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10 June 2025

New Zealand Game Developers Association
Level 6 Findex House
57 Willis Street
Wellington 6011

Attention: Joy Keene, Executive Director
By email only: joy@nzgda.com

Dear Joy

Open letter to New Zealand game developers about misleading practices

1. The Commerce Commission (**Commission**) has recently undertaken some compliance monitoring in the New Zealand gaming industry. We are writing to the New Zealand Game Developers Association (**NZGDA**) to alert its members to the risks of breaching the Fair Trading Act 1986 (**Act**).

2. In our view, it is important that commercial game developers and studios (**developers**) understand that the Act applies to the sale, design, and marketing of games in New Zealand. This letter provides NZGDA's members with an introduction to some of their obligations under the Act, with the aim of initiating a conversation within the industry.

The Commission's responsibility to enforce the law and promote compliance

3. The Commission is an independent crown entity and New Zealand's primary competition, fair trading, consumer credit, and economic regulatory agency.

4. Our vision is that New Zealanders are better off when markets work well and consumers and businesses are confident market participants. We want to ensure New Zealand game developers know their obligations so they can create and sell games with confidence.

The Act applies to game developers and studios in trade

5. The Act applies to all aspects of the promotion and sale of goods and services, which includes the design, advertisement, pricing, and promotion of games, digital gaming products, and gaming services (**digital games**).

6. Developers and studios that sell digital games are "in trade" and have obligations under the Act. Developers may risk breaching the Act if they make false or misleading statements or engage in conduct that is liable to mislead the public.

7. When gamers purchase digital games – such as, games software, currency, upgrades, downloadable content (**DLC**), or subscriptions – they have a right to receive accurate information that will help inform their decision to purchase.

Five areas of compliance risk for commercial game developers

8. The Commission has identified five areas of compliance risk that developers should pay special attention to and avoid. To identify these five issues, we conducted a sweep of popular New Zealand mobile games, reviewed reports we received from the public in the last 12 months, and considered other consumer protection work underway overseas.

Discounts must be genuine

9. It is common for developers to sell gaming products at a discount to encourage gamers to make a purchase. Developers risk breaching the Act if they:

    9.1 routinely advertise digital games at a discount, when the "sale" or "special" price is in fact the usual selling price (extended discounting);

    9.2 claim a sale is a discount from a previous price that was never charged or was charged a long time ago; or

    9.3 artificially raise a selling price shortly prior to offering a discount to create the impression of a greater saving.

10. Under the Act,[1] any discounts a developer offers must be a genuine opportunity to purchase digital games at a lower than usual price.

11. Developers who engage in deceptive discounting practices risk misleading gamers about the usual selling price of digital games. In 2022, retail company Strand Bags was fined $780,000 for using similar misleading discounting practices described above.

Example of a recent report made to the Commerce Commission

12. Recently, the Commission received a report of concern about a popular action-adventure role-playing game that allows gamers to purchase cosmetic character

[1] Section 10 and 11 of the Act, prohibit conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods or services. Section 13 of the Act prohibits false or misleading representations in connection with the supply, possible supply, or promotion by any means of goods and services. Click here to read the Act in full.

upgrades. The report included a screenshot of a new cosmetic pack on sale for $16.99 at a 79% discount, which was referenced against a previous price of $82.

13. The report alleges the contents of the character pack were new to the game and had never been sold before at a price of $82 (see the cropped example in red below). If the previous price was never charged, $16.99 would become the usual selling price of the pack.

14. If the report is further substantiated, the developer may risk breaching the Act for making false or misleading representations of price, because the discount does not represent a special opportunity to purchase the pack at a lower than usual price.

15. In our sweep of mobile games, we came across many examples of discount claims, including one developer that appeared to continually offer an in-app upgrade at the same "sale" price. The Commission intends to contact this developer to further discuss the risks of engaging in "extended discounting."

Sales practices cannot be false or misleading

16. Developers often use various design and sales practices to incentivise gamers to purchase digital games. Mobile developers, for example, often design games to make it easier for gamers to make progress when they purchase in-game items. Even though these in-game items are commonly available to purchase, developers may use the language of scarcity and urgency to make the purchase seem attractive.

17. Developers can risk breaching the Act by misleading gamers about the value and availability of digital games if they:

    17.1 use promotional countdown timers that give consumers the impression a limited offer will end once the timer ends, when in fact the timer has been designed to automatically reset and for the promotion to continue; or

    17.2 make scarcity or urgency claims, such as "rare" "today only" "hurry!" "limited supply," to describe gaming products that are commonly available.

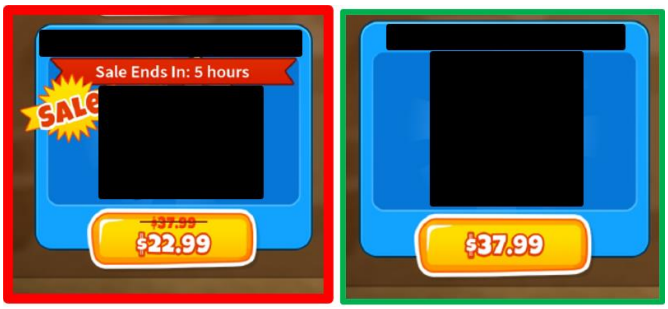
18. Under the Act, the sales practices a developer uses must accurately reflect the value and availability of the digital games they sell.

19. In 2022, retail company 1-Day limited was fined $840,000 for misleading "today only" deals. The company had used a countdown timer to give the misleading

impression goods were being sold for a low price for a limited time. The Commission found the timer had been programmed to reset and for the sale to continue at the same price.

Example of a sales countdown timer

20. During our sweep, we observed that many developers use countdown timers to indicate when a sale or special promotion will end. One example (shown below) displayed a sale that was said to end in five hours before returning to full price at $37.99 (shown in red). The next day, the Commission checked the sale and confirmed the sale had ended as expected (shown in green).



21. To determine if the developer used the timer in a compliant fashion, the Commission would need to track the timer over a period of time to establish a pattern of sales accuracy. To avoid the risk of breaching the Act, ensure your timers do not mislead gamers about the availability of the sale you are offering them.

Game developers must be able to back up their claims

22. Gamers frequently decide to purchase a digital game based on the images, videos, or promotional material developers provided about the gaming product, either online, at conventions, or within the game-store.

23. Developers will risk breaching the Act if they:

    23.1 market incomplete alpha games[2] as if they are completed games;

    23.2 claim their game has features that do not yet exist; or

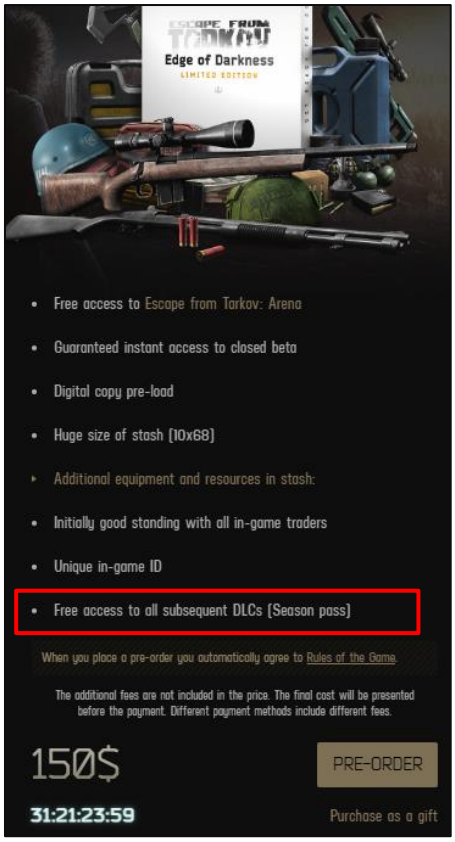
    23.3 sell games based on future promises that later prove to be false.

24. Under the Act, developers must be able to back up or substantiate the claims they make about their games. Developers must have a reasonable basis for the claims they make at the time a claim is made. Making a bold claim and trying to retrospectively prove it later will risk breaching the Act. Making false claims about the quality or character of the games you sell may also risk breaching the Act.

[2] Alpha games typically give gamers early access to digital games still in development, usually for the purpose of testing core mechanics or gameplay.

25. In 2017, Fujitsu claimed to sell "NZ's most energy efficient heat pump." Fujitsu was fined $310,000 when it was established that it could not back up its claims at the time they were made.

In the news: Battlestate Games' future claims about DLC access



26. In April 2024, it was widely reported that many gamers who had purchased "Escape from Tarkov: Edge of Darkness edition" (**EOD**) were unable to access a new person versus environment (**PVE**) game mode. Battlestate Games had released the new mode with a new edition of the game named "the unheard edition."[3]

27. Gamers alleged that Battlestate Games had failed to deliver on its future promise of giving EOD owners "free access to all subsequent DLCs" (emphasis in red above). The developer initially claimed the new PVE mode was not DLC as it was a unique feature. In response to community backlash, the developer later gave all EOD owners free access to the new PVE mode.[4]

[3] Michael Hoglund. 27 April 2024. "Escape From Tarkov has alienated its entire community over broken promises and new pay-to-win mechanics." Windows central. https://www.windowscentral.com/gaming/escape-from-tarkov-has-alienated-its-entire-community-over-broken-promises-and-new-pay-to-win-mechanics

[4] Mike Stubbs. 23 May 2024. "All 'Escape From Tarkov' EoD Owners Now Have Access To $250 PvE Mode." Forbes. https://www.forbes.com/sites/mikestubbs/2024/05/23/all-escape-from-tarkov-eod-owners-now-have-access-to-250-pve-mode/

28. To avoid the risk of making future claims you cannot back up, avoid making exaggerated claims about your game. Under section 12A of the Act, you must be able to show you had reasonable grounds to support the accuracy of the claim at the time you made it.

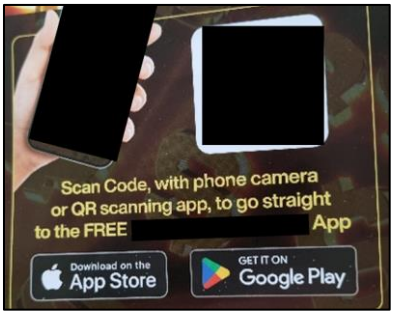
"Free" games must not require a payment to play

29. Developers sometimes offer a game for "free" with the expectation that in-game advertising, microtransactions, subscriptions, and paid cosmetics will generate revenue. Developers may risk breaching the Act, however, if these "free" games are not really "free" and require an in-app purchase to be played as advertised.

30. For example, developers may restrict access to game features and require the gamer to pay for an unlock or upgrade. This may mislead gamers if advertising for the game does not make it clear payment is required to access the advertised features — leading gamers to form a misleading impression about what they can access for free.

31. Under the Act, developers have a responsibility to advertise accurately and truthfully, it is misleading to claim something is free when it really requires payment.

Example from a recent report to the Commerce Commission



32. Recently, the Commission received a report of concern about a popular board game that advertised a "free" companion app. The report alleged that while downloading the app was "free" a payment of $3.99 was required to access the board game content. If further substantiated, this developer may risk breaching of the Act for making false or misleading representations of price.

33. To avoid the risk of breaching the Act, make it clear to gamers in an upfront and prominent way what content is available for free and what content requires payment.

Developers cannot mislead gamers about their rights

34. "Game-breaking" bugs[5] can make games unplayable. When this happens, gamers might be entitled to a remedy under the Consumer Guarantees Act 1993 (**CG Act**). This important consumer protection legislation provides gamers with statutory rights

[5] A fatal coding error that may cause a game to unexpectedly crash, not open, or that renders the game unplayable.

and guarantees, such as the right to a remedy where goods (computer software) are not fit for purpose, are not as described, or are faulty.

35. Developers may risk breaching the Act if they mislead gamers about any guarantee, right or remedy available under the CG Act by:

    35.1 claiming gamers have no right to a refund under any circumstances;

    35.2 claiming faulty games cannot be refunded if the gamer has played the game for a specified time (such as, two hours); or

    35.3 writing terms and conditions that contract out of any obligation under the CG Act.

36. In 2018, retailer Noel Leeming was fined $200,000 for misleading consumers about their rights under the CG Act. The company made false and misleading comments about the applicability of the CG Act, which resulted in consumers not having their complaints taken seriously, investigated properly, or remedied when appropriate.

Example of recent compliance work with a major game distributor

37. In 2024, we wrote to a major game distributor, developer, and publisher. The distributor had a rule that refunds were only offered if a game had been played for less than two hours and had been requested within 14 days of purchase.

38. While this rule is likely fine for gamers who simply change their minds about their purchase, it may risk misleading gamers who experience a fault or are entitled to remedy. The CG Act does not impose a time limit on when a gamer can request a remedy but indicates only that a request be made within a reasonable time of the fault becoming apparent.

39. In our view, developers should take care to seek legal advice about their application of the CG Act to digital gaming. Customer support staff dealing with requests for CG Act remedies should receive training to ensure they understand the law.

Penalties for breaching the Fair Trading Act 1986

40. Only the courts can decide if there has been a breach of the Act. The court can impose severe penalties where it finds the law has been broken.

41. Developers in trade that breach the Act can be fined up to $600,000 per offence and individuals up to $200,000 per offence. Where a developer is a repeat offender, directors and those involved in the management of the development business can be banned from involvement in the management of any company for ten years.

42. We recommend you seek legal advice on complying with the law and encourage you to regularly review your compliance procedures and policies.

NZGDA Conference in September 2025

43. The Commission will present at the upcoming NZGDA Conference to expand on this letter and provide developers an opportunity to ask questions about compliance with the Act.

44. The session will also provide an important opportunity for developers of all experience levels to better understand the Act, the role of the Commission, and how to develop games that do not use false and misleading practices.

Further information available about compliance with the Act

45. We have published a series of fact sheets on our website (comcom.govt.nz) to help you comply with the Act and other legislation we enforce. The following fact sheets are particularly relevant to this letter:

- Making accurate claims: unsubstantiated representations
- Pricing your products and services
- Misleading claims: online sales practices
- Business obligations under the CG Act

46. You can view the Act and other legislation at www.legislation.govt.nz.

You have an opportunity to discuss this letter with the Commission

47. If you wish to discuss this letter with the Commission, please contact Iain Sutherland via email Iain.Sutherland@comcom.govt.nz or phone +64(4)924 3768.

Yours sincerely,

Iain Sutherland
Investigator