

Telling Your Story with Integrity

Natural Health Products NZ Summit

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The Fair Trading Act

- Protects against
 - Misleading and deceptive conduct
 - False or misleading representations
 - Unfair trading practices
- To enable consumers to make informed choices about the goods and services they buy
- To ensure fair competition



Fair Trading Act – Section 9

No person shall in trade engage in conduct that is misleading or deceptive or is likely to mislead or deceive.



Important Points

- Intention to mislead is not relevant
- Applies to conduct likely to deceive (no one needs to have actually been misled)
- Applies to companies and individuals
- The overall impression is important
- Can mislead by omission
- Can be literally true but liable to mislead
- Traders may have a reasonable reliance defence but the threshold is high



Consumer Test

- All the target consumers except the outliers.
- Outliers are unusually stupid/ill equipped or whose reactions are extreme or fanciful.
- What claims, express and implied, does the ad convey to the target consumers?
- Advertisers are liable for all reasonable interpretations.
- Biodegradable....here today, gone tomorrow tidy bags.



Principles – Headline Representations and Qualifiers

- Overall impression/dominant message/general thrust of an advertisement is crucial
- Overall impression not just the sum of the separate representations
- Where the headline representation and the qualifying information vary greatly, any qualifiers need to be very clear
- Proximity and prominence of the qualifying information important
- Does the additional information make the true position clear?



Credence Video

- The Commerce Commission has released a new video, giving guidance to traders on false, misleading or unsubstantiated claims and how to avoid making them.
- <https://www.youtube.com/watch?v=a9a2HtaeNFE>



No Unsubstantiated Claims

- A person must not, in trade, make an unsubstantiated representation
- Any claims (oral /on labelling/in advertising) must be able to be substantiated – whether claims express or implied
- A business making a claim must have reasonable grounds for the claim.



No Unsubstantiated Claims.....cont

- Reasonable grounds come from:
 - Information provided by reputable suppliers/manufacturers
 - Any other reasonable source e.g. scientific or medical journals
 - Information within the company's knowledge
 - Google may not be reliable - likely to depend on the source
 - Anecdotal evidence or customer testimonials unlikely to suffice



- NZ's most energy efficient heat pump range
- A heat pump range delivered “better heat efficiency” and constituted “the most efficient system ever”
- E3 heat pump was ‘a breakthrough energy saver – delivered \$4.57 of heat for every \$1 of power used
- Performance achieved only under laboratory conditions and unlikely to be achievable in real world



Baa Baa Beads

- Baa Baa Beads – amber necklaces to help babies with teething
- ‘for generations it is said when worn on the skin, the amber warms and releases the oil that helps sooth and relieve symptoms’
- Recent scientific research has proved that succinic acid has a very positive influence on the human organism
- Succinic acid strengthens the body, improves immunity
- Succinic acid has been proven to be ‘the equal or better of many commercial drugs and is significantly less expensive’



Baa Baa Beads.....cont

- Substantiation provided by the trader involved some research and articles about Baltic amber's origin and its use by ancient people
- Article from www.home.remediesfor.you.com related to ancient tribes wearing amber necklaces due to their medicinal properties
- No expert or reputable scientific opinion or independently peer reviewed studies that justified the claims



Yoghurt Story

- Claimed the product:
 - Increases your immune system
 - Lowers the risk of subsequent heart disease and diabetes
 - Prevents infections once your immunity is strong
 - Fines of \$70,000 imposed on two related companies – would have been \$270,000 but companies in liquidation



Megavitamin Judgement 1995

- Company convicted and fined for not have the represented quantities of some types of Vitamin B in some tablets
- No defence to say that the level of Vitamin B may have degraded on the shelf
- The represented quantities must be present for the ordinary shelf life of the product



Red Seal

- Red Seal product range marketed as “pharmacy strength”
- None of the products in the range warranted a pharmacy only designation
- Commission concerned that some consumers might think the range was approved for sale in pharmacies or that it wasn’t usually available in stores other than pharmacies
- Company warned after it agreed to stop making the representations



Nurofen

- Product packaging implied that the products ‘targeted’ a particular type of pain.
- In fact each product contained exactly the same active ingredient and each worked identically to the other products.
- Consumers paid more for the ‘targeted’ products than for the standard ibuprofen products.
- Penalty of \$1.08 million imposed.

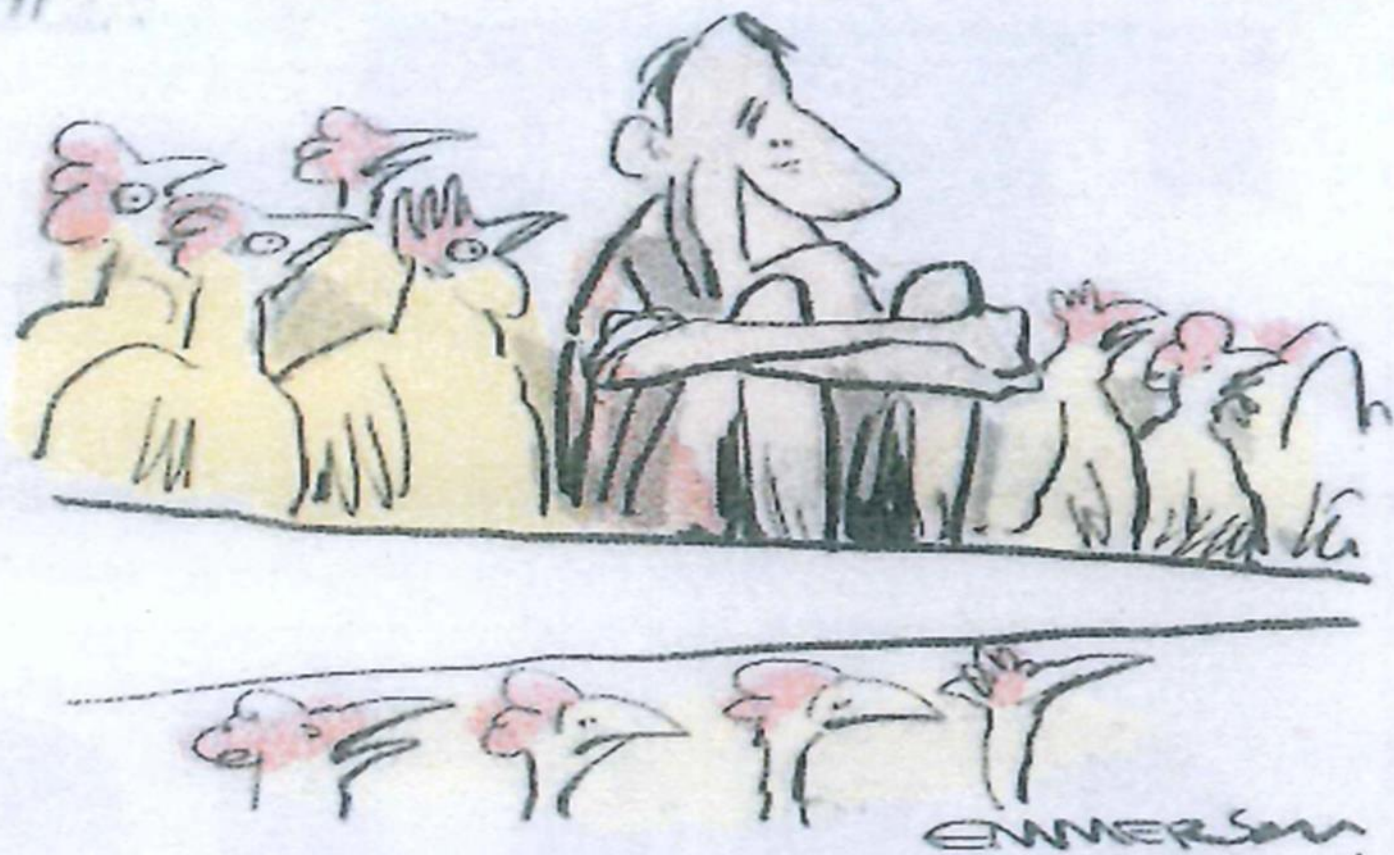


Forest Hill Farms

- Produced caged eggs
- Company also supplied free range eggs
- Investigated and convicted for selling over 260,000 caged eggs as “free range” or “barn laid” eggs over a year
- Charges laid under Crimes Act
- Owner pleaded guilty and sentenced to home detention



NO LONGER FREE RANGE



NZ Nutritionals case

- Goat's milk powder labelled as "100% NZ made and proud of it"
- Powder and Calcium Citrate both imported
- Goat's milk tablet labelled as "New Zealand made" with a Kiwi image
- Tablet made from 12 ingredients
- 8 of the 12 were imported including only 2 active ingredients
- Remaining 4 ingredients produced in NZ but were excipients or inactive ingredients



Court Ruling

- Misleading because the goat's milk in both products was sourced from and processed overseas
- Substantial transformation test – this stage was the conversion of the goat's milk into powder not the tableting or blending process



Pricing Claims

- Particular care should be taken with:
 - Internal pricing comparisons: *Was/Now, 50% off – Bike Barn*
 - Calls to action: *“Clearance”, “End of Line” – Bike Barn*
 - External pricing comparisons: *“Lowest” prices*
 - Government subsidies and levies: *CC v Kowhai Montessori*
 - Terms and conditions: *e.g. \$10 per month*

* For the first 12 months, \$30 per month for the rest of 24 month contract. \$120 break fee applies for early termination



What impression is created by the claim?

- Was \$1,000 Now \$500 – save \$500.
- \$1,000 (crossed out) - \$500 for a limited time.
- Sale price - \$500.
- \$1,000 RRP, Our Price \$500 – save \$500.
- Elsewhere \$1,000 – our price \$500.



Penalties

- \$600,000 per offence for companies.
- \$200,000 per offence for individuals.



How to stay off the Radar

- Have good complaints handling matters to reduce complaints to the Commission.
- Put in place good compliance processes.
- Review high risk claims including pricing and credence.
- Pay heed to compliance advice and warning letters.



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