

SALES & MARKETING UPDATE



November 2012

“UNSUBSTANTIATED CLAIMS”: HOW A CLAIM CAN BE CORRECT BUT BREACH THE LAW

Don't have time to read this? See a one minute video summary [here](#).

The Consumer Law Reform Bill will introduce a prohibition on making unsubstantiated claims into the Fair Trading Act. In practice, this means that all claims about your products (that a reasonable person would expect to be substantiated) must be substantiated before you make them.

The Bill provides that an unsubstantiated claim is a claim, made by someone, who does not, when the representation is made, have reasonable grounds for the representation. An unsubstantiated claim does not have to be false or misleading. You can make a claim that is correct - but you may have committed an offence if you do not hold evidence that the claim is correct at the time you make it. A claim does not have to be substantiated under the provisions of the Fair Trading Act if other legislation sets out requirements relating to the grounds on which representations may be made and these requirements have been complied with.

Only the Commerce Commission can take enforcement action in respect of “unsubstantiated claims”. So, while your competitors can complain to the Commission, they can't take action themselves. A court, on an application from the Commerce Commission, will consider whether there were reasonable grounds for making a representation at the time it was made.

The Bill now provides a list of considerations that the court will take into account to determine if the claim was “unsubstantiated”.

These include:

- the nature of goods, services, or interest in land in respect of which the representation was made;
- the nature of the representation (for example, whether it was a representation about quality or quantity);
- any research or other steps taken before the representation was made;
- the nature and source of any information that the person relied on to make the representation;
- the extent to which the person making the representation complied with the requirements of any standards, codes, or practices relating to the grounds on which such a representation may be made, and the nature of those requirements; and
- the actual or potential effect of the representation on any person.

In an attempt to account for “puffery” (exaggerations routinely used in advertising), the Bill provides that it will not apply to a representation that a reasonable person would not expect to be substantiated. However, since it will be first up to the Commerce

Commission to bring enforcement action, and then up to the court to decide what a reasonable person would expect, this still means businesses may be put to considerable expense trying to prove that a claim is intended to be puffery.

Under the Consumer Law Reform Bill penalties for breaches of the Fair Trading Act have tripled (up to \$600,000 per breach for businesses) and that includes breach of the provisions dealing with unsubstantiated claims. We consider that the prohibition

on unsubstantiated claims is unnecessary. The Fair Trading Act and the ASA's Codes of Practice already contain a general prohibition on misleading and deceptive representations.

NEXT STEPS

If provisions dealing with unsubstantiated claims are passed into legislation, you need to ensure that all claims about your products (that a reasonable person would expect to be substantiated) are substantiated before you make them.

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