

GUIDELINES FOR THE DISCLOSURE OF PRODUCT BUNDLING IN TELECOMMUNICATIONS

THE FAIR TRADING ACT

PURPOSE OF THESE GUIDELINES

These guidelines are intended to help telecommunications retailers better understand the Commerce Commission's application of the Fair Trading Act in relation to the disclosure of bundled telecommunications products. While providing general guidance, the Commission cannot provide legal advice about specific representations or promotions. Ultimately only a court can decide whether or not a representation breaches the Fair Trading Act.

The guidelines do not deal with issues which are more appropriately covered under the Telecommunications or Commerce Acts.

BACKGROUND

The New Zealand government has regulated the wholesale telecommunications market. It is expected that competition at the wholesale level will filter through to downstream markets and that retailers will be able to compete vigorously. It is vital for the New Zealand economy that competition works effectively in the retail telecommunications market.

An important development in this market is that a number of retailers have bundled together two or more products so that consumers can purchase those products at cheaper prices than what they would pay for the individual products in the bundle. While product bundling can lead to cheaper prices and increased competition, the potential danger of bundling is that it can make logical consumer choice more difficult if prices, terms and conditions are not clearly explained. Well informed consumers are essential to drive competition and help ensure that markets operate effectively.

Consequently the Commission has identified the clear disclosure of bundled products as a key element of effective competition in the retail telecommunications market. Following the publication of these guidelines, the Commission will adopt an active enforcement approach in relation to them.

IMPORTANCE OF PRICE DISCLOSURE

Representations about the price of bundled products are the Commission's primary concern. Where no price is given, representations about bundled products are less likely to raise issues under the Fair Trading Act.

However, representations which include a reference to the price of one of the bundled products if purchased individually are at significant risk of breaching the Fair Trading Act. Particularly risky are promotions where a price is quoted for an individual product which is only available at that price if purchased as part of a bundle, and that fact is not adequately disclosed. Even if that requirement is disclosed in fine print, the real danger of such advertising is that a consumer will gain the incorrect impression that the promoted service is available without restriction at the advertised price.

In such a case it is vital that the requirement to purchase additional products in order to achieve the advertised price is stated as part of the main message. The following is an example of an advertisement of a main message for a basic product bundle which would be acceptable: "Our company can offer you x GB of broadband for \$y per month, provided that you also have your national and international calling with us."

It is not acceptable for the calling requirement to be relegated to the fine print. Neither is it sufficient for it to be disclosed at the point of sale, because by then a misleading representation about the price of the broadband service will already have been made and consumers may have acted on that representation. It is a breach of the Fair Trading Act to provide a main message which is misleading, even if full information is provided to consumers prior to purchase.

CONTENT OF THE MAIN MESSAGE

When communicating an offer in relation to a bundled product it is particularly important that advertisers accurately identify what elements of the promotion need to be included in the main message and which can legitimately be relegated to the fine print. Key aspects of the offer that would need to be disclosed as part of the main message are likely to include the content of the bundle and the price together with any restrictive conditions including any minimum contract period.

Conditions which may be legitimately conveyed to consumers in the fine print or before they sign up are those which most consumers would assume would apply to offers of this nature, or those that do not change the effect of the main message, given that the offer has already been accurately described in the main message. For example, most consumers who sign up for a contract with a minimum 12 month period would not be surprised if there was a termination fee if they ended the contract within the 12 months. However, any conditions that depart from those which consumers might usually expect, such as abnormally high fees or a high minimum monthly spend on a particular service, should be disclosed as an element of the main message.

There are no set rules regarding the size of any fine print. However, it will be important to have any significant information in a form which is clearly readable and in close proximity to the main message. You will also need to ensure that, where written advertising is of varying sizes, all important information remains clearly readable even when the original advertisement has been reduced in size. It is vital to ensure that the main message, read by itself without any reference to fine print, gives a clear, accurate impression of the offer and the price.

WHAT DOES THE MAIN MESSAGE INCLUDE?

The courts have indicated that they will not take into account the space limitations of any advertising medium in deciding whether a particular advertisement is misleading. Each advertisement is a legal representation which must be able to stand on its merits. It is the advertiser's legal responsibility to ensure that viewers or readers of any single advertisement gain an accurate impression of the offer being promoted, rather than relying on information provided on a website or by a customer services representative to correct misleading information.

While the scope of the main message will vary according to the particular facts of each promotion, the Commission's view is that, in general, the main message will include the following:

- **TELEVISION ADVERTISING.** Information clearly referred to in the voiceover and/or by way of clear and compelling visual display, ie, the major image on the screen for a period sufficient for the viewer to see easily.
- **WRITTEN ADVERTISING.** Information conveyed in large print or by obvious images – the initial impression likely to be gained by a casual reader.
- **RADIO ADVERTISING.** This includes all the spoken information, unless it is indistinct.
- **TEXT MESSAGE/SMS ADVERTISING.** Because of the limited space available, traders need to be particularly careful that any text advertising does not breach the Fair Trading Act. In this case the main message is likely to include the whole text. However, because there is likely to be room for only a short message, it is even more important that this provides an accurate impression of the content of the advertised offer. A statement such as "Broadband for \$10 per month – see our website for details" where the broadband is only available for \$10 per month as part of a bundled offer, or other restrictive or unexpected conditions apply, is likely to breach the Fair Trading Act.

- ONLINE BANNER ADVERTISING. Again, because of the limited space available, the main message is likely to include all of the words on the banner. In the Commission's view it's not acceptable to have a misleading message in an online banner on the basis that the reader can click through the message to obtain more detail about a bundled offer. That is because some viewers of the banner may not click on the message and may retain a misleading impression.
- BUS SHELTERS/BILLBOARDS/POSTERS. As with texting this type of advertising is likely to be quite restricted in the space available to provide readable information. Also many viewers of this advertising will be on the move and only be able to glance quickly at it. Consequently the main message of such advertising is likely to be only those words large enough to be read quickly from a reasonable distance.
- WEBSITE ADVERTISING. Generally this is the opportunity for a very clear description of any product bundles on offer as well as the applicable price and any conditions.
- Is there a termination fee payable if the minimum contract period is not completed? Any such fees need to be disclosed clearly. Any unusually high fees would need to be disclosed in the main message.
- Does the main message give a clear and accurate impression of the price and content of the offer?
- Television advertising – are all key ingredients of the offer included in the voiceover or in the main screen image for a reasonable period?
- Other advertising – are all the key elements of the offer and any unexpected conditions included in the main message?
- Instore or call centre explanations to customers (or website if you can purchase online). This is an opportunity to ensure that the customer has fully understood all relevant aspects of the offer. It is not the place for correcting a misleading impression created by earlier advertising.

The Commission has developed Fair Trading Act compliance resources which are available on the Commission's website at www.comcom.govt.nz/developing-a-fair-trading-compliance-programme/

The resources include a check sheet for Fair Trading Act advertising and promotion compliance.

CHECKLIST

The following is a checklist of points to consider when planning the advertising of bundled telecommunications products. It is not an exhaustive list and is intended to be used in conjunction with the additional guidance provided in these guidelines.

- What products are being offered as part of the bundle?
- Are all references to the price of the bundle accompanied by clear references to the products which comprise the bundle?
- Are there any unexpected conditions which would surprise consumers? If so, these should also be disclosed in the main message.
- Is there a minimum contract period? If this is unexpectedly long, is this disclosed in the main message? If this is similar to or shorter than other similar offers, is it disclosed clearly?