

25 September 2019

The Depths LP trading as Hell Pizza  
123 Adelaide Road  
Mount Cook  
Wellington 6021

Attn: [REDACTED]

Copy by email: [REDACTED]

Dear Sirs

### **Fair Trading Act 1986: Warning**

The Commerce Commission (**Commission**) has been investigating The Depths LP, trading as Hell Pizza (**Hell**) under the Fair Trading Act 1986 (**FT Act**) in relation to its online advertising of the “Burger Pizza”. We have now completed our investigation and are writing to alert Hell to our concerns.

In summary, the Commission considers that by describing the Burger Pizza as being “loaded with chunks of medium-rare burger patty”, Hell has likely made false or misleading representations about the particular kind and/or composition of good being offered and supplied for sale. In our view, the description was likely to be false or misleading because it created the impression that the chunks of medium-rare burger patty comprised meat when in fact the patty was made from plant-based protein.

We are issuing you with this warning letter because in our view, Hell’s conduct is likely to have breached section 13(a) 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 to establish fault.<sup>1</sup>

### **The investigation**

The Commission has investigated complaints that Hell made false or misleading representations about the contents of the Burger Pizza by creating the impression to consumers that the Burger Pizza contained meat when it did not.

During our investigation, we obtained the following evidence, which we consider indicates a likely breach of the FT Act:

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<sup>1</sup> Commission’s published *Enforcement Response Guidelines* at [41].

- Between 21 June 2019 and 1 July 2019 Hell advertised online the Burger Pizza. The Burger Pizza was initially described as “Loaded with chunks of medium-rare burger patty, Smoked Cheddar, Honey Mustard, Red Onion Rings and Gherkins”. On 25 June the description was amended to “medium-rare Beyond Meat™ burger patty”.
- The “Beyond Meat™” addition referred to the American company, which manufactures the plant-based patty.
- On 27 June Hell disclosed on its website and social media that it had taken more than 3,000 customers by complete surprise with its meat-free Burger Pizza by revealing that the burger patty in the Burger Pizza was a plant-based creation from US company Beyond Meat. The Burger Pizza was offered for a limited time as part of a marketing campaign aimed at introducing “carnivores to meat-free options”.

### *The relevant law*

Section 13(a) of the FT Act prohibits businesses from making false or misleading representations, in the supply or promotion of goods, that goods are of a particular kind and/or composition.

### *Hell’s response*

Hell cooperated with the Commission’s investigation by attending a voluntary interview. Hell told the Commission that:

- It did not disclose that the burger patty was meat-free in order to get consumers to try something new that they wouldn’t otherwise have experienced. It had expected some consumers to assume that the Burger Pizza contained meat.
- It left the interpretation of the description of the Burger Pizza in the hands of consumers. In Hell’s view, the phrase “burger patty” was generic and vague enough to not be misleading.
- The “medium-rare” description came from Beyond Meat itself, due to the patty’s pink colouring in the centre when cooked. Hell did not want consumers thinking that the patty was accidentally under-cooked and therefore added “medium-rare” to the product’s description. In Hell’s view, “medium-rare” would become a common adjective for plant-based proteins as they grow in popularity.
- It did not seek legal advice prior to launching the Burger Pizza.

### **The Commission’s view**

In this case, the Commission’s view is that Hell’s conduct is likely to have breached section 13(a) of the FT Act because the description of the Burger Pizza as “loaded with chunks of

medium-rare burger patty” created a misleading overall impression that the pizza contained meat.

A burger traditionally includes a patty of minced beef. Although a burger patty can be made of other ingredients, these are generally considered variations on the traditional burger patty. Here the burger patty ingredient was referred to in conjunction with the adjective “medium-rare”. Medium-rare is a term associated with meat, usually beef, indicating how thoroughly cooked a cut of meat is. There was no reference to the actual contents of the patty being vegetarian or plant-based.

Several complainants told us that they believed the Burger Pizza included meat.

In our view, the description was a false or misleading representation that the pizza was of a particular kind and/or composition (i.e. included meat as a topping) when in fact the patty was made from plant protein.

### **Warning**

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 commencing legal proceedings.

In reaching our enforcement decision, we have considered the short duration of the conduct, and the fact that Hell has ceased offering the Burger Pizza. We also understand that the potential harm resulting from the conduct has already been considered by the Ministry for Primary Industries. Hell has told the Commission it has no intention to engage in this type of campaign again and will seek legal advice before launching campaigns in the future to ensure it complies with the law.

While we will not be taking any further action against Hell at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against Hell.

We recommend you seek legal advice on complying with the law and encourage you to regularly review your compliance procedures and policies.

This warning letter is public information and will be published in the case register on our website. We may make public comment about our investigation and conclusions, including by issuing a media release.

### **The Commission’s role**

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 Fair Trading Act**

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.

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**

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](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the FT Act.

You can also view the FT Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions in relation to this letter.

Yours sincerely

  
[REDACTED]  
Principal Investigator