

14. FACT SHEET ON TRADING AND OTHER ACTIVITIES



This fact sheet summarises the laws that apply to organisations that carry out trading activities. These organisations are required to comply with laws protecting those who buy or use their goods or services, including the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Commerce Act 1986, the Credit Contracts and Consumer Finance Act 2005, the Gambling Act 2003 and the Health and Disability Services (Safety) Act 2001.

WHAT IS "TRADING"?

The Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Commerce Act 1986 define "trade" as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

A voluntary organisation whose main activity is not a trade or business may still be held to be acting "in trade" if it undertakes activities of a trading or business character, even if they are incidental to the organisation's main purpose. In that case, only the organisation's trading activities will be covered by the three Acts listed above, rather than all its activities.

The following types of activity have been held to be "in trade":

- Marketing and selling goods and services to the public for fundraising
- Providing goods and services to members and employees
- Selling a business or business assets to another person for use in trade
- Providing endorsements for reward
- Making statements or performing acts to preserve or enhance commercial interests
- Tendering or submitting a proposal for the provision of goods or services

Conduct not carried out in the course of business is not "in trade" even if it involves supplying or acquiring goods and services (for example, a one-off private conveyance of property that is not used in business, such as residential housing).

"Trade" only occurs between traders and consumers, so the conduct of members, employees or agents within an organisation is not conduct in trade.

FAIR TRADING ACT 1986

This Act is designed to ensure that business is conducted in a fair manner. An organisation, including

the individuals in it, can be prosecuted under this Act if they breach it.

The Fair Trading Act prohibits three main types of unfair trading:

- **False representation:** Anything said about the product or service must be accurate, including shelf labels, signage, product and service catalogues, advertising and so on. Under the Act, all representations must be accurate and truthful. Not stating something that is relevant is prohibited if it is misleading or deceptive to omit it.
- **Misleading or deceptive conduct:** Those in an organisation's trading section must always conduct themselves with honesty and integrity, ensuring that the correct impression is always given about the organisation's business, products and services. The organisation must give correct advice about whether the goods or services are suitable for a purpose and the nature and characteristics of the goods or services supplied.
- **Unfair practices:** An organisation must clearly disclose the rules of any competition and describe gifts and prizes accurately. It must not offer gifts and prizes if it has no intention of supplying them. An organisation must not advertise goods at a specified price that it does not intend to offer for supply, nor ask for or accept payment for goods and services unless it knows that the goods are actually available within a reasonable time or within the time specified.

To check if conduct is misleading and deceptive an organisation needs to consider:

- Is the conduct capable of being misleading?
- Was the consumer or user misled by the conduct?
- Was it reasonable for the consumer or user to have been misled by the conduct?

CONSUMER GUARANTEES ACT 1993

The Consumer Guarantees Act provides minimum standards or guarantees when suppliers and manufacturers supply goods and services to consumers.

A prerequisite for obtaining a remedy under this Act is that the consumer must, first of all, reject the goods. Consumers have the right to a repair, replacement or a refund if an organisation provides goods or services that do not comply with Consumer Guarantees Act standards.

The Act also confers a right to compensation for a manufacturer's breach of the guarantees.

The Act and charitable organisations

The Consumers Guarantees Act does not give any person a right of redress against a charitable organisation if the organisation supplies goods or services for the main purpose of benefiting the person to whom the supply is made.

In order to come under this exception, an organisation must be charitable within the legal meaning of that word, and must not have supplied the goods or services principally for profit or some other non-charitable purpose. Also, the exception does not apply if the goods or services were supplied through a secondary structure such as a company.

Goods and services

What goods are covered by the Act?

The Consumer Guarantees Act applies to all goods normally bought for personal or household use, and also goods that are sold, sold by hire purchase, hired out or gifted.

Goods that are not covered by the Act are:

- goods used in trade to work on or repair other goods or property
- goods bought to be resold
- goods used in a manufacturing process
- goods sold in an auction or by tender.

What services are covered by the Act?

A service includes any of the following:

- the performance of work
- providing, in trade, facilities for accommodation, amusement, the care of people or animals or things, entertainment, instruction, parking or recreation

- insurance, including life assurance and life reinsurance
- banking services
- lending money or granting credit (or arranging to do so), buying or discounting a credit instrument, or accepting deposits
- the supply of electricity, gas, telecommunications or water, or the removal of waste-water.

A service does not include:

- paying or crediting any money to the consumer without performing any other task
- supplying goods or performing work under an employment agreement.

“Manufacturers” and “suppliers”

The Consumer Guarantees Act applies to manufacturers of goods, suppliers of goods and suppliers of services.

An organisation is a “manufacturer” if it:

- assembles, produces or processes goods
- tells the public that it is the manufacturer of the goods
- attaches its brand name or mark to goods, or
- imports or distributes goods that are manufactured by a foreign manufacturer that does not have a place of business in New Zealand.

An organisation is a “supplier” for those goods or services it provides to customers “in trade”.

Guarantees provided by the Consumer Guarantees Act

Guarantees provided by suppliers

Under the Consumers Guarantees Act, suppliers of goods must give the following guarantees:

- **Legal title:** The supplier must have the legal right to sell the goods.
- **Acceptable quality:** Goods must be of an acceptable quality, taking into account the nature of the goods, the price and any representations made about the goods.
- **Fitness for purpose:** Goods supplied must be fit for any particular purpose specified by the customer or that the customer is told they are fit for.
- **Description:** Goods must comply with any description given to the customer.

- **Samples:** Goods must comply with any sample or demonstration model shown to the customer.
- **Price:** Goods must be sold at a reasonable price if an agreement has not been previously reached with the customer about the price.

Guarantees provided by manufacturers

The Consumer Guarantees Act requires that goods must comply with any express manufacturer's guarantee given with the goods.

If the manufacturer hasn't given any express guarantee, the consumer will still be covered by the specific guarantees required of manufacturers by the Act, namely:

- **Acceptable quality:** Goods must be of an acceptable quality, taking into account the nature of the goods, the price and any representations made about the goods.
- **Description:** Goods must comply with any description given to the customer.
- **Repairs and parts:** Repair facilities and spare parts must be reasonably available for a reasonable time.

Guarantees provided by suppliers of services

Suppliers of services must give these guarantees:

- **Fitness for purpose:** Services, and any product resulting from them, must be fit for any particular purpose named by the customer or that the customer has been told they will be fit for.
- **Time and price:** Services must be completed within a reasonable time (if there is no agreement with the customer about the time for completion) and at a reasonable price (if not previously agreed).

Exceptions to liability

Acceptable quality

- A supplier isn't liable for a breach of the acceptable quality guarantee if the manufacturer made a representation about the goods (other than on the packaging or label) and the goods would have met the guarantee if it hadn't been for that representation.
- If any defects in goods have been drawn to the consumer's attention before they buy the goods, the goods do not breach the guarantee of acceptable quality. If the goods are displayed

for sale or hire, the defects must have been included in a written notice displayed with the goods for this exception to apply.

- Goods do not breach the acceptable quality guarantee if the consumer uses them in an unreasonable way or with unreasonable frequency and they would otherwise have complied with the guarantee.
- Manufacturers are not liable for a breach of acceptable quality if this was caused by:
 - an act, omission or representation by someone other than the manufacturer
 - a cause outside human control after the goods left the manufacturer's control
 - the supplier charging more than the average retail price or the manufacturer's recommended retail price.

Fitness for purpose

If the supplier tells the consumer the goods are fit for a particular purpose but the goods are not in fact fit for that purpose, the supplier won't be liable if the consumer didn't rely on the organisation's skill and judgment or if it wasn't reasonable to rely on it.

Description

Manufacturers are not liable for goods not matching their description if this was caused by:

- an act or omission by someone other than the manufacturer
- a cause outside human control after the goods left the manufacturer's control.

Remedies against suppliers of goods or services

Problems that can be fixed

Problems that can be fixed must be remedied within a reasonable time and any repair or replacement provided free of charge by:

- repairing the faulty goods (or, if repair would be unreasonable, by refunding the consumer's money) or remedying the faulty service
- giving a replacement.

The consumer must accept the repair, refund or replacement.

If an organisation does not act within a reasonable time, the consumer can take the goods elsewhere to be fixed or get someone else to provide the service and claim the reasonable costs from the organisation.

Problems that can't be fixed or serious problems

A problem is a serious problem if:

- a reasonable consumer would not have bought the goods or used the service if they had known it would be deficient
- the product or the service is not fit for its normal purpose or the purpose the consumer intended, and cannot easily be made fit for the purpose (the consumer has an obligation to communicate any special intended purpose to the supplier beforehand), or
- the product or the service is unsafe.

In these cases, a consumer can choose to:

- receive a refund, or
- get compensation of an amount equal to the drop in value of the product or the service.

Remedies available against manufacturers

A consumer has the following rights of redress against manufacturers:

- **Compensation:** A consumer can get the following compensation from an organisation if it breaches an express manufacturer's guarantee or any of the guarantees contained in the Act:
 - The consumer can require the organisation to pay the amount by which the goods have dropped in value because of a problem.
 - The organisation is also responsible to pay for any reasonably foreseeable loss or damage resulting from the faulty goods. For example, an organisation that sells T-shirts as a fundraising venture may be liable for damages caused to other clothes by the colour in the T-shirts running excessively.
- **Repair or replacement:** If an organisation has given an express guarantee that the goods will be repaired or replaced when a problem arises, the consumer must give the organisation the opportunity to do that. But the consumer can claim compensation if the organisation refuses to repair or replace, or doesn't do so within a reasonable time.

Consumers still have these rights against the manufacturer if they have disposed of the goods to someone else. In addition, any new possessor also has these rights against the manufacturer, regardless of how he or she acquired the goods from the consumer.

Damage and other losses caused by a defective service

An organisation is responsible for reasonably foreseeable loss or damage resulting from the defective service. If the service has been only partly performed when the consumer chooses a refund, they are entitled to the refund, unless the organisation gets an order from a Court or tribunal that part of the payment can be retained. Neither party is required or entitled to perform the contract further.

Contracting out

There are two situations in which the Consumers Guarantees Act can be contracted out of:

- A supplier can contract out of the guarantees under the Consumers Guarantees Act when it supplies goods or services to a business.
- A manufacturer can contract out of its spare parts and repair facilities guarantee as long as the consumer is told this before acquiring the goods.

COMMERCE ACT 1986

The Commerce Act deals with competition law, restrictive trade practices and the control of prices and business acquisitions. The Commerce Commission is established under the Act, and the Act states the Commission's role and powers.

The Commerce Act also has procedures for enforcing the provisions of the Act and remedies for breaches of the Act.

One of the main goals of the Act is to promote competition in the market place. To achieve this, the Act has certain provisions that allow for an organisation to apply to the Commerce Commission for clearances and authorisations in situation that may otherwise breach the Act.

CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2005

The Credit Contracts and Consumer Finance Act applies only if an organisation:

- lends money to people
- sells goods or property and undertakes the financing of the purchase.

The Act:

- requires credit providers to provide adequate

- information to consumers about their credit contracts or leases
- provides rules about interest charges, fees and payments in relation to consumer credit contracts
- allows consumers to seek reasonable changes to consumer credit contracts on the grounds of unforeseen hardship.

GAMBLING ACT 2003

The purposes of the Gambling Act are to control gaming, minimise harm from it, and ensure that the community benefits from the proceeds.

The Act classifies gambling according to the amount of money involved and the risks of problem gambling and criminal activity associated with the activity. Classes range from class 1 (low-stake, low-risk activities that do not require a licence) to class 4 (high-turnover and high-risk activities). Licences are required for classes 3 and 4 and casinos.

Lotteries and raffles

Lotteries, prize competitions and other gambling for community fundraising purposes where prizes are more than \$5,000 require a class 3 licence. To obtain a licence:

- the organisation must be a “society” (an organisation that exists entirely for not-commercial purposes)
- the net proceeds must be distributed to authorised purposes, which are:
 - a charitable purpose
 - a non-commercial purpose that benefits the community
 - race meetings
 - electioneering purposes.

Applications for this licence are made to the Department of Internal Affairs.

Housie

All games of housie must comply with rules in the Gambling Act:

- There must be a person appointed as the co-ordinator to control the session.
- The co-ordinator must ensure the game is conducted in accordance with the Act and housie rules and must be present at all times during the game.

- The co-ordinator must appoint a person to act as caller in a game or session of housie.
- If the total value of the turnover is over \$25,000, or the total value of prizes is more than \$5,000 for a session, a class 3 licence is required.

CERTIFICATION OF HEALTH AND DISABILITY SERVICE PROVIDERS

The Health and Disability Services (Safety) Act 2001 replaced the licensing of hospitals and rest homes, and the registration of residential care homes, with a system of certification of people and organisations that provide health and disability services. The Act covers a wide range of services and buildings and a wide range of governance issues. The Ministry of Health manages the certification system and audits service providers.

All hospitals, old people’s homes and homes for people with disabilities must meet the following standards:

- Health and disability sector NZS8134: 2000
- Infection control NZS8142: 2000
- Restraint minimisation and safe practice NZS8143: 2001.

Those providing mental health services must also meet the national mental health sector standard NZS8143: 2001.

RESOURCES

Websites

www.comcom.govt.nz

The Commerce Commission has various publications available for free from its website, including *The Fair Trading Act – A General Guide and Compliance Programmes and the Fair Trading Act*.

www.consumeraffairs.govt.nz

More information is available from the Ministry of Consumer Affairs website, particularly the credit guide section.

www.dia.govt.nz

The Department of Internal Affairs’ website has more information and fact sheets on gambling.

