

SUBMISSION

by the



PACKAGING COUNCIL
OF NEW ZEALAND (INC)
(PAC.NZ)

to the

Ministry of Consumer Affairs

on the

Consumer Law Reform

30th July 2010

This submission has been prepared with legal advice from Rae Nield Marketing Law.

1.0 Introduction

This submission is from:

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- 1.1 The Packaging Council of New Zealand is industry's voice on policies affecting packaging and packaging waste. We are the focal point for providing impartial, factual information on packaging and the impact of packaging on the environment.
- 1.2 We are committed to minimising the environmental impact of packaging and increasing packaging recovery rates by advocating cost effective, sustainable solutions and championing product stewardship.
- 1.3 The Packaging Council represents the whole packaging supply chain, including raw material suppliers, packaging manufacturers, brand owners, retailers and recycling operators.
- 1.4 The Packaging Council has approximately 135 members. We represent more than 80% of the packaging manufacturing industry and 75% of New Zealand's top 100 food and grocery brands. Packaging Council members contribute approximately NZ\$20 billion to the New Zealand economy.
- 1.5 The Packaging Council has been intimately involved in the development of environmental policy affecting packaging since at least 1996 when it signed the first

New Zealand Packaging Accord. The organisation was involved in developing the 2002 New Zealand Waste Strategy, provided data for the 2006 review of targets and assisted with the research behind the Parliamentary Commissioner for the Environment's 2006 report '*Changing behaviour: Economic instruments in the management of waste*'. The Packaging Council was a principle signatory to the second New Zealand Packaging Accord (2004 – 2009).

- 1.6 The Packaging Council has recently launched its Packaging Product Stewardship Scheme, with a goal to have the scheme accredited by the Minister for the Environment under the Waste Minimisation Act 2008. The Packaging Council has also developed a *Code of Practice for Packaging Design, Education and Procurement*. The objective of the Code is to assist stakeholders in the design, manufacture and end-of-life management of packaging to minimise its environmental impacts.
- 1.7 **The Packaging Council would welcome the opportunity to make an oral submission.**

2.0 Summary

2.1 This submission is limited to the issues raised under section 6.2.2 of the discussion paper regarding the substantiation of claims. **Specifically, our comments and recommendations are made in relation to environmental claims about packaging.**

2.2 While the Packaging Council would **support** a power to issue substantiation notices, providing this power were aligned with the relevant Australian provisions (ref. paragraph 6.3), our support is conditional on the following recommendations being adopted:

Recommendation 1: The Ministry should consider promoting and supporting compliance with packaging standards, industry Codes of Practice and guidelines as a means of providing incentives for claims to be made only when substantiated.

Recommendation 2: Only the person who initiates the claim should be the target of a substantiation order.

Recommendation 3: There should be no general provision prohibiting unsubstantiated claims which is enforceable privately.

Recommendation 4: There should be no general provision prohibiting unsubstantiated claims which is enforceable by the Commerce Commission.

Recommendation 5: The Commerce Commission should be required to have reasonable grounds before issuing a substantiation notice.

3.0 Packaging Standards, Codes of Practice and Guidelines

- 3.1 The packaging industry is in a state of constant technological change. Although the staple packaging materials are paperboard, steel, aluminium, glass and plastic, packaging comes in many forms and is subject to considerable technical development. This results in new products regularly being introduced into the New Zealand market. The technical characteristics of these new products in relation to their packaging and storage attributes are monitored by the manufacturers who use them in their own production and distribution. However a key benefit of interest to consumers is the environmental effect of the packaging product.
- 3.2 The Packaging Council is aware of the Commerce Commission's publication '*Fair Trading Act: Guidelines for Green Marketing*'. As an industry association, we are keen to promote compliance mechanisms which give industry participants (whether members or not) positive guidance. To that end, we recently published a *Code of Practice for Packaging Design, Education and Procurement*¹. The objective of the Code is to assist stakeholders in the design, manufacture and end-of-life management of packaging to minimise its environmental impacts.
- 3.3 Two important pieces of work are underway internationally which could have an influence on environmental claims about packaging in New Zealand. The first is the establishment of an ISO Technical Committee² to develop technical performance standards for packaging and the environment. The second is the Global Packaging Project³, a project of The Consumer Goods Forum, to develop a set of metrics for measuring packaging sustainability.
- 3.3 When these two projects are completed we will have an internationally recognised set of environmental technical performance standards for packaging (ISO standards), which could be referenced by New Zealand legislation, and a set of measurement metrics which will likely become the *de facto* industry standards in North America and Europe for communicating about packaging sustainability across the supply chain.

¹ http://www.packaging.org.nz/packaging_info/packaging_code.php

² International Standards Organisation (ISO) TC 122/SC 4 Packaging and the Environment. Working groups have been established to develop standards for packaging source reduction, reuse, recycling, energy recovery, chemical recovery and organic recovery.

³ <http://globalpackaging.mycgforum.com>

- 3.4 This international work demonstrates that developments in this area are fast moving and both industry and consumers would benefit from clear guidelines by the Commerce Commission on what claims can be made against which standards and/or industry Codes of Practice or guidelines in the New Zealand context.
- 3.5 The provision and promotion of suitable guidelines is the Packaging Council's preferred approach. However, we recognise that there will be circumstances when unsubstantiated claims will be made about products, where those claims may or may not be correct. Packaging is a 'credence good' for both business customers and consumers so we recognise that there may be circumstances where only the actual packaging supplier will be in a position to readily substantiate a claim. The submissions below are made on this basis.

4.0 Pre-emptive measures

- 4.1 The Packaging Council urges the Ministry to consider and support pre-emptive measures such as compliance with packaging standards, industry Codes of Practice and guidelines. As set out in section 3 above, the Packaging Council is devoting considerable efforts to researching, updating and promoting packaging standards, industry Codes of Practice and guidelines, including our own *Code of Practice for Packaging Design, Education and Procurement*.
- 4.2 **Recommendation 1:** The Ministry should consider promoting and supporting compliance with packaging standards, industry Codes of Practice and guidelines as a means of providing incentives for claims to be made only when substantiated.
- 4.3 This has particular value in complex technical industries which supply 'credence goods', such as the packaging industry.

5.0 A general prohibition on unsubstantiated claims

- 5.1 This proposal raises several significant issues which lead to the conclusion that it should not be supported.

- 5.2 *There is no requirement that the person who actually initially makes the claim is the person who is to be the target of the substantiation notice.* This means that the substantiation notice could be served on any person who uses manufacturers' or suppliers' advertising, at any time, whether retailer or manufacturer⁴. The section 44 remedies of reasonable mistake, reasonable reliance on a third party and events outside the control of the trader are unlikely to be available in the context of failure to respond to a substantiation notice.
- 5.3 **Recommendation 2:** Only the person who initiates the claim should be the target of a substantiation order.
- 5.4 This is consistent with Australian law⁵, which is significant considering the Trans-Tasman nature of much business: for example, a Trans-Tasman retailer might be subject to a substantiation notice in New Zealand when the same trader would not be similarly subject in Australia.
- 5.5 This person is likely to be a person within the Fair Trading Act definition of "manufacturer" but in any case is likely to be identifiable. Persons passing on the claim (such as retailers passing on their suppliers' claims) would still be subject to existing Fair Trading Act requirements but would be able to make use of any statutory defences which might apply.
- 5.6 *A general prohibition on unsubstantiated claims enforceable privately would be easily abused by competitors attempting to secure confidential information and would in practice stifle competition.* At best, this would be easily manipulated by competitors requiring a trader to disclose trade secrets and research which they had not carried out themselves. Competitors would then be secure in using substantiated claims themselves without carrying out the relevant work.
- 5.7 At worst, this would act as a disincentive reducing the availability of new products and services to New Zealand consumers. New entrants to the market could easily face time-consuming and costly legal action from competitors: the costs fall almost exclusively upon the person required to substantiate the claim. In any case, if any claims are wrong, the provisions of the Fair Trading Act will still apply. In that case, a

⁴ This becomes particularly hazardous if persons other than the Commerce Commission were able to bring actions requiring substantiation: competitor harassment might well be rife.

⁵ Trade Practices Act 1974 s 219.

competitor would have to pass the threshold of establishing enough facts to show that there was more likely than not a breach of the Fair Trading Act.

- 5.8 **Recommendation 3:** There should be no general provision prohibiting unsubstantiated claims which is enforceable privately.
- 5.9 *A general prohibition on unsubstantiated claims which is not enforceable privately gives the Commerce Commission no advantage in an investigation, without substantiation notices.* The notice is intended to provide evidence of a breach. If the substantiation is supplied by the trader, there is no Fair Trading Act breach and no further enforcement action is required. If there is no support for the relevant claim, it is likely to be incorrect and there is likely to be an enforceable Fair Trading Act breach in any case.
- 5.10 **Recommendation 4:** There should be no general provision prohibiting unsubstantiated claims which is enforceable by the Commerce Commission.

6.0 Substantiation notices

- 6.1 We note that the Ministry has not asked for a response to the idea of giving the Commerce Commission powers to issue substantiation notices, as is the case in Australia (see paragraphs 5.2 - 5.5 above). Clearly this is a matter which is part of the background for this review.
- 6.2 We further note that a provision requiring a person to provide a criminal enforcement agency with evidence of its own offence is potentially a breach of the New Zealand Bill of Rights Act 1990, and recommend that rights under this Act should be taken into account in assessing the value of this proposal.
- 6.3 *Having said this, the Packaging Council would **support** a power to issue substantiation notices, providing this power were aligned with the relevant Australian provisions and thus:*
- (a) Available only to the Commerce Commission, and
 - (b) The notice was applicable only to the person who initiates the claim which requires substantiation,

each case being aligned to the Australian provisions⁶.

6.4 We would however be concerned if the Commerce Commission were to be able to issue substantiation notices without having reasonable grounds to do so. Notices of this kind can create considerable work for those making the claims (but not the Commission) even when the claims can be substantiated. We note that the section 44 remedies of reasonable mistake, reasonable reliance on a third party and events outside the control of the trader would not be available in the context of failure to respond to a substantiation notice. Again, this would seem to raise Bill of Rights Act issues.

6.5 **Recommendation 5:** The Commerce Commission should be required to have reasonable grounds before issuing a substantiation notice

7.0 **The Packaging Council would welcome the opportunity to make an oral submission.**

⁶ Including the media exceptions: s 44(4) would need to be expressly imported into this provision as it is in Australia.