FACT SHEET

COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

The Fair Trading Act

Buying and selling online

This fact sheet is designed to give anyone who buys or sells online an understanding of how the Fair Trading Act and Consumer Guarantees Act apply to the transaction.

The internet has changed the way consumers purchase goods and services, letting them buy anything from groceries to a flight to Vanuatu at the click of a button. The internet has also given sellers new opportunities to widen their reach by having an online shop to complement their bricks and mortar retail presence, or to do away with bricks and mortar retail altogether.

But the internet is not a 'free for all' where anything goes. The Fair Trading Act applies to all traders who advertise or sell to New Zealand consumers online, even if the trader is based outside of New Zealand.

The internet is not a 'free for all' where anything goes

Traders who sell online must also make it clear that they are in trade, so that consumers know they are protected under the Fair Trading Act and the Consumer Guarantees Act.

Types of online selling

There are many different ways of selling online including:

- websites or smartphone applications
- emails
- text messaging
- social media
- online auctions such as Trade Me and eBay
- daily deal and group buying websites.

The Fair Trading Act and the Consumer Guarantees Act apply to offers and sales made through all of these channels, and more. It does not matter what promotional medium the trader chooses.

When does the Fair Trading Act apply?

The Fair Trading Act applies to online selling when a seller is **in trade**.

Who is in trade?

The Fair Trading Act's definition of "trade" is broad. It defines trade as "any trade, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services."

Whether a person is in trade will depend on the specific circumstances of the seller and the offer. Many factors can be relevant to whether a person is in trade, including whether they:

- regularly or habitually offer to sell goods or services online
- make, buy or obtain goods with the intention of selling them
- are GST registered
- have staff or assistants to help manage their sales
- have incorporated a company or set up another type of trading vehicle.

There are other factors that might mean a person is, or is not, in trade. Sellers who are uncertain whether they are in trade should obtain legal advice.

Sellers cannot avoid their obligations under the Fair Trading or Consumer Guarantees Act by having someone else make offers or sell on their behalf. In these cases the principal seller will still be in trade, and the person selling on their behalf (their agent) may also be liable.

Anyone selling goods initially bought or acquired for their own personal use is not in trade.

Disclosure of trader status

The Fair Trading Act requires anyone who is in trade to make this clear to consumers when offering goods or services for sale online. This informs consumers that they are covered by the Fair Trading Act and the Consumer Guarantees Act.

Traders must disclose their trader status clearly and prominently in every place online where a customer can complete a purchase. Ideally traders should be making their trader status clear from the outset, and on every website or platform the trader uses. The Commission can issue infringement notices with fines of up to $1,000 to any trader who does not disclose their trader status.

Any intermediary that provides a platform for online selling (like an online auction or daily deal website) must take reasonable steps to ensure that traders using their platform disclose their trader status.

You can read more about the *Fair Trading Act* in our range of fact sheets at www.comcom.govt.nz/fair-trading-act-fact-sheets

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EXAMPLE

Ben travels overseas on holiday. While away he buys a pair of shoes for himself and nine other pairs to sell online when he gets home. Ben is in trade when he sells the nine extra pairs, because he bought the shoes with the intention of selling them. Ben's online listing for the extra shoes must clearly state that he is selling them in trade. Ben must comply with the Fair Trading Act and Consumer Guarantees Act.

Kate has a young son. She sells online the clothes he has outgrown. Despite selling a lot of her son's clothes online, Kate is not in trade because the clothes she is selling were initially purchased for personal use.

Paula regularly buys books, reads them and then sells them online. When selling books like this, Paula is not in trade because she purchased the books for personal use. Paula also makes jewellery from home which she sells through online auctions. When selling her jewellery, Paula is in trade because she made the jewellery items with the intention of selling them. Paula must comply with the Fair Trading Act and Consumer Guarantees Act when selling jewellery.

Liam sells cars as a registered car dealer. One of his customers trades in an old car when buying a new one. Liam asks his uncle to sell the trade-in car on his behalf to try and avoid the consumer laws.

Liam is in trade when his uncle sells the car, because his uncle is his agent under the Fair Trading Act and Liam continues to be responsible for the sale. Liam's uncle may also be breaching the Consumer Guarantees Act in acting as an agent for Liam and the Fair Trading Act by assisting Liam to breach that Act.

What obligations do those selling online have?

Traders selling online need to make sure they comply with both the Fair Trading Act and the Consumer Guarantees Act.

Fair Trading Act

Under the Fair Trading Act traders selling goods online must:

- make it clear to potential buyers that they are in trade (see above)
- ensure any representations they make about the goods or service are accurate and do not mislead or deceive consumers
- not mislead consumers about their rights and obligations
- avoid engaging in unfair sales practices, such as bait advertising or pyramid selling
- have a reasonable basis for any claims they make about their products or services, whether the claims are expressed or implied – you can read more in our fact sheet *Unsubstantiated Representations* at **www.comcom.govt.nz/unsubstantiated-representations**
- comply with the product safety and consumer information standards where relevant, and not sell any goods prohibited by an unsafe goods notice.

Consumer Guarantees Act

The Consumer Guarantees Act applies to goods and services that are ordinarily purchased from a trader for personal, domestic and household use.

Under the Consumer Guarantees Act, goods must match their description, have no undisclosed defects, and be fit for their normal purpose, safe, durable, of reasonable quality, and acceptable in look and finish.

The Commerce Commission does not enforce the Consumer Guarantees Act. However, any trader who makes misleading representations about the rights that consumers have under the Consumer Guarantees Act (or under any other law) may breach the Fair Trading Act, which the Commission does enforce.

You can find out more about your rights under the *Consumer Guarantees Act* at www.consumeraffairs.govt.nz/for-consumers/law/consumer-guarantees-act

Product safety and consumer information standards

There are currently six product safety standards. They are for:

- Baby walkers
- Children's nightwear
- Children's toys
- Household cots
- Cigarette lighters
- Pedal bicycles

There are currently five consumer information standards. They are for:

- Care labelling
- Clothing and footwear country of origin labelling
- Fibre content labelling
- Used motor vehicles
- Water efficiency labelling scheme

You can read more about product safety and consumer information standards at www.comcom.govt.nz/fair-trading

You can find out more about unsafe goods notices at www.consumeraffairs.govt.nz/legislation-policy/acts-regulation/product-safety-standards/unsafe-goods-notices/current-bans

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Common Fair Trading Act problems online

The Commission sees a number of commonly-recurring problems with online sales.

Terms and conditions

Traders need to make sure the terms and conditions of any online sale are clear and easy to find. This includes terms relating to price, quality and condition, delivery, returns and warranties, and the like.

Traders also need to ensure that the messages conveyed in any offer are accurate and not likely to mislead.

Traders must not bury qualifications, limitations and other important terms in the fine print or on a link-through page. Any term that is likely to be material to a consumer must be given prominence in the offer.

Availability of goods and services

Traders must not offer to sell goods or services that they do not reasonably believe they will be able to supply on the terms offered.

Traders must provide clear and accurate information to consumers about the availability of goods and services and when the consumer can expect to receive them.

EXAMPLE

A tour promoter offered a rail tour from Christchurch to Dunedin for a concert. The promoter knew at the time he made the offer that rail carriages to transport customers might not be available. He continued to take bookings and then advised customers just three days before the concert that he would be substituting a bus for the train. The company's director was prosecuted and fined, and ordered to compensate affected customers

Traders who do not hold stock

Not all online traders hold stock "on the shelves". Some traders only source stock to supply once they have taken an order or sold the item online. Traders who do this need to make sure that any representations they make about availability and delivery times are accurate, and that they don't promote goods for sale unless they have a reasonable basis to believe they can fulfil the order consistently with how the offer was promoted.

Daily deals and voucher sales

Traders offering goods or services through daily deal or group buying websites must have the capacity to fulfil every deal that they sell.

Where a voucher is sold, the trader must make clear before customers accept the offer the timeframe within which the voucher must be redeemed. Traders selling vouchers must also make sure that they have sufficient resources (stock, staff, booking-slots etc) to fulfil every voucher within a reasonable time of the voucher being presented. If the trader is only able to satisfy a certain number of sales, it should limit the offer to a manageable number, specify in the offer any dates when the voucher cannot be redeemed, or ensure a refund is available if the customer has trouble redeeming it.

Buyers should not be left with a voucher that they are unable to redeem because the seller is "booked-up" or otherwise unable to deliver on the voucher within a reasonable timeframe.

EXAMPLE

Mary operates a small restaurant, and tries to boost sales by offering a discount dinner deal. The dinner voucher is valid for one year and Mary does not limit the number of vouchers sold.

Sebastian buys a dinner voucher along with 600 other people. Sebastian calls Mary's restaurant and asks for a booking next month. He is told there are no bookings available for six months.

This is likely to be a breach of the Fair Trading Act because by offering an unlimited number of meals, Mary was unlikely to have a reasonable basis for believing that she could fulfill the deal.

While Mary could not have known how many meal vouchers she was going to sell, she did know her business's capacity was limited. Mary could have limited the number of vouchers sold. The time Sebastian was asked to wait to redeem his voucher was unreasonable.

Delivery of goods

As with any business where goods are not supplied at the time of purchase (such as telemarketing or mail order), an online trader must ensure that delivery terms are clear and can be met. These include shipping costs, taxes, fees and the estimated delivery times.

EXAMPLE

The Commission issued an alert to the public regarding a website using a 'deliver now, pay later' scheme. The websites practice was to send consumers goods which were in their basket online without payment being tendered. Many consumers were unaware they would be sent the goods without tendering payment. The website would then send an invoice to the customer and add fees and threaten debt collection if the customer does not pay.

Shill Bidding

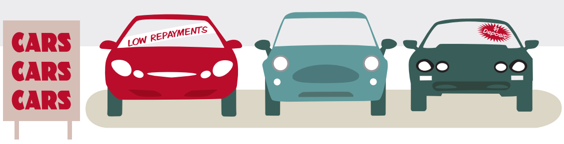
Under the Fair Trading Act a vendor or seller is only allowed to bid on their own online auction or get someone to bid for them where:

- the online auction has a reserve price
- the vendor bid is below the reserve price
- the bid is clearly identified at the time it is made as a vendor bid.

If a vendor or seller bids in any other circumstances this is illegal under the Fair Trading Act as it misleads genuine bidders about the price. This illegal practice is referred to as "shill-bidding".

EXAMPLE

An Auckland car dealer used 20 different Trade Me memberships to place bids on 530 of its own $1 reserve online auctions, in order to artificially raise the price of the cars it was selling. The dealer was prosecuted and fined, as well as having already paid compensation to affected customers.



Price comparisons

Traders often compare the price of a good or service with a usual price or recommended retail price (RRP) to show consumers that they can get a bargain by buying now, through them. This is common practice on daily deal and group buying websites.

Any trader selling goods or services online must not exaggerate price discounts.

You can read more in our fact sheet *Pricing* at www.comcom.govt.nz/pricing

A usual price must be the price at which a good or service is commonly sold, or the price of a good or service immediately before it was marked down.

EXAMPLE

Following a Commission investigation, a company selling bicycles was fined $800,000 by the Court for creating misleading impressions about the discounts available on bicycles and the duration of the discounts. The Company gave the impression in their advertising they were selling bikes at significant discounts of up to 50%, and that sales were 'for a limited time only'. However, in reality neither was true. The discounted prices were the company's normal selling prices and they were commonly available for these prices before and after the advertised sales.

Online shopping – quick tips for buying online

- **Be savvy:** if you have any doubts or the offer seems too good to be true, don't proceed.
- **Know who you're dealing with:** search the seller online, look at their online auction feedback, check review sites, social media, Scamwatch and similar to see what other customers have experienced. Check where the business is based and that it provides its name, street address, phone and email details. Don't assume that just because the website ends .co.nz it is a New Zealand-based business.
- **Know what you're buying:** read the description of the goods or services closely, especially any fine print. Read the terms and conditions, including what happens if there's a problem.
- **Work out what it will cost:** factor in shipping, exchange rates, insurance or any applicable extra charges, such as customs duty.
- **Shop around:** search online and compare prices, terms and conditions.
- **Protect yourself:** only buy if you are comfortable with the payment method and keep a record of the transaction details. Purchasing by credit card or a secure payment system like PayPal should give you more protection than a cash transfer.
- **Buying from overseas based traders:** in addition to complaining to the Commerce Commission, consumers who have problems with online transactions with overseas traders can lodge a complaint with the international watchdog www.econsumer.gov

Contact us with information about possible breaches of the laws we enforce:
Phone: 0800 943 600 **Write**: Enquiries Team, PO Box 2351, Wellington 6140 **Email**: contact@comcom.govt.nz