

# Fair Trading Act 1986



**Understanding the implications of misrepresentation, misleading and deceptive behaviour which could impact on the customer and you as a real estate salesperson**

# The Fair Trading Act 1986

The main purpose of the Fair Trading Act 1986 is to protect consumers. Rule 6.4 & 10.7 builds on the principles expressed in Section 9 and Section 14 of the Fair Trading Act.

The Ministry of Consumer Affairs says that:

**“The Fair Trading Act prohibits misleading and deceptive conduct, false representations and unfair practices by people in trade.”**

In particular we will cover the 4 sections specifically relating to real estate

## Section 9

- misleading and deceptive conduct

## Section 14

- misrepresentation in relation to land

## Section 17

- Offering prizes with no intention of giving them

## Section 12 A

- Unsubstantiated representations

## Fair Trading Act 1986

The provisions of the Fair Trading Act 1986 grants certain protection to the consumer. It deals with the issue of misleading and deceptive conduct and applies to anyone 'in trade'.

The word 'trade' is defined in **Section 2** of the Act as meaning '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'.

- Conduct by a private individual, outside their occupational business, is not considered to be 'in trade'.
- Licensed real estate practitioners are 'in trade' and their conduct, therefore, is required to comply with the Fair Trading Act.

Two key sections of this Act that apply are:

**Section 9** - prohibits conduct that is misleading or deceptive or is likely to mislead or deceive.

**Section 14** - in relation to land - prohibits false or misleading representation.

- is a specific section concerning false representations and other misleading conduct in relation to the sale or possible sale or promotion for sale of an interest in land and also apply to real estate work.

# The Fair Trading Act 1986 – Section 9

## Section 9 Misleading and deceptive conduct generally

**No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.**

‘engaging in conduct’ means doing or refusing to do an act, and includes:

[a] omitting to do [not doing] an act; or

[b] making it known [stating] that an act will or, as the case may be, will not be done

**Section 9** means that no person ‘**in trade**’ can engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive. It does not matter whether you **intend** to mislead or not, only that your conduct is **likely** to mislead.

A client or purchaser who considers they have suffered loss or damage as a result of misleading or deceptive conduct by a licensee may sue (in the civil jurisdiction) the Agent and/or Salesperson involved.

## The Fair Trading Act 1986 – Section 9

In a real estate agency relationship, the client is not usually considered to be in trade [although property developers would be considered to be 'in trade'].

This means that if a customer thinks they have been misled or deceived by a licensee during the purchase/lease process, or the contract was misleading or deceptive, it is the licensee and not usually the client that the customer may look to for compensation under the Fair Trading Act 1986.

- Under the Fair Trading Act 1986 property **sellers** in New Zealand are normally **exempt from liability to buyers**, even when that liability results from actions of an agent acting under the specific instructions of the seller. In these situations **the agent, or licensee acting for and on behalf of the agent, are now normally the only parties to carry liability**.
- Misleading or deceiving conduct can be not only **what you do or say**, but also **what you do not do or say** [not properly disclosing information]. This includes advertising and marketing information.
- Section 9 has been used to bring claims against real estate agents who have misled or deceived purchasers **about the condition / status of the property** or **some aspect of the agreement for sale and purchase / lease**, even when the agent said they 'did not know' the information was incorrect.

## The Fair Trading Act 1986 – misleading and deceptive conduct

Even if the client or customer **does not act upon** any incorrect information you give them, you could still be found in breach of the Act because it talks about information 'likely' to mislead or deceive.

Examples could be:

- Giving incorrect information about the area of land belonging to a property, e.g. stating that a property has larger land than it actually has.
- Giving incorrect information about the zoning or use of a property, e.g. that it has commercial potential due to business zoning when in fact it has residential zoning.
- Leading a customer to believe that a property has the potential to be subdivided or will get planning permission for an extension without checking that this is truly the case.
- Assuring a customer that a property is structurally sound, when it is not, and failing to encourage them to seek independent advice.
- Remaining silent to a customer about a property defect that you know about, or should know about, e.g. where you know that renovation work was done to the property without a building consent when one should have been applied.

## The Fair Trading Act 1986 - Civil liability

**Section 9** of the Fair Trading Act prohibits any person in trade engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. A client or purchaser who considers they have suffered loss or damage as a result of misleading or deceptive conduct by a licensee may sue (in the civil jurisdiction) the Agent and/or Salesperson involved.

Real estate agents owe contractual and tortious duties to their clients to exercise the care expected of a competent and careful agent in the performance of their duties. Agents owe a fiduciary duty to their clients. A fiduciary duty includes the duty not to allow the interests of a third party to conflict with the interests of the party on whose behalf the agent is acting (the client or vendor). An agent must not put themselves in a position or enter into a transaction in which the agent's personal interest, or duty to another person, may conflict with his or her duty to their client, unless the client has full knowledge of all the material circumstances and the nature and extent of the agent's interests and consents to the agent acting for them. Consent should be obtained in writing, together with a summary of the conflict of interest as it has been described to the client.

## The Fair Trading Act 1986 - Civil liability

In a high profile legal case in 2009, an agent was found in breach of **Section 9** of the Fair Trading Act by failing to disclose the nature and extent of their association with a purchaser. The agent had acted on behalf of the purchaser on a number of occasions and had knowledge of the purchasers' way of operating in property speculation.

The court found that the agent should have disclosed that the purchaser was a trader and property investor, and that the agent had been involved with the purchaser on a number of other speculative transactions.

The agent was ordered to pay half of the under-value at which the property was sold, and also ordered to repay the commission received on the sale. This is an example of a misrepresentation by silence.

**If found guilty of an offence under Section 9 - there is no limit to fines awarded for breach of Sections 9. Section 40 (which limits fines) excludes Section 9.**



# The Fair Trading Act 1986 – Section 9 and Section 14

## NOTE: False Representations and Other Misleading Conduct

The legislation talks about 'land'. This also includes any buildings and interests in land, e.g. leases or equitable interests.

- 'Promotion by any means' covers all activities and communications that may impact upon a property sale or possible property sale.
- Showing the property [open homes, individual viewings]
- Telephone / face to face discussions with customers and prospective customers
- Emails and other correspondence
- Advertising, signs, fliers, electronic marketing material
- Discussions with colleagues
- Sales negotiations
- Social functions [e.g. promotional seminars]
- Any other activities that impact on promotion

## Mistakes

Ever found an absolute bargain, only to be told when you get to the shop counter the price was a mistake?

- Unfortunately for you, the shop can't be forced to sell at the display price. The price tag is an invitation for you and the shop to talk; it isn't an "offer" under contract law. The shop can raise the price or introduce other new conditions at any time until you reach agreement.
- But if the shop discovers the mistake after you've made the purchase, it generally can't then ask you to pay more. By then, you have a contract.
- The only exception is if you knew the price was a mistake, but took advantage of it anyway. Under the Contract and Commercial Law Act, a court could require you to pay the correct price. For example, you go to buy a jacket for \$300, but the shop assistant only types \$30 into the eftpos machine. You notice this but continue with the purchase, hoping to get away with it. If the shop contacts you later once they realise the mistake you have to pay them the difference.
- Shops can't deliberately display the wrong price in order to entice customers in. That would breach the [Fair Trading Act](#), which bans misleading advertising.

## The Fair Trading Act 1986 – Criminal liability

**Section 14** of the Fair Trading Act (which relates specifically to land) is in two parts. The first part prohibits persons making a false or misleading representation concerning the:

- nature of the interest in the land
- price payable for the land
- location of the land
- characteristics of the land
- use to which the land is capable of being put or may lawfully be put; or
- existence or availability of facilities associated with the land.

Interest in relation to land means a legal or equitable estate or interest in the land, so it includes a right of occupancy of the land or any right, power or privilege over, or in connection with, the land.

## The Fair Trading Act 1986 – Criminal liability

In Part 2 of **Section 14**, persons are prevented from using physical force, harassment or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for and interest in land.

The word 'land' includes any house or other building on the land.

**To be liable under the Fair Trading Act**, there is no need for any person to have been influenced by the misleading representation in question. It is enough that the misrepresentation was made. Representations can be made by words, conduct, or even by silence.

In considering whether a statement or representation is misleading, the court will ask whether the average New Zealand prospective house purchaser or vendor would find the statement misleading. For example, an advertisement in which a house was described as 'not a cent to spend' was found to be misleading, as the average New Zealand prospective house purchaser would have taken it to literally mean that although the house was about 25 years old, the property would not require anything significant to be spent on it in the immediate future.

**This was not the case, so the statement was held to be misleading.**

## The Fair Trading Act 1986 – Price Indications

Licensees need to take care when scripting marketing and advertising material to ensure the statements cannot be construed as being misleading in any way.

Another area that requires care is in regard to giving price indications or price ranges for properties.

In a case decided in the High Court in 2006, the Judge considered that an advertisement with the statement 'BEO (Buyer's Enquiries Over) \$380,000' represented that an offer over \$380,000 had a prospect of being accepted, and had to be given serious consideration. The Judge said it would not be legitimate to have a 'BEO' priced less than the vendor's 'bottom line' price and houses should not be advertised at a lower price than realistically would be accepted.

**Rule 10.9** of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 specifically instructs that **a licensee must not advertise any land or business on terms that are different from those authorised by the client.**

## The Fair Trading Act 1986 – Location of Land

Care should also be taken when describing the location of land in relation to its proximity to shops and other facilities. The courts have held that statements about a house being close to man-made features such as churches, schools and other community services may be misleading under **Section 14** in relation to the location of the land.

Licensees found in breach of the first part of **Section 14** may be criminally liable under the Fair Trading Act. The second part of **Section 14** will result only in possible civil liability. Other sections of the Act relating to misleading conduct or false and misleading representations may apply also to property managers, agents, or salespersons.

**Section 43 Other Orders covers loss and damages.**

### **Application for order under section 43A**

- A person may apply to a court or the Disputes Tribunal for an order under [section 43](#) at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

## Fair Trading Act – Section 12A - Unsubstantiated representations

- (1) A person must not, in trade, make an unsubstantiated representation.
- (2) A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.
- (3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.
- (4) In this section and [sections 12B to 12D](#), **representation** means a representation that is made
  - (a) in respect of goods, services, or an interest in land; and
  - (b) (1) in connection with the supply or possible supply of the goods or services;
    - (11) the sale or grant or possible sale or grant of the interest in land
    - (111) the promotion by any means of the supply or use of the goods services or the sale or grant of the interest in land.

## The Fair Trading Act 1986 - Section 17

This is considered unfair practice

### Offering gifts and prizes

- No person shall,—
  - (a) in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or
  - (b) in connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—offer gifts, prizes, or other free items with the intention of not providing them or of not providing them as offered.

Every person who contravenes a provision of **Sections 17** commits an offence and is liable on conviction,—

- (a) in the case of an individual, to a fine not exceeding \$200,000; and**
- (b) in the case of a body corporate, to a fine not exceeding \$600,000.**

Examples would include running a competition at an open Home about the price a property may sell for. Participants could be other Licensees, Clients or customers.



## Case Study - Some examples of misrepresentation

The principles of the law and misrepresentation apply whether you are working in a residential, commercial, business broking or rural real estate role.

**Residential** - Lawton vs Norcross, 2000 - A real estate licensee misrepresented the size of a house to a purchaser as 4500 sq. ft. when, in actual fact, it was 3552 sq. ft.

**Rural** - Clemance v Hollis, 1987 - The purchaser of a kiwifruit orchard relied on a representation by a real estate licensee as to the potential production capacity of the land. The salesperson's prediction was well in excess of the orchard's capacity.

**Commercial** - Modelled scenario - A purchaser proceeded to buy two industrial units based on a representation made to her by an agent that the units were returning 10.4% and 9.5% annually. In fact the net rent for both units was approximately 5.2%.

*Misrepresentation occurred because the real estate salespersons made 'false or incorrect statements' to purchasers about 'material facts' which persuaded / influenced the purchasers to make their decisions.*

*The information given were facts that **a reasonable person would be expected to rely on when making their decision**, e.g. house size in the residential case, production capacity of the land in the rural case, and net rents in the commercial example.*

***It did not matter whether the misrepresentation was 'innocent' or 'fraudulent'.** Parties can still be liable even if they do not know the information is false or incorrect.*

## The Contract and Commercial Law Act 2017

Misleading and deceiving a client or failing to inform or correct an assumption is a breach of the Fair Trading Act and could result in damages under The Contract and Commercial Law Act 2017.

A **false statement** could refer to information that is **spoken, stated in documentation or advertising** is also a breach of the Fair Trading Act and could result in damages under The Contract and Commercial Law Act 2017.

To protect consumers, breaches of the Fair Trading Act is covered by the Contract and Commercial Law Act 2017 and it outlines their entitlement to damages for deceit or negligence and situations where a customer wants to make a claim because of a misrepresentation made by a real estate agent acting on behalf of their client.

**The customer may bring action under the Fair Trading Act and the Contract and Commercial Law Act 2017**

Misrepresentations made by the agency or licensee on behalf of the client [where the client was not at fault] may result in the agent being required to **indemnify the client** [this means cover the cost of any court decisions made against them].

# The Contract and Commercial Law Act 2017

Relevant Sections of the Contract and Commercial Law Act 2017 are:

**Section 24** - Outlines the relief that may be granted if a mistake by one party is known to another party or is common or mutual

*An example would be if the apartment being purchased off the plans had great views but the incorrect Lot Number appeared on the S&P Agreement resulting in a different apartment being sold with no views. The vendor may or may not have been aware of the error.*

**Section 28** – Outlines the nature of relief for breaches under Section 24 -26

*An example would be the Court may declare the contract void or if possible may correct the mistake or award compensation.*

**Section 35** – Outlines the damages for misrepresentation

*An example would be if a spa pool was promised but not included in the chatels and was not there on settlement day, then the compensation would only be for the cost of the spa pool to be replaced. There would be no allowance for claims of damages for negligence.*

**Sections 36 and 37** - Outlines the options parties have to cancel a contract

*Under S36 A party may cancel the agreement if the other party has indicated they will not perform their obligations. Under S37 you could only cancel a contract if the mistaken representation was substantial. The spa pool example would not qualify you to cancel.*

## Fair Trading Act 1986 – Section 40 - Offences

- (1) Every person who contravenes a provision of **Part 1 (except Sections 9, 14 (2) 23, or 24), Part 3 or Part 4** commits an offence and is liable on conviction,—
  - (a) in the case of an individual, to a fine not exceeding \$200,000; and
  - (b) in the case of a body corporate, to a fine not exceeding \$600,000.
- (1a) Every person who contravenes **section 24** commits an offence and is liable on conviction to a fine not exceeding \$600,000.
- (1b) Every person who contravenes a provision of **Part 2** or **Part 4A** commits an offence and is liable on conviction,—
  - (a) in the case of an individual, to a fine not exceeding \$10,000; and
  - (b) in the case of a body corporate, to a fine not exceeding \$30,000.
- (2) Where a person is convicted, whether in the same or separate proceedings, of 2 or more offences in respect of contraventions of the same provisions of this Act and those contraventions are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person in respect of those convictions shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence.

# Protect the client, the customer and yourself

## Information and advice

- Make sure you are knowledgeable about the law, the property you are selling and agency best practice.
- Give verifiable and accurate information to customers when it is available.
- Do not pass on information that you are not sure about. Check the facts.
- If you don't know the answers to vendors' or purchasers' questions, say so.
- Advise customers to seek independent advice themselves, e.g. legal advice, builders reports, surveyors, the local council, registered valuers, engineers.

## Disclosure and confidentiality

- Fully disclose defects that you are aware of. *See Rule 10.7*

## Documents and advertising

- Make sure that transactional documents comply with legal requirements, and that you carefully explain them to clients and customers before they sign the documents.
- Carefully proof read all advertising and marketing materials to make sure they are accurate.
- Keep good diary notes.

## Risk Management

- You and your agency must be aware of your obligations and must implement systems and procedures to make sure you comply with the Fair Trading Act to avoid breach and liability.
- You need to be able to recognise ‘alarm bells’ where a situation could expose you to liability. Approach contracts from a ‘protection of self’ point of view – this means you should not process contractual agreements with clients and customers whom you think could expose you to ‘dangerous territory’.
- Make sure you understand your company’s risk management plan in relation to liability.
- Check that your agency has adequate professional indemnity insurance to cover claims and associated costs.

**NOTE:** The Contract and Commercial Law Act 2017 covers off the Remedies for breaches of the Fair Training Act 1986.

See Sections 28, 37 and 42 to see what damages could be awarded or if the customer has the right to cancel the contract.

**TEST YOUR KNOWLEDGE**

TRUE

FALSE

If you make an 'innocent' false or incorrect statement to a potential customer you are not in breach of the Fair Trading Act 1986.

If you pass on incorrect information but did not know it was incorrect you are not in breach of the Fair Trading Act 1986.

You cannot do or say anything that misleads or is likely to mislead a customer.

You could be in breach of your legal responsibilities to customers even though you have followed your client's instructions.

Because you are working in the best interests of your client it is your duty not to mention to prospective purchasers any issues that you may be aware of in regard to the land.

Customers may decide to take cases to court and sue under both the Contract and Commercial Law Act and the Fair Trading Act.

Rules 6.4 and 10.7 from the Code of Conduct are built on the principles of Sections 9 and 14 of the Fair Trading Act.

You are only accountable for deceptive or misleading information that you pass on to the customer, if it influences them to agree a sale.

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# Resources Acknowledgment

## Statement

The material contained in these power points has been collated from various sources acknowledged below:

- REINZ Best Practice Guides
- The REA public website
- The REA Verifiable Training material from 2012 through to 2019
- The Skills.org Real Estate Salespersons Level 4 - Learning guides
- Real Estate Industry information from various Agencies.

The information included in these Power Points is based on best practice and industry experience and should not be considered as legal advice.

If employed by an Agency students must adhere to Agency policy and procedures unless contrary to law.