

Optimising and attacking ICT and online contract terms: Part 3

June 2015

Speed read

In this series of articles, we overview some of the issues that we addressed at the NZ Law Society's May 2015 IT and Online Law Conference.

Part 3 discusses the issue of unsubstantiated representations in ICT and online contracts and marketing. Below, we provide a checklist to help ICT and online suppliers ensure their representations are legally compliant.



The Detail

This follows on from our earlier articles:

- [Optimising and attacking ICT and online contract terms: Part 1](#)
- [Optimising and attacking ICT and online contract terms: Part 2](#)

Unsubstantiated representations in ICT and online contracts and marketing

In summary, under s 12A, ICT and online suppliers must not make unsubstantiated representations, irrespective of whether they are false or misleading. This applies to all material ranging from RFP proposals to ads and online statements. To be sufficiently substantiated, the supplier must have reasonable grounds for the representation (unless a reasonable person would not expect substantiation).

Section 12B lists criteria for deciding whether there are reasonable grounds, ranging from reliability of the supporting information on which the supplier relies, to the gravity of impact on customers and prospects (the greater the impact

the greater the required substantiation).

We've outlined the position in more detail in our article, [Biggest June 2014 Fair Trading Act change for most businesses: representations must be substantiated](#).

Supplier's check list

Here's a check list for suppliers:

- 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.
- Is information from third parties such as manufacturers, from the suppliers' own resources and comparative tests etc., sufficiently reliable?

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- 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).

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