

8 January 2017

NZ Trustees Association Charitable Trust  
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Attention: [REDACTED] – Trustee

Copy to: [office@nzta.org.nz](mailto:office@nzta.org.nz)

Dear [REDACTED],

### **Fair Trading Act 1986: Warning**

1. The Commerce Commission (Commission) has been investigating the NZ Trustees Association Charitable Trust (NZTA) 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 NZTA is likely to have breached sections 21C and 13(c) of the Act by:
  - 2.1 sending invoices to registered charities for unsolicited membership services, without clearly informing the recipients of the invoice that they were under no obligation to make payment of the invoice; and
  - 2.2 falsely representing to the recipients of the invoices that they had agreed to acquire membership services from the NZTA.
3. If this behaviour is continuing at the present time, we recommend that you take immediate action to address our concerns and seek legal advice about complying with the Act.

### **The investigation**

4. The Commission received complaints alleging that NZTA had sent unsolicited emails to registered charities. In the first unsolicited email, NZTA donated to the charities membership of the Association for a period of approximately six months. On expiry of the six month period, NZTA invoiced the charities an annual membership fee for continued membership of the Association.
5. The complainants raised concerns with us about receiving an invoice for a membership that they believed they had not agreed to purchase.

6. Based on information provided by complainants and by NZTA, we understand that:
- 6.1 In October 2015, NZTA sent unsolicited emails donating membership to the Association to registered charities for the remaining of the year to 1 April 2016 (ie approximately 6 months).
  - 6.2 NZTA had obtained the charities' contact details from publicly available information.
  - 6.3 The email did not require the charities to accept the donated membership services; rather the charities were required to contact NZTA to opt-out of the membership donation, if they did not want it.
  - 6.4 The email stated that on 1 April 2016 NZTA would draw 10 Corporate Charity Members for a further donation of 5 year's free membership each.
  - 6.5 The email did not state that a failure to advise NZTA that the charity did not want the donation would result in the charities being invoiced for continued membership once the donation period had expired.
  - 6.6 During the six month period, NZTA emailed bulletins to the charities. At the bottom left hand corner of these emails, was the word "unsubscribe". Recipients could use this link to contact NZTA and ask to stop receiving NZTA's communications.
  - 6.7 The email bulletin, dated February 2016, includes a statement from NZTA's President welcoming the charities who "accepted" the donation of 6 months membership and thanking them for joining. The statement includes an offer to those charities, who do not win one of the 5 year's free subscriptions, to become a full Corporate Member with a 40% charitable subsidy.
  - 6.8 On 31 March 2016, NZTA issued invoices to recipients of the donated membership services (who had not unsubscribed to the email communications) for an annual membership subscription. The invoices were for an amount of \$158.70. The invoices did not include any information informing recipients that they were under no obligation to pay it.
  - 6.9 In error, NZTA also emailed invoices for an annual membership subscription to entities that had not received the donated membership. It retracted the invoices issued to those entities who were unaware of the offer of donated membership.

#### **The Commission's view**

7. In this case, the Commission's view is that NZTA's conduct is likely to have breached sections 13(c) and 21C of the Act.

*Section 13(c)*

8. Section 13(c) of the Act prohibits a trader from making a false or misleading representation that a person has agreed to acquire goods or services.
9. In our view, by issuing the invoice, NZTA made a false or misleading representation to recipients of the invoice that they had agreed to acquire paid membership services from NZTA. The representation was likely to be misleading because, at no time previously, had the invoice recipients expressly agreed to become members of NZTA.
10. The Commission does not agree with NZTA's view that, because recipients did not unsubscribe from the offer of donated membership services, there was an implied agreement to continue with the membership. We also note that it was never disclosed to recipients that a failure to opt-out of the donated membership would result in the charities being invoiced for continued membership once the donation period had expired.
11. In our view, this conduct gives rise to a likely breach of section 13(c) of the Act.

*Section 21C*

12. Section 21C of the Act prohibits sending an invoice which sets out the charge for supplying unsolicited goods or services, unless the invoice contains information which clearly informs recipients that they are under no obligation to make any payment for the goods or services.
13. The invoice issued by NZTA did not contain a statement clearly advising the recipient of the invoice that they were under no obligation to make payment of the invoice.
14. The invoice issued by NZTA was for unsolicited membership services because:
  - 14.1 These recipients did not have an existing relationship with NZTA.
  - 14.2 All services provided and offered to these recipients prior to their receipt of the invoice were on an unsolicited basis.
  - 14.3 There was no requirement on recipients of the membership donation to confirm acceptance or opt out of the membership donation.
  - 14.4 Prior to the invoices being issued, recipients of the membership donation were not required to indicate their acceptance of further membership, or informed that they need to opt out to prevent being deemed to have accepted paid membership.
15. While the invoice was sent attached to an e-mail with an "unsubscribe" link, this is unlikely to meet the threshold of "clearly informing" the recipient that they were under no obligation to make payment.

16. We note that unsubscribe links are for the purpose of removing email addresses from lists used to correspond via email. Unsubscribe links are not associated with invoices or payments in the normal course of business.
17. For the reasons described above, we consider NZTA is likely to have breached section 21C of the Act when issuing the email invoices on 31 March 2016.

#### **NZTA's response**

18. NZTA responded to the Commission's enquiries by stating that it did not believe it had breached the Act. In its view, the donated membership was provided through an email with clear options of unsubscribing and implications of remaining as a free member.
19. However, we note that where requested, NZTA refunded payments made in relation to the invoice.

#### **Next steps**

20. While we will not be taking any further action against NZTA at this time, we will take this warning into account if this conduct continues or if it engages 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 NZTA.
21. This warning letter is public information and will be published on our website in the Enforcement Response Register. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.
22. We recommend that NZTA seeks legal advice and it is encouraged to regularly review its compliance procedures and policies.

#### **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 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**

24. 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 body corporate that breaches the 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 Act and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://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.
27. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
28. 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](mailto:zeb.walker@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



Kirsten Mannix  
Consumer Manager - Wellington