

11 December 2018

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Dear Ms ██████████,

Fair Trading Act 1986: Warning and compliance advice

The Commerce Commission has been investigating Taieri Motor Court Limited (**TMC**) under the Fair Trading Act 1986 (**FTA**). We have now completed our investigation and are writing to you to alert you to our concerns.

After considering the factors set out in our Enforcement Response Guidelines¹, we have decided to warn TMC for likely breaching the FTA during its sale of two motor vehicles. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred.² We also take this opportunity to provide TMC with compliance advice about not misleading consumers when describing what rights they may have under the Consumer Guarantees Act 1993 (**CGA**).

In summary, the Commission considers that TMC:

- made misleading representations about:
 - the distance a vehicle it offered for sale had travelled; and
 - selling vehicles on a private basis.
- failed to comply with the Consumer Information Standards (Used Motor Vehicles) Regulations 2008.

In the Commission's view, TMC's conduct is likely to have breached the FTA.

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 FTA.

The investigation

During our investigation, the Commission considered a complaint alleging that TMC advertised on its Facebook page a 2001 Subaru Impreza (licence plate number ██████████) (the **Subaru**) with an odometer reading of 160,000kms. The Subaru's odometer reading was actually 166,000kms.

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

² Commission's published Enforcement Response Guidelines at [41].

When responding to the Commission's enquiries, TMC advised that the Subaru was sold privately and without TMC displaying or providing to the purchaser a Consumer Information Notice (CIN). TMC also stated that it sold the Subaru on an "as is, where is" basis.

The Commission subsequently identified another vehicle on TMC's Facebook page (a 2013 Mercedes AMG (licence plate number [REDACTED])) being advertised as a private sale. We established that at the time of advertisement, both the Mercedes and the Subaru were owned by TMC.

The law

Section 13(a) of the FTA states:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use.

Section 13(b) of the FTA states:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics.

Section 13(i) of the FTA states:

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

Section 28 of the FTA states:

If a consumer information standard in respect of goods or services relates to a matter specified in section 27(1A), a person must not supply, or offer to supply, or advertise to supply those goods or services unless that person complies with that consumer information standard.

The Commission's view

In this case, the Commission's view is that TMC's conduct is likely to have breached the FTA. We set out our reasons for this view under the headings below.

Section 13(a)

TMC represented, in comments on its Facebook page, that the Subaru offered for sale had travelled 160,000kms. However, when a consumer inspected the vehicle, they found that the odometer reading was over 166,000kms. The consumer supplied the Commission with documents proving this was the actual distance the vehicle had travelled.

TMC's representation that the vehicle had travelled 160,000kms when it had actually travelled over 166,000 kms, is likely to breach the FTA by misrepresenting the history and previous use of the vehicle.

Section 13(b)

In its response to the Commission regarding the transaction involving the Subaru, TMC advised us that the vehicle was a "private sale". We identified a second vehicle advertised on TMC's Facebook page, a 2013 Mercedes AMG (██████████), which was also represented as being sold as a private sale.

We established, through vehicle registration records, that at the time TMC represented that the vehicles were being sold on a private basis, TMC was in fact the person registered in relation to of both vehicles.

TMC's representation that the vehicles were being sold on a private basis, when it was the person registered in relation to the vehicles, is likely to breach the FTA by misrepresenting who was providing the service of selling the vehicles. Who sells the vehicle is important because different rights and obligations apply when a vehicle is sold by a person in trade as opposed to a private seller. Private sales are generally not covered by the FTA or the CGA.

Section 28

In its response to the Commission regarding the Subaru mentioned above, TMC advised us that the vehicle was sold without a CIN.

The Consumer Information Standards (Used Motor Vehicles) Regulations 2008 require that a completed CIN is attached to a vehicle offered for sale by a motor vehicle trader, a copy given to the purchaser of the vehicle, and a signed copy retained by the trader.

TMC's failure to comply with these regulations means it has likely breached section 28 of the FTA.

Warning

We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.

While we will not be taking any further action against TMC 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 TMC.

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.

Compliance Advice

Section 13(i)

In its response to the Commission regarding the Subaru, TMC advised the vehicle was sold on an “as is, where is” basis, because it was not yet ready for sale.

As you may be aware, under the CGA consumers are protected by guarantees including that the vehicle is of acceptable quality, taking into account its nature, type and price, and also that the vehicle matches its description. A vehicle can be sold with work needed or defects as long as the trader describes the condition of the vehicle accurately. Representing that goods are sold “as is, where is” can misrepresent the CGA protections applying to the vehicles by suggesting that the CGA does not apply at all and that the buyer has no recourse against the trader for undisclosed problems with the vehicle.

We want to bring this matter to your attention to assist you in complying with your obligations under the FTA.

The Commission’s role

The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. 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

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.

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

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.

You can also view the FTA and other legislation at www.legislation.co.nz.

Thank you for your assistance with this investigation. Please contact [REDACTED], Senior Investigator on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

[REDACTED]
Wellington Consumer Manager