulty Apple products are new products, when they were in fact remanufactured products.
38. Section 13(d) of the FTA prohibits persons in trade from making misleading representations that goods are new or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time.
39. We understand that when Apple has provided products to replace faulty Apple products, that in most instances the replacement products had been remanufactured products.
40. Apple has explained to us that remanufactured goods comprise a mixture of new, second-hand and repaired components. The parts that can be used in a remanufactured product are first tested and, if they pass, placed into the assembly

line for remanufactured products. Each remanufactured product is individually tested and then given a new Apple serial number.

41. By way of example, we obtained a statement from a consumer who stated:

“The staff member ‘said to me that I would get a new phone. She said when the new phone arrives, we will call you’. A week later he was contacted and told, ‘we have your new phone here; come and pick it up.”
42. From the evidence we have obtained these representations were made orally, by Apple’s staff or those employed by Apple Authorised Service Providers.
43. In our view, consumers are likely to interpret the term “new”, when used to describe goods, as indicating that the goods are newly manufactured (ie the same products that they would purchase new from a retail store) and not that they have been remanufactured. We recommend that Apple is more explicit to its customers about the fact that the replacement products are remanufactured.
44. In our view, Apple’s representation that goods are new, in circumstances where the goods were remanufactured, is likely to breach section 13(d) of the FTA.

Additional information

45. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
46. While we will not be taking any further action against Apple at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Apple for similar or related conduct.
47. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission’s role

48. 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 Fair Trading Act

49. 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.

50. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

51. We have published a series of fact sheets and other resources to help businesses comply with the Act 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 FTA.
52. You can also view the FTA and other legislation at www.legislation.co.nz.
53. Thank you for your assistance with this investigation. Please contact Zeb Walker on 04 924 3635 or by email at zeb.walker@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Kirsten Mannix
Consumer Manager Wellington