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KENSINGTON SWAN

Consumer protection in New Zealand

2021

Consumer protection in New Zealand



4 partners

9 professionals

Specialists in:

The Fair Trading Act

Consumer Guarantees Act and other
consumer legislation

Reviewing marketing collateral for
compliance with both the Fair
Trading Act and Advertising
Standards Codes

Ranked with:



"Dentons Kensington Swan advises a diverse client base on legal issues surrounding public and private sector procurement, consumer law, electronic commerce, technology product compliance, privacy and data protection."

Legal 500 Asia Pacific 2021



Key points about consumer protection in New Zealand

Consumers in New Zealand are protected by five key pieces of legislation:



Fair Trading Act 1986



Consumer Guarantees Act 1993



Credit Contracts and Consumer Finance Act 2003



Privacy Act 2020



Unsolicited Electronic Messages Act 2007



The detail

Fair Trading Act 1986 ('FTA')

The FTA promotes trading which is fair, honest, and transparent. It applies to the supply of goods or services in 'trade'. The FTA prohibits:

Deceptive or misleading conduct: Consumers must not be misled or deceived about the nature, manufacturing process, characteristics, suitability to purpose, or quantity of goods or services.

False, misleading and unsubstantiated representations: Representations made to consumers about goods or services must not be false or misleading. Representations made without reasonable grounds, even if they are believed to be true (or are in fact true), will also breach the FTA.

Unfair contract terms: Standard form consumer contracts cannot contain terms which a court declares to be unfair to consumers. Unfair terms will not be enforceable. 'Consumer' contracts are those for the supply of goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption.

Unfair practices: The FTA lists a number of activities which are considered to be unfair and which are prohibited. The listed activities include pyramid selling schemes, bait advertising, and requiring payment for unsolicited goods or services.

CONTRACTING OUT

In most cases, the FTA cannot be contracted out of. In some business-to-business transactions, contracting out is possible in writing if both parties are 'in trade' and the goods or services are both supplied and acquired 'in trade' and it is fair and reasonable to do so.

Other matters dealt with under the FTA include:

- compliance with safety standards for certain products and services offered to consumers, to prevent or reduce risk of injury to a person;
- compliance with consumer information requirements for certain products offered to consumers;
- layby sale agreements and disclosure requirements to consumers;
- extended warranties; and
- auctions.

PENALTIES FOR BREACHING THE FTA

- a maximum fine for breach by an individual of NZ\$200,000 per offence, or for a business of NZ\$600,000 per offence;
- compensation to affected consumers;
- injunctions; and
- management banning orders.

Consumer Guarantees Act 1993 ('CGA')

- Provides consumers with a number of guarantees that apply to goods or services purchased from a supplier in trade.
- Has a broad scope defining a consumer as a person who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, provided that the person does not represent themselves as acquiring the goods or services for resupplying in trade or for use in manufacture or production.
- Applies to certain business-to-business transactions, giving the business consumer the benefit of the same guarantees as an individual consumer.
- The guarantees generally cannot be contracted out of, but as with the FTA, there is a limited exception for parties to a business to business transaction where the goods or services are purchased for business purposes and it would be fair and reasonable to contract out of the CGA.

The CGA implies guarantees for goods supplied that:

- the supplier has the legal right to sell the goods and the goods are free of security interests;
- the goods supplied are of acceptable quality;
- the goods supplied are fit for a particular purpose made known by the consumer or represented by the supplier;
- the goods supplied match the supplier's description of the goods or any sample;
- the goods are sold at a reasonable price where the price is not pre-determined;
- repairs and spare parts are reasonably available; and
- goods are delivered at the time agreed (or within a reasonable time) if the supplier is to deliver the goods.

The CGA implies guarantees for services supplied that the services must:

- be performed with reasonable care and skill;
- be fit for a particular purpose that the consumer makes known to the supplier;
- be completed within a reasonable time where the time has not pre-determined; and
- be for a reasonable price where the parties have not pre-determined the price.

LIABILITIES AND PENALTIES

Where goods do not comply with a guarantee, a consumer may seek redress against the supplier or, in the case of goods supplied, the manufacturer or importer, at the consumer's election. If the failure is capable of remedy, the consumer must first give the supplier (or otherwise) the right to rectify the breach. If the failure is minor, the supplier can choose to either repair the goods, replace the goods or refund the consumer. If the supplier refuses to repair faulty goods or fails to do so within a reasonable time, the consumer may have them repaired elsewhere and recover the costs from the supplier. If the failure cannot be remedied or cannot be put right within a reasonable time, or is substantial, the consumer may reject the goods or cancel the service contract, or obtain damages for any reduction in value of the good or service.

In addition, the consumer can also claim for any reasonably foreseeable other loss that results from the failure.



Credit Contracts and Consumer Finance Act 2003 ('CCCFA')

- Places strict requirements on lenders who provide credit to consumers for personal or domestic use under credit contracts and consumer leases, and buy-back transactions of land.
- Requires lenders to comply with the 'lender responsibility principles' which include:
 - exercising care, diligence and skill in advertising credit services or before entering into credit arrangements with a borrower;
 - making reasonable inquiries into a borrower's requirements and objectives;
 - considering a borrower's repayment abilities;
 - assisting a borrower to make an informed decision; and
 - treating a borrower reasonably and in an ethical manner.

PENALTIES

Lenders can be fined up to NZ\$200,000 for individuals and NZ\$600,000 for businesses for breaching the CCCFA. Courts can also reopen 'oppressive' contracts which are unjustly burdensome or breach reasonable standards of commercial practice.

Privacy Act 2020 ('Privacy Act')

- Governs the collection, storage, use and disclosure of personal information by requiring compliance with thirteen Information Privacy Principles ('IPPs').
- 'Personal information' is broadly defined as 'information about an identifiable individual.' The Privacy Act applies to agencies, which include any person or body of persons, whether corporate or unincorporated and whether in the public sector or private sector (unless an exception applies). It applies to New Zealand agencies as well as overseas agencies carrying on business in New Zealand.

The IPPs, among other things, specify that an agency:

- must not collect personal information unless it is necessary for a lawful purpose connected with a function or activity of the agency (and not require identifying information if the purpose does not require it);
- must collect personal information from the individual concerned (unless an exception applies);
- should take reasonable steps to ensure the individual is aware of the collection of personal information, and other information in relation to the collecting agency and the purpose for such collection, who the information will be disclosed to, the consequences (if any) for the individual if the information is not provided, and the individuals rights of access to, and correction of, information ;
- may only collect personal information by lawful means, and by fair and not unreasonably intrusive means (particularly in the case of children or young persons);
- ensure that the personal information is protected by reasonable security safeguards to protect the information from loss, unauthorised access, use, modification or disclosure and other misuse;
- on request from an individual, give confirmation of whether or not the agency holds, and give access to, their personal information, and also advise the individual that they may request correction of any personal information. If the agency does not correct the information it must attach a statement of correction to the information if the individual has provided it;

- must not use or disclose personal information without taking reasonable steps to ensure that the information is accurate, up to date, complete, relevant and not misleading;
- must not to keep personal information longer than necessary;
- should only use or disclose personal information for the purposes it was collected for, unless the individual consents or another of the exceptions applies;
- may only disclose personal information to a foreign entity in certain circumstances, essentially where the information will be protected by similar safeguards to those provided under the Privacy Act; and
- may only use unique identifiers when it is necessary, may not use a unique identifier assigned by another agency, and must take reasonable steps to protect unique identifiers from misuse.

The Privacy Act requires mandatory reporting of privacy breaches where it is reasonable to believe the breach has caused serious harm or is likely to do so.

PENALTIES

Breach of any of the IPPs is grounds for a complaint to the Privacy Commissioner. The Privacy Commissioner may investigate the complaint and may refer matters to the Director of the Human Rights Review Tribunal, who may award remedies such as damages, a declaration that the actions interfere with privacy, a compliance order, costs, or other relief deemed appropriate. The Privacy Commissioner may issue compliance notices and binding decisions on access requests. Fines of up to NZ\$10,000 may be imposed for offences.

Unsolicited Electronic Messages Act 2007 ('UEMA')

An individual or organisation ('**person**') must comply with the UEMA when sending emails (and SMS messages) to consumers. The UEMA prohibits the sending of unsolicited commercial electronic messages. Essentially, in order to send commercial electronic messages, the person must first obtain consent from the recipient. Consent can either be:

- express (for example by way of a 'tick the box' opt in when a person provides their contact details);
- inferred (from the conduct, business and other relationships of the person concerned); or
- deemed (where an email address has been published by a person in a business or official capacity, they have not expressly said they do not wish to receive unsolicited electronic messages and the message sent to that address is relevant to the business or duties of the person in a business or official capacity).

'Electronic messages' that are subject to the UEMA include emails, faxes, instant messages, SMS (txt), multimedia messages, and other mobile phone messages, but not voice calls or voice messages. 'Commercial' electronic messages are defined to include 'electronic messages that market or promote goods, services, land, an interest in land, or a business or investment opportunity'.



Common electronic messages that are not considered 'Commercial' electronic messages include those that:

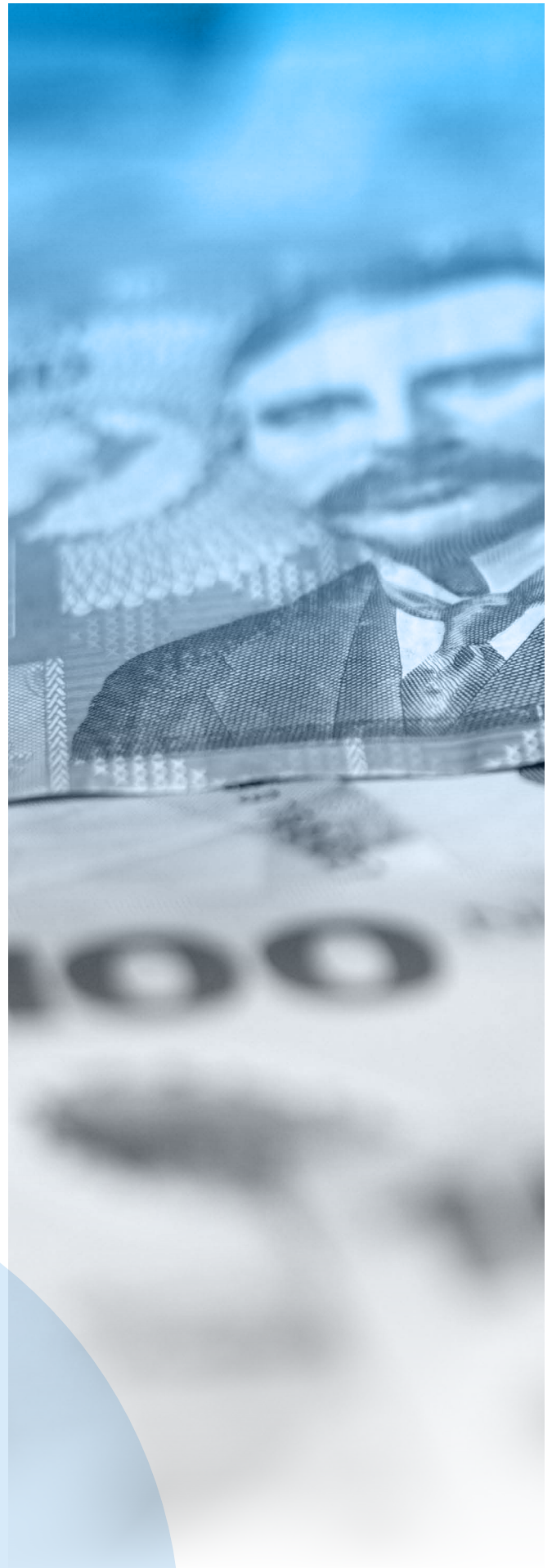
- provide a quote or estimate of goods or services, if that quote was requested by the recipient;
- facilitate or confirm a commercial transaction which was previously agreed to with the person sending the message; or
- provide notification of factual information about a subscription, membership, account, loan, or similar relationship involving the on-going purchase or use by the recipient of goods or services offered by the person who authorised the sending of the message or the recipient's on-going subscription, membership, account, loan, or similar relationship.

The person, when sending a commercial electronic message, must also:

- identify itself clearly as the sender of each commercial electronic message; and
- include a functional unsubscribe facility in all commercial electronic messages which is functional and valid for at least 30 days after the principal message is sent.

PENALTIES

An individual can be liable to pay a penalty not exceeding NZ\$200,000 in respect of a civil breach and an organisation can be liable to pay a penalty not exceeding NZ\$500,000. The Department of Internal Affairs ('**DIA**') is active in this space, and if a complaint is made it is very likely to be investigated.





For more
information contact



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How we can help you

FTA and CGA

- Draft or review your consumer contracts and terms of trade
- Draft or review your business-to-business contracts
- Review your marketing material
- Advise you on your obligations under the FTA and CGA
- Defend a claim for an alleged breach of the FTA
- Provide training on the CGA and FTA to avoid staff breaching it.

CCCFA

- Draft or review your credit contract terms, consumer leases or buy-back agreements
- Advise you on advertising requirements under the CCCFA
- Draft or review your disclosure statements to borrowers
- Register and enforce security interests
- Defend a claim for an alleged breach of the CCCFA
- Provide training on the CCCFA to avoid staff breaching it.

Privacy Act

- Advise you on how to safely hold, collect, store, use and disclose information
- Draft or review your Privacy Notices for New Zealand and Australian law; and GDPR
- Prepare templates and guidance on data audits and privacy impact assessments
- Prepare policies for various aspects of privacy compliance, for example, in relation to HR matters, front-line staff, breach protocols and procedures
- Assist you in responding to requests for information.

UEMA

- Advise you on whether your methods of obtaining consent to send commercial electronic messages are adequate for the purposes of the UEMA
- Prepare internal policies and provide training on the UEMA to avoid staff breaching it
- Assist you in responding to investigations by the DIA.

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