

New Zealand Consumer Law Update: Key Developments To Keep On
Your Radar
4th Annual In-House Counsel Summit¹

Authors: Troy Pilkington and Sarah-Michelle Washer
12 March 2019

1. INTRODUCTION

- 1.1 There have been a number of important developments in New Zealand consumer law over the past few years. Changes to the Fair Trading Act 1986 ("**FTA**") (by way of the Fair Trading Amendment Act 2013 ("**FTAA**")) resulted in the introduction of the unfair contract terms ("**UCT**") regime, the prohibition on unsubstantiated representations, and the trebling of FTA corporate penalties.
- 1.2 This paper considers these developments, highlighting key themes and principles arising from their enforcement as well as practical tips for businesses. The paper also outlines proposed consumer law reforms.

2. COURTS REFLECTING THE INCREASE IN FTA PENALTIES

- 2.1 One key development arising from the FTAA was the trebling of corporate penalties and the increase in individual penalties. The maximum penalty for breaching the FTA for corporates increased from \$200,000 to \$600,000, and the penalties for individuals increased to a maximum of \$200,000 per offence.²
- 2.2 Reflecting this amendment, penalties awarded against companies found in breach of the FTA have increased significantly over the past two years. For example:
- (a) In February 2017, Reckitt Benckiser (New Zealand) Limited was fined \$1.08 million in relation to its Nurofen "specific pain" products.³
 - (b) In October 2018, Steel & Tube Holdings Limited ("**Steel & Tube**") was fined \$1.885 million for making false and misleading representations about its steel mesh products.⁴

In November 2018, the New Zealand Commerce Commission ("**Commission**") announced it would appeal this fine, arguing that it should be higher in order to properly attribute the knowledge of the

¹ This paper was prepared for the Legalwise 4th Annual In-House Counsel Summit on 12 March 2019. Troy Pilkington presented on this topic and his session was recorded as an on-demand recording. The recording is available at: <https://www.legalwiseseminars.co.nz/search/SeminarDetail?SessionId=OND193NZA01>

² FTA, s 40.

³ *Commerce Commission v Reckitt Benckiser (New Zealand) Limited* [2017] NZDC 1956.

⁴ *Commerce Commission v Steel & Tube Holdings Limited* [2018] NZDC 21579.

Steel & Tube managers to the company, and to properly take into account the size of Steel & Tube and the potential for it to gain from the conduct.⁵

- 2.3 The sizes of FTA penalties are likely to continue to increase over the coming years, including through the Commission's Steel & Tube appeal,⁶ and also as the Commission has filed 59 charges against Euro Corporation Limited for allegedly similar representations about its steel mesh products.⁷

3. FIRST PROCEEDINGS AGAINST AN OVERSEAS ONLINE SELLER

- 3.1 In another interesting development, in August 2018 the Commission announced that it would commence proceedings against Viagogo, a Switzerland-based ticket resale website.

- 3.2 The Commission claims that Viagogo made false or misleading representations that it was an "official" seller, that tickets were limited or about to sell out, that consumers were "guaranteed" to receive valid tickets for their event, and about the price of the tickets.⁸ In filing these proceedings, the Commission mirrored a number of international enforcement agencies in Europe and Australia taking similar action against Viagogo.

- 3.3 This is the first time the Commission has issued proceedings against a wholly-overseas based online business under the FTA. This reflects the Commission's priority focus on online retail.⁹ The Commission anticipated that the proceedings would raise complex jurisdictional issues, and that has proven to be the case in the preliminary steps so far. Namely, the High Court dismissed the Commission's application for an interim injunction to prohibit Viagogo from making allegedly false representations on its website, on the basis that the Commission had not yet formally served Viagogo.¹⁰ That decision highlights the difficulties for the Commission in taking pre-emptive action against companies that are based overseas.

- 3.4 Counsel for Viagogo has also indicated that once validly served, Viagogo will lodge a protest to the New Zealand Court's jurisdiction to determine the substantive proceedings.¹¹ This will be a matter watched with interest by a number of overseas-based businesses that trade online in New Zealand.

⁵ <https://comcom.govt.nz/news-and-media/media-releases/2018/commerce-commission-to-appeal-steel-and-tube-sentence>

⁶ <https://comcom.govt.nz/news-and-media/media-releases/2018/commerce-commission-to-appeal-steel-and-tube-sentence>

⁷ <https://comcom.govt.nz/news-and-media/media-releases/2018/commission-lays-charges-against-eurosteel>

⁸ Commerce Commission Statement of Claim (30 November 2018) in Viagogo proceedings.

⁹ https://comcom.govt.nz/_data/assets/pdf_file/0024/90087/Commerce-Commission-Priorities-2018-19.pdf

¹⁰ *Commerce Commission v Viagogo AG* [2019] NZHC 187.

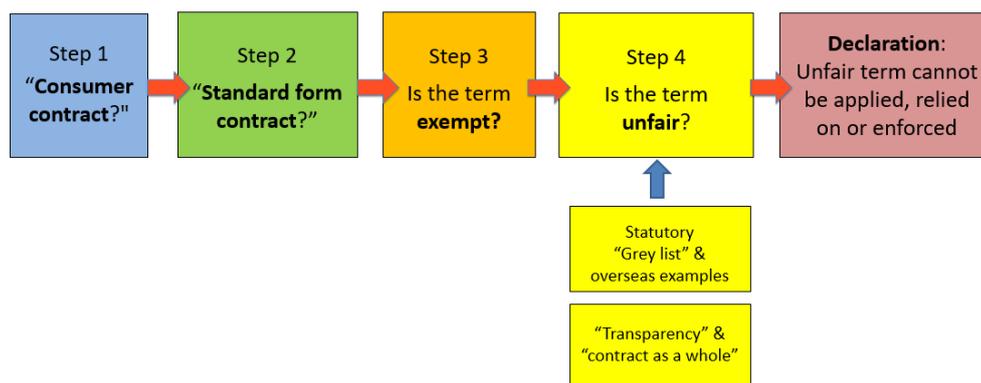
¹¹ *Commerce Commission v Viagogo AG* [2019] NZHC 187.

4. UNFAIR CONTRACT TERMS: THE DETAILS YOU NEED TO CONSIDER

- 4.1 The UCT regime came into force on 17 March 2015.¹² Section 26A of the FTA provides that if a court declares that a term in a standard form consumer contract is unfair a person must not include, apply, enforce or rely on that term.
- 4.2 Only the Commission can apply to the courts to seek a declaration. A declaration automatically extends to the same term in other contracts in the same circumstances.¹³ However, courts do not have the power to vary existing contracts.
- 4.3 A breach of the UCT regime could result in fines of up to \$600,000 for a company and \$200,000 for an individual, refunds or damages, corrective advertising and management banning orders for repeated offences.¹⁴

How does the prohibition work?

Diagram 1 – Overview of the UCT regime



- 4.4 Step 1) Is the contract a "consumer contract"? A "consumer contract" is a contract between at least one supplier and at least one consumer relating to goods or services that are ordinarily acquired for personal, domestic, or household use.¹⁵ The UCT regime may apply to B2B contracts, provided the goods or services are not acquired for commercial purposes.¹⁶
- 4.5 Step 2) Is the contract a "standard-form contract"? A contract is standard-form when the terms (other than the exempt terms) have not been subject to "effective negotiation".¹⁷ When determining this, courts must consider the

¹² Contracts that pre-date 17 March 2015 are not covered by the UCT regime, unless they are varied or renewed after that date (excluding insurance contracts). The UCT provisions only apply to new insurance contracts after 17 March 2015.

¹³ FTA, s 46I(3).

¹⁴ FTA, s 40, s 46C, s 42.

¹⁵ FTA, s 2(1).

¹⁶ FTA, s 2(1) defines "consumer" as a person who does not acquire the goods or services for the commercial purposes of – (i) resupplying them in trade, (ii) consuming them in the course of a process of production or manufacture, or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

¹⁷ FTA, s 46J(1).

respective bargaining power of the parties, whether the contract was prepared before discussing the transaction, whether a party was required to either accept or reject the terms as presented, whether the parties had an effective opportunity to negotiate the terms, and whether the contract reflects the characteristics of the parties.¹⁸ Once alleged, it is presumed that a contract is a standard-form contract.

- 4.6 Step 3) Is the term exempt? Certain terms cannot be declared unfair, including terms that define the main subject matter of the contract, set the upfront price, and are required or expressly permitted by any enactment.¹⁹ Certain insurance contract terms are also exempt.²⁰
- 4.7 Step 4) Is the term "unfair"? Courts must be satisfied (cumulatively) that the term:²¹
- (a) would cause a *significant imbalance* in the parties' rights and obligations under the contract;
 - (b) is *not reasonably necessary* to protect the legitimate interests of the advantaged party. The onus is on the business to prove that the term is reasonably necessary; and
 - (c) *would cause detriment* to a party if it were applied, enforced or relied on. This is a low threshold (eg "*would cause*" rather than actual proof it did in fact cause detriment) and is not limited to financial detriment.
- 4.8 In determining unfairness, courts must also consider the transparency of the term and the contract as a whole.²² The FTA provides examples of the kinds of terms that may be unfair.²³

Enforcement of the UCT regime

- 4.9 Since its enactment, the Commission has issued three warning letters,²⁴ commenced proceedings against Home Direct Limited²⁵ and Viagogo,²⁶ and undertaken three reviews of specific sectors (namely, the telecommunications, energy retail, and gym sectors). The Commission also

¹⁸ FTA, s 46J(2).

¹⁹ FTA, s 46K.

²⁰ FTA, s 46L(4).

²¹ FTA, s 46L(1).

²² FTA, s 46L(2).

²³ FTA, s 46M. For example, limitation, cancellation, penalty, variation, renewal and liability clauses may be unfair.

²⁴ In December 2018, the Commission issued warning letters to The Good Guys Limited, Home Zone Catalogue Company Limited and Auckland Christian Fellowship & Recreations (Inc.) t/a NZ Badminton Centre.

²⁵ In 2018, the Commission issued proceedings against Home Direct Limited ("**Home Direct**") under the UCT provisions. Home Direct, a mobile trader, invited customers to opt-in to a "voucher entitlement scheme", where direct debit payments were converted into "voucher entitlements" for future Home Direct purchases after goods were paid off in full. The Commission claims that the terms of the scheme are unfair as "vouchers" could not be refunded or exchanged for cash and expired after 1-2 years with the proceeds going to Home Direct.

²⁶ In 2018, the Commission issued proceedings against Viagogo, an overseas-based online ticket reseller, alleging (among other things) that the governing law term in Viagogo's terms and conditions is unfair.

reviewed the standard terms of some major public transport providers' travel cards, resulting in changes to their terms.²⁷

Key themes and principles arising from the enforcement of the UCT regime

- 4.10 While the purpose of the sector reports is to provide guidance to businesses and consumers, the guidance is specific to the particular context. While there are similarities in the types of terms identified as potentially unfair in the three sector reviews, the guidance provided in each report is specific to the particular context. This is because the nature of the terms (and circumstances where they apply) in each sector differs.²⁸
- 4.11 Contracts need to be accessible and in "plain English". In the review of the gym sector, the Commission recommended that the contracts communicate in "plain English" and have accessible formatting (eg numbered terms and highlighting of key terms).²⁹ The Commission also recommended that contracts be clear and transparent, easily accessible, and that staff draw customer attention to key contractual terms (eg term, fees, notice period).³⁰
- 4.12 Apparent from the Commission's action and statements to date, as a general proposition, there are certain types of contract terms that are at greater risk of being regarded as unfair, including:
- (a) terms relating to the automatic renewal of a contract.³¹ Automatic renewal clauses are not unfair *per se*. However, automatic renewal clauses may be unfair when accompanied by early termination fees,³² where the party has no choice whether the contract automatically renews, where it is not transparent, or if there is insufficient notice to cancel prior to the renewal.³³
 - (b) terms providing for the unilateral variation of contracts. While certain unilateral variation clauses may be legitimate, the unilateral variation of contract services, prices, and membership or use terms may be unfair in certain circumstances.³⁴ For example, where the term requires customers to accept unanticipated costs, new requirements or reduced benefits, the term is likely to be unfair.³⁵ The term may also be unfair where the party is unable to terminate without cost or unable to negotiate a discount where the change causes detriment and the variations occur without sufficient notice.³⁶

²⁷ <https://comcom.govt.nz/news-and-media/media-releases/2018/fairer-contract-terms-for-public-transport-users-in-major-cities>

²⁸ Energy Retail Contracts Review (August 2016) at [7]-[8]. Gym Contracts Review (August 2017) at [6]-[7].

²⁹ Gym Contracts Review (August 2017) at [48].

³⁰ Gym Contracts Review (August 2017) at [49]-[51].

³¹ Gym Contracts Review (August 2017) at [87]. "Ultimately the fairness of early termination fees will depend on the size of the fee, the way it is calculated and the business model of the particular gym concerned."

³² Energy Retail Contracts Review (August 2016) at [51].

³³ Gym Contracts Review (August 2017) at [62].

³⁴ Gym Contracts Review (August 2017). Energy Retail Contracts Review (August 2016). Telecommunications contract review (February 2016).

³⁵ Telecommunications contract review (February 2016) at [62].

³⁶ Gym Contracts Review (August 2017) at [123].

- (c) widely drafted exclusion or limitation of liability terms and "entire agreement" clauses. Terms that limit, exclude or avoid liability for loss / damage, consequential loss and rights under consumer protection law could potentially be unfair.³⁷ Terms are likely to be considered unfair where there is no corresponding limitation on the customer's liability. The use of "entire agreement" clauses could also be unfair where any pre-contractual representations have occurred.³⁸
- (d) terms that provide for unauthorised charges or limit the right to obtain a refund. Where the term imposes on the consumer a risk that the trader is better able to control, it has the potential to be unfair.³⁹ Terms that made customers liable for all charges, including from unauthorised use,⁴⁰ and that required parties to indemnify or compensate the other party in certain events could be unfair.⁴¹ Terms limiting the right to obtain a refund or to transfer unused credit⁴² or pre-payments for vouchers are also likely to be unfair.⁴³
- (e) certain terms providing for the cancellation of a contract. For example, lengthy notice periods for cancellation, complicated cancellation processes or requirements that cancellation be on a specific form, early termination fees that act as penalties (eg exceed unpaid balances or are disproportionate to the losses), and unilateral determination of a contract breach, may potentially be unfair.⁴⁴

4.13 That these types of contract terms are at potential risk is consistent with the enforcement action of the Australian Competition & Consumer Commission ("**ACCC**") to date, where "four common types of contract term" have been subject to successful challenges by the ACCC:⁴⁵

- (a) unilateral variation terms;
- (b) automatic renewal terms;
- (c) liability and indemnity terms; and
- (d) one-sided termination terms.

³⁷ Gym Contracts Review (August 2017). Energy Retail Contracts Review (August 2016). Telecommunications Contract Review (February 2016).

³⁸ Gym Contracts Review (August 2017) at [147].

³⁹ Telecommunications Contract Review (February 2016) at [74].

⁴⁰ Telecommunications Contract Review (February 2016) at [74]-[81].

⁴¹ Gym Contracts Review (August 2017) at [124].

⁴² <https://comcom.govt.nz/news-and-media/media-releases/2018/fairer-contract-terms-for-public-transport-users-in-major-cities>

⁴³ <https://comcom.govt.nz/case-register/case-register-entries/home-direct-limited/media-releases/commission-seeks-first-declaration-that-contract-terms-are-unfair>

⁴⁴ Gym Contracts Review (August 2017). Auckland Christian Fellowship & Recreations (Inc.) t/a NZ Badminton Centre Warning Letter (December 2018) at [18]-[19].

⁴⁵ <https://www.corrs.com.au/thinking/insights/what-trends-are-emerging-from-unfair-contract-term-actions-brought-by-the-acc/>

- 4.14 In addition to types of contractual terms that are generally at risk, the Commission has identified a number of company or industry specific terms that are potentially unfair. For example:
- (a) in relation to retail energy contracts, terms providing for the right of first opportunity to negotiate with departing consumers;⁴⁶
 - (b) in relation to public transport cards, terms limiting the validity period of unused cards;⁴⁷
 - (c) terms providing for ongoing direct debiting of customer accounts after customers finished paying for goods and requiring debtors to sign multiple direct debit authorities;⁴⁸ and
 - (d) governing law terms providing that all disputes brought by a customer must be heard overseas under overseas law (in that case Swiss law), but that the supplier could choose to take action against the consumer in the consumer's own country.⁴⁹

Practical tips for your practice going forward

- 4.15 It is important that businesses know how to identify potentially problematic terms and rectify these. The so-called "grey list" in the FTA (s 46M), the Commission's guidelines, sector reviews, warning letters and court proceeding documents provide helpful insights into potentially unfair contract terms as well as the appropriate business response. Drawing those together:
- (a) Consumer contracts should be clear, in "plain English", transparent, easily accessible and have accessible formatting, such as numbered terms and highlighting of key terms, to assist consumers to understand the contract.
 - (b) It is important to aim for mutuality when drafting or amending standard-form consumer contacts. For example, if a trader a can:
 - (i) cancel without notice, allow consumers to do so as well. Cancellation should not be subject to a complicated process or on a specified form.
 - (ii) vary a contract, allow consumers to exit the contract at no cost or require consumer consent to variation. Businesses should ensure that consumers have sufficient notice of the variation.
 - (iii) automatically renew a contract, ensure this is clear and allow consumers to choose whether the contract will automatically renew and provide sufficient notice prior to renewal.

⁴⁶ Energy Retail Contracts Review (August 2016) at [115]-[118].

⁴⁷ <https://comcom.govt.nz/news-and-media/media-releases/2018/fairer-contract-terms-for-public-transport-users-in-major-cities>

⁴⁸ The Good Guys Limited warning letter (December 2018) at [19]-[20].

⁴⁹ Commerce Commission Statement of Claim (30 November 2018) in Viagogo proceedings at [68]-[73].

- (c) All (non-exempt) terms should be justifiable. Terms should be reasonably necessary to protect a legitimate interest of the business. Avoid clauses that overreach, and document reasons for each potentially unfair term (ideally in a communication/document protected by legal privilege, to preserve the ability to decide whether to waive that privilege later if ever required).
- (d) Contracts should make it clear that consumers have statutory protections under consumer law that cannot be excluded or limited. As the Commission looks at the contract as a whole, businesses should detail what those consumer rights are and that any limitation or exclusion of liability within the contract does not affect those rights.
- (e) Limiting liability “to the maximum extent permitted by law” or words to that effect is likely to be unsatisfactory in standard form contracts.⁵⁰ Standard "boilerplate" or stock limitation of liability clauses should be used with caution.

5. UNSUBSTANTIATED CLAIMS: HOW TO KEEP YOUR ORGANISATION OUT OF TROUBLE

- 5.1 The FTA's prohibition on persons in trade making unsubstantiated representations (s 12A) came into force in June 2014. Only the Commission may commence proceedings, or apply for an order or an injunction in relation to a contravention of s 12A.⁵¹
- 5.2 Any business that makes an unsubstantiated claim may be at risk of breaching the FTA, even if they did not manufacture or supply the good or service or develop the promotional material.⁵² The consequences of breaching s 12A are fines of up to \$200,000 for an individual and \$600,000 for a company and management banning orders for repeated offences.

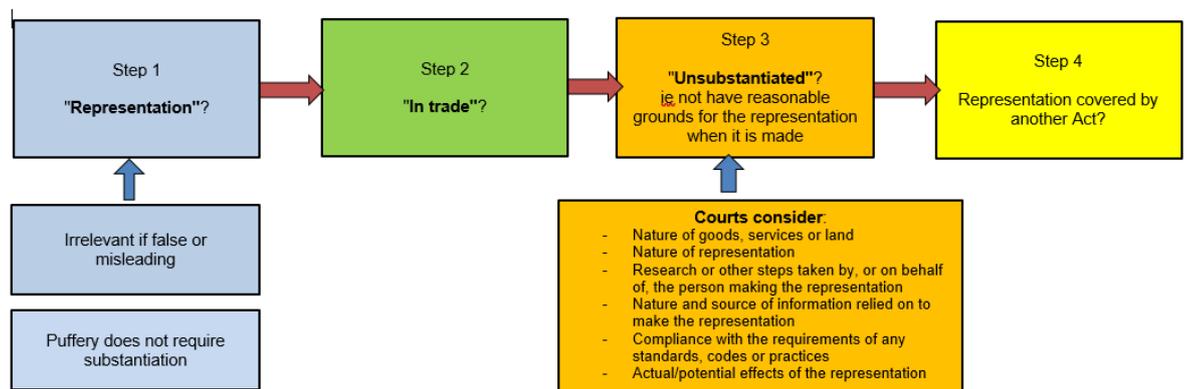
How does the prohibition work?

Diagram 2 – Overview of the unsubstantiated representations prohibition

⁵⁰ Gym Contracts Review (August 2017) at [141].

⁵¹ FTA, s 12C.

⁵² https://comcom.govt.nz/_data/assets/pdf_file/0030/89850/Unsubstantiated-representations-Fact-sheet-July-2018.pdf



5.3 Step 1) What is the representation? Section 12A has a specific definition of "representation", that is, a representation made in respect of the supply or promotion of goods / services (or the sale of an interest in land). Representations include both express and implied claims. It is irrelevant that a representation is false or misleading. However, not every claim requires substantiation. For example, puffery (ie expressions of opinion that are obviously exaggerated or overstated)⁵³ is unlikely to require substantiation.

5.4 Step 2) Was the representation made "in trade"?

5.5 Step 3) Was the representation unsubstantiated? Representations must be substantiated, or in other words, the person making the representation must have "reasonable grounds" for it. This is required at the time the representation is made, and it is not a defence to find evidence at a later date.⁵⁴

There is no precise test for what constitutes reasonable grounds. As provided for in s 12B, courts must have regard to all the circumstances, including:

- (a) nature of the goods or services about which the claim is made.
- (b) nature of the claim (eg was it about quality or quantity).
- (c) any research or other steps taken by or on behalf of the person before making the representation.
- (d) nature and source of any information relied on to make the representation.
- (e) compliance with any standards, codes or practices relating to the grounds on which such a representation may be made.
- (f) actual or potential effects of the representation on any person.

⁵³ https://comcom.govt.nz/_data/assets/pdf_file/0030/89850/Unsubstantiated-representations-Fact-sheet-July-2018.pdf

⁵⁴ *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512.

- 5.6 Step 4) Does another Act make requirements for the representation made? Section 12A does not apply where another law or regulation specifies the grounds on which claims may be made.⁵⁵ For example, Standard 1.2.7 in the New Zealand Food Standards Code sets out requirements for any health and nutrition claims. However, a voluntary code does not exempt the representation from s 12A.⁵⁶

Enforcement of the unsubstantiated representations prohibition

- 5.7 Since the enactment of the prohibition, the Commission has issued eight warning letters, prosecuted three companies,⁵⁷ and commenced court proceedings against Kiwipure Limited.⁵⁸

Key themes and principles arising from the enforcement of s 12A

- 5.8 The purpose of s 12A is to ensure that representations are "made on the basis of sound information or evidence".⁵⁹

- 5.9 Certain types of representations are a particular focus. Health and nutritional claims (eg therapeutic benefits,⁶⁰ key qualities of healthcare products,⁶¹ products that have a particular impact or benefit for humans⁶²), place of origin and environmental / organic claims are of particular focus.⁶³ There is also a high expectation of substantiation for pricing / sales pricing claims⁶⁴ and claims of compliance with safety standards. For example, the Court held in *Commerce Commission v Timber King Limited ("Timber King")*:⁶⁵

...it is self-evident that consumers should be able to expect claims of Standard compliance to be susceptible to proper substantiation. That is especially so in relation to earthquake compliance.

- 5.10 Evidence that is being relied upon to substantiate claims must:

- (a) *Be clear, credible and reliable.* Claims must be substantiated by "credible and reliable" evidence, such as scientific or medical

⁵⁵ FTA, s 12D.

⁵⁶ https://comcom.govt.nz/data/assets/pdf_file/0030/89850/Unsubstantiated-representations-Fact-sheet-July-2018.pdf

⁵⁷ In 2017, Fujitsu General New Zealand Limited was fined \$310,000 for making unsubstantiated and misleading claims about the energy efficiency and performance of some of its heat pumps. In April 2018, Timber King Limited and NZ Steel Distributor Limited were fined \$400,950 for making false, misleading and unsubstantiated claims about their steel mesh products. In October 2018, HRV Clean Water Limited was fined \$440,000 for making unsubstantiated and misleading claims.

⁵⁸ In August 2018, the Commission filed charges against Kiwipure Limited for making unsubstantiated claims about the benefits and ability of its water filters to soften water.

⁵⁹ *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512 at [22].

⁶⁰ Reform Limited t/a Baa Baa Beads warning letter (October 2015) at [12].

⁶¹ The Green People Company Limited warning letter (June 2016) at [24].

⁶² Sales Concepts Limited warning letter (July 2016) at [24].

⁶³ <https://comcom.govt.nz/business/dealing-with-typical-situations/making-accurate-claims>

⁶⁴ https://comcom.govt.nz/data/assets/pdf_file/0030/89850/Unsubstantiated-representations-Fact-sheet-July-2018.pdf. New Zealand Home Services Limited warning letter (October 2017). The Commission considered that ROI / price representations, which were presented as factual statements intended to influence consumers' purchasing decisions, required substantiation.

⁶⁵ *Commerce Commission v Timber King Limited* [2018] NZDC 510 at [96].

evidence⁶⁶ and rigorous product testing.⁶⁷ Different sources of evidence have varying degrees of reliability. For example, blog posts, news articles, information from competitor websites and sources where it is unclear where some or all of the data has originated are unlikely to be reasonable grounds for claims.⁶⁸ In our experience, the Commission is also sceptical of internal test results, or results provided by affiliated testing companies, due to the lack of independence, and so it is necessary to proceed with caution if relying on such results.

- (b) Be tailored to the actual representations being made. Evidential findings that are being relied upon must support the specific claim being made and not be overgeneralised.⁶⁹ Evidence must show a causal link between the products and the benefits claimed. For example, the Commission regarded laboratory studies that were confined to laboratory observational settings and did not test the everyday use of the products in real world settings to be insufficient substantiation for the claims made.⁷⁰
- (c) Relate to the relevant New Zealand (or even regional) market conditions (where applicable).⁷¹
- (d) Be up-to-date and supported by other relevant evidence. It is important that information relied on is up-to-date and accurate.⁷² Where the business is aware of later testing or findings that contradict the earlier findings, it is not reasonable for the business to rely on those older results.⁷³

5.11 Making unsubstantiated representations can, depending on the circumstances, be more serious than making general misleading representations. In *Commerce Commission v Fujitsu General New Zealand Limited ("Fujitsu")*,⁷⁴ the Court held that s 12A offences could result in a higher fine than s 13(e) offences depending on the nature of the breach, culpability of the defendant, and the facts of the case. However, the Court ultimately found in that case that the s 13(e) offences were more serious.⁷⁵

5.12 In the cases under s 12A to date, there has been consistency from the Courts towards sentencing:

⁶⁶ Reform Limited t/a Baa Baa Beads warning letter (October 2015) at [12]. Sales Concepts Limited warning letter (July 2016) at [24].

⁶⁷ The Green People Company Limited warning letter (June 2016) at [24].

⁶⁸ New Zealand Home Services Limited warning letter (October 2017) at [9].

⁶⁹ Sales Concepts Limited warning letter (July 2016) at [29].

⁷⁰ Sales Concepts Limited warning letter (July 2016) at [26].

⁷¹ New Zealand Home Services Limited warning letter (October 2017) at [11]-[12].

⁷² New Zealand Home Services Limited warning letter (October 2017) at [16].

⁷³ The Green People Company Limited warning letter (June 2016) at [32]-[33].

⁷⁴ *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512.

⁷⁵ *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512 at [24]-[25]

- (a) In *Fujitsu*, the Court adopted *Connell v LD Nathan & Co Ltd*⁷⁶ and considered the objects of the FTA, seriousness of offending, culpability of the company (ie whether it was deliberate or careless), the possible impact of the offending on consumers (including the need to denounce and deter such offending), and the totality of offending. The Court reduced the fine for cooperation and guilty pleas. Fujitsu was fined \$310,000 in total for making unsubstantiated and misleading claims. Of that, \$125,000 were for charges under s 12A (excluding court costs and solicitor's fees).
- (b) In *Timber King*, the Court adopted *Commerce Commission v LD Nathan and Co Limited*.⁷⁷ The aggravating factors included the objectives of the FTA and relevant codes, the importance of any untrue statement made, the degree of wilfulness or carelessness, the extent to which the statements depart from the truth, the degree of dissemination, prejudice to consumers, efforts made to correct the statements, and the need to impose deterrent penalties. The mitigating factors included the withdrawal of products, additional steps taken to achieve compliance, and the decision to cease the sale of the products. Timber King Limited and NZ Steel Distributor Limited were fined a total of \$400,950 for making false, misleading and unsubstantiated claims about their steel mesh products. Of that, \$121,500 were for charges under s 12A (excluding court costs).

- 5.13 During sentencing, specific claims that influence consumer decision making are likely to be treated as more serious than claims made in general terms.⁷⁸
- 5.14 A reasonable consumer would expect a business to scrutinise the evidence used to support the claims prior to the sale of the products. In *Timber King*, the Court held that, even though the defendants took positive steps, they were "completely inadequate" as the defendants failed to appreciate the testing deficiencies and scrutinise them before the products went on sale.⁷⁹

Practical tips for your practice going forward

- 5.15 It is important that businesses only make claims in relation to goods and services where they have reasonable grounds to support them. Where claims are made by manufacturers or suppliers, businesses should confirm with them if, how, and when these claims were substantiated, and conduct independent product testing where appropriate.
- 5.16 In order to substantiate claims, businesses should rely on evidence supported by credible and reliable sources, rather than guesses, simple observations and unsupported opinions. For example, evidence may come from medical or scientific journals, independent product testing, and information provided

⁷⁶ *Connell v LD Nathan & Co Ltd* [1990] 2 NZLR 160.

⁷⁷ *Commerce Commission v LD Nathan and Co Limited* [1992] NZLR 160 (HC).

⁷⁸ *Commerce Commission v Fujitsu General New Zealand Limited* [2017] NZDC 21512 at [63].

⁷⁹ *Commerce Commission v Timber King Limited* [2018] NZDC 510 at [96] Degree of wilfulness or carelessness (b).

by reputable suppliers and manufacturers. Evidence should accurately reflect the representations made (eg avoid overgeneralising), be up-to-date, and relate to the New Zealand (or even regional) market conditions (where appropriate).

- 5.17 As the reliability of information sources vary, businesses should select the source of the information according to the level of substantiation required. For example, health, nutritional, place of origin and environmental claims require a higher level of substantiation. Therefore, news articles, blog posts, and competitor websites are unlikely to be appropriate.
- 5.18 Businesses should keep all documentation or other information gathered in the process of sourcing or researching a good or service. Keeping a timeline of when the information was collected is also important as claims must be substantiated at the time they are made.

6. KEY DEVELOPMENTS MOVING FORWARD

- 6.1 As noted above, the consumer law space has seen a number of key developments in recent times, resulting in new prohibitions and higher penalties. Businesses need to operate with care and caution (looking to the Commission's previous enforcement actions) to ensure their representations and contracts meet FTA requirements.
- 6.2 Moving forward, there will be further developments in consumer (and business) protection law. The Ministry of Business, Innovation and Employment ("**MBIE**") is considering whether there is a need for additional protections for businesses and consumers against unfair commercial practices.
- 6.3 For example, MBIE is currently consulting on options to:⁸⁰
 - (a) introduce a prohibition against "unconscionable", "oppressive", or "unfair" conduct; and / or
 - (b) extend the existing protections against unfair contract terms in standard form consumer contract terms to also protect business contracts.
- 6.4 From our perspective, the proposed prohibitions would represent one of the most significant changes to New Zealand's commercial law framework in recent memory, and could have far-reaching impacts on the way that businesses negotiate and contract with one another and with consumers. It will be important that New Zealand's legal and business communities actively engage in that consultation process to achieve the best policy outcomes for New Zealand.

⁸⁰ In December 2018, MBIE published the "Protecting Businesses and Consumers from Unfair Commercial Practices" Discussion Paper.

Your consumer law contacts

Troy Pilkington

PARTNER



Troy.Pilkington@russellmcveagh.com

DDI: +64 9 367 8108

Sarah Keene

PARTNER



Sarah.Keene@russellmcveagh.com

DDI: +64 9 367 8133

Joe Edwards

PARTNER



Joe.Edwards@russellmcveagh.com

DDI: +64 9 367 8172