

Packaging, environmental claims and the law



Contents

Packaging, Environmental Claims and the Law	2
5.1 Green Marketing and the Fair Trading Act 1986	3
5.2 Unsubstantiated representations	3
Important precautions	5
5.3 Environmental Claims about Packaging	6
5.4 Making Misleading Environmental Claims - “Greenwashing”	7
5.5 Waste Minimisation Act 2008	8
5.6 Consumer Guarantees Act 1993 (“CGA”)	9
5.7 Commerce Act 1986	11
5.8 Selected Industry-Specific Packaging Laws	12
Health & Safety Regulations	12
Food Contact	12
New Zealand Requirements for Toxic & Hazardous Substances	13
International Requirements for Toxic & Hazardous Materials	13
Pharmaceuticals	13
Overseas Laws and Regulations	13
Sample Legislation Related to Consumer Packaging	13
More information	14

Packaging, Environmental Claims and the Law

It is recommended that this section is read in conjunction with the key principles sections 1 – 4 of the Code of Practice for packaging design, education and procurement

- Green Marketing and the Fair Trading Act 1986
- Unsubstantiated representations
- Environmental Claims about Packaging
- Making Misleading Environmental Claims - “Greenwashing”
- Waste Minimisation Act 2008
- Consumer Guarantees Act 1993 (“CGA”)
- Commerce Act 1986
- Selected Industry-Specific Packaging Laws

The information in this Code about the law is for general guidance only. For all legal issues, including complying with legal requirements for packaging, it is critical that independent legal advice is taken in relation to New Zealand and any other jurisdictions to which products or packaging are exported.

For copies of New Zealand legislation and regulations listed in this Code go to:

www.legislation.govt.nz

The law can change rapidly so it is important for individual businesses to be aware of changes and the impact this has on them. This Code discusses key statutes in force as at November 2017, and includes commentary on the prohibitions against unsubstantiated representations.

5.1 Green Marketing and the Fair Trading Act 1986

In New Zealand, the Fair Trading Act prohibits traders from engaging in conduct within New Zealand that misleads or is likely to mislead customers – both businesses and consumers. “Conduct” includes information placed on packaging, in advertising, and communications to distributors or consumers.

The Fair Trading Act (“FTA”) prohibits persons in trade from engaging in conduct that is:

- misleading or deceptive, or
- likely to mislead or deceive.

The Act also sets out more specific prohibitions including prohibitions against making false or misleading representations that goods are of a particular:

- kind,
- standard,
- quality,
- grade, or
- composition,
- or that goods have had a previous history.

Also, the FTA prohibits businesses from claiming that goods or services have any sponsorship, approval, endorsement, performance characteristic, use or benefit that they do not have. For example, businesses must not claim that packaging is certified as sustainable unless certification has been obtained from an independent accredited certification agency and is current for that packaging. Further, businesses should not claim that packaging is recyclable unless facilities for recycling are available in New Zealand or overseas facilities are able to be used to recycle New Zealand waste packaging.

Breach of these specific prohibitions is a criminal offence that can result in a fine of up to \$600,000 for a company or \$200,000 for an individual *per breach*. Individuals, who can be employees or directors directly involved in a breach, can also face management banning orders if they or their company have committed at least 2 separate offences under the Fair Trading Act within 10 years, whether in New Zealand or in an overseas jurisdiction in relation to fair trading law

Most other countries including Australia and the United Kingdom have similar laws prohibiting misleading or deceptive conduct, or more specific laws prohibiting misleading environmental claims.

The Commerce Commission has broad powers to investigate potentially misleading conduct, including environmental claims, made by a New Zealand business or a business marketing into New Zealand. The Commerce Commission can also accept written undertakings in relation to breaches, which are enforceable in the Courts.

The Advertising Standards Authority is a non-government body which hears complaints about advertisements, including complaints about the accuracy of advertisements. If the Advertising Standards Authority upholds a complaint about an advertisement, almost all publications in New Zealand are obliged by contract to refuse to publish that advertisement.

5.2 Unsubstantiated representations

All traders who make representations about performance or other characteristics of their products are now required to substantiate those representations before they are made. This relatively new provision of the FTA, effective from 17 June 2014, is intended to encourage traders to verify,

confirm or otherwise check the claims that they make or pass on, so that consumers and business purchasers of their products can confidently buy their products.

The New Zealand provision requires a trader to carry out due diligence on product claims before those claims are released in the market place. In this, it differs from Australian law, where traders can be required to substantiate their representations on receipt of a substantiation notice from the Australian Competition and Consumer Commission (ACCC). The New Zealand provision effectively reverses the burden of proof in a criminal prosecution under the FTA, placing it on the trader.

A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading. Thus, the representation can be true but there is a breach if it is unsubstantiated. The provision does not apply to a representation that a reasonable person would not expect to be substantiated. In this way, puffery is excluded, and persons further down the supply chain may well be able to rely on information supplied to them. However, it is unlikely that manufacturers, importers and specialist distributors within the packaging would be protected by the puffery provision.

In deciding whether a representation is unsubstantiated, the Court must consider:

- the nature of goods or services;
- the nature of representation (eg about quality or quantity, performance etc);
- any research or other steps taken by or on behalf of the person before the representation is made (this is intended to encourage checking on the part of those who supply the product);
- the nature and source of any information relied on;
- the extent to which the person making the representation complies with any relevant standards or codes or practices;
- the actual or potential effects of the representation on any person.

Only the Commerce Commission can bring a claim that a representation is unsubstantiated. This eliminates the opportunity for competitors to bring claims of unsubstantiated representations against each other, necessitating the disclosure of confidential product and testing information and other trade secrets.

On conviction, defendants could be fined up to \$600,000 per breach for a company or up to \$200,000 per individual. Further information is available from the Commerce Commission¹.

Important precautions

- Ask suppliers for test reports from accredited international testing laboratories before making sensitive claims, particularly about end of life options eg recyclability or composability.
- When dealing with suppliers who do not have internationally established names, double check the reports you are given and if in doubt, organise further testing. Your reliance on those reports must be reasonable.
- If you are an importer of packaging materials, remember that your customers are dependent upon you for accurate information.

¹ <http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/unsubstantiated-representations/>

5.3 Environmental Claims about Packaging

If a product has “environmentally friendly” properties (e.g. recycled content or recyclable materials, recyclability or compostability), often that benefit can be promoted to consumers. More and more consumers consider these claims when choosing which products to purchase. Consumers are entitled to rely on those traders who manufacture and supply the products to ensure that all environmental claims are true and accurate. All environmental claims about products or packaging must be accurate and must not give any misleading impression.

The effect of the FTA is that environmental claims about goods (including packaging) must not mislead or be likely to mislead. All environmental claims in advertising, promotional materials and on product or packaging must be accurate, and have been substantiated before they were made [cross-reference to unsubstantiated representations].

This means that businesses making environmental claims about their products must have records on hand to justify all environmental claims. For some claims, this includes keeping records of:

- independent testing by a qualified and certified testing laboratory (e.g. that a “compostable plastic” can break down fully if composted) or
- independent certification (e.g. “paper sourced from renewable plantations”).
- Whether appropriate recycling or composting collection and facilities are available locally where the packaging is sold to end-users

To assist businesses in complying with the FTA, The Commerce Commission has published: • Guidelines for Green Marketing², and • Guidelines for Carbon Claims².

These guides are recommended for businesses developing or marketing “green” products in New Zealand.

² Both available on <http://www.comcom.govt.nz/fair-trading/fair-trading-downloads/>

5.4 Making Misleading Environmental Claims - “Greenwashing”

Greenwashing is the practice of making vague or general “environmental” claims which do not stand up to close scrutiny. Greenwashing behaviour includes making broad claims like “friendlier for the environment” which are unable to be proved or disproved. Consumers and the Commerce Commission scrutinise environmental claims to ensure that they are meaningful and accurate.

Greenwashing harms all law-abiding traders because it devalues all environmental claims in the eyes of consumers.

The Commerce Commission is aware of this problem and has already investigated the accuracy of green claims, it has issued warnings where traders were not able to substantiate their claims, and successfully prosecuted two packaging companies.

Indicators of greenwashing claims can include:

- **Vagueness:** Including claims a product is “green” or “sustainable” without any details backing up or detailing the supporting information for these claims. Generic claims without support can be meaningless and therefore likely to mislead consumers.
- **No Proof:** Including claims a product is “from sustainable sources” or is “carbon neutral”. Claims a product or packaging is sourced from sustainable or sustainably managed sources must be backed up by independent certification. “Carbon Neutral” claims must be supported by independent checking and certification taking into consideration the whole lifecycle of the product.
- **Irrelevance:** Including claims that are inherent in the nature of the product: eg a paper product is “biodegradable”, or an aerosol is “CFC free”. Paper should biodegrade. By law, aerosol products should be CFC free. These claims suggest that there is an added environmental benefit to the product when in fact the product does not have any added environmental benefit.
- **Distractions:** These are claims that seek to distract consumers from the normal environmental problems attached to a product. Several car companies have been the subject of complaints to the Advertising Standards Authority because they have claimed their cars were “green” when in fact those cars emitted large amounts of CO₂ during their useful lives.
- **Not the full picture:** This includes claims a product is “recyclable” or “compostable” when in fact there are no facilities in New Zealand to recycle or compost that product or to collect it for efficient recycling overseas. Where environmentally friendly disposal facilities are not available throughout New Zealand, representations should be qualified eg “compostable: check availability locally”.

5.5 Waste Minimisation Act 2008

The Waste Minimisation Act 2008 gives the government the power to encourage, and in some circumstances require, industries to take responsibility for their products (including packaging) when those products reach the end of their useful lives.

The Act empowers the government to require particular industries to set up mandatory “product stewardship schemes” to manage end-of-life products. “Product stewardship” is an ethic that encourages or requires everyone involved in the manufacture, use and disposal of a product to take responsibility for what happens at the end of the product’s useful life.

A mandatory product stewardship scheme under the Waste Minimisation Act can place legal obligations on producers, brand owners, importers, retailers, consumers and other parties to take greater responsibility for the environmental effects of designated products (including their packaging) throughout the product lifecycle.

Alternatively, industry groups can choose to apply to the ministry to have a voluntary product stewardship scheme accredited under the Waste Minimisation Act.

If the government finds that voluntary measures, including voluntary product stewardship schemes, are not sufficient to manage the environmental effects of packaging, then the government is more likely to impose mandatory product stewardship requirements for some or all types of packaging.

The Waste Minimisation Act gives the government power to impose regulations, including regulations to support a mandatory product stewardship scheme. Fines of up to \$100,000 could be imposed on businesses or individuals that breach regulations, for example by knowingly disposing of an item of packaging other than via the applicable product stewardship scheme.

5.6 Consumer Guarantees Act 1993 (“CGA”)

The Consumer Guarantees Act (CGA) gives statutory rights to consumers where consumer goods or services do not meet a reasonable consumer’s expectations. A “consumer” is a person who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. Consumers’ rights under the CGA cannot be excluded or limited by any provision in a contract between a business and a consumer.

The Consumer Guarantees Act 1993 provides flexible guarantees for the performance of goods and services that are ordinarily acquired for personal, domestic or household purposes. If goods or services fail to meet consumers’ reasonable expectations, consumers (including business end-users of the goods) are entitled to recover remedies from the suppliers of goods or services, and from the manufacturer of goods. The CGA guarantees do not apply where goods or services are resupplied in trade (ie manufacturer to wholesaler) or used in manufacture.

Under the CGA, packaging is part of the product (this includes both product packaging and packaging supplied by retailers).

If the packaging does not perform as stated, consumers might have a claim against the manufacturer or supplier/retailer of the product under the Consumer Guarantees Act 1993. In some circumstances traders might have to give full refunds to consumers because packaging does not live up to its environmental claims. If packaging fails to comply with a CGA guarantee, traders might have to give full refunds of the product’s purchase price even if the product itself is satisfactory: the packaging is as much a part of the product as its warranty.

Guarantees for goods will apply whether goods are purchased, hired or gifted. They include a guarantee that the goods will:

- be of acceptable quality;
- be reasonably fit for any specific purpose made known by the consumer to the retailer or by the retailer to the consumer;
- reasonably correspond with any description under which they are supplied;
- reasonably correspond with any sample offered before they are supplied;
- be a reasonable price. This guarantee applies only if the price is not a normal price, or part of the contract, and is rarely used.

The key guarantee for goods is the guarantee of acceptable quality. It is very flexible:

Goods must be as:

- fit for all of the purposes for which goods of the type in question are commonly supplied. In the case of packaging, this means that it must appropriately protect the goods
- acceptable in appearance and finish
- free from minor defects
- safe
- durable,

as a reasonable consumer, fully acquainted with the state and condition of the goods and knowing about any defects, would regard as acceptable, having regard to:

- the nature of the goods
- the price
- statements on packaging or labels
- representations by supplier or manufacturer
- the nature of the supplier and the context of supply (new)
- all other relevant circumstances of the supply.

A reasonable consumer would expect HDPE bags provided at checkout to be capable of carrying the goods packed in them, and would expect packaging around a small appliance to protect the appliance.

Consumer remedies for defective goods: Where guarantees for goods are breached, consumers have the right to ask for the problem to be fixed by the supplier (the supplier can choose whether to repair, replace or refund at this stage). If the problem is not fixed within a reasonable time, or if the problem is serious, they may have the right to a refund of any money they've paid for the goods, together with compensation for any reasonably foreseeable loss that they have suffered as a result of the failure to comply with guarantee.

If the packaging does not perform as expected consumers might have a claim against the manufacturer or supplier/retailer of the product under the Consumer Guarantees Act 1993. In some circumstances traders might have to give full refunds to consumers because packaging does not live up to its claims. If packaging fails to comply with a CGA guarantee and the product it contains is damaged, retailers might have to give full refunds of the product's purchase price even if the product itself had otherwise been satisfactory: the packaging is as much a part of the product as its warranty.

Warning: Any attempts to contract out of Consumer Guarantees Act rights will breach the Fair Trading Act and could lead to prosecution by the Commerce Commission.

5.7 Commerce Act 1986

The Commerce Act 1986 prohibits conduct which impacts negatively on competition in New Zealand. The Act also empowers the Commerce Commission to enforce the Commerce Act (as well as other Acts including the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003).

In summary, the Commerce Act prohibits agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. Contracts between competitors to fix buy or sell prices of goods are prohibited, as are agreements between competitors to exclude third parties from a market. Businesses that have a substantial degree of power in a market must not use that power to eliminate competitors, or to restrict, prevent or deter others from competing in a market. This is a brief summary only of the major provisions in the Commerce Act that are most likely to arise in relation to packaging and product stewardship. There are other more specific rules in the Commerce Act, including a prohibition on resale price maintenance.

If found to have committed a Commerce Act breach, businesses could face a penalty of up to the greater of \$10 million, or three times the commercial gain from the breach, (or if commercial gain cannot be ascertained) 10% of group turnover. Individuals face a penalty of up to \$500,000.

In some circumstances, the Commerce Commission can authorise an anti-competitive agreement. However, this is only possible before an agreement is entered into. Independent legal advice can help identify whether Commerce Commission authorisation is an option.

Whenever competitors talk to one another about environmental packaging, including recycling or waste recovery systems, all individuals and businesses must be aware of competition law issues. Before considering entering into an agreement with competitors (even an informal agreement based on a hand shake) members should obtain independent legal advice about Commerce Act issues. Discussions between competitors should only take place on the basis that nothing will be agreed to until the parties have obtained their own legal advice, and if required, Commerce Commission authorisation has been granted.

At any meeting with competitors, if you become uncomfortable about a competition law issue, leave the meeting straight away and get independent legal advice.

This is just a brief introduction to competition law issues. You should get specific legal advice. Investing now in an understanding about how competition law could affect your business can save money in future, particularly if a problem emerges.

Most countries have similar competition laws (also called “Anti-trust” laws). Regulators in different countries frequently work together in dealing with international or multinational cartels.

5.8 Selected Industry-Specific Packaging Laws

In New Zealand there are some laws that impose industry-specific or product-specific legal requirements relating to packaging. Businesses must ensure all packaging complies with all applicable laws both in New Zealand and in any export markets across the world. This section is not intended to be exhaustive in terms of specific packaging legislation or regulations in New Zealand, or overseas. You should obtain your own independent legal advice, and other necessary professional advice.

In developing new products/packaging or adapting products/packaging for a new overseas market, allow time to comply with applicable local laws. For example, some countries might require registration or approval of products, including packaging. Development timeframes must take into account the time that will be needed to obtain the relevant registrations or approvals.

For some packaging, material choice could be dictated by legislative or regulatory requirements. Packaging size could be influenced by the quantity of regulatory information required on the package and/or label.

Health & Safety Regulations

Health and safety regulations are a legislative requirement throughout all aspects of the packaging lifecycle. For example to reduce the risk of human injury during handling, smaller packaging formats may be required which use more packaging when compared with larger packaging formats.

For a guide on the Health & Safety in Employment Act 1992 go to the Worksafe New Zealand website: <http://www.worksafe.govt.nz/worksafe/>

Food Contact

Packaging material which comes into direct contact with food is regulated. It is the responsibility of food manufacturers and sellers to ensure their products are safe and that they comply with relevant legislation, including the Food Act 2014 and the Food Standards Code. Under the Food Act 2014, food is unsuitable if it has packaging that is damaged, deteriorated, perished, or contaminated to the extent of affecting the food's reasonable intended use. Further information on the application of the Food Standards Code to packaging is available on the Food Standards Australia New Zealand website, e.g.

<http://www.foodstandards.govt.nz/consumer/chemicals/foodpackaging/Pages/default.aspx>

Regulations in this area also apply internationally and compliance with recognised international food standards such as those of the European Union or the United States Food and Drug Administration is necessary for selling food in those jurisdictions:

- www.fda.gov
- www.efsa.europa.eu

New Zealand Requirements for Toxic & Hazardous Substances

All Hazardous Substances must be packaged and handled in compliance with the requirements of the Hazardous Substances and New Organisms Act 1996 (“HSNO Act”) and all applicable regulations under that Act including the Hazardous Substances (Packaging) Regulations 2001³. The Environmental Protection Agency enforces compliance with the HSNO Act. For more information including a database of chemicals classified in accordance with the Hazardous Substances and New Organisms (HSNO) regulations go to the hazardous substances section of the EPA Website:

www.epa.govt.nz

When buying products from overseas, specialist advice may be needed to ensure that you check that substances which are prohibited in New Zealand, but not in the source country, are not part of the products that you import.

International Requirements for Toxic & Hazardous Materials

Many jurisdictions including the USA, the European Union, Japan, China, and many other Asian and South American countries have laws identifying chemicals that must not be used as additives in packaging. Use of prohibited additives or use of higher than permitted levels of additives could lead to prosecution and/or product recall. These additives restrictions include heavy metals.

For further information:

- www.epa.gov search on toxic and hazardous chemicals regulations in the USA
- <http://echa.europa.eu/> (formerly known as the European Chemicals Agency) for regulations relating to Europe. Including a link to REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) regulations.

Independent advice may also be needed particularly if your products are for export.

Pharmaceuticals

Medsafe is responsible for administering the Medicines Act 1981 and Regulations 1984 and should be consulted for specific information relating to pharmaceutical packaging www.medsafe.govt.nz

Overseas Laws and Regulations

Businesses intending to export packed goods need to be aware of the legislation which is specific to the jurisdiction where the product is to be exported to. Businesses are likely to need specialist legal advice on the law of the country to which products will be exported.

For example packaging in the European Union is subject to the Packaging and Packaging Waste Directive (94/62/EC) which relates to the essential requirements to be satisfied by packaging in order for packaged goods to circulate freely in the EU single market.

For further information:

- https://ec.europa.eu/commission/index_en
- the Transport & Packaging section of: www.cen.eu/cen

Sample Legislation Related to Consumer Packaging

RELATES TO

LEGISLATION

³ Amended 2004. Available on www.legislation.govt.nz

Misleading labelling, packaging and environmental claims	<ul style="list-style-type: none"> •Fair Trading Act 1986 •Refer - Guidelines for Green Marketing •Refer - Guidelines for Carbon Claims •Refer - Guidelines for Substantiating claims
Waste Minimisation & Product Stewardship	Waste Minimisation Act 2008
General Sales & Marketing	<ul style="list-style-type: none"> •Consumer Guarantees Act 1993 •Contract and Commercial Law Act 2017 Part 3 (formerly the Sale of Goods Act 1908)
Hazardous Goods	<ul style="list-style-type: none"> •Hazardous Substances (Packaging) Regulations 2001 •Hazardous Substances (Identification) Regulations 2001 •Hazardous Substances (Disposal) Regulations 2001
Distribution of Goods	<ul style="list-style-type: none"> •Contract and Commercial Law Act 2017 Part 5 subpart 1 (formerly the Carriage of Goods Act 1979) •Civil Aviation Act 1990 •Maritime Transport Act 1994

