

NEW ZEALAND



Erich Bachmann / Peter Woolley

Hesketh Henry

erich.bachmann@heskethhenry.co.nz

peter.woolley@heskethhenry.co.nz

www.heskethhenry.co.nz

1. Topic:	Gambling Act 2003
Who:	Department of Internal Affairs
When:	1 July 2004
What Happened:	<p>The Gambling Act 2003 came into effect on 1 July 2004. With the exception of the six existing casinos in New Zealand gambling is not permitted as a commercial venture although gambling may be licensed for community fundraising. Sales promotion schemes which fall within the definition of the Gambling Act are permitted and do not require a licence. The statutory definition of sales promotion schemes requires that participants purchase the goods or services for no more than the usual retail price. The promotion must be run within a specified period of time which is clear to the participant at the time and place of sale. The outcome must be determined either randomly or wholly by chance or partly by chance and partly by the application of some skill or knowledge. Certain prizes are prohibited at present including fire arms and ammunition, liquor, second hand goods, land not zoned residential and vouchers or entitlements for any of those items. The scope of prohibited prizes is currently being reconsidered and promoters should check to ensure there have been no recent changes. The regulator has recently drawn attention to a number of issues for promotions using cell phones. It notes that if a communications device such as a cell phone is used the sales promotion can only be a lottery i.e. each entry represents a chance to go into a draw and the draw decides the winners. A participant must not have to pay additional costs although normal costs of mailing or texting a sales promotion entry are acceptable. A text sales promotion that charges a higher than normal rate for text messaging will not be legal. The Regulator gives some examples of illegal text competition:</p> <ul style="list-style-type: none">• a telecommunications company or broadcaster cannot run a text competition where the only thing people do is send a text to a particular number to have the chance of winning a prize. In this example the only purpose of the text is to enter the draw and no goods or services are being offered. In the regulator's view this is not a sales promotion and the company will be operating legal gambling for its own profits.• if on the other hand a telecommunications company offered free entry to a lottery, for example 5 texts sent to any numbers at the usual price, this would be a legal sales promotion. The service is text to friends or for business and there is no additional cost to enter.• a sales promotion which includes texts that cost more than the usual price is illegal. The company cannot increase the costs of text messaging to cover the cost of running the sales promotion
Comments:	As yet the Courts have not ruled on the legitimacy of the sales promotion schemes involving the use of cell phones. Given the Regulator's published views it is important that any promoter obtain legal advice about the specific facts of

	the proposed promotion. The first question is whether the competition is a form of gambling. If it is not then the Gambling Act does not apply. If the competition is a form of gambling the next question is whether it is a sales promotion. If it is not then it is probably illegal. If it is a sales promotion the organisers must ensure they meet the requirements of the Gambling Act.
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2. Topic:	Telemarketing, Fair Trading Act 1986
Where:	High Court Wellington
Who:	Commerce Commission v. Telecom Mobile Limited
When:	August 2004
What Happened:	Telecom Mobile (Telecom) employed agents to conduct door to door/telemarketing campaigns to attract customers to Telecom's CDMA 027 mobile phone network. In both campaigns "cold calls" were made at the door or over the phone. Telecom then carried out a credit cheque for a prospective customer. If the credit check was favourable Telecom dispatched a phone to the customer with its standard contract terms. Those terms committed customers to a 24 month contract which could be cancelled only on payment of early disconnection charges. The Court found that Telecom had failed to comply with the Door to Door Sales Act 1967 under which customers have 1 month to cancel the contract. Telecom's failure to inform the customer and provide the written notice required by the Door to Door Sales Act 1967 was found to be misleading conduct under the Fair Trading Act 1986. The High Court considered the statements by Telecom in its letters, and on the packaging of the phones was misleading because they did not inform customers of other rights they had, in particular the right to cancel at any time up to 1 month later without penalty. The effect of those statements was to mislead customers as to their rights.
Comments:	The definition of "conduct" in the Fair Trading Act 1986 includes "omitting to do an act". The relevant sections 10 (proscribing misleading conduct in relation to goods) and section 11 (proscribing misleading conduct in relation to services) are effective in cases where a trader has not made a positive representation but has rather remained silent as in this case where there was no mention of the consumer protection provisions found in the Door to Door Sales Act 1967.

3. Topic	Misleading Labelling
Who:	Commerce Commission v. Muscle Marketing U.S.A.
When:	1 July 2004
Where:	Auckland District Court
What Happened:	A trader, Muscle Marketing USA used promotional material and labelling which represented that 5 ml of its Serum yielded the equivalent of 2,500 mg of creatine taken in tablet form. Tests showed that 5ml of the product contained only approximately 11.5mg of creatine and thus on the basis of Muscle Marketing's recommended daily dose of 5 ml, an athlete would not be able to obtain the benefits as represented. A 150 ml bottle of the Serum retailed for \$119.95. The company was convicted of making false representations regarding the quantity of creatine in its Serum product and the benefits that people would get from using it. A fine of \$70,000 was imposed.
Comments:	The maximum fines for contraventions of the Fair Trading Act 1986 have recently been increased to \$60,000 for individuals and \$200,000 for companies. The fine at \$70,000 suggests that the Courts are willing to impose significant high penalties. The sentencing Judge considered the consumers' dependence

	on the accuracy of the claims and the lack of means to check the actual composition and effectiveness of the product were aggravating features.
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4. Topic	Resale Price Maintenance
Who:	Commerce Commission v. Aquanaut Pty Limited
When:	June 2004
Where:	Auckland High Court
What Happened:	Aquanaut admitted that between November 1999 and July 2001 it induced or attempted to induce the Kaiapoi Dive Shop to refrain from selling any Aquanaut products below the supplier's recommended price. Resale price maintenance is a contravention of the Commerce Act 1986 and occurs where a supplier of goods specifies the minimum price that a reseller can charge for those goods. A penalty of \$60,000 was imposed.
Comments:	The Judge noted that the contravening conduct was carried out by Aquanaut's senior management who the Court considered should have been well aware that their conduct was a likely contravention. The Judge also noted that the difficulty of detecting resale price maintenance was a good reason for imposing a deterrent penalty in this case.

5. Topic	Parallel Importing – Films Videos and DVDs
When:	October 2003
What Happened:	New Zealand has since 1998 allowed the importation and sale by third persons of goods legitimately obtained in another country. The coming into effect of the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003 has made two limited changes. It bans parallel importation of films, videos and DVDs for 9 months after the titles first international release whether in New Zealand or elsewhere. A parallel importer will infringe New Zealand's Copyright Act if it knows or has reason to believe that the item is a pirated copy or in the case of CDs, film, DVDs or computer programs "knows or ought reasonably to know" the item is a pirated copy.

6. Topic	Predatory (below cost) Pricing
Who:	Carter Holt Harvey Building Products Group Ltd v. the Commerce Commission
When:	June 2004
Where:	Privy Council
What Happened:	The Privy Council in one of its last judgments as New Zealand's ultimate Court of Appeal overturned a New Zealand Court of Appeal's ruling and decided that matching a competitor's price was not a breach of section 36 of the Commerce Act 1986 which as expressed at the relevant time prohibited a firm from using a dominant position in a market for an anti-competitive purpose. The Commerce Act has recently been amended so that section 36 no longer applies a dominance test but rather a lower threshold which prevents a firm from taking advantage of a substantial degree of market power in a market for an anti-competitive purpose. The decision is likely to remain relevant despite the amendment to section 36 and the creation of the Supreme Court as the ultimate New Zealand appellate court. INZCO a division of Carter Holt Harvey was the major producer of "pink batts" insulation blocks in New Zealand with approximately 70% market share. A small competitor launched a new rival product based on wool which it claimed had superior environmental characteristics to the pink batts fiberglass based product.

	<p>INZCO responded by launching a wool based product priced considerably higher than the new entrants product. As a result the new entrant rapidly gained 30% of the market share. INZCO reacted by offering a 2 for 1 offer which effectively priced its product 30-40% below cost. The offer ran for approximately 6 months. The Privy Council by a 3 to 2 majority concluded that a dominant firm can price its product below cost to match a competitor's price and INZCO's conduct was competitive price cutting as there was no evidence INZCO had priced below cost with a view to charging supra-competitive prices at a later date without fear of reprisal.</p>
<p>Comments:</p>	<p>The Privy Council drew on Australian High Court decisions to reiterate a requirement that a Court must apply a counter-factual test to see whether a non-dominant firm otherwise having the characteristics of the defendant would have conducted itself in the same way. Following the Privy Council decision it will be difficult for a Court to find a trader has breached section 36 where there is evidence of a good business rationale for the conduct in question.</p>