

5 September 2022

Occasion Box Limited

For the attention of: [REDACTED],
Director

By email only: [REDACTED]

Dear [REDACTED]

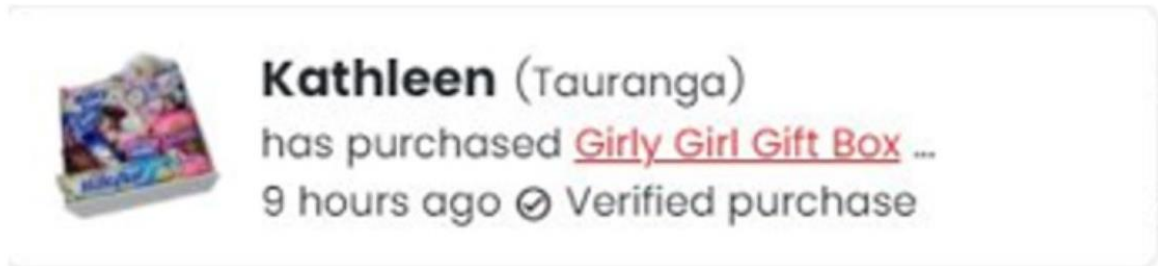
Fair Trading Act 1986: Warning for false Sales-Pop notifications

1. As you are aware, the Commerce Commission (**Commission**) has been investigating Occasion Box Limited (**Occasion Box**) under the Fair Trading Act 1986 (**FT Act**) regarding pop-up representations that consumers had purchased goods from <https://www.occasionbox.co.nz> (**the website**).
2. We have now completed our investigation and are writing to inform Occasion Box of our concerns.
3. The conduct that the Commission has been investigating relates to the display of false information on the website. Namely, statements that many (fictitious) consumers from various locations around New Zealand had purchased goods from its website (**Sales-Pops**). The Commission considers that Occasion Box displayed false information in the form of Sales-Pops between May and November 2021.
4. We are issuing you with this warning letter because in our view Occasion Box's conduct, in displaying the false information, is likely to have breached sections 10 and 12A of the FT Act. In particular, Occasion Box's conduct was liable to mislead consumers about the characteristics and/or quantity of goods and the information displayed in the Sales-Pops were unsubstantiated representations.
5. 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].

The investigation

6. During the investigation, the Commission considered a complaint regarding the display of ‘Sales-Pops’ - notifications which appear on the website and state that a consumer from a specific place has recently purchased a product. The notifications include links to products on the website and the text “*Verified purchase*”. The complaint alleged information displayed in Sales-Pops was not referring to actual purchases made from the website. An example image of a Sales-Pop is provided below:



7. We identified that Sales-Pops were displayed on the website through the use of an e-commerce application provider. The webpage for the Sales-Pops application (**Sales-Pops website**) indicated that Sales-Pops “help to establish credibility by showing recent sales notifications and enticing visitors to make purchases as they view what other shoppers are buying.”
8. The Sales-Pops webpage and an instructional video for the Sales-Pops application both explained how to make customisations to Sales-Pops. The video explained how user-generated information was required and demonstrated how fictional consumer and place names were entered under “Text Settings.”
- 8.1 Specifically, the instructional video for the Sales-Pops indicated that users could:
- 8.1.1 input names which “are just the fictional shoppers who will appear randomly on your site;”
 - 8.1.2 input cities which are “fictional cities that will be randomly mixed with inputted fictional shoppers;” and
 - 8.1.3 select products from their website that would be showcased inside the Sales Pops.
9. Occasion Box explained that it took ownership of the website in November 2020 and activated Sales-Pops on its website around May 2021. Occasion Box explained that the purpose of Sales-Pops was “making people that have never landed on our site before or heard of the brand more comfortable that other customers not only exist but are actively purchasing goods from us.”

10. Occasion Box further advised that it activated Sales-Pops in the belief that the application relied on actual sales data. However, during the investigation Occasion Box:
 - 10.1 acknowledged that the Sales-Pops were “NOT reading legitimate customer data from our sales records;” and
 - 10.2 failed to provide information and/or documents that demonstrate reasonable grounds for the Sales-Pops notifications.
11. Occasion Box deactivated Sales-Pops in November 2021, upon being informed of our investigation.

How this conduct can break the Law

Section 10: Misleading conduct in relation to goods

12. Section 10 of the FT Act prohibits traders from engaging in conduct that is liable to mislead the public about the characteristics and/or quantity of goods. The Court has held that:²

A representation will be misleading if it leads the mind of the representee into error ... [T]he question whether a representation is misleading is to be judged objectively. It is not a question whether someone has actually been misled, although proof of that may well be helpful for an informant. The question for the Court is whether the mind of the representee, in the present case the average New Zealand shopper, would be misled.

13. Consumers tend to trust something is good when they see others buying it. Sales-Pops convey a sense of popularity and demand. These factors can encourage hesitant customers to purchase goods or view the goods others have purchased.
14. We consider that the use of false information in Sales-Pops is liable to mislead consumers about the popularity of, and demand for the goods.

Section 12A: Unsubstantiated representations

15. Under section 12A of the FT Act, it is illegal to make an unsubstantiated representation about a good or service without any reasonable grounds for doing so. What this means is that businesses that make claims or imply something about their goods or services must have reasonable grounds for making those claims at the time the claims are made.
16. Reasonable grounds for representations that consumers had purchased goods from the website would likely be records demonstrating that the represented purchases had in fact occurred.
17. Given Occasion Box published Sales-Pops that required it to populate names of fictitious consumers and locations around New Zealand for display with products

² *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502(HC) at 508

specifically selected from its website, the Commission considers that the representations within the Sales-Pops were unsubstantiated.

The Commission's view

18. In this case and having fully considered relevant information obtained during the course of the investigation, the Commission's view is that it is likely that Occasion Box's conduct breached s 10 and s 12A of the FT Act. This is because:
 - 18.1 The conduct was liable to mislead the public as to the characteristics of the goods. Namely, the Sales-Pops were a form of social proof, and used false information to boost the appearance of the popularity of and demand for the product.
 - 18.2 In addition, the conduct was liable to mislead the public as to the quantity of goods sold by Occasion Box as the Sales-Pops did not reflect actual sales (i.e. they were misrepresenting that they had sold more goods than was the case).
 - 18.3 The representations were unsubstantiated (made without reasonable grounds) as the Sales-Pops did not rely on and present actual sales data. Rather, it was the result of user-generated information (names, locations, products, timing and time of sales.)

Warning

19. 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.
20. This warning represents our opinion that Occasion Box's conduct is likely to have breached the FT Act 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 Occasion Box.
22. This warning letter is public information and will be published on the case register on our website. We may also make 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 FT Act. The FT Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the FT Act

24. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A

company that breaches the FT Act 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 any other person or entity from taking private action through the courts.

Further information

26. We have published a series of fact sheets and other resources to help businesses comply with the FT 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 FT Act.
27. You can also view the FT Act and other legislation at www.legislation.co.nz.
28. Thank you for your assistance with this investigation. Please contact Jonathon Gale on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Kirsten Mannix
Fair Trading Investigations and Compliance Manager