

Fair trading in NZ FAQs

What kinds of conduct are prohibited under the FTA?

The FTA prohibits traders from:

- Engaging in misleading or deceptive conduct in trade generally and specifically in relation to goods, services and employment;
- Making false representations in trade about goods, services, land and from certain conduct in relation to trade marks; and
- Engaging in unfair practices in trade such as bait advertising, pyramid selling schemes and the offering of gifts and prizes.

What does “in trade” mean?

The FTA applies to anyone who is “in trade”. Under the FTA “trade” has a broad meaning: it is defined 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 person may be found to be operating “in trade” in respect of a single transaction as well as multiple transactions.

What does “misleading or deceptive” mean“?

There is no definition of ‘misleading’ or ‘deceptive’ in the FTA. The Courts decide what is misleading and/or deceptive by applying the ordinary meaning of those words to the particular facts of each case. The Courts in Australia (under similar legislation) have interpreted both words to mean ‘to cause to

believe what is false; to mislead as to a matter of fact, to lead into error, delude, take in’.

What kinds of “false representations” are covered by the FTA?

The FTA prohibits traders from making false or misleading representations in relation to a wide variety of commercial activities. In the context of breaches of intellectual property rights, the most common allegations concern misrepresentations that:

- Goods or services are connected or associated with those of another trader because of use of a confusingly similar trade mark or branding;
- Goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use;
- Services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill;
- Goods or services have a sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- A person has a sponsorship, approval, endorsement, or affiliation; and
- Goods have a particular place of origin.

Does the FTA prohibit certain activity in relation to trade marks?

Yes. Section 16 of the FTA prohibits any person in trade from forging a trade mark. Section 16 also prohibits traders from falsely applying to any goods, and falsely using in relation to the provision of services, any trade mark or sign

that would be likely to mislead or deceive consumers.

Is there a difference between a claim for misleading and deceptive conduct under the FTA and passing off?

Yes. For example, if trader A brings a claim under section 9 of the FTA against trader B for misleading and deceptive conduct in respect of an unregistered trade mark, trader A must prove two elements: first, that it has reputation or goodwill in its mark, and, second, that there has been a misrepresentation by trader B with the result that consumers are either actually confused or will likely be confused. Under the tort of passing off, trader A has to prove an additional third element: it must also show that it has suffered loss or damage as a result of trader B's misrepresentation. In practice, both claims are often brought together.

Who can take action under the FTA?

Anyone: consumers and businesses alike can take legal action under the FTA, although it is usually businesses who initiate proceedings due to the expense of doing so. The Commerce Commission in New Zealand has overall responsibility for enforcing the FTA on behalf of the general public.

What if my business didn't intend to breach the FTA?

Whether or not your business intends to breach the FTA is irrelevant, unless it can rely on one of the defences referred to in the FAQ below. If your business is found to have engaged in misleading and deceptive conduct as a matter of fact, your business may well be found liable.

Can I be personally liable for breaches of the FTA by my business?

Yes. Under the FTA a director, servant or agent of a company who is found to have breached the FTA may be found personally liable if the director, servant or agent, acting within the scope of their actual or apparent authority,

intended the company to do the acts which constituted a breach of the FTA.

What defences are available for breaches of the FTA?

The FTA provides a number of statutory defences to breaches of its provisions. These include:

- If a breach of the FTA was due to a reasonable mistake;
- If a breach was due to reasonable reliance on information supplied by another person (not including a director, servant or agent of a business); and
- If a breach was due to the act or default of another person (not including a director, servant or agent of a business), or to an accident or to some other cause beyond a defendant's control and the defendant took reasonable precautions and exercised due diligence to avoid the breach.

What remedies are available for breaches of the FTA?

There are a variety of remedies available under the FTA. In the context of intellectual property disputes, the most relevant are:

- Fines (up to \$60,000 for an individual and \$200,000 for a body corporate);
- An account of profits;
- Injunctions to restrain a person from engaging in certain conduct;
- Orders to disclose certain information or publish corrective statements;
- Orders to vary the terms of a contract or declare whole or part of a contract void; and
- Orders to compensate for loss or damage.

Where can I find out more information on fair trading in New Zealand?

You can find out more by contacting our Litigation Team and/or by reading the chapter on the Fair Trading Act in 'Intellectual Property

Law of New Zealand', written by James & Wells
and published by Thomson Reuters (formerly
Brookers).