

6 September 2022

Nano-Care New Zealand Limited
c/o BDO Level 4
4 Graham Street
Auckland Central
1010



Fair Trading Act 1986: Warning for unsubstantiated representations about the performance of a surface treatment product

1. The Commerce Commission (**Commission**) has been investigating Nano-Care New Zealand Limited (**Nano-Care**) under the Fair Trading Act 1986 (**FT Act**). We have now completed our investigation and are writing to inform you about our views.
2. The Commission considers that Nano-Care is likely to have breached the FT Act by making representations about the Liquid Guard surface product and textile spray, which Nano-Care did not have reasonable grounds for.
3. We are issuing you with this warning letter because in our view, Nano-Care's conduct is likely to have breached s12A of the FT Act. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.¹
4. We note that following receipt of the Stop Now letter from the Commission dated 21 April 2022, Nano-Care has ceased making the relevant representations about Liquid Guard on its website and social media channels. We recommend that Nano-Care takes legal advice and puts policies in place to ensure ongoing compliance with the FT Act.

¹ Commission's published *Enforcement Response Guidelines* at [41].

The investigation

5. Nano-Care sold a surface coating product called Liquid Guard which was described as the “World’s best permanent surface anti-microbial coating”. Liquid Guard is a liquid product designed to be applied to various surfaces and is intended to kill/inactivate organisms such as viruses and bacteria.
6. Nano-Care made representations on its website², Facebook page and the product packaging about Liquid Guard including that:
 - 6.1 it is effective on a wide range of organisms;
 - 6.2 carries on working for up to four years on low touch surfaces, and up to one year on high touch surfaces;
 - 6.3 unlike other disinfectants it does not require regular reapplication;
 - 6.4 it is suitable for any non-porous surface such as door handles, floors, toilets, phones, cars and kitchen splashbacks; and
 - 6.5 the textile spray can be used on fabrics and textiles and lasts for 10 deep cleans of 60 degrees or 1 year.
7. Examples of the Liquid Guard advertising are included as **Attachment A**.
8. In November 2020 Nano-Care was asked by the Commission to provide the information that it had relied on to substantiate the representations at the time the claims were made. It supplied documents and test reports that it had been provided with by the manufacturer. Nano-Care stated it relied on the test results supplied by the manufacturer.
9. Additionally, Nano-Care had consulted with a New Zealand based microbiologist who carried out a limited review of some of the test results in respect of Liquid Guard’s efficacy against coronaviruses.
10. The documents and test reports supplied by Nano-Care were reviewed by an expert instructed by the Commission who provided his opinion that many of the claims were, in his view, not supported by the test reports provided. The Commission’s expert stated that:
 - 10.1 there is insufficient testing carried out to show that the product lasts 1 or 4 years as stated. The tests carried out were artificial aging tests relevant to the expiration date of sterile barrier systems used to pack medical devices. It is not suitable for coated surfaces that might expect a different type of wear;
 - 10.2 there is insufficient evidence to show that Liquid Guard is suitable for the range of surfaces specified. The product has only been tested on aluminium

² www.nanocare.co.nz

and foil during testing and as different surfaces have different properties, the suitability for different surfaces cannot be predicted;

- 10.3 there is insufficient evidence to show that Liquid Guard is effective against all types of organisms or specified organisms represented. No tests were provided for some organisms listed such as algae and the antiviral tests show a low level of antiviral activity (and in some cases show the product is ineffective); and
- 10.4 there is no evidence about the efficacy or longevity of Liquid Guard in the textile spray format so no assessment can be made as to how it would perform after standard tests for laundering.

The relevant Law

- 11. Section 12A of the Act prohibits persons in trade making unsubstantiated representations, i.e. where the person making the representation does not have reasonable grounds to support their claims.

Nano-Care's response

- 12. Nano-Care told the Commission that it did not intend to mislead consumers by making the representations about the Liquid Guard product. Nano-Care believed that it was entitled to rely on the test reports supplied by the manufacturer.
- 13. Nano-Care ceased advertising and supplying Liquid Guard during the course of the investigation.

The Commission's view

- 14. In this case, and having fully considered the information received, the Commission's view is that it is likely that Nano-Care's conduct breached the FT Act.
- 15. We have reached this view because we do not consider that Nano-Care had reasonable grounds to make the representations about Liquid Guard at the time that they were made. Additionally, we do not consider that the reliance placed by Nano-Care on the information supplied by the manufacturer was reasonable in these circumstances. Factors that we considered include:
 - 15.1 Nano-Care themselves made representations that went further than those claimed by the manufacturer when describing Liquid Guard's performance on low and high-touch surfaces;
 - 15.2 Whilst test reports from laboratories were supplied, these do not appear to have been critically assessed by Nano-Care against the marketing claims made by the manufacturer. If they had been then the shortcomings of the test reports the Commission's expert has highlighted should have been identified, including that the test reports did not test for the range of surfaces the manufacturer claimed Liquid Guard could be used on, and also the lack of testing for the textile spray; and

- 15.3 Any reliance on information provided by Nano-Care's New Zealand based microbiologist was, in our view, not reasonable as his review was confined in scope in that it was limited to only a small number of tests by provided by the manufacturer and did not address the duration claims for the product's efficacy (which were a key component of the marketing material).
16. Where businesses wish to rely on and repeat representations made by others (such as the manufacturer), they should ensure that the supporting information is both requested and reviewed to ensure it does support the claims made about the product. In this case the marketing claims made by Nano-care went even further than the claims made by the manufacturer.

Warning

17. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided it is appropriate and sufficient to conclude our investigation by issuing this warning letter rather than by issuing legal proceedings.
18. This warning represents our opinion that the conduct in which Nano-Care has engaged is likely to have breached the FT Act and that legal action remains available to the Commission in the future if the conduct is repeated or further unsubstantiated representations are made.
19. We may draw this warning letter to the attention of a court in any subsequent proceedings brought by the Commission against Nano-Care.
20. This warning letter is public information and will be published on the case register on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

21. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FT Act. The FT Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.


Penalties for breaching the FT Act

22. As indicated above only the courts can decide if there has actually been a breach of the FT Act. The court can impose penalties where it finds the law has been broken. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
23. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

24. We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies. You should ensure that you are able to

substantiate (prove) your claims by holding evidence to support them at the time you make them.

25. We have published a series of fact sheets and other resources to help businesses comply with the FT Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act. Our website page "Making Accurate Claims" includes information and a short video to help traders understand their obligations to not make unsubstantiated claims or claims that are false or misleading. You can view this webpage at <https://comcom.govt.nz/business/dealing-with-typical-situations/making-accurate-claims>.
26. You can also view the FT Act and other legislation at www.legislation.co.nz.
27. Thank you for your assistance with this investigation. Please contact the investigator,  if you have any questions about this letter.

Yours sincerely



Investigations and Compliance Manager, Fair Trading

Attachment A: Examples of Liquid Guard advertising on www.nanocare.co.nz and the product packaging



Liquid Guard famous for its duration

One coat of Liquid Guard® lasts up to 4 years on low touch surfaces like kitchen splashbacks and windows or up to 1 year on high touch surfaces like entry door handles, floors, phones and tablets.



Liquid Guard® is certified to eliminate many different organisms including:

TGEV Coronavirus (99.8%) and CCov Coronavirus, which are both model viruses for SARS-COV2 (COVID-19), Influenza A, Methicillin-Resistant Staphylococcus Aureus (MRSA), E Coli, Clostridium, Salmonella, Haemophilus, Pseudomonas, Aspergillus, Listeria, Strep Mutans, Candida Albicans and many more.

LIQUID GUARD

Permanent disinfecting
Antimicrobial surface coating
– up to 4 years –

LIQUID GUARD WIPE ON
Step 2 – Treatment

Effect

Viruses	✓
Bacteria	✓
Fungi	✓
Algae	✓
Yeasts	✓

Icons: Door handle ✓, Toilet ✓, Smartphone ✓, Car ✓, Hand ✗

Liquid Guard® Textile Spray – Permanent Anti-Microbial. Protect fabrics and textiles in your home or business from viruses and bacteria for years.

Use as an anti-viral barrier for your Face Mask, or use as an anti-bacterial / anti-mould in linens and clothing.