

SUBMISSION

by the



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

to the

Commerce Committee

on the

Consumer Law Reform Bill

29th March 2012

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

1.0 Introduction

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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 represents 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 appear before the committee.**

2.0 Summary

- 2.1 This submission is limited to the proposed changes to the Fair Trading Act 1986 regarding the substantiation of representations (i.e. claims). **Specifically, our comments and recommendations are made in consideration of environmental claims about packaging, although we are aware that there are similar issues affecting most markets.**
- 2.2 **Recommendation 1:** There should be no general provision prohibiting unsubstantiated claims which is enforceable by the Commerce Commission.
- 2.3 **Recommendation 2:** The Commerce Commission should have the power to issue substantiation notices on terms identical with the relevant provisions set out in the Australian Consumer Law, including the defences set out in those provisions.
- 2.4 **Recommendation 3:** The definition of “infringement offence” in clause 23, proposed in section 40B should be amended to include offences in relation to substantiation notices.

3.0 General prohibition on unsubstantiated claims: clause 9

3.1 In its submission to the Ministry of Consumer Affairs dated 23 July 2010, the Packaging Council opposed a general prohibition on unsubstantiated claims. That submission was made in the context of a discussion paper released by the Ministry in June 2010. The Packaging Council did not support a general provision prohibiting unsubstantiated claims, discussing this in the context of the purpose of the Fair Trading Act (now to be expressed more explicitly in the proposed section 1A) of prohibiting unfair conduct and practices, and in particular the prohibitions on conduct in trade which is liable to mislead the public or consists of false or misleading representations.¹

3.2 It is also surprising that the proposed new section 12A contains criminal sanctions to the maximum level of penalty (other than that for pyramid selling) for conduct which may not in fact mislead the public in any way. This raises the question as to whether there has been proper consideration of this provision in relation to the New Zealand Bill of Rights Act, as this point is not specifically raised in the Ministry of Justice Bill of Rights consistency report dated 4 April 2011.

3.3 The proposed provision defines “unsubstantiated representation”:

“unsubstantiated representation” means a representation made by a person who does not, at the time of making the representation, have reasonable grounds for the representation, irrespective of whether or not the representation is in fact false or misleading. (emphasis added)

3.4 In effect, this provision (which as drafted operates at every level in the supply chain) would criminalise everyday conduct including conduct from which no harm accrues to the person who receives the representation. Thus accurate claims, which have not been substantiated by the trader who makes them or passes them on, are criminalised. The breadth of this provision means that it would necessarily impact negatively on large and small businesses at all levels of the supply chain.

3.5 We have researched this carefully and have not been able to locate any similar provision elsewhere in the Western world, other than in relation to medicines and

¹ Sections 10, 11 and 13.

therapeutic claims, which in New Zealand are already covered by the Medicines Act 1981. All general provisions referring to conduct which might include substantiation focus on harm to the consumer or to unfair competition². This means that New Zealand would have a provision substantially different from those of the rest of the world, one which would require overseas suppliers to disclose information which may be proprietary or otherwise confidential **in advance** of any supply to New Zealand businesses. The potential for restrictions of new technology inputs into the economy are obvious. A further detrimental potential consequence is the increased risk of stifling the development of innovative products in New Zealand.

3.6 A further concern with this provision is the vagueness of the concept of “reasonable grounds” for the representation. The Packaging Council understands that the existing section 44(1)(b) defence of reasonable reliance on information supplied by a third party would also apply, but notes that the two levels of “reasonable” conduct make it extremely difficult for traders to assess appropriate conduct. In each case, it is a matter for the Court to decide, after all.

3.7 There are further practical issues. For example:

- (i) There is no provision requiring the Court to take into account industry codes, of which there are a number in the packaging industry, including the Packaging Council’s *Code of Practice for Packaging Design, Education and Procurement*. As an industry association, we are keen to promote compliance mechanisms which give industry participants (whether members or not) positive guidance. The objective of our Code of Practice is to assist stakeholders in the design, manufacture and end-of-life management of packaging to minimise its environmental impacts and provide clear guidance on making environmental claims. Other industry codes exist which are specific to particular products.
- (ii) A breakfast cereal manufacturer claims on their packaging that the carton board (i.e. the box) contains 70% recycled content and has Forest Stewardship Council (FSC) accreditation to demonstrate that the fibre has

² As an example, we note the text on page 7 of the Ministry’s Consumer Law Reform Additional Paper November 2010 referring to the FTC substantiation provisions. However, this refers to a policy statement by the FTC. The statutory provision under which it is issued is section 5 of the FTC Act. Section 5 (now 15 USC § 45) states “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”.

come from sustainably managed forests. The cereal manufacturer would normally have obtained a specification document from their carton board supplier, confirming that the board does indeed contain 70% recycled content, and an FSC chain of custody certificate. Would that be ‘reasonable grounds’ for making these two representations, based on reasonable reliance on information supplied by a third party? Would the new substantiation provisions require the cereal manufacturer to audit their carton board supplier’s entire supply chain back to the forest, potentially for each batch? (Bear in mind that the cereal manufacturer’s supplier may not be based in New Zealand and that FSC is an independently audited, internationally recognised compliance programme.)

- (iii) A margarine manufacturer supplies their product in a plastic container made from polypropylene, applies the Mobius Loop to the container and in compliance with international standard ISO 14021 includes the words ‘recyclable polypropylene’ underneath. Polypropylene packaging is technically recyclable and is collected by most, but not all, local councils as part of their household recycling collection service. Would the substantiation provisions require the manufacturer to include on pack a list of all the local councils where the packaging is collected? (Clearly this would be impractical, particularly as many products are imported).



3.8 This submission should not be taken as support for conduct which is in fact false or misleading. However, that conduct is already covered by the existing provisions of the Fair Trading Act. The recent industry-wide activity of the Commerce Commission in relation to playground equipment and potential non-compliance with standards is an excellent example of the effectiveness (and effective use) of the existing law³.

3.9 Recommendation 1: There should be no general provision prohibiting unsubstantiated claims which is enforceable by the Commerce Commission.

3.10 If the Select Committee does not agree with this recommendation, then at the least the proposed provision should be reworded to ensure that only false or misleading claims are captured, by deleting the words “*irrespective of whether or not the representation is in fact false or misleading*” and substituting “*where the*

³ Press release 26 March 2012

representation is false or misleading". But the Packaging Council considers that this merely reflects the status quo, and adds an interpretational difficulty to the consideration of the reasonable reliance defence.

4.0 Substantiation notices – Trans-Tasman consistency

4.1 It seems unlikely that international suppliers will want to make special disclosures to New Zealand customers at all levels, when in Australia those disclosures are required only if the representation is challenged under the substantiation provisions set out in section 221 of the Australian Consumer Law. In addition, the Australian Consumer Law protects the all-important privilege against self-incrimination for individuals⁴.

4.2 Similarly, a person who responds to a substantiation notice by presenting information which turns out to be false or misleading is subject to a lesser pecuniary penalty as befits a strict liability offence of this kind⁵. The other criminal provisions which parallel sections 10, 11 and 13 of the Fair Trading Act remain intact and are able to be used appropriately.

In its earlier submission, the Packaging Council supported a power to issue substantiation notices provided the power was aligned to the relevant Australian provisions. It repeats that submission:

4.3 **Recommendation 2:** The Commerce Commission should have the power to issue substantiation notices on terms identical with the relevant provisions set out in the Australian Consumer Law, including the defences set out in those provisions.

4.4 **Recommendation 3:** The definition of "infringement offence" in clause 23, proposed in section 40B should be amended to include offences in relation to substantiation notices.

⁴ Section 221(3).

⁵ The Ministry of Justice report at paragraph 36 does not address this issue in its consideration of the effect of the penalties in relation to unsubstantiated claims which attract the higher penalties.