



COMMERCE COMMISSION

7 June 2012

The Clerk of the Select Committee
Parliament Buildings
Private Bag 18041
Wellington 6160

Dear Sir

Supplementary submission on the Consumer Law Reform Bill

At the conclusion of our appearance at the Select Committee on Thursday 31 May, the Chair invited the Commission to put in writing any further submissions it wished to make.

Please find attached our supplementary submission on the Consumer Law Reform Bill. Our submission focuses on matters raised by other submitters and on specific questions put to the Commission by the Select Committee.

If you have any further questions about any of our submissions please contact Yvette Popovic, Chief Adviser Advocacy and Development by phone (04) 924 3771 or by email Yvette.Popovic@comcom.govt.nz in the first instance.

Yours sincerely

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Supplementary submission on the Consumer Law Reform Bill to the Commerce Select Committee

Purpose

1. This submission supplements the Commerce Commission's initial submission to the Commerce Committee and sets out the Commerce Commission's views on issues that arose during the public submissions on the Bill. We focus on concerns raised about the unsubstantiated representations and uninvited direct sales provisions. We also provide further information on infringement notices, including information from Australia on how similar provisions are working in practice there.

Unsubstantiated Representations

2. During submissions, a number of submitters raised concerns about the proposed provisions on unsubstantiated representations. We address some of those concerns below.

Will traders need to hold large quantities of information to substantiate claims made?

3. We think that this is a matter of common sense. The Commission's view is that traders will not usually be required to hold information to substantiate claims, particularly where the trader is passing on a claim made by a reputable manufacturer or supplier. The fact that the claim was made by a reputable manufacturer or supplier will usually be a sufficiently reasonable basis for the claim.
4. When a trader is the author of the claim, similar considerations apply. Where the claim is obviously true (eg "carrots are healthy") we would not expect traders to hold information to substantiate that claim. However, where the claim is not so obviously true (eg "eat carrots and lose weight"), the trader should then have a supportable basis for making that claim. That may include having information in their possession to justify the claim.
5. Where a claim is clearly questionable or appears misleading, we think a trader should undertake further enquiries to satisfy themselves as to the veracity of the claim before passing it on to the public. For example, we would not expect a supermarket to hold information to substantiate claims made about all the products it sells, although we would expect the supermarket to hold information that substantiates claims that are clearly questionable, or appear misleading or where they receive information that suggests that the claim may be incorrect.

Will the provision create uncertainty?

6. We do not consider that the provision will create uncertainty. In some ways it could lead to more certainty for traders and consumers. Traders will know that they can only make claims for which they have a reasonable basis, and consumers should have more trust in the claims that are being made.

7. Also, the Commission will provide guidance to traders on compliance with the new law. The Commerce Commission has a statutory obligation to provide this guidance and already produces many guidelines and fact sheets to aid interpretation of the Act.

Will the provision stop puffery?

8. Submitters have raised concerns that the current provisions of the Bill would outlaw puffery (ie comments that are so clearly exaggerated that no person could be misled by them). The Commission's view is that the provision does allow genuine puffery. This is because clauses 12A (3) (c) and (d) of the Bill require the Court to have regard to the nature of the representation and its actual or potential effects on any person when assessing whether the provision has been breached. We think these clauses clearly anticipate that genuine puffery will not be unlawful.

Would true statements be captured by the provision?

9. In theory, the provisions do capture true statements. However in practice, the Commission is unlikely to pursue claims that are true, or that appear true. Our focus is likely to be on claims that are, on their face, questionable. The key point here is that, in our experience, consumers expect traders to have a basis for claims they are making. This provision seeks to cure the mischief created by traders who make claims that they do not have a reasonable basis for.
10. It is important that the failure to substantiate a claim is an offence in itself. If the Commission also needs to prove that the claim is false or misleading, then consumers are no more protected under the proposed provision than they are at present.

Does the provision reverse the onus of proof?

11. As with all other offences under the Fair Trading Act, the Commission must prove that the offence has occurred. In this case, the Commission must show that the representation was unsubstantiated.

Is the provision unprecedented worldwide?

12. This type of substantiation provision is not unique. The United States has a similar legal requirement that requires traders to have a reasonable basis for the claims they make.
13. A recent example of how substantiation operates in the United States is the Skechers settlement announced by the Federal Trade Commission (FTC) on 16 May 2012. Skechers claimed that its shoes would promote weight loss and muscle toning. The FTC alleged, amongst other things, that those claims could not be substantiated and alleged that the testing provided by the company to support such claims was flawed as the test was not independent and the company had cherry picked the results. A \$40 million dollar settlement has resulted, with that money to be distributed to affected consumers.

Uninvited Direct Sales

Coverage of the section

14. The Commission submits that the uninvited direct sales provision should be carefully worded to capture only conduct that involves an uninvited approach by a trader (eg where the trader initiates the contact with the consumer). The majority of complaints the Commission receives about uninvited direct sales arise from this type of uninvited contact:
 - a. *Telemarketing*: A particular problem area is telemarketing calls which offer new telecommunications or electricity contracts. We frequently see cases where consumers allege that they have been supplied with a good or service that they did not agree to receive, or that is different from what they agreed to receive.
 - b. *Door to Door*: The Commission has received complaints regarding particular door to door sales campaigns. Often these campaigns target vulnerable and/or elderly people and involve the sale of expensive products using pressure selling techniques.
 - c. *Seminars*: The Commission has investigated a significant number of complaints about seminars promoting various products, including timeshares, sleep systems, various get rich quick or pyramid selling schemes and travel discount clubs. A number of prosecutions have resulted from those investigations. Often great pressure is placed on those attending to sign up immediately.
15. A number of submissions focussed on unintended consequences arising from the current wording of this provision. A particular concern is that the provision may capture traders who do not make uninvited approaches to customers but are caught by the provision because they are operating outside of their normal place of business.
16. We think a possible solution to these concerns would be to exclude sales initiated by consumers from the coverage of the provision. An example of this is a trader who sets up a stall at Field Days or a local market. We agree that this type of sale should not be caught by the provision, as it does not usually involve an uninvited approach by the trader to the customer. We believe that these types of transactions can be removed from the coverage of the provision without weakening the protections being offered to consumers in the areas of most concern.

The \$100 limit for transactions

17. The Commission submits that the provision needs to be clearer that ongoing service contracts such as telecommunications contracts are included in the definition of Uninvited Direct Sales.

Supply During the Cooling Off Period

18. We had submitted that there should be a general prohibition on supply and accepting payment during the cooling off period. We note that that point has been the subject of many submissions and that, even with the current wording, traders are incentivised

not to supply during the cooling off period to avoid the problems that may follow if the consumer cancels. The Commission's primary concern is that consumers who are supplied during the cooling off period and then seek to exercise their right to cancel may still face termination fees charged by their original supplier. A prohibition of supply during the cooling off period would have the effect that the consumer who wished to exercise their cooling off rights can do so, without penalty.

Infringement Notices

19. During our oral submission to the Select Committee, we were asked about the Australian experience of using Infringement Notice powers. We have made further enquiries with the Australian Competition and Consumer Commission (ACCC) who have told us:
 - a. The Australian Consumer Law (the Australian equivalent of the Fair Trading Act) allows the ACCC to issue Infringement Notices for the majority of the offences under that law.
 - b. The ACCC have found Infringement Notice powers to be a useful alternative to court action. Infringement Notices are considered to be a low cost, quick and proportionate means of addressing matters that either would not be able to be dealt with or might otherwise require disproportionately costly court proceedings to resolve.
 - c. The requirement to pay a fine can be an incentive for traders to change their behaviour without any major impact on their businesses – it is therefore seen as an effective way of achieving compliance. Infringement Notices are also considered to be a good fit with other enforcement tools – the ACCC has used Infringement Notices in conjunction with court enforceable undertakings to good effect in appropriate cases.
 - d. The Australian law provides a number of safeguards to protect the rights of individuals and the ACCC has in place a number of process requirements that are designed to ensure that the powers are not used arbitrarily, but are subject to scrutiny and used in a consistent and justifiable manner.
20. The Commission supports the inclusion of Infringement Notice powers in the Fair Trading Act, but favours providing them on a wider basis than is currently included in the Consumer Law Reform Bill.
21. Of note, the penalty amounts in the Australian Consumer Law are substantially higher than is currently provided for in the New Zealand Bill. They are up to \$6600 for a corporation (or \$66 000 for a listed corporation) and \$1320 for an individual for each alleged contravention.