

Telecom's injunction claim as to Vodafone's SuperNet Ads

Speedread

We set out a framework as to how Vodafone's performance claims would be addressed under the Fair Trading Act, in relation to Telecom's court claim.

Stuff reports that Telecom has gone to Court to try and stop Vodafone's claims that it has New Zealand's best fixed line network and that its Wellington and Christchurch cable (HFC) network provides "ultra fast broadband services".

It may be that Telecom will have additional allegations too including as to the mobile network.

Tis gutsy calls for either or both Vodafone and Telecom to make the claims and to litigate respectively.



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Stuff reported on 2 August¹ that:

- "Vodafone says it stands behind its claim it has the "best fixed-line network" after Telecom went to the High Court at Auckland seeking an injunction....."
- "Telecom is also understood to be objecting to Vodafone's use of the term "ultra fast broadband" to describe Vodafone's cable networks in Wellington and Christchurch, which were formerly owned by TelstraClear."

What the complaints are, and the issues they raise, are not yet clear and we expect they will evolve, and might differ from the above. For example, Telecom may choose to make allegations as to mobile network claims.

Until then, we'll talk about the framework for the approach, assuming the Telecom allegations are in fact as above, for the sake of illustration.

Fair Trading Act: how it works with ads like this

Competitors of those making misleading and deceptive statements under s9 of the Fair Trading Act (FTA) can seek injunctions,

plus other orders such as to compensate them for losses caused by the breaches. The right to proceed is not limited to the Commission (and in fact the Commission has no rights under the FTA in important respects such as under the s9 provision).

In broad terms –there is a lot of detail under this – advertising claims need to be accurate to comply with the FTA including s9 FTA. Some of the detail underlying this includes the degree to which qualifications can be put in fine print and the degree to which there can be some marketing puffery. The generally applicable principles have been confirmed as recently as this week in an FTA High Court case between two competitors in the carpet manufacturing business.²

Telcos have a big challenge in complying with the FTA when describing how good their services are in ads. That's because the quality of service can vary so much according to location, and with performance attenuating as more users share limited resources during peak hours, and so on. The best available performance can be negatively affected as constraints are encountered between the customer's equipment and well into the network.

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These problems are well recognised by regulators in Australia, New Zealand and the UK, and the regulators provide guidance as to how to ensure compliance by Telcos and ISPs with legislation such as the FTA.

Is Vodafone's network the "best fixed line network"?

That's the first claim listed by Stuff.

Vodafone's website³ states:

".....we've brought together New Zealand's leading mobile network, and best fixed line network to create SuperNet™..."

And then, having described some features of the service, the web page concludes that:

"All this makes the SuperNet™ the best, fastest, and most reliable network in New Zealand."

While the mention in Stuff is only about fixed line, it may be that Telecom will look wider than fixed line, into mobile as well, given the ad's claims extend beyond fixed line. But, sticking with what we are told via Stuff, here we'll only address fixed line considerations at this stage.⁴ The framework approach applies to mobile too, though.

VF and each of its fixed line competitors (Telecom, CallPlus, Orcon, Kordia, etc) have unique but overlapping network elements. They each also make choices that impact their networks, even where the same network elements are used. For example, two fixed line competitors may use the same inter-city backhaul for their traffic, but one buys more capacity per user than the other over that backhaul, so that one is less likely to face reduced performance –contention – over that link as the number of users increases during peak hours. But even that can be too simple, as the Telco with more capacity may have users that have bigger data needs, and so the users on its network can be worse off. A Telco targeting gamers has a quite different profile than a Telco targeting average home users.

That's just a simple example of how complicated these things can be, and those issues play out over and over again over the multiple network elements.

All those network elements make up the fixed line network, not just the link from an exchange or similar point to the end user (the so called last mile). Maybe, the relevant "fixed line network" even extends beyond the Telco's directly owned and controlled network into other networks.

Or maybe whether that happens is a matter for debate in relation to ads and the FTA. For example, does the quality of the Telco's links into the Internet beyond its directly owned network come within the Telco's fixed line network?

Sometimes that will be determined by context, such as the context and breadth of claims made by the Telco in the relevant ad.

The "best fixed line network" claim is a claim that Vodafone's network is the best such network nationally. Vodafone would not only rely on superior performance over its HFC network to justify that claim. It knows it can't do that as the HFC network covers only a small part of the national network and its performance cannot be extrapolated as to national performance. That can happen only if other network elements outside the Wellington and Christchurch footprint support the national network claim in combination with the superior performance over the HFC footprint.

So it must be relying on the wider network as well to show that it has "New Zealand's.....best fixed line network" (and that its SuperNet network is "the best, fastest, and most reliable network in New Zealand").

What makes a network the "best" network (and the "fastest" and "most reliable") can be complex and challenging, when performance can vary so much depending on location, usage at the time, and so on. What are the relevant factors? Is it potential speed? Usual speed? Speed range, differentiated up and down? Reliability? The size of the footprint nationally (urban and/or rural)? What an independent survey says about performance and/or customer satisfaction? The

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range of services provided over the fixed line network, or capable of being provided? Internet performance? Voice performance? Performance at layers 1, 2 and/or 3? Performance beyond interconnection points (for example as to access to other points on the Internet)? Performance in particular market sectors and services (e.g. for corporate, SME and consumer customers respectively where needs and ways of providing services differ?) Other factors? A combination of all those matters? Or a combination that excludes some of those factors as they are not relevant to the FTA exercise?

A "fixed line network" is unlikely to be just the last mile, unless an ad is completely clear that this is the case (given the target audience which includes residential consumers who are not familiar with the distinction between the last mile and the multiple other network components.

It will be interesting to see how Telecom will formulate its complaints and how Vodafone will respond to the complaints.

Does the VF HFC network in Wellington and Christchurch provide "ultra fast broadband"?

On the same page of Vodafone's website, it's said:

"SuperNet™ has..... ultra fast broadband already available to over 191,000 homes....."

It's not clear but maybe Telecom considers that this refers to the HFC network. But we'll proceed on what Stuff says (that it objects to "Vodafone's use of the term "ultra fast broadband" to describe Vodafone's [HFC] networks...").

The Government fibre initiative of course is often called ultra fast broadband or UFB. Its providers (Chorus, Ultrafast Fibre, Enable, etc) only sell fibre access to Telcos and ISPs, which in turn use the service as an input into their retail services. Ultra fast broadband is often used in the media and other material to refer to the fibre initiative.

In those circumstances, is VF acting wrongly by describing its HFC services as ultra fast broadband, and is it thereby breaching s9 FTA? Guessing, and this really only can be a guess, this may raise two issues:

- Is "ultra fast broadband" a name that can really only mean the fibre initiative services, and perhaps services sold by ISPs and Telcos using the fibre services, so it cannot be used for non-fibre services?
- Is the HFC service good enough to be called "ultra fast broadband"?

That first question would be addressed having regard to how this would be viewed and understood by consumers (business or residential), and not how it would be seen by Telcos and ISPs, for consumers are the relevant market. Descriptors and names that cause confusion or an incorrect impression (as to what the service is and/or its performance characteristics) can breach the FTA, just as that can raise questions as to the legal ground of passing off, and as to registered trademarks. Is ultra fast broadband so closely linked and identified with the fibre initiative and its performance characteristics, as supplied by Telcos and ISPs, not as supplied by the Fibre providers such as Chorus, that the ultra fast broadband claim as to the HFC network is misleading and deceptive? Is there something like a brand name that is so closely identified by consumers that it can only mean the fibre based services?

The second question is related to the characteristics of the ultra fast broadband service. Does the HFC provide the quality of service expected of a service that is labelled ultra fast broadband, as understood by business and residential consumers? Again, it is their perspective and understanding that counts and not the understanding of Telcos and ISPs.

The high end HFC services have downstream speeds in the order of downstream fibre entry level services. But will one be more reliable than the other, or better or worse, or have better

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or worse actual upstream speeds, on the other dimensions listed above (bearing in mind that the HFC service and the fibre based service are not just about the last mile HFC and fibre links respectively, given the Telcos all have multiple choices as to how to configure their services throughout their networks). A service could be worse over the layer 2 last mile connection on VF's HFC network than a competitor's over the last mile fibre, but, all up, network configurations may make the competitor's service worse. "Ultra fast broadband" claims should be all about the service and its quality, rather than how that service is provided (unless the position has been reached where ultra fast broadband can only mean fibre services). So how that service is provided should be irrelevant, so long as performance means that it qualifies as an ultra fast broadband service.

Just as there wasn't a clear definition of what comprises "broadband" in earlier days, so there is not a clear definition of what "ultra fast broadband" means.

Where is this going?

Tis gutsy calls for either or both Vodafone and Telecom to make the claims and to litigate respectively. Given we don't know the detail, we can only talk about a framework for the approach. More may emerge unless the matter settles. It may be that Telecom is jumpy about other things in the ads, and that more will emerge (for example the claim on the same web page that Vodafone has "New Zealand's leading mobile network" (in combination with the other claims)).

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1. <http://www.stuff.co.nz/business/industries/8994913/Telecom-takes-Vodafone-to-court>
 2. *Godfrey Hirst NZ v Cavalier Bremworth* [2013] NZHC 1907. (31 July 2013)
 3. As at 3 August 2013.
 4. And we won't draw conclusions on merits as it is too soon.

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