



A-Z OF EMPLOYING

## **Fair Trading Act**

*Our guide for Employers and Managers*

**SUPPORTING,  
FACILITATING &  
REPRESENTING  
BUSINESS**

Business**Central** 

# Fair Trading Act

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It should not be a  
substitute for  
professional advice.

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Team if you require  
specific assistance.

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# Fair Trading Act

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## Overview

The Fair Trading Act 1986 (the Act) prohibits certain conduct and practices in trade, whilst providing for the disclosure of consumer information in relation to the supply of goods and services.

The Act applies in New Zealand, but also extends outside New Zealand, to any person who is a resident, or carrying on business in New Zealand that involves the supply of goods or services, or granting interest in land.

The Crown cannot be prosecuted under the Act (but Crown corporations engaged in trade can). If it is alleged that the Crown has contravened the Act, an application may be made to the Court for a declaration regarding the Crown's behaviour.

## Definitions

The Act defines a “*business*” as any undertaking:

- ▶ That is carried on whether for gain or reward or not; or
- ▶ In the course of which:
  - Goods or services are acquired or supplied; or
  - Any interest in land is acquired or disposed of; Whether free of charge or not.

“*Goods*” means:

- ▶ Personal property of every kind (whether tangible or intangible); and
- ▶ Includes:
  - Ships, aircraft, and vehicles;
  - Animals, including fish;
  - Minerals, trees, and crops, whether on, under, or attached to land or not;
  - Gas and electricity;
  - To avoid doubt, water and computer software.

“*Services*” includes:

Any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred; and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:

- ▶ A contract for, or in relation to,
  - The performance of work (including work of a professional nature), whether with or without the supply of goods; or
  - The provision of, or the use or enjoyment of facilities for, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation; or
  - The conferring of rights, benefits, or privileges for which remuneration is payable in the form of a royalty, tribute, levy, or similar exaction;

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- To avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water;
  - ▶ A contract of insurance, including life assurance, and life reinsurance;
  - ▶ A contract between a bank and a customer of the bank;
  - ▶ Any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits;
- But does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service.

“Supply” in relation to:

- ▶ Goods, includes supply (or resupply) by way of gift, sale, exchange, lease, hire, or hire purchase; and
  - ▶ Services, includes provide, grant, or confer;
- And “supply” as a noun, “supplied”, and “supplier” have corresponding meanings.

“Trade” means

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.

## Prohibited Conduct

The Act prohibits a person in trade: [sections 9, 10, 11, 13]

- ▶ Engaging in conduct that is misleading or deceptive, or likely to mislead or deceive;
- ▶ Engaging in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability or quantity of goods;
- ▶ Engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability or quantity of services;
- ▶ In relation to the supply(or possible supply), or promotion of the supply or use of goods or services, making a false, or misleading representation:
  - That goods are of a particular kind, standard, quality, quantity or that they are supplied by any particular person or person with a trade, qualification or skill; or
  - That goods are of a particular kind, standard, quality, grade, quantity, composition, style, model or have a particular history or particular previous use; or
  - That a particular person has agreed to acquire goods or services; or
  - That goods are new, reconditioned, or that they were manufactured, produced, processed or reconditioned at a particular time; or
  - That goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits; or
  - That a person has any sponsorship, approval, endorsement or affiliation; or
  - With respect to the price of any goods or services; or
  - Concerning the need for any goods or services; or

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- Concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- Concerning the place of origin of goods

## Representations about land

In addition to goods and services, the Act prohibits false representations and other misleading conduct in relation to land.

The Act provides that no person, either in trade, in connection with the sale, grant, possible sale or possible grant of an interest in land, shall make a false or misleading representation that they have any sponsorship, approval, endorsement or affiliation. Neither shall they make a false or misleading representation regarding the land's nature, price payable, location, characteristics, capable and lawful uses and associated facilities. Physical force, harassment and coercion shall not be used in connection with the sale or grant (or possible sale or grant) or the payment for an interest in land.

## Trademarks

The forging of trademarks, or using trademarks or signs, that closely resemble other trademarks, so that it is likely to mislead or deceive, is prohibited under section 16 Fair Trading Act 1986.

## Unfair practices

The Act also prohibits unfair practices such as:

- ▶ Offering gifts, prizes and other free items without the intention of providing them, or not providing them as offered;
- ▶ Bait advertising (advertising goods or services at a price when there is no intention or ability to reasonably supply them at that price);
- ▶ Referral selling (selling goods or service to a person on the condition that they will then receive a rebate, commission or other benefit in return for providing names of prospective customers);
- ▶ Demanding or accepting payment without intention to supply the goods or services as ordered;
- ▶ Misleading representations about certain business activities;
- ▶ Harassment and coercion in connection with the supply, possible supply or payment for goods and services;
- ▶ Pyramid selling schemes;
- ▶ Importing goods with false trade descriptions.

## Fair Trading in employment situations

Section 12 of the Act states that no person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

Section 12 A of the Act states that a person must not make any unsubstantiated (unreasonable) claims about a product or service, irrespective of whether the claim is false or misleading.

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Section 162 of the Employment Relations Act 2000 gives the Employment Relations Authority, in any matter relating to an employment agreement, the power to make any order the High Court or District Court may make under the Fair Trading Act 1986.

In *Crampton v Tait Electronics Limited* (Unreported) CA 128/02; 10 December 2002; H Doyle; the Employment Relations Authority found that Ms Crampton had not been misled as to the nature of her employment; the position she had been offered was that that she had accepted and performed. The job description matched the description she had been given at the interview.

In *Neutze v Peter Baker Transport Limited* (Unreported) CA 81/03; 23 July 2003; P Cheyne; the Employment Relations Authority determined that the company had not breached either section 9 or 12 of the Fair Trading Act 1986. Ms Neutze claimed that her position as a tele-sales consultant was in fact a sales support role; the Authority found that the company wanted to engage a person to perform a sales role that focused on a certain type of client but also to assist the other members of the sales team. It said that the job description and employment agreement made that abundantly clear, and that Ms Neutze received that information prior to commencing work; so there was nothing about the recruitment process to suggest Ms Neutze was or was likely to be misled.

The Employment Relations Authority and Employment Court do not have jurisdiction to deal with complaints brought pursuant to the Fair Trading Act 1986 unless an employment agreement has been entered into.

## Remedies for breach of the Act

Breaches of the Fair Trading Act 1986 may be remedied by:

- ▶ Fines (up to \$200,000 for individuals and \$600,000 for companies) for significant breaches in Part 1;
- ▶ Fines (up to \$10,000 for individuals and \$30,000 for companies) for lower level breaches in Parts 2 or 4A;
- ▶ Infringement fees of up to \$2,000 for minor breaches;
- ▶ Granting an injunction;
- ▶ Ordering the disclosure of information;
- ▶ Making an order declaring a contract or any part of a contract void;
- ▶ Making an order varying a contract;
- ▶ Making an order directing the refund of money or return of property;
- ▶ Granting of damages;
- ▶ Ordering the repair or provide parts for goods;
- ▶ Ordering the supply of services.

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## Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website [www.businesscentral.org.nz](http://www.businesscentral.org.nz) regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to BC Learning courses and conferences designed for those who manage employees.

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[Reviewed: June 2021]