

10 June 2021

Ministry of Business, Innovation and Employment

By email only: [building@mbie.govt.nz](mailto:building@mbie.govt.nz)

Dear Sir/Madam,

**Building system reform: Proposals for regulations**

1. Thank you for the opportunity to provide comment on the proposals for regulations to be made under the Building Amendment Bill, relating to:
  - 1.1 Building Product Information Requirements;
  - 1.2 Modular Component Manufacturer Certification Scheme; and
  - 1.3 Product Certification Scheme.
2. The Commerce Commission is New Zealand's primary competition, consumer and regulatory agency. We enforce legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.
3. The Commission has previously investigated numerous construction product manufacturers, suppliers and certifiers under the Fair Trading Act 1986.
4. Our submissions in respect of the proposed regulations focus on practical enforcement considerations and identification of issues for further consideration to ensure the effectiveness of the proposed regulations.

**Building Product Information Regulations**

*Proposal 1*

5. It is proposed that:
  - 5.1 distributors and retailers are responsible for ensuring that products “meet” information requirements, i.e. that the required information is provided in the correct format; and
  - 5.2 *“only importers and manufactures of a product are well placed to produce and evidence information”.*

6. The Commission submits that the wording of this provision will require careful consideration to ensure consistency with sections 12A and 12B of the Fair Trading Act 1986.
7. Section 12A prohibits persons in trade from making an unsubstantiated representation (i.e. a representation made without reasonable grounds). Section 12A applies to all participants in a supply chain, although the level and source of information required to establish reasonable grounds for a supplier (as compared with a manufacturer) will be case specific.<sup>1</sup>
8. An assessment of whether a trader had reasonable grounds for making a representation will depend on the factors set out in section 12B FTA, which include:
  - 8.1 the nature and source of any information that the person relied on to make the representation<sup>2</sup>; and
  - 8.2 the extent to which the person making the representation complied with the requirements of any standards, codes, or practices relating to the grounds on which such a representation may be made, and the nature of those requirements.<sup>3</sup>
9. The Commission considers this emphasises the importance of consistency between the proposed provision and ss 12A and 12B.
10. While the extent to which a representation must be substantiated by a particular trader may differ within the supply chain, what ultimately matters for s12A is whether and to what extent a reasonable person would expect the representation to be substantiated by that trader. As currently described, it might be implied that a supplier can blindly rely on information from a manufacturer or importer.
11. While in some cases reliance may be partly made on such information, in order to ensure compliance with s12A, all suppliers must, at the very least, critically assess the information provided to them. By way of illustration, a supplier of steel mesh pleaded guilty to and was sentenced in 2018 on two charges pursuant to section 12A FTA for representing that the steel mesh was of 500E grade and complied with the Australian/New Zealand Standard for reinforced steel, AS/NZS 4671:2001, when the

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<sup>1</sup> See discussion of factors in the Federal Trade Commission case of *Re Pfizer Inc* 81 FTC 23 (1972) which are similar to the provisions in section 12B FTA. The Commission said "The precise formulation of the 'reasonable basis' standard, however, is an issue to be determined at this time on a case-by-case basis. This standard is determined by the circumstances at the time the claim was made, and further depends on both those facts known to the advertiser, and **those which a reasonably prudent advertiser should have discovered** [emphasis added]."

<sup>2</sup> Section 12B(d) FTA.

<sup>3</sup> Section 12B(e) FTA.

supplier did not have reasonable grounds for making those representations because:<sup>4</sup>

- 11.1 The goods were not sampled and tested in accordance with the requirements of the standard; and/or
  - 11.2 The test report documentation obtained by the supplier from the manufacturer and the testing agency contained information and omissions that should have alerted the supplier to deviations from the standard.
12. At the foot of page 24, it is noted: *“Importers **do not necessarily do the kind of testing required to substantiate claims** about Building Code compliance, but they do regularly **retrieve** this information from overseas manufacturers to fulfil current obligations”.* (emphasis added)
13. Again, we point out that under s12A, importers are reasonably expected to do far more than simply “retrieve” information from an overseas manufacturer. The Commission considers an importer is reasonably expected to exercise due diligence and undertake a critical assessment of information provided to it. This is particularly so when compliance relates to a matter particular to the New Zealand Building Code or a compliance pathway under it, as it did in the steel mesh case referred to above.

#### *Proposal 5*

14. It is proposed that information is kept up to date with the “*latest*” version of a product. We note that where a product is updated, it may be beneficial for information relating to previous versions to be made available for a transition period.

#### *Proposal 7*

15. It is proposed to that product information is “*made available online*”. We believe that this proposal would benefit from clarification that information should be made “freely” available online.

### **Certification Scheme Regulations**

#### *Proposal 9*

16. It is proposed that PCBs carry out a routine review at least every 12 months, including the content of the certificate. We believe that this proposal would benefit from inclusion of reference to all documents referenced on the certificate, e.g. installation instructions, technical data sheets to ensure currency etc.

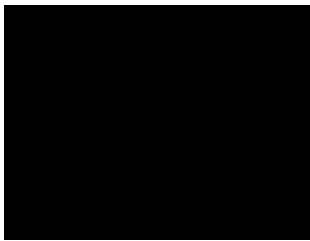
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<sup>4</sup> *Commerce Commission v Timber King Limited* [2018] NZDC 510

**Further details**

17. Please continue to keep the Commission informed as these proposals progress. The Commission is happy to provide further assistance if required, particularly in relation to ensuring consistency with the Fair Trading Act.
18. Please contact Grant McIntosh on [REDACTED] or by email at [REDACTED] if you have any questions about this response.

Yours sincerely



Vanessa Horne  
General Manager, Fair Trading