

Compliance with the Fair Trading Act

Natural Health Products NZ Compliance Workshop

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**100%
PURE**

Healthy 

free from...

Gluten free 

**Boosts
immune
system**

Organic


**SUSTAINABLY
SOURCED**

**Reduces
body
fat**


ETHICALLY FARMED


RECYCLABLE

**Made in
New Zealand**


LOW CARB


**Low
carbon
footprint**

Role of the Commerce Commission



- Working towards consumers and businesses being confident market participants
- Work cuts across all markets in New Zealand
- Includes:
 - Regulation in the electricity and telecommunication sectors
 - Clearance regime for mergers of businesses
 - Looking at anti-competitive conduct
 - Enforcing consumer credit law
 - Enforcing the Fair Trading Act

Increasing compliance with the Fair Trading Act



Two approaches:

- Raising traders awareness
- Investigating and taking action for breaches of the Act

Investigation outcomes

- No action
- Compliance advice
- Warning
- Civil proceedings
- Criminal prosecution

Penalties

- \$600,000 per offence for companies.
- \$200,000 per offence for individuals.



The Fair Trading Act

- Protects against
 - Misleading and deceptive conduct
 - False or misleading representations
 - Unfair trading practices
- To enable consumers to make informed choices about the goods and services they buy
- To ensure fair competition



Fair Trading Act – Section 9

No person shall in trade engage in conduct that is misleading or deceptive or is likely to mislead or deceive.



Important points

- Intention to mislead is not relevant
- Applies to conduct likely to deceive (no one needs to have actually been misled)
- Applies to companies and individuals
- The overall impression is important
- Can mislead by omission
- Can be literally true but liable to mislead
- Traders may have a reasonable reliance defence but the threshold is high



False or misleading representations

- What is a representation?
- Can be words or images
- Can be in print, online, on products, made verbally



Consumer test

- All the target consumers except the outliers.
- Outliers are unusually stupid/ill equipped or whose reactions are extreme or fanciful.
- What claims, express and implied, does the ad convey to the target consumers?
- Advertisers are liable for all reasonable interpretations.
- Biodegradable....here today, gone tomorrow tidy bags.



Principles – headline representations and qualifiers

- Overall impression/dominant message/general thrust of an advertisement is crucial
- Overall impression not just the sum of the separate representations
- Where the headline representation and the qualifying information vary greatly, any qualifiers need to be very clear
- Proximity and prominence of the qualifying information important
- Does the additional information make the true position clear?



Yoghurt Story



- Claimed the product:
 - Increases your immune system
 - Lowers the risk of subsequent heart disease and diabetes
 - Prevents infections once your immunity is strong
 - Fines of \$70,000 imposed on two related companies – would have been \$270,000 but companies in liquidation



Nurofen cont.

- In fact each product contained exactly the same active ingredient and each worked identically to the other products.
- Consumers paid more for the ‘targeted’ products than for the standard ibuprofen products.
- Penalty of \$1.08 million imposed.

No unsubstantiated claims

- A person must not, in trade, make an unsubstantiated representation
- Any claims (oral /on labelling/in advertising) must be able to be substantiated – whether claims express or implied
- A business making a claim must have reasonable grounds for the claim.



No unsubstantiated claims.....cont.

- Reasonable grounds come from:
 - Information provided by reputable suppliers/manufacturers
 - Any other reasonable source e.g. scientific or medical journals
 - Information within the company's knowledge
 - Google may not be reliable - likely to depend on the source
 - Anecdotal evidence or customer testimonials unlikely to suffice



“Reasonable Basis” - Standard



When an ad does not make an express or implied references to a certain level of support and, in the absence of other evidence indicating what consumer expectations would be, it is assumed that consumers expect that the advertiser had a “reasonable basis” for making the claims.

“Reasonable Basis” – Factors

- Type of claim.
- Benefits if the claim is true.
- Consequences if the claim is false.
- The ease and cost of developing substantiation for the claim.
- Type of product.
- The level of substantiation experts in the field would agree is reasonable.

Competent and reliable scientific evidence

What it Isn't

- Anecdotal evidence from customers.
- Newspaper or magazine articles.
- Sales materials from the manufacturer.
- Low return rate or money-back guarantee.

What it Is

- Tests, studies, other scientific research.
- Based on expertise of professionals in field.
- Objectively conducted by qualified people.
- Using procedures accepted as accurate.

Green People Company



- Green People Company sold an organic children’s sunscreen
- The label represented “Water repellent”
- Commission **warned** Green People for not being able to substantiate this claim
- Commission expected high level substantiation of this claim
 - Rigorous product testing results / creditable scientific evidence
- In fact Green people relied on its own observation of what happens to a person’s skin when wet

Fujitsu prosecution

- NZ's most energy efficient heat pump range
- A heat pump range delivered “better heat efficiency” and constituted “the most efficient system ever”
- E3 heat pump was ‘a breakthrough energy saver’ – delivered \$4.57 of heat for every \$1 of power used
- Performance achieved only under laboratory conditions and unlikely to be achievable in real world



Baa Baa Beads



- Baa Baa Beads – amber necklaces to help babies with teething
- ‘for generations it is said when worn on the skin, the amber warms and releases the oil that helps sooth and relieve symptoms’
- Recent scientific research has proved that succinic acid has a very positive influence on the human organism
- Succinic acid strengthens the body, improves immunity
- Succinic acid has been proven to be ‘the equal or better of many commercial drugs and is significantly less expensive’



Baa Baa Beads.....cont.



- Substantiation provided by the trader involved some research and articles about Baltic amber's origin and its use by ancient people
- Article from www.home.remediesfor.you.com related to ancient tribes wearing amber necklaces due to their medicinal properties
- No expert or reputable scientific opinion or independently peer reviewed studies that justified the claims



Sales Concepts - Envirochip

Claims

- The use of electronic products was damaging to health
- Envirochip protected people from the damaging impact of electronic goods

Investigation

- Sales Concepts relied largely on marketing materials for its claims
- Commission's view was that the information relied on was not reasonable grounds for the claims
- Sales Concepts stopped marketing the product
- Commerce Commission issued a warning for the conduct

Country of origin claims



- A question of fact and degree
- Test: is the 'made in New Zealand' claim likely to mislead consumers?
- Relevant considerations:
 - Food – where is the essential character of the food created?
 - Manufactured product
 - Is it substantially manufactured in NZ?
 - Where was the critical componentry manufactured?

NZ Nutritionals case



- Goat's milk powder labelled as "100% NZ made and proud of it"
- Powder and Calcium Citrate both imported
- Goat's milk tablet labelled as "New Zealand made" with a Kiwi image
- Tablet made from 12 ingredients
- 8 of the 12 were imported including only 2 active ingredients
- Remaining 4 ingredients produced in NZ but were excipients or inactive ingredients



Court ruling

- Misleading because the goat's milk in both products was sourced from and processed overseas
- Substantial transformation test – this stage was the conversion of the goat's milk into powder not the tableting or blending process



Topline case



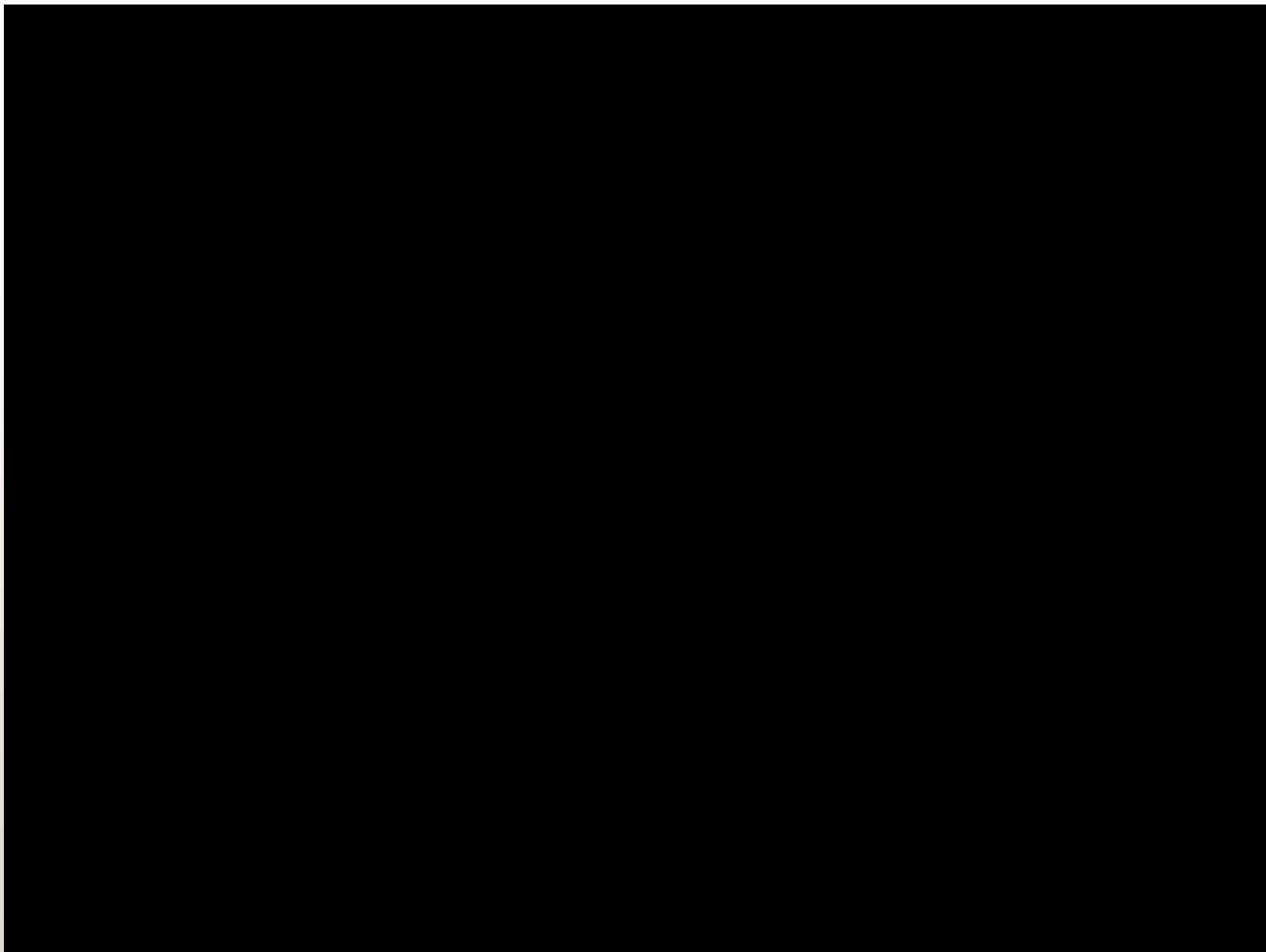
- Initially sold a product derived from New Zealand bee pollen
- Product said “MADE IN NEW ZEALAND”
- Then began using Chinese bee pollen and removed NZ references
- Later reintroduced the NZ representations on the Chinese sourced pollen

- Director of the business fined \$121,000
- Business fined \$405,000

Credence video

- The Commerce Commission has released a new video, giving guidance to traders on false, misleading or unsubstantiated claims and how to avoid making them.





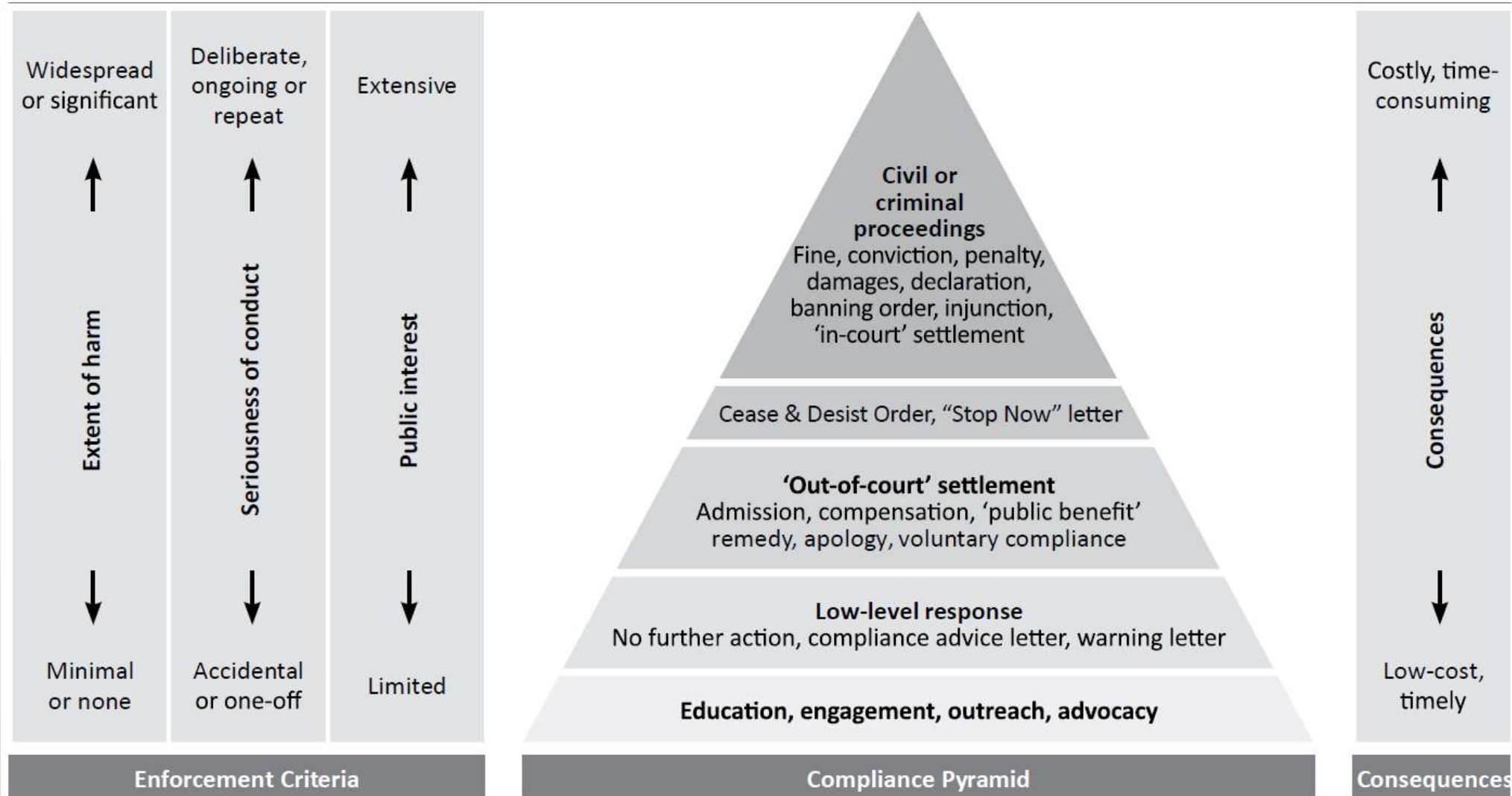
What happens if you are under investigation?

- Contact from an investigator
 - Details of the allegations
 - Process information
 - It's a good idea to consult a lawyer
- Investigator will gather information
 - Information requests
 - Interviews
- Commission then considers the evidence and determines the appropriate enforcement response

Enforcement criteria

- Used in decision making
 - What matters we investigate
 - Selecting the appropriate enforcement response
- Three elements
 - Extent of detriment
 - Seriousness of conduct
 - In the public interest

Enforcement response model



How to stay off the radar

- Have good complaints handling processes to reduce complaints to the Commission.
- Put in place good compliance processes.
- Review high risk claims including pricing and credence.
- Pay heed to compliance advice and warning letters.



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