

NZ consumer news | October 2015

Harvey Norman – when is a price the right price?

Australasian retailer Harvey Norman launched its "New Zealand's Biggest Retail Sale" promotion last week. However due to a technical computer glitch some goods, including lounge suites, were mistakenly advertised online for less than \$100 when their intended price was significantly more. According to media reports, around 330 people "purchased" those goods from Harvey Norman's online shop only to later receive an email stating that the prices were the result of a "genuine error" and they would not be receiving their goods at the advertised price. In the meantime customers' credit and debit cards had been charged the intended selling price, leading to complaints that customers might have been misled.

Consumer NZ's Chief Executive, Sue Chetwin, reportedly commented that Harvey Norman's conduct "*...might be misleading advertising...*" and consumers may "*...have more rights than just getting a \$100 voucher [offered in conjunction with an apology from Harvey Norman] and their better option might be to complain to the Commerce Commission*".

What does the law say?

The Fair Trading Act (**FTA**) prohibits parties in trade from making representations that are *likely* to mislead or deceive consumers. A party is not required to *intentionally* mislead to breach the FTA – inadvertent omissions can breach the FTA.

Limited defences are available to defendants facing a prosecution for an offence against section 40 of the FTA (ie criminal proceedings generally brought by the Commerce Commission). For example it is a defence to section 40 if a defendant proves that the breach was a due to a "reasonable mistake". It would seem that Harvey Norman is suggesting that that is the case here. However, the "reasonable mistake" defence is not available in civil proceedings brought by the Commission or relevant consumers under the FTA.

If the Commission or a relevant consumer can demonstrate to the District Court or a Disputes Tribunal that:

- Harvey Norman's conduct breached the FTA; and
- the consumer(s) suffered, or is likely to suffer, loss or damage as a result of Harvey Norman's conduct,

then the District Court or a Disputes Tribunal may make orders including varying the contract (if a valid contract is found to exist) or directing Harvey Norman to pay the amount of the loss or damage or supply specified goods to a particular consumer(s).

When is a price the right price?

The Harvey Norman incident raises broader questions about what a "price" means. This is particularly the case where businesses make comparisons between discounted prices and non-sale prices of their products. For example many businesses promote products on a "was \$x / RRP\$**x**" (**usual** price) and

“now \$y” basis. According to the Commission “[a] usual price must be the price at which a good or service is commonly sold, or the price of a good or service immediately before it was marked down... [and] will become out of date if it has not been charged for a reasonable period of time”.

A “reasonable period of time” will depend on the particular facts of the case but if a business had been selling the product for the usual price for some months prior to promoting the discounted price then the comparison is unlikely to raise concerns under the FTA.

However there can be concerns (depending on the particular circumstances) where the business:

- has never charged the usual price;
- has a strategy of inflating the usual price of its products in order to make its discounted price more compelling;
- has many prices at which the business commonly sells products for and the claimed usual price is just one of those common prices; or
- uses a usual price that is out of date.

Therefore businesses need to take care that they have sufficient grounds for making any claims about “usual” prices.

Commerce Commission’s Consumer Issues 2015 Report

On 24 September the Commerce Commission published its second annual [Consumer Issues 2015 Report \(Report\)](#). According to the Commission the Report is “[b]ased on analysis of information from a wide range of sources, including the Commission’s own data as well as information from other government and community agencies...” The Report provides useful insights into consumer issues that the Commission is likely to focus on in 2016.

Key issues in the report include:

- **Fair Trading Act (FTA) complaints are up:** More consumers are laying FTA complaints to the Commission with complaints up from 3425 in 2013 to 4377 in 2014. The Commission considers the increase is likely a result of recent consumer law reform and associated publicity. Online trading accounts for 33% of complaints – twice the number of complaints received in respect of bricks and mortar traders. A small number of traders are generating a significant number of complaints with 25% of complaints relating to 24 traders. Domestic appliance retailers and telecommunication providers continue to generate the most complaints, but Christchurch rebuild complaints have decreased. According to the Commission, “premiumisation” (eg “green claims”) and misleading origin claims continue to mislead consumers about the quality, properties, and value of products. Retailers are also increasingly telling consumers to seek remedies from manufacturers when that is a choice for the consumer – this is particularly prevalent in the appliance retail sector.
- **Online sales & influence of technology:** Online sales continue to grow and now account for at least 6% of core retail sales. This trend brings increasing regulatory challenges not least seeking to apply NZ consumer law to online traders based overseas who are supplying NZ-based consumers. The Report specifically notes that online subscription services can expose consumers to unfair contract terms and increased mobile usage has the potential to expose more consumers to bill shock. The NZCC’s focus on online sales is consistent with the Australian Competition and Consumer Commission which included the online marketplace as one of its focus areas for 2015.

- **Consumer credit:** Finance companies followed by mobile traders (ie “truck shops”) are the most complained about lenders and motor vehicle contracts account for 30% of complaints.
- **Commerce Act complaints are up:** The majority of complaints are single complaints about individual businesses and there has been an increase in the number of domestic leniency applications (ie “whistle-blowers” who have been involved in cartel/price fixing conduct and seek immunity from the Commission in exchange for full cooperation). In 2014 the Commission received 503 complaints compared to 260 in 2013, however 224 of last year’s complaints related to the IAG and Lumley merger, the Progressive Enterprises (Countdown) investigation, and an organised campaign against brewery DB’s trademarking of the “Radler” style of lager. It was also noted that trade associations continue to be often involved in cartel investigations.
- **Christchurch rebuild:** While the Christchurch rebuild represents only 20% of the total national construction activity it remains a current priority for the Commission. International experiences suggest that the construction boom following natural disasters is often accompanied by an increase in fraud and cartel activity (ie including price fixing/bid rigging conduct).
- **Commercial environment:** According to Statistics NZ the total number of NZ businesses continues to decrease. There continues to be increasing aggregation in some industries (eg agriculture, forestry, telecommunications, rental, hire and real estate services) however the number of transactions seeking clearance from the Commission remains below pre-GFC levels. For example there were 21 clearance application in 2007 and 14 in 2014. Comparatively, there have only been 7 clearance applications registered so far this year.