



Consumer Law Reform Additional Paper – November 2010

Substantiation

The Ministry of Consumer Affairs released the discussion paper “Consumer Law Reform” in June 2010. The June 2010 discussion paper included a section entitled “Claims which cannot be Substantiated”¹, which raised the possibility of an inclusion of a general prohibition on unsubstantiated claims in the Fair Trading Act (FTA). The discussion paper asked an additional question; whether a general prohibition on unsubstantiated claims should be enforceable only by the Commerce Commission or should also be enforceable privately.

The Australian Consumer Law includes provisions for the Australian Competition and Consumer Commission (ACCC) to issue substantiation notices as an investigative tool to help the ACCC to prove traders have committed the offence of making various misrepresentations. If a trader cannot substantiate a claim there is an inference that the claim was a misrepresentation, and it is an offence for a trader to fail to respond to a substantiation notice issued by the ACCC. It is not an offence to make an unsubstantiated claim in Australia, but making misrepresentations and failing to respond to substantiation notices are offences.

The general prohibition proposed in the discussion paper would make it an offence to make a representation that is an unsubstantiated claim in New Zealand, whether or not that claim would qualify as a misrepresentation. The defence to the allegation that a claim was unsubstantiated would be for the trader to prove that it had reasonable grounds to justify or substantiate the claim at the time the claim was made. It was not proposed in the discussion paper to issue the Commerce Commission with the power to issue substantiation notices similar to those under the Australian Consumer Law. The enforcement of a general prohibition would however be the responsibility of the Commerce Commission, so third parties could not take enforcement action themselves.

This paper provides further analysis of the proposition that the FTA should be amended to include provisions relating to substantiation. This paper also discusses whether regulatory intervention is necessary and whether the current information request provisions provided in the FTA are sufficient.

Background

Substantiation refers to the requirement for verification, confirmation, corroboration, evidence or proof that a representation made by a trader is true. Where particular or specific claims are made, substantiation would need to be appropriate for that claim.

¹ Pages 35 - 40

For example, if scientific claims are made, then substantiation would require that reliable scientific tests had actually been undertaken to support the scientific claim. In more general cases the evidence would need to be on a reasonable basis, depending on the particular situation and circumstances.

There are examples provided in the discussion paper and further examples are provided by the existing Commerce Commission guidelines on high risk products (see page 14 for further discussion on these). The United States information (see page 6 below) also identifies aspects that need to be considered to determine whether there is a reasonable basis for a claim. At the very least, this would require objective evidence that supports the claim made. The kind of evidence depends on the claim. If there is a level of evidence expressly claimed, then that level of substantiation should be required. The intention is that traders should be able to substantiate a claim when it is made. Later substantiation (after someone complains about an unsubstantiated claim) might be valuable in relation to enforcement action for an alleged misrepresentation, but the critical issue is whether the claim was substantiated *when it was made*.

The FTA prohibits misleading or deceptive conduct in trade and false or misleading representations in connection with the supply of goods and services in trade under sections 9 and 13. Civil remedies are available against traders which engage in misleading or deceptive conduct under section 9 or which make false or misleading representations under section 13. Making false or misleading representations under section 13 is also a strict liability offence, with fines and other penalties available on prosecution by the Commerce Commission in the courts' criminal jurisdiction.

The essential question with respect to substantiation is whether the rights and remedies available to the Commerce Commission to enforce the strict liability misrepresentation offences under section 13 are sufficient to protect consumers and other honest traders, or whether additional rights and remedies are necessary.

One of the limitations on the effectiveness of section 13 is that it is likely to be difficult for the Commerce Commission to prove that a representation that is an unsubstantiated claim is actually false or misleading; especially when the nature of the claim may be complex, and the trader or manufacturer holds all the information necessary to prove whether or not the claim is false or misleading. The Commerce Commission does not have to prove a trader *intended* a representation to be false or misleading for the purposes of section 13 because it is a strict liability offence, but the Commerce Commission does have to prove that a representation was actually false or misleading, to a beyond reasonable doubt standard of proof.

A similar question arises in relation to the civil remedies available to consumers and other traders; are the rights and remedies currently available to consumers and other traders in relation to misleading and deceptive conduct under section 9, or misrepresentation under section 13, sufficient to protect consumers and honest traders from unsubstantiated claims by dishonest suppliers? This question is relevant to the issue of whether parties other than the Commerce Commission should have the ability to enforce substantiation provisions. These parties are subject to the same limitations in terms of the burden of proof and access to

information as the Commerce Commission, except they have fewer investigatory tools available to them.

Essentially substantiation is about honesty; traders should not make claims about their goods and services without being able to demonstrate a reasonable basis for making the claim, especially where the claims are “credence” claims where the purchaser pays a premium because of the claim being made, e.g. health, scientific, environmental or ethical claims. Consumers effectively have to take these claims on trust, and honest traders face unfair competition from unscrupulous traders. The policy challenge is to redress the information imbalance between the trader and the Commerce Commission (or consumers and other traders) so dishonest traders may be held to account for unsubstantiated claims they make, without causing injustice or undue compliance burdens on traders generally.

Overview of Comments in Submissions

The majority of the submissions on the discussion paper, including some of those from businesses and law societies, supported including a general prohibition in the FTA on claims that cannot be substantiated. This support was on the basis that it would be dishonest for suppliers and manufacturers to sell goods or services if they cannot substantiate the claims they make. Requiring claims to be substantiated would,

- increase consumer and business confidence
- protect both consumers and honest businesses
- make suppliers be careful about claims they make
- ensure a more even base for businesses to be able to compete in the marketplace
- enable easier enforcement, and
- reduce claims that have a false basis.

Another consideration raised by some submitters was that a substantiation provision must be supported by comprehensive Commerce Commission guidelines as to what information is required to substantiate various claims. Submitters suggested this should include guidance on the specific level of substantiation necessary for each specific category of claims, with the level being justified in accordance with the principles of good regulatory practice. Submitters noted that a general prohibition should be supported by penalties to address the harm caused by unsubstantiated claims and that failure to provide supporting evidence for a claim should be a strict liability offence with appropriate safeguards.

Those opposing the inclusion did so for a variety of reasons, including that the Commerce Commission already has sufficient powers to adequately deal with unsubstantiated claims and that further protection is unnecessary. The arguments from business and legal submitters also included,

- the current prohibition on misleading and deceptive conduct catches unsubstantiated claims
- increased compliance costs in ensuring there are reasonable grounds to justify claims would outweigh the potential benefits for consumers

- the proposal would create uncertainty as to what information is required to substantiate the claims made
- the Commerce Commission would use substantiation notices for “fishing expeditions”
- the proposal would create absolute liability on traders making unsubstantiated claims, regardless of whether the claim was in fact correct
- the proposal would fail to target key areas of commercial risk
- excess caution and costs would be created around promotional claims, and
- suppliers would be required to “prove” their innocence, which may be contrary to their rights under the New Zealand Bill of Rights Act 1990.

Those submitters who commented on the inclusion of a general prohibition generally thought that the Commerce Commission and not third parties should enforce the prohibition. There was a concern that third party enforcement would,

- be abused by competitors attempting to secure access to confidential information
- act as a disincentive reducing the availability of new products and services to New Zealand consumers, and
- would invite anti-competitive enforcement.

Submitters also noted that businesses and private individuals could still take enforcement action in relation to misleading and deceptive conduct under section 9 and that consumers utilise the provisions of the Consumer Guarantees Act to address issues post-purchase.

Those submitters who supported wider enforcement suggested it would encourage general enforcement of substantiation, rather than relying on the Commerce Commission alone.

Substantiation Notices

While the discussion paper did not ask for submissions on an additional power for the Commerce Commission to issue substantiation notices, some submitters discussed this new power held by the ACCC.

There was some support for the Commerce Commission being given powers to issue substantiation notices. Submitters considered that these notices would be useful in redressing the information imbalance between suppliers and consumers. Submitters considered that the power to issue substantiation notices should only be available where the Commerce Commission has reasonable grounds to believe that a claim cannot be substantiated, and that such notices must be targeted at the relevant point in the supply chain, with accountability lying with the manufacturer or the person initiating the claims.

Corresponding concerns in relation to substantiation notices were that the current section 44 defences of reasonable mistake, reasonable reliance on third parties and events outside the control of the trader would not be available in relation to claims that cannot be substantiated. Some submitters commented that the Commerce

Commission already has sufficient information gathering powers and that further powers are unnecessary and would encourage “fishing expeditions”.

Is regulatory intervention required for substantiation?

The guiding principle for the Consumer Law Reform project is that consumers should be confident when they purchase goods and services. Their reasonable expectations should be met when they transact, they should have access to redress if their reasonable expectations are not met, and consumers and suppliers should be able to have confidence in market rules.

These are the reasons why the FTA prohibits misleading and deceptive conduct, and traders making false and misleading representations. Redress is available for consumers through the civil jurisdiction of the courts, and public enforcement is available through the Commerce Commission and the criminal jurisdiction of the courts. The design of the false and misleading representation offences as strict liability offences is intended to enhance the enforceability of the rules, and to increase the confidence of consumers and suppliers that dishonest traders will be held to account.

The issue for substantiation is whether the guiding principles of consumer confidence in goods and services, redress and market rules are compromised by the fact that traders can make claims about their goods and services which consumers and other purchasers are expected to believe, yet which they are required to take on trust (because there is limited practical ability to test the veracity of the claims). Traders ought to know whether their claims are true when they supply goods or services, but consumers and other purchasers are often unable to know whether the claims are true or false.

The misleading or deceptive conduct and false or misleading representation provisions in the FTA do not address this issue when it is not possible or practical for consumers (or the Commerce Commission) to know whether a claim is deceptive, misleading or false.

Clearly identifying the types of claims which would need to be substantiated would be important. For example, consumers are not expected to believe the exaggerated or figurative claims that advertisers use for their creativity or entertainment value; these are regarded as “mere puffs” under the common law and existing FTA provisions. A “mere puff” is not capable of being an actual misrepresentation because the law is only concerned with misrepresentations that are objectively capable of being misleading. The same distinction should apply to unsubstantiated claims.

One option to deal with this problem is to prohibit traders from making unsubstantiated claims about their goods or services. Another option is to focus on the information imbalance, and to require traders to share the knowledge they have about the claims they make with the Commerce Commission and consumers if they are called on to do so.

Making an unsubstantiated claim could be an offence, and the defence available to the trader would be that there was prior substantiation for the claim on which it was

reasonable for the trader to rely. A representation which is *subsequently* substantiated would still have been unsubstantiated when it was made, so it would still be an offence. A representation which could *not* subsequently be substantiated would remain an unsubstantiated claim, and it would also probably be false and misleading, which would be a breach of section 13.

The intention of such a provision would be to incentivise traders to make sure they can substantiate any claims they make *before they make the claim*. They would not necessarily be required to share the information with their customers when they make their claims, but suppliers should know their claims can be substantiated. This is a market behaviour issue, which goes to the principles of consumer confidence, redress and consumers and traders being able to be confident in market rules.

The approach of empowering the regulator to issue substantiation notices is an alternative way of dealing with the information imbalance, although it has a narrower application than a general prohibition on unsubstantiated claims. Suppliers which will know whether or not the claims they make can be substantiated can be asked to share that information with the regulator, and the market generally. Suppliers making claims which cannot be substantiated are being dishonest, and are likely to be committing the offence of making false or misleading representations.

One of the arguments against authorising the Commerce Commission to issue substantiation notices requiring traders to substantiate the claims they make is that the Commerce Commission already has information gathering powers under section 47G of the FTA. The cases on the Commerce Commission's powers under the equivalent information gathering powers in the Commerce Act have held that the Commerce Commission does not have unlimited powers to require information to be provided, and information requests must be relevant to an investigation authorised by the Act.²

This means section 47G could not be used for a "fishing expedition", and (in this context) it could only be used as part of an investigation into an alleged false or misleading representation. This does little to redress the information imbalance in respect of unsubstantiated claims, because consumers and the Commerce Commission often have no basis for knowing whether a claim might be false or misleading. The Commerce Commission has therefore advocated for the power to issue substantiation notices, which is the same power held by the ACCC.

The Commerce Commission would be in a better position to require information to be provided under section 47G if making unsubstantiated claims is prohibited under the FTA, because the threshold for investigating a suspected unsubstantiated claim would be lower than the threshold for investigating a suspected misrepresentation.

General Prohibition on Unsubstantiated Claims - The American example

Since the 1970s the United States has had a legal requirement that all advertising has a reasonable basis for advertising claims before they are disseminated.³ The

² Telecom Corp of NZ Ltd v CC [1991] NZAR 155 and AstraZeneca Ltd v CC (2008) 12 TCLR 116

³ See *FTC Policy Statement Regarding Advertising Substantiation*
<http://www.ftc.gov/bcp/guides/ad3subst.htm>

Federal Trade Commission (FTC) enforces section 5 of the Federal Trade Commission Act (FTC Act) which prohibits “unfair or deceptive acts and practices in commerce.”

The FTC Act gives the FTC authority to regulate deceptive advertisements. An advertisement is considered deceptive if it contains a misrepresentation or an omission that is likely to mislead consumers who are acting reasonably under the circumstances. Deceptive claims must be material to the consumer's decision to buy, but the FTC does not need to prove actual injury to the consumers. Case law has held that an advertisement is deceptive where the advertisement contains objective or factual claims and the advertiser does not have a reasonable basis for making the claims⁴. This is referred to as the doctrine of “substantiation.”⁵

A “reasonable basis” means objective evidence that supports the claim made, and the kind of evidence depends on the claim. At the very least, the advertiser must have the level of substantiation expressly claimed in an advertisement. However, the substantiation requirement not only applies to express claims, but also to implied claims, whether, direct or indirect. In other words, it is a violation of the FTC Act to make health claims or other claims directly in promotional material, or indirectly through claims that could be implied as a result of the product name, the website name, or any other means, without adequate scientific support.

If the advertising claim suggests a level of support, the advertiser must have evidence of that support. For example, if a marketer claims that “four out of five doctors prefer” product x, then the marketer must have reliable survey evidence showing such a result.

Where a claim is not specific, the FTC will look at a number of factors in reviewing substantiating evidence to determine whether there is a reasonable basis for the claim including,

- The type of claim
- The product involved
- The consequences of a false claim and the benefits of a truthful claim
- The cost of developing substantiation, and
- The level of substantiation experts would believe is reasonable.⁶

The FTC pays the closest attention to, and requires a relatively high level of substantiation for, advertisements that make claims about health or safety. What this means for the marketer is that if health and safety claims are made, the marketer should have “competent and reliable scientific evidence” in the form of scientific analysis and often clinical trials.⁷

⁴ See *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

⁵ See

<http://www.mllegal.com/FTC%20Guidelines%20Testimonials/FTC%20GuidelinesRegulationofAdvertising.html>

⁶ See *Pfizer, Inc.*, 81 F.T.C. 21 (1972).

⁷ Some products may fall into the jurisdiction of specialist agencies which can enforce unsubstantiated claims or misrepresentations under their own legislation, e.g. therapeutic products under the

In one case, the FTC defined acceptable scientific evidence as "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results"⁸. Other cases have stated that the tests and studies relied upon must employ the appropriate methodology, addressing specific claims. Such tests have been referred to as "adequate and well-controlled clinical testing," and in one drug case, the FTC required two clinical trials.⁹

The tests as to what substantiation is needed are variable according to the circumstances of each case, and the nature of the product and the claim. This is consistent with a principles-based approach to regulation. However, if a supplier is making specific claims as to performance, giving numbers representing performance levels, it needs to have scientific tests demonstrating those performance levels.

FTC enforcement action

The FTC Policy Statement Regarding Advertising Substantiation outlines the enforcement mechanisms the FTC uses for substantiation. It has sought substantiation from firms in two different ways: through industry-wide "rounds" that involved publicised inquiries, with identical or substantially similar demands to a number of firms within a targeted industry or to firms in different industries making the same type of claim; and on a case-by-case basis, by sending specific requests to individual companies under investigation.

United States research information differentiates between the substantiation required for different types of consumer goods, with some goods requiring greater levels of substantiation on the basis that consumers value more credible information on those goods because they are expensive, vital or infrequently purchased.¹⁰ Other goods are the opposite, and consumers often know the relevant information and evidence in relation to those goods.

Substantiation Notices - The Australian example

The new Australian Consumer Law includes provisions enabling the ACCC to issue substantiation notices. The ACCC can require a person who makes a claim or representation promoting or intending to promote goods or services, the sale of land or employment to give information and/or produce documents to the ACCC that could be capable of substantiating or supporting that claim or representation. The information or documents requested by the ACCC must be those that the ACCC

Medicines Act 1981, veterinary medicines under the Agricultural and Veterinary Medicines Act 1997, chemicals under the Hazardous Substances and New Organisms Act 1996, and food products under the Food Act 1981.

⁸ See *Brakeguard Products, Inc.*, 125 F.T.C. 138 (1998).

⁹ See, *Schering Corp.*, 118 F.T.C. 1030 (1994); *Removetron Int'l Corp.*, 111 F.T.C. 206 (1988); *Thompson Medical Co.*, 104 F.T.C. 648 (1984), Aff'd 791 F.2d 189 (D.C. Cir. 1986), Cert. Denied, 479 U.S. 1086 (1987).

¹⁰ "Did the Federal Trade Commission's Advertising Substantiation Program Promote More Credible Advertising?" Sauer and Leffler, *The American Economic Review*, Vol 80, March 1990

considers to be relevant to supporting or substantiating the claim made. Notices must be complied with, although refusal to provide information on the grounds of self incrimination is permitted.

The ACCC also has information gathering powers under section 155 of the Trade Practices Act (similar to section 47G of the FTA), but these powers can only be used where the ACCC has reason to believe that a person is capable of furnishing information or providing documents relating to a matter that constitutes or may constitute an offence, and the notice must specify the actual information required.

The new substantiation notice provisions do not have the limitations that apply to section 155 (or section 47G of the FTA) and can be used wherever a promoting claim has been made. The information request can be broad. The substantiation notices do not require a person to prove that a claim or representation is true or is not misleading, but the information provided can be used by the ACCC to determine whether further investigation or action is required. The information that was or was not provided in response to the substantiation notice will inform that determination.

Australian material in relation to the new substantiation provisions usually describes the notices as a preliminary investigatory tool to seek information that the ACCC then uses to determine whether a breach has occurred that necessitates action. However business compliance advice on the Australian market is recommending that businesses consider this new power preventively, prior to a claim being made in order to decrease the likelihood of the ACCC issuing a substantiation notice and in order to be able to respond quickly to any request. For example lawyers in Australia are now advising their clients to hold credible and complete information substantiating any claims they make from the time those claims are made.¹¹

Intervention options

The discussion paper, and previous policy work on substantiation, considers two options for resolving substantiation issues under the FTA. The first is to provide a general prohibition against traders from making a claim that cannot be substantiated and the second is to replicate the Australian substantiation notice provisions. A combination of both of these options is also possible.

Consideration needs to be given as to what claims need to or should be substantiated. The Australian provisions relate to claims or representations made that promote or intend to promote goods or services and the United States requirements relate to advertising claims. It would be appropriate to consider these options for the New Zealand provisions.

Option 1: General prohibition only

A general prohibition would prohibit suppliers from making claims without having reasonable grounds to justify or substantiate those claims. The purpose of the prohibition is that suppliers should only make claims they can support or justify, which in turn enhances consumers' confidence in making purchasing decisions.

¹¹See <http://www.lexology.com/library/detail.aspx?g=01545c58-489f-4cf0-b01b-eeac7c921a8c>

The effect of a general prohibition should be to decrease the number of claims that have not been substantiated and to increase the credibility of the claims that are made. This should provide greater consumer confidence in the claims made by suppliers, and protect and differentiate those businesses which do substantiate their claims from those which do not.

The onus would be on the Commerce Commission or a consumer or other trader to prove that the supplier has made an unsubstantiated claim. The Commerce Commission could use section 47G of the FTA to require the person in trade to provide information that they did have reasonable grounds to justify or substantiate the claim made if the Commerce Commission had reasonable grounds to suspect the claim was not substantiated. Whether the Commerce Commission has reasonable grounds to suspect a claim was not substantiated will be a matter of judgement on the part of the Commerce Commission, informed by its market knowledge.

Consumers and other traders would only have to prove that an unsubstantiated claim was made to a “balance of probabilities” standard of proof if civil enforcement is permitted, but they could not obtain information under section 47G because that power is only available to the Commerce Commission as regulator. This may have the effect of so limiting the effectiveness of substantiation as a civil remedy that there is little value in putting it in place.

The onus would be on the supplier to make out the defences if the Commerce Commission (or a consumer or other trader) has proved that an unsubstantiated claim has been made (to the requisite standard of proof).

The current defences in section 44 would apply in relation to unsubstantiated claims. These defences include that the contravention was due to a reasonable mistake, or was due to reasonable reliance on information supplied to the supplier.¹² It is not reasonable for a supplier making a claim to rely on information it knows is false. The defence that the contravention was due to an act or default of another person, or an accident beyond the defendant’s control, could also be relied on if reasonable precautions had been taken and due diligence exercised.¹³ These defences would be appropriate for a general prohibition on unsubstantiated claims.

Option 2: Substantiation Notice only

Another option is to add a new provision to the FTA similar to the new Australian Consumer Law, so substantiation notices may be sent to a supplier which has made a promoting claim. The notice would require that supplier to give information and/or produce documents that substantiate or support the claim.

The Commerce Commission has supported the inclusion of substantiation notices over the past 5 years on the basis that such notices would enable it to gather the evidence to prove that a claim could not be substantiated. The information would show whether the claim had been substantiated prior to being made. The notice would effectively require the supplier which made the claim to prove that the claim had been substantiated. That person would not have to prove that the claim was

¹² Section 44(1)(a) and (b).

¹³ Section 44(1)(c).

necessarily true, but rather that there is information that led the person to reasonably make the claim.

Making an unsubstantiated claim would not be an offence, but the information provided would be assessed by the Commerce Commission to decide whether it warranted a case against the supplier who made the claim, on the basis that the lack of substantiation amounted to making a false or misleading representation. The onus of proving that there had been a contravention of the FTA would still lie with the Commerce Commission which would have to prove that the claim constituted misleading or deceptive conduct or a false representation. The Commerce Commission would have the advantage that the false misrepresentation offences under section 13 are strict liability offences, so it would not have to prove that a misrepresentation was deliberate or intentional.

Similarly to the existing Commerce Commission information request provisions (the power in section 47G, and the offence for not complying in section 47J) it would be an offence to fail to comply with a notice or to provide misleading or false information. The offence relates to the failure to comply with the notice, rather than making an unsubstantiated claim *per se*. The current witness protection provisions of the FTA (section 47G(2)) would also apply so the privilege against self-incrimination would apply to suppliers responding to substantiation notices.¹⁴ The Australian substantiation notice provisions also include these aspects.

The substantiation notice process could only ever be available to the Commerce Commission as the regulator; it would never be appropriate for traders to be exposed to consumers or other parties somehow issuing substantiation notices themselves. This is another reason why the substantiation notice proposal is much narrower in scope than a general prohibition on unsubstantiated claims.

Option 3: Using both a general prohibition and substantiation notices

Including a prohibition against claims that have not been substantiated in conjunction with a power for substantiation notices is another possibility. The prohibition would set the behavioural expectations for suppliers to substantiate claims before they were made and providing for substantiation notices would give the Commerce Commission specific powers to seek information about that substantiation.

There is some attraction in applying both regulatory tools, rather than choosing between them. However the most convincing reason against taking this approach is that the current information gathering power under section 47G of the FTA would be sufficient to back up a general prohibition on unsubstantiated claims. Investigating a breach of the unsubstantiated claims prohibition would provide a sufficient basis for the Commerce Commission to require information to be produced under section 47G, and the Commerce Commission would not need the additional power to issue substantiation notices.

Reverse Onus and New Zealand Bill of Rights Act

¹⁴ Note however that the privilege against self-incrimination is only available to individuals, and is not available to companies – section 60 Evidence Act 2006

Where a statutory provision allows a particular fact, or element of the offence, to be presumed in the absence of evidence to the contrary, the prosecution is discharged from its burden to prove guilt, and the accused is effectively required to prove its innocence. This is known as a reversal of the onus of proof and is generally inconsistent with the right to be presumed innocent in section 25(c) of the New Zealand Bill of Rights Act 1990.¹⁵

Apparent inconsistency with the Bill of Rights would not be an issue with a general prohibition on unsubstantiated claims, which would technically be similar to the prohibition on false or misleading representations already found in section 13 of the FTA. The section 13 offences are strict liability offences, because the trader is not required to have made a representation that is *intentionally* false or misleading to be in breach. The defences available under section 44 include the defendant or accused proving that it made a reasonable mistake or relied on another person, and therefore did not make an intentional misrepresentation.

This could be seen as being similar to a reverse onus, but in fact it is the same as other situations where a defendant or accused has the opportunity to make out a defence. Rather than the FTA saying a misrepresentation is presumed to have been intentional unless it is proved to the contrary (which would be a reverse onus), the FTA says it is an offence to make a false or misleading representation, irrespective of the trader's intention. The only "element" of the offence is the false or misleading representation. The trader has the opportunity to make out a defence if it can prove that there was a reasonable mistake etc, but that does not require the defendant to disprove any element of the offence. Even if the effect may be similar, a strict liability offence is not technically a reverse onus offence.

A strict liability offence of making an unsubstantiated claim could be the same in this respect as the existing misrepresentation offences under the FTA.

The Bill of Rights issue with the apparent reverse onus has also been raised by submitters in relation to substantiation notices, because substantiation notices would require information to be disclosed that may be relevant to an offence. However,

- there is no suggestion that there will be any presumption that promotional claims by traders are unsubstantiated
- the proposed offence in relation to substantiation notices would be failing to respond to a notice, rather than making an unsubstantiated claim
- if making an unsubstantiated claim becomes an offence (under the general prohibition proposal), the Commerce Commission will have to prove to the required standard of proof that the claim is unsubstantiated
- evidence obtained by the Commerce Commission through a substantiation notice process (or a section 47G information request) will be relevant, but it would not constitute a reverse onus

¹⁵ Legislation which is inconsistent with the New Zealand Bill of Rights Act is valid in New Zealand. A prima facie inconsistency which is considered to be justified in a fair and democratic society is regarded as a justified limitation on the right under section 5 of the Bill of Rights Act. These tests are considered when a Bill is vetted for Bill of Rights compliance by the Attorney-General before it is introduced to Parliament.

- the trader would have the opportunity to defend itself by proving that the claim was in fact substantiated (or that it was not a false or misleading representation), but the opportunity to make out a defence is different from a reverse onus
- the inability of a trader to substantiate a claim when a substantiation notice is issued may be self-incriminatory, but that does not mean it is a reverse onus. The ability to obtain information is a legitimate and necessary part of the Commerce Commission's investigatory powers, and individuals have the benefit of the privilege against self-incrimination under section 60 of the Evidence Act 2006.

Therefore, neither the general prohibition option nor the substantiation notices option raises concerns in relation to the presumption of innocence or a reverse onus under the Bill of Rights. There may be more of a reverse onus risk if the general prohibition is combined with a substantiation notices process, but even then the issue is a self-incrimination issue rather than a reverse onus issue, and only individuals have the benefit of the privilege against self-incrimination in New Zealand law.

Enforcement – Commerce Commission and/or third parties

The discussion paper sought responses on whether enforcement of substantiation should be able to be undertaken only by the Commerce Commission or whether third party enforcement should also be permitted. The majority of submitters considered that such new and additional enforcement powers should be the sole responsibility of the Commerce Commission. Some of the reasons provided included that the Commerce Commission only undertakes prosecutions when required, and in accordance with prosecution guidelines. This was in comparison to businesses that use prosecutions for competition purposes or to obtain confidential information.

Many submitters also felt that the reverse onus and Bill of Rights issues (discussed above) meant the enforcement power should be limited to the Commerce Commission. Some submitters suggested that consumers would more likely use the Consumer Guarantees Act provisions if they had concerns and that section 9 of the FTA (*no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*) was also still available to consumers.

The Commerce Commission is responsible for enforcing the offences under the FTA; the rights available to other persons are to bring civil proceedings. The criminal sanctions available for the courts under action taken by the Commerce Commission are individual fines up to \$60,000 and body corporate fines up to \$200,000.¹⁶

The range of civil penalties available to third parties under a civil proceeding is considerable and includes injunctions, disclosure of information orders, advertisement publication orders, and a variety of remedial orders where a person has suffered, or is likely to suffer, loss or damage because of breaches of the FTA.

¹⁶ These fine limits are under review, because they are significantly out of line with the limits for fines and civil penalties under the Australian Consumer Law.

Regardless of which option or combination of options is progressed, we consider that enforcement powers should be limited to the Commerce Commission. Any power to issue substantiation notices could only lie with the Commerce Commission. This would ensure that such notices are used appropriately and are issued in accordance with the Commerce Commission's enforcement policy. A general prohibition against making claims that were not substantiated would also fit better within the current enforcement provisions of the Commerce Commission.

Role of the Commerce Commission

The Commerce Commission has a very important role in educating suppliers in relation to their obligations under the FTA. The Commerce Commission develops guidelines, encourages compliance programmes and issues compliance advice letters as part of this educational function.

Some submitters have expressed a concern that the Commerce Commission would use an additional power relating to substantiation to go on "fishing expeditions", to collect information where there is no reasonable justification for doing so. Currently the Commerce Commission uses enforcement criteria to assist when making decisions about whether to commence an investigation and what enforcement action it will take at the end of an investigation. The three main criteria applied are the extent of the detriment, the seriousness of the conduct and the wider public interest in the matter.

The Commerce Commission has identified a range of enforcement responses for resolving investigations and prosecutions of suspected contraventions of the FTA. The preferred response ensures that the individual circumstances are considered against the enforcement criteria. The range includes,

- compliance letters for possible/likely breaches of the FTA that are not serious where the aim of the letter is to educate and to deter future similar behaviour
- settlements for a likely/serious contravention that aims to modify the behaviour of the business and may include redress for affected parties
- prosecutions.

It would be reasonable to expect the Commerce Commission to apply these criteria to determining whether or not to send a substantiation notice or whether to commence an investigation in relation to a suspected breach of a provision that required claims to be substantiated prior to being made. The range of enforcement responses could also equally apply.

The Commerce Commission also have a role in encouraging compliance with the FTA and currently promote Fair Trading compliance programmes, compliance policies, and marketing guidelines, to assist businesses in complying with the FTA. While such methods of encouragement are guides only, are not legal advice and would not necessarily provide a full defence to a prosecution, they do provide information that supports businesses in their compliance. Current guidelines include,

- Green marketing

- Carbon Claims
- Environmental Claims
- Health and Nutrition Claims.

In all instances these guidelines note that consumers must be able to rely on information provided to them that claims should not mislead consumers and can be substantiated. While the guidelines do not have the force of law they do provide businesses with easily understood ways of avoiding FTA breaches. Additional guidelines could provide information on the factors to be considered in other high risk areas as well as more general guidelines on what information is required to substantiate claims. These sorts of factors should help to alleviate concerns expressed by some submitters in relation to the role of the Commerce Commission and would provide greater certainty to suppliers as to the information that was required in order to substantiate a claim.

Recommendations

We conclude that the analysis supports recommendations that:

1. A general prohibition on unsubstantiated claims be added as a new restricted trade practice in Part I of the FTA;
2. Specific substantiation notice powers are not necessary, because the Commerce Commission will be able to use its existing investigatory powers under section 47G to support a new general prohibition on unsubstantiated claims; and
3. Enforcement of unsubstantiated claims should be limited to the Commerce Commission, without being extended to include self-enforcement rights for consumers and other traders.