

Biggest June 2014 Fair Trading Act change for most businesses: representations must be substantiated


June 2014

Speed read

This is the second article in our special series on the big B2B and B2C law changes from 17 June.

This change ups the ante for vendors, advertisers, etc. The need to substantiate representations is now clearer and more critical. The effect of the FTA has always been that suppliers must be able to justify their representations. What this change does is to make the substantiation obligation apply even if the statement is not false or misleading, and make it easier for the Commission to sue.

Suppliers should revisit their ads, etc. B2B suppliers can contract out of this liability although that has challenges so they should ensure compliance anyway.



This fact sheet provides an overview of the new substantiation provisions of the Fair Trading Act. It is designed to help businesses and consumers understand their obligations and rights when claims are made about goods and services.

Everyday consumers are faced with advertising that claims goods and services are now cheaper, superior, or provide particular benefits. Consumers generally don't have the time or resources to establish whether these claims are accurate. And in many cases even when they use the advertised good or service, they

What types of claims need to be substantiated?
Any claim a business makes about a good or service must be substantiated – whether the claim is express or implied.

Of the changes in June, this probably has the biggest impact. Under s 12A, suppliers as to goods, services and real estate must not make unsubstantiated representations, irrespective of whether they are false or misleading. To be sufficiently substantiated, the supplier must have reasonable grounds for the representation (unless a reasonable person would not expect substantiation).

Section 12B lists factors for deciding if there are reasonable grounds. These predominantly ensure the approach is contextual. For example:

- What is the nature of the goods and services?
- What is the nature of the representation?
- What research has been done to justify the representation?
- How reliable is the information on which the supplier relies?
- Can the supplier rely on meeting standards, codes and practices?
- What is the actual or potential impact of the representation on the customer? (minor and the reasonable grounds can be of a lower standard; to the contrary if the potential impact is major).

The new regime doesn't apply to the extent that there is compliance with another statutory regime (for example, a product disclosure regime). (s 12D).

Unusually, only the Commission can enforce this regime.

B2B suppliers can contract out of the regime but there are challenges in this which mean B2B suppliers should comply regardless: see our article, [New law from June 2014: Reducing exposure under NZ B2B supply contracts.](#)¹

The Commission has produced a useful fact sheet, [Unsubstantiated Representations.](#)²

Suppliers will need to closely review their material. So, the following is just a high level list of some issues to consider:

Check list

- Substantiate before the representation is made as after is too late.
- Make sure the substantiation is sufficiently robust. How would it look to an affected competitor? To the Commission? To the court? This is not a time to rely on distorted or unreliable information.

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Check list (continued)

- Is information from third parties such as manufacturers, from the suppliers' own resources and comparative tests, etc, sufficiently reliable?
- Keep records of the steps taken and the reasons for being satisfied.
- Take care on indirect claims too. The Commission gives the example of "Available to you at factory prices". That implies prices are especially low, says the Commission, because it reflects what other retailers would pay. So the supplier needs to have sufficient comparative sales and pricing data to show the price would be what the manufacturer would charge.
- Retailers have the obligation too as to goods and services they resell. But it may be reasonable to rely on material provided by the manufacturer, depending on the circumstances.

- Develop clear processes to achieve these outcomes (and to be seen to be doing the right thing).

1. <http://www.wigleylaw.com/assets/Uploads/New-law-from-June-2014-Reducing-exposure-under-NZ-B2B-supply-contracts.pdf>

2. <http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/unsubstantiated-representations/>

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