

Unsubstantiated Representations: Information Sheet

This information sheet provides guidance on what the unsubstantiated representations change to the Fair Trading Act 1986 means for licensees. The new legislation came into effect on 18 June 2014.

Background

The Fair Trading Act 1986 was amended at the end of 2013, creating a new offence (under Section 12A) that prohibits the use of unsubstantiated representations. This includes representations in relation to the sale of property.

Licensees will not be able to make representations in trade without having reasonable grounds at the time for making them.

This change means that licensees can now be held to account under the Fair Trading Act as well as the Real Estate Agents Act 2008 and the Code of Conduct. The Fair Trading Act is enforced by the Commerce Commission.

What is the relevant legislation?

- Real Estate Agents Act 2008 ([the Act](#))
- Real Estate Agents (Licensing) Regulation 2009 ([Licensing Regulations](#))

What is an unsubstantiated representation?

In the real estate context, an unsubstantiated representation is a claim made in relation to the sale of property that does not have any reasonable basis. It applies to all types of representations – whether statements made within marketing brochures, on websites or verbal statements made by a licensee.

If a licensee makes a claim, they must have appropriate evidence to justify it, even if the claim is true.

Are there any exceptions?

Claims that are regarded as clearly an exaggeration and are so obvious that no-one ought to reasonably believe them are still allowed. An example might be "This is the best property ever!" It is of course risky to rely on this 'puffery' exception except where it is so obvious that what you are saying about a property is clearly not meant to be taken as fact.

The law is designed to catch serious representations which a reasonable person would expect to be substantiated. An example could be advertising a property as "Home and Income", when there is a restrictive covenant preventing this.

What if a representation is unsubstantiated but true?

The key point is that if a licensee makes a statement or representation without making sufficient enquiries to check whether it was true or not, they will fall foul of the law.

The law requires a licensee to make sure they have reasonable grounds at the time for making any statement about a property or business they are marketing - before they make those statements.

Why has the law changed?

A prospective purchaser has the right to rely on statements made in good faith by a licensee. It is unfair on licensees that have gone to the trouble of ensuring any representations they have made can be substantiated, when a competitor makes a representation without doing this.

Unsubstantiated representations act as an inducement to attract purchasers. They may entice prospective purchasers to enter into negotiations to buy a property based on information that has not been substantiated. This could deny other licensees who comply with the legislation from having free and equal competition for the business of that purchaser.

Breaches of the Fair Trading Act carry additional penalties for licensees

Breaching the Fair Trading Act could mean individual licensees facing fines of up to \$200,000, and real estate agencies up to \$600,000. The courts can also grant an injunction and can order corrective advertising **to cure any misrepresentation.**

The Commerce Commission is responsible for prosecutions under the Fair Trading Act. However we will work closely with them on any matters regarding real estate licensees.

What the law change means for your business

You should be thinking about how you and your staff describe properties for sale and whether you are making claims that cannot be verified. At the very least you should consider whether you will need to implement any new processes or procedures - to ensure that you can show, if required, that you have reasonable grounds for making specific representations. You may need to prepare and retain documentation before making representations.

Real estate agents should look at their advertising and business practices to ensure that they accommodate this change. You need to be vigilant and take steps to ensure that any statements you and your staff make (whether verbally to a prospective purchaser or in advertising) are accurate, genuine and can be substantiated.

Commerce Commission guidance on unsubstantiated representations

The Commerce Commission has issued more general guidance on unsubstantiated representations.

For more info go to: <http://www.comcom.govt.nz/fair-trading/changes-to-the-fair-trading-act/fact-sheets/unsubstantiated-representations/>

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To the best of the Real Estate Authority knowledge, the information in this guide is accurate at the date shown below. However, the requirements on which this information is based can change at any time and the most up-to-date information is available at rea.govt.nz

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