

THE FAIR TRADING ACT PRICING

The Fair Trading Act applies to all aspects of the promotion and sale of goods and services, including pricing. There are many legitimate pricing techniques a business can use to promote its products and services, however, care must be taken to ensure consumers are not misled or deceived.

MARKDOWNS

It is relatively common for businesses to compare the prices of their goods or services with the usual price of those items in order to indicate to consumers that they can obtain a bargain by purchasing the item now. Where the 'usually' price used is genuine, the bargain being advertised can be a true bargain. However, there are two ways in which the advertising of former prices can be misleading:

1. The 'usually' price is an artificially inflated price established for the purposes of enabling the subsequent offer of an apparent large reduction. A comparison price should be one which is based on the regular mark-up, not an inflated one, and be a realistic market price at which sales are regularly made. If significant sales have not been made at the 'usually' price, then this is likely to indicate that the comparison price was not genuine. Any price comparison, when closely examined, will need to be supported by the actual facts of the particular case.

2. The 'usually' price is out of date. The comparison prices should be ones at which the items have been sold sufficiently recently and have applied for a reasonable period to meet the description 'usually'. What is a reasonable period may depend on factors such as the type of product or market involved and the usual frequency of price changes.

Once a price has been charged for a reasonable time, it then becomes the normal price and comparisons should not be made with a previous original price unless the basis for the comparison with the original price is made very clear. For example, if a retailer advertises a product as 'was \$15 now reduced to \$10', and the product has recently been available for \$12, the 'was' price quoted may be misleading, even if the product was originally sold at \$15. This is because the actual saving is only \$2 not \$5. A way to overcome this would be to advertise 'originally \$15, previously \$12, now \$10'.

Likewise, an introductory special should be a genuine offer to sell an item for a lower price than the usual mark-up. There must be a genuine intention to increase the price to the usual selling price once the period of the introductory special has finished. Also, the introductory special should not apply for a prolonged period.

EXAMPLES

A bed retailer ran an extensive nationwide campaign in print and on radio, advertising beds at special prices. The advertisements claimed that customers could make 'massive savings' and that the retailer had 'slashed prices', offering specific percentages off the 'normal' prices of its beds. However, a Commission investigation revealed that beds were consistently sold at approximately the same prices during both sale and non-sale periods. The retailer was convicted and fined.

A camping and outdoor gear retailer advertised various items of clothing as being available at a discount of up to 50 to 60 per cent off normal retail price during their nationwide sales. However, some of these items had already been available in store at this reduced price and, in some cases, were also available at the same 'sale' price afterwards. The retailer was convicted and fined.

A sale represents a special buying opportunity which, if missed, cannot be reasonably expected to appear again in the short term. For this reason, many buyers may change their ordinary shopping habits in order to take advantage of this opportunity.

COMPARISONS WITH COMPETITORS

If a business compares its prices with those of a competitor (for example, 'Elsewhere \$X, our price \$Y'), the business should be able to identify where in the local market the goods or services are available for purchase at that price. The goods or services compared should be exactly the same, not just similar. If the 'elsewhere' price is not in fact charged in the local market, then the suggested bargain is not genuine. The local market is the area in which an average person would travel to buy the advertised product in question. It may, therefore, vary depending on the product being sold. For example, people may be willing to travel further for an upmarket stereo system than they would for a packet of Easter eggs.

Businesses who advertise 'elsewhere' prices in nationally distributed flyers, need to be sure that the 'elsewhere' or 'was' prices are valid for all the areas the flyers are delivered to. It would be misleading to use a high 'elsewhere' or 'was' price in the flyer that was not a true representation of the saving in the relevant market where the flyer was distributed.

EXAMPLE

A nationwide hardware chain distributed more than a million copies of a 'Summer specials' coupon booklet claiming that only the coupons could give you the special coupon price. However, some of the coupon prices were the normal shelf prices charged by some stores in the chain. The company was convicted and fined.

RECOMMENDED RETAIL PRICE

A recommended retail price is the price a manufacturer suggests a retailer sell a product at, with the intention of standardising prices across locations. However a retailer is under no legal obligation to do so (the Commerce Act prohibits Resale Price Maintenance) and will often sell below the suggested retail price.

When consumers see an advertisement that uses a recommended retail price as a price comparison they may assume that by purchasing the goods at the lower price they will make a genuine saving as they are paying less than the 'normal' price.

Because of this consumer perception, comparisons with recommended retail prices may be misleading unless these are the prices at which the item is normally available in the local market.

EXAMPLE

An appliance retailer advertised a number of sales over a period of four months. Each product advertised had a stated recommended retail price, with the retailer's 'sale' price which was significantly cheaper, and the percentage saving. The recommended retail prices were not the retailer's normal selling price; in fact the sale price was the normal selling price. The company was convicted and fined.

DUTY-FREE

The term 'duty-free' implies to consumers that there is a price advantage in comparison to prices charged by other retailers. Tourists and people travelling overseas are entitled to assume that they will get the benefit of this price advantage. Businesses need to take care when using this term that the goods described as duty-free would usually attract duty, and that the duty-free price advantage is passed on to the consumer.

The range of goods attracting import duty has declined considerably in recent years, and it is common for duty-free stores to have a mixed stock of dutiable and non-dutiable goods available both for export and for retail sale. Businesses claiming to make duty-free sales should clearly identify those goods which do not usually attract duty so as not to give customers the impression that there is an advantage in buying the stock from their store because in another store it would attract duty.

EXAMPLE

A business advertised jewellery as duty-free when it did not attract import duty. The company was convicted and fined.

PRICE DISPLAYS

It is important that businesses price goods clearly to ensure that consumers are not misled. When a customer sees a price sticker on a product or a shelf price, it is reasonable for them to expect that that is the price they will be charged at the checkout.

A business that displays prices which are lower than the actual price at which they are selling goods or services will breach the Fair Trading Act because they are misleading consumers about the true cost of goods.

EXAMPLE

A supermarket charged higher prices for certain fruit and vegetables at the checkout than at their point of display. The supermarket was convicted and fined.

PRICE RANGES

Businesses must be careful not to mislead customers when advertising a range of prices. A claim that goods are on sale 'from \$9.99' or have 'up to \$50 off', when only a small proportion of the items in the sale actually qualify for that description, is literally true but could mislead consumers into believing the sale is more attractive than it actually is.

In these situations, to avoid misleading consumers, it is important that as much detail as possible is given, for example, '\$10 off men's T-shirts, \$20 off summer skirts'. If there is not enough space to list individual prices, the most common saving should be indicated – for example, 'up to 50% off, most items 30% off'.

Promotional material should also be kept up to date to reflect changes in price ranges.

Price ranges are commonly used in the advertising of property to indicate the range in which the vendor is likely to accept an offer. While 'price-banding' or price range representations can be a useful practice if represented accurately, care must be taken by vendors and real estate agents not to be misleading.

Where price ranges are used in property advertising, there must be a realistic prospect that the vendor will give serious consideration to offers made at the bottom of the advertised price range.

Where the advertised price is not one at which the vendor would consider selling at the time of the advertisement but is a false low price to attract potential buyers to properties which they might not otherwise have considered, the advertisement will breach the Fair Trading Act.

EXAMPLE

A real estate agent advertised a property for sale on three separate occasions at 'buyer enquiry over \$380,000'. However the agent was aware that the vendor was not willing to accept less than \$400,000 for the property. The agent and his real estate company were both convicted and fined.

QUOTES AND ESTIMATES

Businesses must not mislead potential customers when giving quotes and estimates. When a price is quoted or estimated, customers must be able to rely on that figure. It is on the basis of that quote that customers decide whether to purchase the goods or services offered by the business.

A quote is an offer to do a job for a certain price. If accepted, then there is a contract for the work to be done for that price, unless the parties agree to a change in the price to cover extra work not covered by the original quote.

An estimate is the nearest price, or range of prices, that a business can give based on past experience. If there may be any significant variation from the estimated price, the business should make this, and the nature of the possible variation, very clear to the customer. All limits and conditions must be clearly spelled out. The business must make the estimate honestly, based on reasonable grounds.

It is good business practice to put quotes and estimates in writing, however, the Fair Trading Act makes no distinction between an oral or written quote or estimate.

Any charge for giving a quote or estimate should be disclosed before agreeing to provide it.

Quotes or estimates should be inclusive of GST.

EXAMPLE

A septic tank cleaning company misled customers as to why final invoices for completed work were considerably higher than the original quotation, in some cases up to 300 per cent more. Reasons given for the increase were in some cases untrue or did not justify the significantly higher cost.

The company and its director were convicted and fined.

REASONS FOR PRICE CHANGES

Any representations made about the reasons for changes to the prices of goods or services should be accurate. Businesses should not attribute price increases for which they are either wholly or even partly responsible to other organisations such as regulators or their supplier.

The Fair Trading Act prohibits such practices because it is important that consumers are aware of the correct reasons for any price changes so that they can make informed purchasing decisions.

EXAMPLE

Several electricity companies incorrectly implied to their customers that increases in electricity prices were caused by increases in network charges for the use of electricity lines. In settlements with the Commission, the companies admitted they had breached the Fair Trading Act, advised the affected customers for the correct reasons for the price increases and, in some cases, paid compensation.

SALES - PROMOTIONS, TYPES AND DURATION

In the mind of the ordinary consumer, the word 'sale' means an opportunity to buy goods at reduced prices for a limited time.

It is misleading for a business to use signs or advertisements saying 'sale' unless a substantial proportion of stock relating to the sign is being offered at lower prices than were charged before the 'sale' started. Businesses should also take care when promoting goods ordered specifically as sale stock. Such goods should not be promoted using 'was now' prices, as the goods have not been sold by the business prior to the sale.

There are many different types of sales. All sales, however, imply that a lower price than usual is being charged. To avoid breaching the Fair Trading Act, the goods or services being offered as part of the sale must be priced below normal levels. Businesses must also be able to prove that the description of the sale is truthful. 'Liquidation', 'receivership' or 'fire' sales imply that the stock is from a business that is closing down. Advertising a 'closing down' sale, with no intention of closing the store, will breach the Act.

A sale represents a special buying opportunity which, if missed, cannot be reasonably expected to appear again in the short term. For this reason, many buyers may change their ordinary shopping habits in order to take advantage of this opportunity. To avoid misleading shoppers, a sale must be for a short duration and only for the period stated. If advertising states 'last three days of the sale' for several weeks, shoppers would be misled about the opportunity available to them.

EXAMPLE

A business advertised a '12 hour sale'. However, the 'special prices' shown in the advertisement had been available before the start of the sale. The business was convicted and fined.

SPECIAL OFFERS

An advertisement referring to 'special offers' or 'specials' would be misleading unless there was truly something special about what was being offered – such as a lower price or additional features.

A special offer that is advertised widely when only a few people are able to take it up would also be misleading, such as an advertisement for cheap credit which does not specify that the offer is only available to those with incomes over \$60,000 a year.

Any unpredictable limitation or qualifications to a special offer should be clearly shown, such as if:

- ≥ the offer applies only to cash purchases;
- ≥ if there are limits on the number of items per customer;
- ≥ if it applies only to purchases over a minimum value;
- ≥ if there are limited stocks available; or
- ≥ if the offer is only for a limited time.

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CONTACT

Contact the Commerce Commission with information about false or misleading trading practices.

TELEPHONE

Our Contact Centre during office hours on 0800 943 600

WRITE

To us at Contact Centre,
PO Box 2351, Wellington 6140

EMAIL

Us at contact@comcom.govt.nz

This fact sheet is a guideline only, and reflects the Commission's view. The publication is not intended to be definitive, and should not be used instead of legal advice. It is traders' responsibility to remain up to date with legislation.

The Commerce Commission enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.

Only the courts can make an authoritative ruling on breaches of the Fair Trading Act. Courts may fine companies found guilty of breaching provisions of the Fair Trading Act up to \$200,000 and individuals up to \$60,000.