

14 November 2018

Reference: 15432

Building Element Assessment Laboratory Limited
2a Plimmerton Drive
Plimmerton
Porirua 5026

Attn: Colin Prouse, Managing Director

By email: sales@beal.co.nz

Dear Mr Prouse

Fair Trading Act 1986: Warning

1. As you are aware, the Commerce Commission (Commission) has investigated whether you and/or Building Element Assessment Laboratory Limited (**BEAL**) made false or misleading representations under the Fair Trading Act 1986 (**the Act**). In particular, we investigated whether you and/or BEAL may have breached section 13(e) of the Act. Section 13(e) prohibits misleading representations that goods have any endorsement.

Commission's role

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

The Commission's view

3. The Commission considers that both you and BEAL are likely to have breached section 13(e) of the Act through making a false representation in an email to the Cavan Forde Group of companies (**CFG**) on 9 April 2013. In our view, BEAL had not appraised the AAC product at the time that you represented that it had been appraised. The representation is therefore likely to have breached section 13(e) of the Act.
4. The Commission has exercised its enforcement discretion to issue a warning to both you and BEAL rather than to commence legal proceedings. In making a decision to

warn, we have taken into account the Commission's Enforcement Response Guidelines.¹

Basis for the Commission's view

5. On 9 April 2013, you sent an email to Steven Hands of CFG stating that BEAL had appraised the AAC product manufactured by two specific manufacturers. That email noted:

We confirm that the 50mm AAC panel from Nanjing and Eastland are included under our BEAL Appraisal certificate and subject to our standard conditions of appraisal.

6. In our view, we consider this representation to be false because the BEAL appraisal certificate only related to product manufactured by Nanjing Asahi New Building Materials Co Limited. The AAC product manufactured by Eastland Building Materials Co Limited (**Eastland**) had not been assessed by BEAL at the time the e-mail was sent.
7. You have stated that the representation was intended to convey that if CFG complied with a series of caveats and conditions that BEAL had previously provided to CFG, the appraisal would be granted.
8. The Commission does not accept that the representation would be interpreted in any way other than to mean that the AAC product was already appraised. We do not accept that CFG (or any other recipient of the e-mail) would reasonably have understood the representation to mean the Eastland product would be appraised in the future.
9. Indeed, and as explained to you at interview, CFG used your email to represent to other parties, including CFG distributors, builders, customers and the Dunedin City Council, that the Eastland product had been appraised by BEAL and was fit for purpose under the New Zealand building code. You were copied in on those emails, but made no effort to correct CFG's statements, or to clarify that the appraisal was subject to a series of caveats and conditions.
10. CFG's reliance on the representation contained in your email, and your silent acquiescence to CFG's emails to other parties is especially concerning given that only two weeks previously, you had tested the Eastland product and found it to be defective, noting that it:

...is not material that BEAL has appraised. The sample panels supplied contain defects in that the coating covering the reinforcing more has broken down prematurely. The placement of the reinforcing wire is clearly inappropriate and clearly not fit for purpose.²

¹ The Commission's Enforcement Response Guidelines are available on our website at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

² Letter to Mr Les McKenzie from BEAL dated 26 March 2013.

Other conduct of concern to the Commission

11. You advised the Commission at interview that BEAL regularly issues 'desktop' appraisals on an interim or initial basis, before proceeding to undertake a full assessment of the product.
12. We have not investigated the nature of these desktop appraisals or whether or not they raise any issues under the Act, however the Commission may choose to do so at any time.
13. We wish to highlight that it is important that any representations or appraisals issued by you or BEAL are not false or misleading. Any preliminary or 'desktop' appraisals should be clearly identified as such in order to avoid potentially breaching the Act.

The law and the Commission's warning

14. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.
15. The court can impose penalties where it finds the law has been broken. Under the Act, an individual can be fined a maximum of \$200,000 and/or be prohibited from being a company director or a manager of a company. A body corporate can be fined a maximum of \$600,000. Every separate breach of the Act may incur a penalty.³
16. While the Commission does not intend to take any further action against you or BEAL for this conduct, you should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking a private action against you or BEAL.
17. We may draw this warning to the attention of a court in any future proceedings brought by the Commission against you or BEAL for other conduct in breach of the Act. Previous warnings may be considered an aggravating factor in sentencing by the court for any future conduct.

Further information

18. We have published a series of fact sheets and other resources to help businesses comply with the Fair Trading 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.

³ The penalties for breaching the Act in 2013 when the representation was made are \$200,000 for a company and \$60,000 for an individual.

19. You can also view the Fair Trading Act and other legislation at www.legislation.co.nz.

Yours sincerely



Kirsten Mannix
Wellington Consumer Manager