

FAIR TRADING ACT 1986
RECENT MISLEADING & DECEPTIVE CONDUCT – HOW DID THEY THINK IT WAS A GOOD IDEA?

February 2017

The Fair Trading Act 1986 (FTA) makes it an offence for businesses to engage in conduct that is, or is likely to be, misleading or deceptive. The FTA also includes more specific offences such as engaging in conduct that is liable to mislead the public as to the nature, characteristics, quantity, manufacturing process or suitability for purpose of goods and services. Summarised below are a number of recent FTA convictions for, what in hindsight appear to be, blatant misleading conduct.

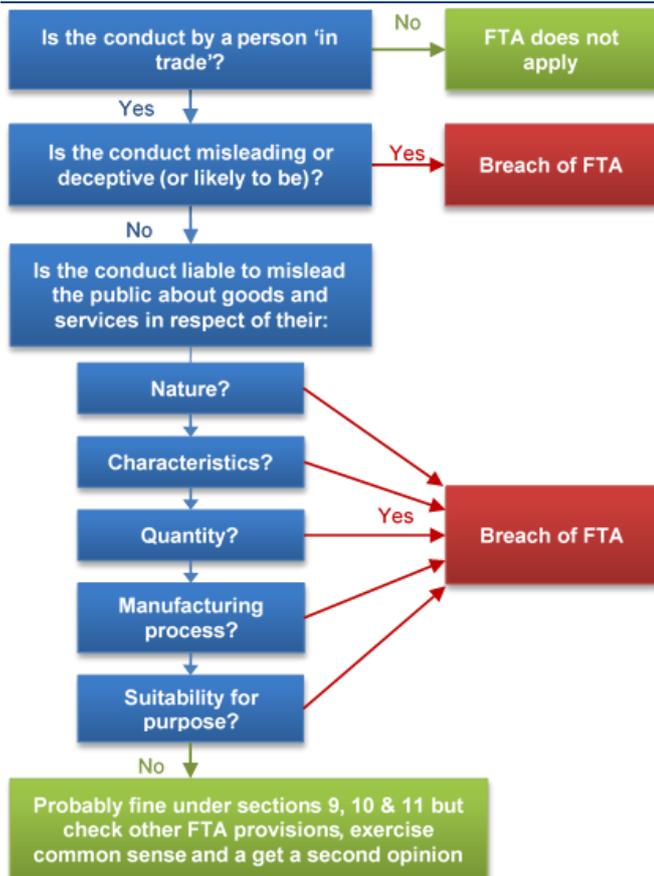
INTRODUCTION

The requirement not to engage in misleading or deceptive conduct is a basic premise of consumer law. It is not new – the FTA was enacted in 1986. Yet a surprising number of businesses are still getting this wrong, including large corporates which should have processes in place to prevent such breaches.

Is it pressure to succeed or a lack of compliance and training in their marketing processes that causes these breaches? Whatever the reason, businesses need to step back before launching new products, services or marketing campaigns and objectively assess whether they could be likely to mislead the public. As usual, if it smells like a fish it generally is a fish.

The public outcry from some of the recent cases shows the public’s derision of such behaviour. Businesses also risk damage to their reputation and goodwill, and hefty fines.

MISLEADING CONDUCT GUIDE – SS 9, 10 & 11



The above flow chart shows a number of basic questions to ask to check for misleading behaviour. Note that there are a number of other FTA provisions that need to be complied with as well. See the Commerce Commission’s website [here](#) for some helpful fact sheets and guidance on this.

RECENT FTA CONVICTIONS

Reckitt Benckiser (New Zealand) Ltd (“RBNZ”) – Nurofen pain relief products

FTA breach: Misleading consumers about the nature, characteristics and suitability of the products.

Penalty: Fined \$1.08 million.

Facts: RBNZ packaged and marketed Nurofen as different products that targeted specific pain (migraines, back pain, tension headache and period pain) – and charged consumers more for these products than ‘normal’ Nurofen. In reality the ‘targeted’ products worked identically to relieve pain and inflammation in general. They did not target specific pain.

Knowledge: While intention and knowledge is not required for a breach, RBNZ knew in 2011 these products could be misleading but continued to market and sell the products until 2015. RBNZ was made aware of this through a NZ Herald article in 2011 and a complaint to the Australian Therapeutic Goods Administration in 2013.

Finding: Judge Jelas stated that RBNZ’s behaviour was “highly misleading” and noted it was “blatantly apparent they were in breach of their lawful obligations to New Zealand consumers” – “without the misleading statements the reason for the products existence disappears. There was no reason to choose one over the other.”

Bike Barn (Bike Retail Group Ltd and Bikes International Ltd) – Bike retailer

FTA breach: Misleading pricing.

Penalty: Fined \$800,000.

Facts: Commissioner Anna Rawlings said “Bike Barn used exaggerated discounting strategies that gave the impression to customers that they were purchasing bikes at significant mark-downs from the normal retail price – typically 50% off. It also advertised clearance

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specials that created an impression that the discounts were available for a limited time only”.

“Neither was true. In fact, the discounted prices were Bike Barn’s usual selling prices. Out of nearly 6000 bike sales we analysed during our investigation, only 30 were sold at the so-called full price.”

Finding: Ms Rawlings noted that while sales are an important marketing “it’s vital that deals offer a real saving and products are not promoted in a way that entices consumers to make a purchase under false pretences”. Judge Sharp also noted that Bike Barn’s conduct was “pervasive” and “calculated”.

Youi NZ Pty Ltd – Insurance firm

FTA breach: Misleading sales techniques.

Penalty: Fined \$320,000.

Facts: Youi represented to consumers they could get online quotes but instead used the information from the online quote requests to make unsolicited calls. Youi also did not make the quotation and sales process clear to consumers.

Commissioner Anna Rawlings said “In the worst case scenario, Youi was able to attract a customer and obtain their contact details through pretext, set up policies they did not want and then charge them without permission. At the same time Youi made it difficult for them to cancel the policy and get refunded.”

Finding: Ms Rawlings noted that the penalty given to Youi “serves as a strong reminder to businesses to ensure that customers clearly understand each step of the quotation and sales process and when, and how, they are committed to any purchase. Businesses should also make sure that they have robust compliance programmes to assist their staff to understand their obligations to consumers.”

Harmony Ltd – Peer-to-peer lender

FTA breach: Misleading consumers into believing they had been pre-approved for loans.

Penalty: Fined \$292,500.

Facts: Harmony sent marketing material in the form of personalised pre-approval letters to over 500,000 individual consumers. Harmony relied on the misrepresentation that the consumer had been pre-approved for a loan to draw them into the sales process.

Finding: Commissioner Anna Rawlings said this conduct gave “Harmony an advantage in the market it would not have otherwise have had”. “It also had the

potential to harm consumers who responded to the letter. Believing that they were guaranteed a loan, they may have been encouraged to sign up with Harmony without first checking whether the terms offered were the best available to them in the market.”

Zodiac Motor Company Ltd – Car dealership

FTA breach: False representations.

Penalty: Fined \$105,000.

Facts: Zodiac falsely claimed that its cars were AA appraised and that it was an AA Appraised Used Dealer.

Knowledge: Zodiac continued to make these claims after it became aware that AA had cancelled its membership, including at its car yard, on its website (in respect of specific vehicles and Zodiac’s membership status) and in numerous radio advertisements.

Finding: Judge Field said there was “a significant degree of recklessness in relation to the offending... The statements were a complete departure from the truth”.

Commissioner Anna Rawlings also said that Zodiac’s conduct was so serious because “Zodiac provided consumers with a measure of comfort that the vehicle they were considering purchasing had been inspected by an impartial, reliable body – when it hadn’t”.

SUMMARY

We encourage all businesses to ensure they have robust legal compliance procedures in place to check any marketing or new products or services before they are launched. While these processes may slightly slow down launch turnaround times, they are vital to ensure a business complies with the FTA and avoids negative impacts to its reputation and goodwill – not to mention the fines – that come from breaching the FTA.

If you have any questions or need assistance responding to Commerce Commission queries or reviewing your compliance procedures or marketing material, please contact your usual Jackson Russell lawyer or one of the lawyers below.

Jackson Russell