

19 April 2018

www.comcom.govt.nz

The Director
PB Technologies Limited
587 Great South Road
Manukau
Auckland 2104

Dear Director

Fair Trading Act 1986: Warning for bait advertising

1. The Commerce Commission (Commission) has been investigating PB Technologies Limited (PB Technologies) under the Fair Trading Act 1986 (the Act). We have now completed our investigation and are writing to alert you to our concerns.
2. In summary, the Commission considers that PB Technologies is likely to have breached section 19 of the Act (which prohibits bait advertising) when it advertised two types of Apple Watches in its 2016 Cyber Monday sale.

The investigation

3. During our investigation, the Commission considered whether PB Technologies had reasonable grounds for believing it could supply reasonable quantities of the Apple Watches at the advertised price, having regard to the nature of the market in which PB Technologies operates and the advertisement.
4. The Apple Watches were advertised as part of an online only “Cyber Monday” sale on 14 November 2016, which ran from 6pm to midnight. PB Technologies advertised the sale primarily through an email, which it expected approximately 100,000 unique users would read. The email advertised the Apple Watches alongside a wide range of other electronic products.
5. The 38mm Apple Watch was advertised for sale for \$219 and the 42mm Apple Watch was advertised for sale for \$259. These prices were significantly below the products’ recommended retail prices (RRP) published at the time.
6. The advertisement noted there was a limit of one Apple Watch of each size per customer. Underneath the headline banner at the start of the email the advertisement said “NO BACK ORDERS | NO RAIN CHECKS | STRICTLY LIMITED STOCK”, but this representation was not proximate to the Apple Watches promotion.

7. The Commission received two complaints from consumers who were disappointed when the advertised watches were sold out in the first few minutes of the sale.
8. PB Technologies advised the Commission that it had only seven 38mm Apple Watches and seven 42mm Apple Watches available at the sale prices at the start of the sale.

The law

9. Section 19(1) of the Act states that:

No person shall, in trade, advertise for supply at a specified price goods or services which that person—

(a) does not intend to offer for supply; or

(b) does not have reasonable grounds for believing can be supplied by that person—

at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

The Commission's view

10. In this case, the Commission's view is that PB Technologies' conduct is likely to have breached section 19(1)(b) of the Act. We have reached this view because PB Technologies did not have any information to suggest the number of Apple Watches it had available for the 2016 Cyber Monday sale would be likely to meet the expected demand.
11. We consider that PB Technologies should have been aware that there would be significant demand for the Apple Watches and that 14 watches would not be sufficient to meet the likely demand.
12. This is because:
 - 12.1 the sale price was substantially below the RRP for the Apple Watches making this an attractive offer for customers;
 - 12.2 it is uncommon for Apple products to be heavily discounted; and
 - 12.3 the offer was advertised directly to a large number of PB Technologies customers.
13. Further, the attempt by PB Technologies to clarify that goods in the sale were in short supply was in our view, not sufficient because the statement was not proximate to the details of the offer.
14. At interview PB Technologies referred to the Apple Watch deal as a "loss leader", which is a term commonly used to describe products sold at a very low price to

attract customers. This indicates PB Technologies expected the Apple Watch deal to be attractive to a reasonable number of its customers.

PB Technologies response

15. PB Technologies responded to the Commission's enquiries and said it was aware that the Apple Watches would sell out during the sale period and at the advertised price point and it would not repeat this conduct again.

Next steps

16. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.
17. While we will not be taking any further action against PB Technologies in relation to the 2016 Cyber Monday sale, we will take this warning into account 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 PB Technologies.
18. 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

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

Penalties for breaching the Fair Trading Act

20. Only the courts can decide if there has actually been a breach of the Act. The court can impose penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
21. 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

22. 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 Act.
23. You can also view the Act and other legislation at www.legislation.co.nz.

24. Thank you for your assistance with this investigation. Please contact Anna Walton on (04) 924 3797 or by email at anna.walton@comcom.govt.nz if you have any questions about this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kirsten Mannix'.

Kirsten Mannix
Consumer Manager Wellington