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**THE FAIR TRADING ACT:
ISSUES FOR THE FOOD AND
BEVERAGE INDUSTRY**

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THE FAIR TRADING ACT

Introduction

The Fair Trading Act provides for the provision of information to consumers about a whole range of consumer goods and services. Justice Fisher says “the purpose of the Fair Trading Act is to keep the consumer informed, not happy.” This sums up the general principles of the Fair Trading Act. The promotion will always want to make the consumer feel happy but the message has got to be realistic and truthful. The Fair Trading Act is about ensuring that any promotion or advertising of any sort, does not convey false or misleading impressions given by word or by picture, and that the overall impression created by a promotional campaign is not misleading.

There are several points to note about the Fair Trading Act.

Intention

The first is that for most sections of the Act, an intention to mislead does not need to be proved for the Act to have been breached. This means that even if you do not intend to mislead anyone, if the effect of your advertising, labelling, or overall campaign, is misleading, then the Act has been breached.

Liability

Both individuals and companies have liability under the Fair Trading Act. A company is responsible for the actions of its employees, even if the employee is acting outside of company policy. An individual is also responsible for their own actions under the Fair Trading Act. The maximum fine for a company is \$100,000 and for an individual \$30,000. (But the real cost to a company is the damaging publicity that can ensue). There are very real incentives, therefore, for traders to ensure that their employees understand the provisions of the Fair Trading Act and comply with them.

No Person Need Be Misled

The fact that no person has been misled, or that there is no evidence that any particular person has been misled, does not mean that the Fair Trading Act has not been breached. The court may make an objective assessment about whether or not something is misleading even if no one comes forward to say that they were misled about a label or advertising campaign. Conversely, the fact that somebody has been misled does not mean that the Fair Trading Act has been breached. A person may be considered to be unusually stupid to have been misled, and the court may decide that no reasonable person would have been misled, given those circumstances. The court in Australia has found that when considering whether people might be misled by something, it is necessary to take into account “the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated, and men and women of various ages pursuing various occupations.”

Anyone Can Take Action

Although the Commerce Commission is the agency charged with enforcing the Fair Trading Act, the Act is set up so that anyone can take action. This creates additional incentives for compliance, for it means that even in situations where the Commission chooses not to take action, a trader can still be exposed to possible litigation by any person or company. The only exception relates to corrective advertising, where only the Commission is able to take action to get a corrective advertising order.

MISLEADING AND DECEPTIVE CONDUCT

Literal Truths May Still Mislead

What is literally true may still be misleading. For example Plumrose Light Deli Ham was labelled as being 90% fat free. However, the Judge found that, although this was true, it was liable to mislead because the overall impression was that it was a low fat ham when, in fact, it was between 2 and 4 times higher in fat than other hams.

One of the most important points about the Fair Trading Act is the concept of how the claim or message from your promotion or labels is understood by your target audience. What this means is that when you are formulating an advertising campaign, or even a label, you must

take into consideration what the average person might understand from your campaign or label and not what would be understood by someone who has technical knowledge of it. You should also be aware that people shopping for food products are likely to be people who are shopping in a hurry. They are not likely to spend a lot of time comparing different products, or looking at a label to find out exactly what the ingredients are or interpreting that information on the labels.

An example of this might be the claim - “no added sugar”. If, in fact, the product has another form of sugar, for example fructose, or lactose added, then that claim would be false. The average shopper is unlikely to recognise the other names for a product that would have the same effect as sucrose in the body. Small print will not prevent a breach of the Fair Trading Act. Recently, the Judge in the Noel Leeming’s case noted that the trader could not rely on the small print to correct a misleading impression made in the body of the advertisement.

Overall Impression

The overall impression created by the advertising is important. Pictures as well as words need to be taken into account. The whole of the campaign, rather than just individual parts of the campaign needs to be considered, when formulating what impression is given by the advertising.

Descriptions

Firstly, claims must be accurate. An example of this was a Dunedin butcher, who pleaded guilty to two charges of selling lean steak mince, when in fact it was fatty mutton. Penalties were imposed totalling more than \$3,700 in that case. A common example of this is the labelling of sausages. For example, sausages are often labelled as pork, when they, in fact, have no pork in them. Once again this is a breach of the Fair Trading Act.

In another case, Woolworths advertised lean topside mince as being 80% fat-free. Our tests revealed that there was a higher percentage of fat, and Woolworths then admitted the mince was not topside.

Terms such as “gluten free”, or “contains no lactose”, should only be used where there is no detectable gluten or lactose. If, for example, gluten is detectable then clearly the product is not “gluten free”.

Consumers should be able to look at the way products are described and take this description on face value.

Illustrations

Illustrations must reflect the actual product. If, for example, a package of sausages did not actually have the words “pork sausages” on it, but instead had a picture of a pig, and the label “sausages” then that would indicate that, in fact, the sausages were pork. If that were not the case and they were not pork, the Fair Trading Act would have been breached.

Claim Substantiation

Claims about a product must be able to be substantiated. An example of this would be an Australian case where a fruit juice labelled “contains 35%”, but, in fact, only contained 17% of real juice. This resulted in an injunction being granted against the fruit juice manufacturer.

Another related area where the Commission has concerns about claims made, is in the area of weight loss and related health claims. For this reason the Commission, this year, reminded pharmacists and health food shops of their obligations under the Fair Trading Act.

SPECIFIC ISSUES FOR THE FOOD INDUSTRY

In general, people are far more conscious about what they eat these days than perhaps their parents were. That is why the advertiser has to be particularly careful regarding statements about the quality of food.

Fresh

The term “fresh” generally means that food has not been frozen or preserved by any method, and which is offered for sale at the earliest possible time. Some foods stay fresh longer than others, so rules covering all foods are not appropriate. For example, bread is fresh when a day or less old, but apples and some vegetables could still be called fresh, even when several days old or longer.

If you are making a claim about the freshness of the food product, this should be able to be substantiated. Labels claiming freshness should be able to be easily removed, if the food is to remain on sale after the claim is no longer accurate. An example of this was outlined in the fruit juice guidelines produced by the Commission in 1995. Juice described as “freshly squeezed”, or “freshly extracted”, should not have been frozen or pasteurised, and should not contain preservatives. It will be misleading to label a packet of fruit juice as “freshly squeezed”, if it has been sitting on the shop shelf for more than the time it takes for the juice to go off. Juice would normally not be viable between 4 and 7 days after being freshly squeezed, unless preservative had been added. Juice that has been concentrated and then reconstituted, should not be called fresh, or squeezed.

Pure

Terms such as “Pure”, “100%”, or “100% Pure”, should only be used to describe products which contain only one ingredient. Another example from the juice guidelines would be a product described as “Pure Orange Juice”; this should not contain anything but orange juice. Language used to describe products should be plain and simple. Technical terms or language foreign to most consumers should not be used to selectively disguise critical parts of food items. For example, a company sold Apple Wine in bottles that closely resembled the packaging of a commonly known wine. All information on the labels was in English, except for the words “Apple Wine”, which were in Maori. This led consumers unable to read Maori, to believe that they were purchasing traditional wine made from grapes.

Organic Claims

Food that is labelled organic should be produced on a farm or agriculture enterprise that has a currently valid certification from an independent reputable authority. That authority should be recognised by the bodies which produce international guidelines for organic food production, and the certification should meet those guidelines.

Natural

The term natural has similar connotations to organic. If you are using this term you must do so to describe things that the ordinary consumer would understand. It would not be appropriate to use this term if there has been complex chemical or technical processes used on the food

in its production or manufacture.

For all of the above claims the consumer pays a premium. This makes the truth of these claims more important.

Country of Origin

The Fair Trading Act does not require country of origin labelling on food products. However, if there is any indication of a country of origin on a label, for example a New Zealand address for a distributor, and if the product is not a New Zealand product, this needs to be made clear. One of the difficulties people have when trying to determine country of origin is that for many products only parts of the product are made in New Zealand, or that the product is produced in New Zealand from imported parts. The rule of thumb is to work out where the essential characteristic of the product comes from.

For example, if the concentrate for an orange juice comes from Brazil and the juice has water added, and is bottled in New Zealand the essential characteristic comes from Brazil. This is because the consumer is buying the product for the orange juice not the water or the bottle. You do not have to say where a product actually comes from, just that it was imported or made up of imported and local ingredients.

FOOD REGULATIONS AND THE FAIR TRADING ACT

The Fair Trading Act is not prescriptive in the area of food labelling. Any information from the Commission is in the form of guidelines only. These are not rulings. The court is the final arbiter of what traders can or cannot do under the Fair Trading Act. The purpose of our guidelines is simply to provide helpful information to those who do not want to breach the Act.

The food regulations are prescriptive and require manufacturers to put certain information on labels or undertake certain procedures. People often approach the Commission with the concern that the food regulations conflict with the Fair Trading Act. Rather than conflict with the food regulations, we believe that the Fair Trading Act adds another level of responsibility. Basically, if you are going to put information on labels or in advertising, then you must ensure that it is accurate and no important information is missed out.

It is our view that if you just had a plain white label describing the product, for example “fruit

juice” and nothing else, the only possible way of breaching the Act would be if you were selling something that was not fruit juice. However, the food regulations require certain other information, therefore you must examine the overall effect of the information you provide and ensure that it is not false or misleading unless you qualify it in some way. This view is consistent with the Food Regulations which also state that labelling must not be misleading.

COMMISSION ACTIVITY IN THE FOOD AND BEVERAGE AREA

For some time, the Commission has taken a proactive interest in this area. Previous activity has focused on claims about fat and orange juice. The outcome of the work in the fat area is that the Commission has successfully taken one case through the court. This is the Plumrose Light Deli Ham I referred to earlier. We believe that this case is a good example of the claim on the label, and the overall promotion of the product misleading consumers about the level of fat in the product. In another case the courts considered the issue of whether an ongoing representation is a breach of the Act, or whether it is when the initial representation occurs that is crucial. The courts ruled that the ongoing representation amounts to a representation under the Act.

The outcome of the work in the orange juice area is that a guideline has been published to assist orange juice manufacturers to avoid breaching the Fair Trading Act. **This guideline does not amount to a ruling as only the courts are able to provide that.** Additionally, the Commission is taking a case through the court in relation to claims about fresh and New Zealand-made. The outcome of this case will provide clear case law on these points. Another orange juice manufacturer has already been successfully prosecuted in relation to claims made on its juice labels.

We have looked at claims made in relation to fibre and did not consider that there were major Fair Trading Act breaches in this area. Our study showed that few claims were being made about fibre, and for the most part these seemed accurate.

We are continuing to focus on claims about sugar, cholesterol, additives and “organic” issues. We have been examining products in these areas and may take examples of misleading claims through court and/or produce guidelines for the industry. We will also contact a wide range of the industry to gather information from them and to disseminate our views, once they are formed.

We have already negotiated settlements with two distributors of eggs, as a result they have

changed the name of Heartsmart Eggs to Omega Smart, and undertook to cease making claims about health benefits that are unproved or misleading. In addition, they have run corrective advertisements in the metropolitan dailies.

In general, the type of action we take in relation to these products depends on the issues we identify, and whether or not it is essential to clarify points in law before we produce guidelines.

The Commission is not in a position to approve or offer advice on specific advertising or labelling. The reasons for this are:

- to do so would compromise us as an enforcement agency;
- each case would have to be examined on its merits. We would need to have a detailed knowledge about the product before we could make a judgment about the advertising or labelling of it - this is not possible;
- we do not have the resources to do this adequately; and
- we do not provide legal advice.

TYPES OF ACTION THE COMMISSION MAY TAKE

The Commission receives around 15,000 complaints a year about breaches of the Fair Trading Act 1986 - clearly not all of these relate to food issues. We only investigate a small number of these complaints and we also take action on matters where there has been no complaint.

The Commission has developed a set of criteria to enable us to act on complaints and issues that will ensure action we take is directed at issues which:

- have wide consumer detriment;
- are related to industry practices or repeat offending; and
- will create precedent and new case law.

Although we conduct about 700 investigations a year, we only take around 30 cases to court each year. In other cases where we believe the Fair Trading Act has been breached, we will either warn a company in writing that there has been a breach of the Fair Trading Act or get written undertakings from a company aimed at ensuring the Act will not be breached in the future and at correcting past false or misleading representations.

Apart from enforcement action, the Commission publishes a wide range of guidelines and brochures to industry. These explain the Commission's interpretation of the Act.

Additionally, we offer seminars, speak at conferences, and work with industry groups to achieve compliance with the Fair Trading Act.