

Fair Trading Act

Unsubstantiated representations



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This fact sheet provides an overview of the substantiation provisions of the Fair Trading Act. It is designed to help businesses and consumers understand their obligations and rights when claims are made about goods and services.

Every day consumers are faced with advertising that claims goods and services are now cheaper, superior, or provide particular benefits.

Consumers generally don't have the time or resources to establish whether these claims are accurate. And in many cases even when they use the advertised good or service, they can't easily evaluate whether the advertised claims are true.

Consumers need to be able to rely on the accuracy of claims to be able to make informed purchasing decisions. Under the Fair Trading Act it is illegal to make an unsubstantiated representation about a good or service without any reasonable basis. What this means is that businesses that make claims or imply something about their goods or services must have reasonable grounds for making those claims.

What types of claims need to be substantiated?



Any claim a business makes about a good or service must be substantiated – whether the claim is express or implied.

An express claim is one that is literally stated in advertising or other material, such as “All bikes half price” or “Clinical tests prove...”. An implied claim is one which is inferred or made indirectly. For example the claim “Available to you at factory prices” implies that the price is especially low because it reflects what a retailer would pay to the manufacturer when purchasing for resale. Equally, the claim “Eco-protect dishwashing liquid” implies that the dishwashing liquid is environmentally friendly.

What are reasonable grounds?

A business making a claim must have reasonable grounds for the claim. Reasonable grounds can come from:

- information provided by reputable suppliers or manufacturers
- information the business making the claim holds
- any other reasonable source (for example, scientific or medical journals).

Importantly, a business must have reasonable grounds at the time they are making the claim. If they don't, they will breach the Fair Trading Act.

Tips for businesses



- Don't make claims that you don't have reasonable grounds for believing to be true
- Rely on facts, figures and credible sources of information, not guesses and unsupported opinions
- Keep documentation or other information that you have gathered in the process of sourcing or researching a good or service
- You must have reasonable grounds for claims at the time they are made. Substantiating a claim after it was made may not get you off the hook.

There is no precise test for what constitutes reasonable grounds. The nature of the goods or services and of the claim itself will influence what type of substantiation is required to support a claim.

For example, the Commission would expect a claim that asserts a particular product can cure disease to be supported by a high level of substantiation in the form of credible and reliable scientific and medical evidence. Alternatively, a general claim about the performance or effectiveness of a product familiar to consumers such as “Calcium is good for healthy bones and teeth” would require a lower level of substantiation.

When considering whether a business has reasonable grounds for a claim, relevant factors include:

- the nature of the goods or services about which the claim was made
- the nature of the claim
- any research steps or other steps taken by or on behalf of the business making the claim before it was made
- the nature and source of any information the business relied on to make the claim
- the actual or potential effects of the claim
- compliance with the requirements of any standards, codes or practices relating to the grounds for the claim



EXAMPLES

“Easter Sale – 50% Off”

This claim represents a special buying opportunity to purchase goods at a 50% discount for the Easter trading period.

In order to satisfy the reasonable grounds requirement, we would expect the business making the claim to have sufficient pricing and sales data to establish that, during the sale period, the relevant goods are for sale at a price that is 50% less than the usual price. This information must show the goods were offered for sale at the usual price for a reasonable time before the sale period.

“Available to you at factory prices”

The term “factory prices” implies that the prices are especially low because they reflect what other retailers would pay when they buy the relevant goods from the manufacturer for resale.

In order to satisfy the reasonable grounds requirement, we would expect the business making the claim to have sufficient pricing and sales data to substantiate that the prices charged to consumers are genuine factory prices. This data would have to show that the prices reflect the price usually charged by the manufacturer for the goods. Any additional costs could not be included in the asking price.

When a particular level of substantiation for a claim is expressly stated, such as “tests prove” or “doctors recommend”, the claim must be supported by the level of substantiation communicated to consumers.

EXAMPLE

“Four independent clinical studies show that Tone Fit Shoes increase muscle activity and energy consumption over standard fitness shoes!”

The reference to independent case studies is a clear and unambiguous claim that the person or business making the claim has independent clinical study results to substantiate the claim.

In order to satisfy the reasonable grounds requirement, we would expect the business making the claim to have access to documentation about

the four clinical studies to which the claim refers. This documentation must be credible and reliable, substantiate that the studies were in fact independent, and support the findings that “Tone Fit Shoes” increase muscle activity and energy consumption when compared with standard fitness shoes.

EXAMPLE

A heat pump supplier made claims about the energy efficiency of its products. It claimed its products were “NZ’s most energy efficient” and a certain range of its products was “the most efficient system ever”.

The District Court found that the supplier had no reasonable grounds to make the claims at the time of publication and the information was significantly inaccurate. The Judge noted that potential customers were unable through any reasonable means to test the accuracy of the claims. The company was convicted and fined.

Who is liable for unsubstantiated claims made about goods or services?

Any business that makes an unsubstantiated claim about a good or service may be at risk of breaching the Fair Trading Act – even if they did not manufacture or supply the good or service or develop the promotional material.

This means that retailers or online sellers who promote, or otherwise make, an unsubstantiated claim about a good or service they are selling may be liable as well as the manufacturer or supplier from whom the claim originated.

EXAMPLE

A retailer displays for sale in its store and in advertising material a device called the AB-Buster, an electronic abdominal belt that claims to cause weight loss, inch loss, and well-defined “six-pack abs” without exercise. The information was supplied by the manufacturer and supplier.

In this case, the retailer (as well as the manufacturer and supplier) is making claims about the AB-Buster by displaying and advertising the product.

Given the nature and potential effects of these claims, we would expect the retailer to have sought information from the manufacturer or supplier to support the claims. Alternatively, the retailer may have conducted their own investigations to substantiate the claims. In either situation, any information the retailer relied upon would have to be credible and clearly support the claims made about the AB-Buster.

A retailer or seller that relies on information provided by a third party (such as the manufacturer or supplier) may not be liable for making an unsubstantiated claim if, in the circumstances, they have reasonable grounds for the claim.

We would not expect a retailer such as a supermarket or department store to make substantiation enquiries in relation to every product it sells. However, retailers must have a reasonable basis for all claims they make about products, whether based on claims made by wholesalers and other suppliers, or otherwise. If the information retailers rely on for their claims is obviously farfetched and unbelievable, or would be tested or doubted by most retailers, we will not consider it reasonable to have relied on the information.

What about claims that a reasonable person would not expect to be substantiated?

The term puffery is used to describe a type of claims that a consumer would not expect to be substantiated. Such claims are often expressions of opinion that are so obviously exaggerated or overstated that they are unlikely to mislead anyone. The reasonable grounds requirement does not apply to claims that a reasonable person would not expect to be substantiated.

EXAMPLE

“Alpine Mints – peak quality, alpine fresh breath”

The statement that “Alpine Mints” are “peak quality” and that a consumer would achieve “alpine fresh breath” is a vague and highly subjective claim of product quality that no reasonable consumer would expect to be substantiated. We would not expect the reasonable basis requirement to apply to this claim.



While a business has some leeway in the use of puffery when describing their goods or services, it is important that businesses do not misrepresent goods or services, or assign them characteristics or benefits that they do not possess.

What if a claim is unsubstantiated but true?

Even if a claim is true, it may still breach the Fair Trading Act if a business did not have reasonable grounds for making it. The substantiation requirement applies irrespective of whether the claim is false or misleading. The important point is that before making a claim about a good or service, businesses must make sufficient enquiries to check whether the claim is accurate or not.

What if other laws set out requirements on which a claim may be made?

Where another law or regulation specifies the grounds on which claims may be made, a business does not also have to comply with the unsubstantiated representation requirements in the Fair Trading Act.

For example, Standard 1.2.7 contained in the New Zealand Food Standards Code (issued under the Food Act 1981) sets out requirements for any health and nutrition claims a business makes. Any claims that comply with that code will not also have to comply with the unsubstantiated claims provisions in the Fair Trading Act.

However, if a voluntary code applies in a particular industry, such as the New Zealand Standard on Sunscreen Products, and it is not governed by a law or regulations, then advertising claims that comply with it would also need to comply with the unsubstantiated claims provisions in the Fair Trading Act.

Where another law or regulation specifies the grounds on which claims may be made, a business does not also have to comply with the unsubstantiated representation requirements in the Fair Trading Act.



Penalties for breaching the Fair Trading Act

Only the courts can make a ruling on breaches of the Fair Trading Act. Courts may fine companies found guilty of breaching provisions of the Fair Trading Act up to \$600,000 and individuals up to \$200,000.

A District Court may impose a management banning order against anyone convicted of these offences on two or more separate occasions within a ten year period.

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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