

# PROTECTING CONSUMER PROTECTION

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*Recent consumer law cases are shaping consumer law in an unwarranted way. The courts have acknowledged the importance of advancing consumer law and protecting consumers, however, upon closer examination it is questionable whether courts are employing the right framework, tools and considerations. By analysing recent country of origin cases this article identifies some potentially worrying ways in which the courts have eroded consumer law rather than strengthening it. In particular, such cases allow the proprietary interest of goodwill to creep into the Fair Trading Act 1986 (FTA). Doing so, even if only at the stage of determining the penalty to be imposed, may shift the dial further towards the Fair Trading Act (FTA) being a means for protecting traders' interests. This, in turn, may lead to negative unintended consequences.*

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## ***I INTRODUCTION: THE ROAD TO UNDERMINING CONSUMER PROTECTION IS PAVED WITH GOOD INTENTIONS***

Recent years have seen a steady growth in consumer law cases concerning country of origin, New Zealand tourism and the New Zealand "brand".<sup>1</sup> Since the enactment of the Fair Trading Act 1986 (FTA), cases brought by the Commerce Commission regarding country of origin claims (particularly misleading or deceptive conduct with respect to being made in New Zealand) have increased steadily.<sup>2</sup>

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1 This is in line with the focus of consumer organisations, such as the Commerce Commission, on credence qualities. See for example Commerce Commission "Commission's alpaca case brings total fines to \$1.5 million" (press release, 23 May 2017); Commerce Commission "Commission releases 2017/18 priorities" (press release, 20 July 2017) ("In our consumer area we will focus on ... credence claims. ... When it comes to credence, it is difficult for consumers to verify claims made about a product, and therefore easy for them to be misled. In particular, we will be paying attention to food products and country of origin claims").

2 For a partial, illustrative list see the Appendix. It should be noted that not all decisions (especially from the District Court) have been published.

Notably, there is also an increased willingness to prosecute the directors of the liable companies. Commensurate with this has been a rise in the penalties imposed.

At the time of writing, the latest of these cases was *Commerce Commission v Topline International Ltd*. In May 2017, the Auckland District Court fined Topline International Ltd (\$405,000) and its director (\$121,500) for misleading consumers under s 10 of the FTA (a total of \$526,500).<sup>3</sup> These figures, no doubt, reflect the courts' increasing willingness to impose high fines in consumer law cases.<sup>4</sup> Significant fines are required in order to deter firms from engaging in misleading or deceptive behaviour. It would, hence, appear that one should not second guess judicial readiness to impose high fines.

Nonetheless, we submit that *Topline*, together with other recent cases, moves the boundaries of consumer law in an unwarranted direction. Upon closer examination, it is questionable whether courts are employing the right framework, tools and considerations for advancing consumer law. We argue that courts employ problematic approaches that may actually erode consumer law, rather than strengthen it. By analysing recent country of origin decisions, we point to potential oversights and explain their unintended consequences.

Before we delve into the matter, an important clarification is necessary. One may argue that the cases addressed are only District Court decisions, and that such decisions have little precedential value. District Courts have a heavy workload and it is assumed that they do not create or develop law.<sup>5</sup> Thus, District Court decisions do not typically merit much scholarly attention. While this observation is important, it should not obscure the character of consumer law. Due to their nature, consumer law cases are predominantly brought before lower courts. Higher courts do dictate the development of law to be applied by the lower courts, however, in the absence of such precedent – as is often the case in the context of consumer law – the District Courts have an important role in developing consumer law. Moreover, District Courts do aspire to apply the law coherently and consistently.<sup>6</sup> This is particularly true with respect to the proportionality of fines and penalties applied to similar behaviours.

Against this background, we seek to advance a consistent and effective approach to deal with consumer law issues, which will facilitate the better development of the law. In particular, we discuss

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3 *Commerce Commission v Topline International Ltd* [2017] NZDC 9221. For a detailed discussion see Part II of this article. Maximum penalty amounts are detailed in s 40 of the Fair Trading Act 1986 [FTA].

4 An additional case from 2017 which illustrates courts' willingness to impose high fines in consumer law cases is *Commerce Commission v Reckitt Benckiser (NZ) Ltd* [2017] NZDC 1956.

5 It is generally the role of District Courts to hear evidence, determine the facts and resolve disputes.

6 As specifically noted in *Commerce Commission v Frozen Yoghurt Ltd* [2016] NZDC 19792 at [9]; and *Commerce Commission v Wild Nature NZ Ltd* DC Auckland CRI-2012-063-003511, 12 December 2014 at [4].

how recent cases allow the proprietary interest of goodwill to creep into the FTA. We opine that doing so may promote the FTA being a means for protecting traders' interests, rather than focusing on consumers' interests.

## ***II PROTECTING CONSUMER PROTECTION: WHAT'S GOODWILL GOT TO DO WITH IT?***

This Part starts by outlining recent country of origin cases. It focuses on how these decisions imported the concepts of reputation and goodwill into the FTA regime. This is followed, in Subpart B, by an examination of case law pertaining to s 9 of the FTA. It addresses judicial statements from the appellate courts regarding: (1) the absence of goodwill in the FTA and an unwillingness to go beyond the statutory wording; (2) the focus of the FTA on consumers and the public interest; and (3) judicial discretion in awarding damages under the FTA, and the relevance of the primary purpose of the Act and the party bringing the cause of action. Subpart C highlights the fact that s 10 of the FTA is arguably even more public-interest orientated than s 9. Finally, Subpart D discusses why one should be wary of subsuming the concepts of reputation and goodwill into the consumer law regime.

### ***A Setting the Scene***

We begin our analysis with *Topline*, where the Court addressed Topline's "NatureBee Potentiated Bee Pollen" product, which was labelled as being made in New Zealand.<sup>8</sup> In fact, the bee pollen was sourced from China, was turned into potentiated bee pollen in China and was encapsulated in China. After being imported into New Zealand, it was then bottled and labelled.<sup>9</sup> As part of this process, Topline used the well-known "New Zealand Made" label, with the red kiwi in a blue and red triangle.<sup>10</sup> It also promoted its product by emphasising the various advantages that New Zealand made bee pollen has.

The Commerce Commission brought the case under s 10 of the FTA. This section pertains to "conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods". Topline and its director pleaded guilty to all charges. In the decision on the penalties for the misleading conduct, the Court stated:<sup>11</sup>

The defendants need to be held accountable for their blatantly misleading and knowingly untruthful promotion of their product. Deterrence must be a principal sentencing factor and consequences need to be

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7 Alluding to Tina Turner *What's Love Got to Do with It* (1993).

8 *Topline*, above n 3.

9 The leading decision for determining where something is made, with respect to the FTA and misleading and deceptive conduct, is *Carter Holt Harvey Ltd v Cottonsoft Ltd* [2004] BCL 995 (CA); and the decision below *Carter Holt Harvey Ltd v Cottonsoft Ltd* (2004) 11 TCLR 161 (HC).

10 Trade Mark No 976133.

11 *Topline*, above n 3, at [26].

imposed to discourage commercially unethical behaviour. Denunciation is also required for the potential damage to the "MADE IN NEW ZEALAND" brand.

Furthermore, the Judge explained:<sup>12</sup>

This breach [of the FTA] has the potential to damage all other exporters using the "MADE IN NEW ZEALAND" label and also damage this country's image for its products sold overseas, resulting in increased scrutiny of New Zealand made products and a lack of consumer confidence in these products.

As reflected in these statements, the Court was willing to consider the potential damage to the "Made in New Zealand" brand, "the potential to damage all other exporters" using the label, and the damage to New Zealand products' image overseas.

*Topline* is not alone in this regard. For example, the 2013 case *Commerce Commission v Mi Woollies Ltd* also considered the damage to the New Zealand image and consequently, to the tourism industry.<sup>13</sup> This case dealt with sheepskin footwear labelled "UGG New Zealand" and "New Zealand Owned & Operated". In fact, the footwear was made in China from predominantly Australian sheepskin. The Court noted that:<sup>14</sup>

The New Zealand tourism industry has also been harmed by this conduct. Tourism New Zealand has invested heavily under the auspices of its "100% Pure" brand, and the activities of retailers who misrepresent that their products are New Zealand made have the potential to harm Tourism New Zealand's efforts to drive sustainable growth for this market.

The Court noted that harm or future harm to the tourist industry and the Tourism New Zealand "100% Pure" brand had not been demonstrated.<sup>15</sup> Nevertheless, the Court considered "potential for damage to the tourist trade" as an aggravating factor for sentencing.<sup>16</sup> Relatedly, in *R v Princess Wool Co Ltd*,<sup>17</sup> a case pertaining to the false labelling of duvets being 100 per cent alpaca wool or containing cashmere, the Court stated that:<sup>18</sup>

The direct impact on other businesses was significant and I accept that there is an overall detrimental impact on the country as a whole as the defendant's actions contribute to an impression that [may be]

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12 At [31].

13 *Commerce Commission v Mi Woollies* DC Christchurch CRI-2012-009-009069, 31 July 2013.

14 At [8]. See also *Commerce Commission v Chen* DC Auckland CRI-2012-004-019312, 28 March 2013 at [13]; and *Commerce Commission v Premium Alpaca* DC Rotorua CRI-2012-063-004546, 5 August 2013 at [16]; aff'd *Premium Alpaca v Commerce Commission* [2014] NZHC 1836.

15 *Mi Woollies*, above n 13, at [26].

16 At [31].

17 *R v Princess Wool Co Ltd* [2017] NZDC 12227.

18 At [14].

gained by persons overseas that they cannot necessarily rely on what they are told by people undertaking business in New Zealand.

Interestingly, this was despite the fact that the misconduct did not involve any country of origin issues. However, the kind of product was one that tourists tended to buy as a New Zealand souvenir. This misconduct, the Court believed, requires special deterrence.<sup>19</sup>

While the terms reputation and goodwill are related, and are often used and applied interchangeably (including by New Zealand courts), they are technically different.<sup>20</sup> A trader's reputation can be positive or negative, as it depends on the way consumers view the trader. In contrast, goodwill can only be positive, as it is an asset and proprietary in nature, measured by how much the market is willing to pay for it. The courts have long accepted that goodwill can be owned by a group of traders.<sup>21</sup>

Lord Macnaghten famously stated:<sup>22</sup>

What is goodwill? It is a thing very easy to describe, very difficult to define. *It is the benefit and advantage of a good name, reputation, and connection of business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has a power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements.* It differs in its composition in different trades and in different businesses in the same trade.

Reputation, of course, feeds into goodwill. However, goodwill is a broader concept, including determinants such as business size. To illustrate, the better a business' reputation, the greater the goodwill associated with its brand. At the same time, two businesses with similar reputations might have different levels of goodwill, because they differ in trading size. Strictly speaking, a business can

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19 At [17].

20 In contrast to New Zealand courts, English case law has held that reputation alone is not enough to bring a case of passing off. There must be established goodwill, meaning trade presence in the jurisdiction. Furthermore, while reputation can attach to individuals, goodwill can only attach to (and is inseparable from) businesses. See *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] UKSC 31 at [23] and [51]–[52]; *Star Industrial Co Ltd v Yap Kwee Kor* [1976] FSR 256 (PC) at 259; and *Bhayani v Taylor Bracewell LLP* [2016] EWHC 3360 (Ch) at [26]–[28].

21 See for example *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 (HL); and *Wineworths Group Ltd v Comite Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327 (CA).

22 *Commissioner of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 (HL) at 223–224 (emphasis added).

only have goodwill in a jurisdiction if it trades within it, though it might have some reputation in that jurisdiction.<sup>23</sup>

Though the cases discussed above did not use the word "goodwill", the judges were in essence referring to the "attractive force which brings in custom" to particular businesses that trade in New Zealand; that is, goodwill. Considering damage to goodwill is common and valid in deciding tort and property cases. However, *Topline, Mi Woollies* and *Princess Wool* were plainly consumer law cases brought by the Commerce Commission or the Crown. This, in turn, raises an interesting issue that the Court did not explicitly consider: should courts incorporate tort and property law concepts and principles into consumer protection law? More specifically, should goodwill be taken into account in sentencing decisions made under the FTA?

### ***B Section 9 of the Fair Trading Act***

The common law tort of passing off and s 9 of the FTA (and indeed torts and consumer law more broadly) have a shared history and continue to have overlapping scope. At their cores, passing off and ss 9–12 (misleading and deceptive conduct) and s 13 (unsubstantiated representations) of the FTA are about some kind of misrepresentation.<sup>24</sup> In passing off, this is a misrepresentation as to source<sup>25</sup> or association with a traditional group of manufacturers.<sup>26</sup> At the same time, s 9 of the FTA pertains to conduct that is (or is likely to be) misleading or deceptive. It is common to see the two argued simultaneously and similarly, and – when that is done – they typically either succeed or fail together.<sup>27</sup>

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23 At 235 per Lord Lindley, stating that goodwill "is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on". Notably, New Zealand courts have not taken such a strict approach: see *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395 (CA); *Cyclone Hardware Pty Ltd v Patience & Nicholson (NZ) Ltd* [2001] 3 NZLR 490 (CA); *Gallaher Ltd v International Brands Ltd* (1976) 1 NZIPR 43 (SC); *Esanda Ltd v Esanda Finance Ltd* [1984] 2 NZLR 748 (HC); and *Crusader Oil NL v Crusader Minerals New Zealand Ltd* (1984) 1 TCLR 211 (HC).

24 See for example *Levi Strauss & Co v Kimbyr Investments Ltd* [1994] 1 NZLR 332 (HC) at 381, stating that "[a]s with passing off, the essence of this cause of action [under s 9 of the FTA] is some misrepresentation by the defendant".

25 *Reckitt & Colman v Borden Inc* [1990] 13 RPC 341 (HL).

26 *Erven Warnink BV v J Townend & Sons (Hull) Ltd*, above n 21. Note that the test for passing off set out in this case differs from that set out in *Reckitt & Colman v Borden Inc*, above n 25. However, both require the essential elements: that the plaintiff had established reputation or goodwill; the defendant made a misrepresentation (in trade, to the public or to consumers); which caused (or will cause) damage to goodwill, or loss of sales. The New Zealand courts use both tests, sometimes mixing them, depending on the facts at hand.

27 See for example *Champagne*, above n 21, at 333–334 per Cooke P and at 344–345 per Gault J. This is, however, not always the case: see *Prudential Building & Investment Society of Canterbury v Prudential Assurance Co of NZ Ltd* [1988] 2 NZLR 653 (CA) [*Prudential v Prudential*] at 659 per Bisson J, where the Court explained the differences between the tort and s 9 of the FTA and found the latter to be more fitting. See also *ABB Ltd v New Zealand Insulators Ltd* (2006) 3 NZCCLR 645 (HC).

The fact that s 9 – unlike some other sections of the FTA – can only result in civil liability,<sup>28</sup> points to another important similarity.

Nonetheless, there are also important differences between passing off and the FTA. First and foremost, the FTA and passing off have different (albeit sometimes overlapping) purposes. In 2013, a "Purpose" section was added to the FTA. This confirmed the broad purposes of the Act, which include protecting consumer interests,<sup>29</sup> contributing to effective competition and promoting confidence in markets.<sup>30</sup> The FTA, thus, prohibits "unfair conduct and practices in relation to trade", "promotes fair conduct" and mandates "disclosure of consumer information".<sup>31</sup> Modern passing off, however, protects the goodwill or reputation associated with "get-up" or a group of traders, as a proprietary right.<sup>32</sup>

For a successful claim of passing off, goodwill or reputation needs to be proven as a matter of fact. In contrast, the FTA makes no allusion to goodwill or reputation, though it may on occasion also protect it. The "public interest" is what matters under the FTA.<sup>33</sup> Justice Fisher reiterated this distinction in *Tot Toys Ltd v Mitchell*, stating:<sup>34</sup>

It is enough for the plaintiff to point to misleading or deceptive conduct by the defendant – whether or not this has caused injury to the plaintiff. Indeed, it would not even seem necessary for the plaintiff to establish that there is market confusion between the defendant and some other existing competitor. To misrepresent that a painting was painted by Goldie would contravene the Act even though there is no current painter of Goldies. *The principal object of the Act is to protect the public, not to vindicate the rights of a competitor.*

Secondly, one can only bring an action for passing off if one is the victim of that tort. In contrast, "any person" can apply to the courts for civil law remedies for a breach of ss 9–12 and 13 of the FTA.

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28 See FTA, s 40(1).

29 Section 1A(1)(a) inserted, on 18 December 2013, by s 5 of the Fair Trading Amendment Act 2013.

30 Section 1A(1)(b)–(c).

31 Section 1A(2).

32 *Spalding v Gamage* (1915) 32 RPC 273 (HL); and *Star Industrial Co*, above n 20.

33 *Taylor Bros Ltd v Taylors Group Ltd* [1990] 1 NZLR 19 (CA) [*Taylor v Taylor*] at 25 per Cooke P.

34 *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325 at 368 per Fisher J (emphasis added).

This includes the Commerce Commission, consumers and competitors.<sup>35</sup> As noted above, criminal sanctions are not available for s 9, but are for ss 10–12 and 13.<sup>36</sup>

Lastly, contravention of ss 9–12 and 13 of the FTA does not require any kind of damage.<sup>37</sup> In contrast, for passing off, there needs to be damage. This can be in the form of lost sales via "diversion of trade",<sup>38</sup> or damage to the plaintiff's goodwill.<sup>39</sup> The Court of Appeal has specifically noted this difference with respect to s 9, adding that the "ordinary words of s 9 are to be applied to the particular facts and are not to be superseded by judicial exegesis".<sup>40</sup>

Of course, if the plaintiff can show goodwill or reputation, this could support his or her case for misleading or deceptive conduct.<sup>41</sup> Furthermore, just because one need not show damage to goodwill to bring an action under s 9 is not to say that such damage is not potentially relevant for assessing the penalty for breach of s 9. When the plaintiff is the owner of the goodwill, damage to goodwill might be relevant when assessing civil liability damages. Under s 43(3)(f) of the FTA, a person who suffers loss or damage as a result of unfair conduct per ss 9–12 and 13 can get tort-like damages.<sup>42</sup> It is at the court's discretion to order payment for damage or loss caused,<sup>43</sup> and whether the award will be for the

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35 FTA, ss 41 and 43. See also Debra Wilson "Consumer Information" in Kate Tokely (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 125 at 129 ("The remedies section, s 43, awards standing to 'any person' to seek a remedy"). See also *Taylor v Taylor*, above n 33, at 40, where Cooke P affirmed and discussed the fact that the FTA could be used by one trader against another. His Honour, furthermore, refused to add a "gloss" to s 9 by requiring some kind of impact on consumers.

36 FTA, 40(1).

37 *Tot Toys Ltd v Mitchell*, above n 34, at 367–368 per Fisher J.

38 See for example *Reckitt & Colman v Borden Inc*, above n 25.

39 See for example *Erven Warnink BV v J Townend & Sons (Hull) Ltd*, above n 21; *Spalding v Gamage*, above n 32; and *Champagne*, above n 21. Note, however, the more recent English case law that has held that reputation alone cannot form the basis for an action of passing off: above n 20.

40 *Champagne*, above n 21, at 333 per Cooke P (emphasis added). See also *Prudential v Prudential*, above n 27, at 658 per Bisson J; and *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385 (CA) at 388 per Cooke J.

41 *Tot Toys Ltd v Mitchell*, above n 34, at 367 per Fisher J.

42 In support of the damages awarded under FTA, s 43, being tort-like rather than contract-law like, see David W McLauchlan "Damages for Misrepresentation Under the Fair Trading Act: Expectation or Reliance?" (1999) 5 NZBLQ 133; and David McLauchlan "Damages for Misrepresentation Under the Fair Trading Act: The Aftermath of *Cox v Coxon*" (2002) 8 NZBLQ 14.

43 *Tot Toys Ltd v Mitchell*, above n 34, at 368 per Fisher J. On this discretion, see Jude Antony "*Heaven, Red Eagle*, and the Importance of Judicial Discretion in the Award of Damages under the Fair Trading Act" (2014) 20 NZBLQ 3.



full amount of damage or loss.<sup>44</sup> In comparison, if the plaintiff of a passing off action proves the cause of action, damages must be awarded to compensate for the entirety of the damage.

Under the FTA, the person who suffers the damage need not be the person who brings the application or be part of the proceedings for the court to grant such damages.<sup>45</sup> Interestingly, the Federal Court of Australia has awarded damages for harm to goodwill or reputation resulting from a breach of the Australian equivalent of s 9 of the FTA on several occasions.<sup>46</sup> However, each of these cases involved competitors.

In contrast, in *Topline*, *Mi Woollies* and *Princess Wool*, it was the Commerce Commission or the Crown that initiated litigation. The courts considered goodwill to assess the penalty, but not the alleged breach. This results in a strange discord between the punishment and the behaviour. It is also not the owners of the goodwill that receive compensation.

Furthermore, the Court of Appeal has noted that the differences between the action of passing off and s 9 of the FTA mean that the availability of remedies is consequently different.<sup>47</sup> Because the principal object of the FTA is to protect the consumer:<sup>48</sup>

In deciding whether a statutory remedy should be granted, the most important question is therefore whether the misleading or deceptive conduct is likely to have a sufficiently serious impact upon customers rather than trade competitors.

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44 See for example *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 399 per Cooke P.

45 FTA, s 43(2)(b).

46 Trade Practices Act 1974 (Cth), s 52; *Typing Centre of NSW Pty Ltd v Northern Business College Ltd* [1989] FCA 115 at [39]–[41]; *Raia Insurance Brokers Ltd v Fai General Insurance Co Ltd* [1993] FCA 92 at [64]–[66]; and *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* [1997] FCA 352.

Note that Ursula Cheer and John Burrows cite *Hay v Chalmers* (1991) 3 NZBLC 102,000 (HC) for the proposition that s 9 of the FTA can be used as an alternative to the tort of defamation (which protects reputation): see "Defamation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 839 at 969. In *Hay v Chalmers* the defendant was in debt and, in order to stall for time, told his suppliers and creditors that this was a result of his accountant (the plaintiff) having misappropriated \$9,000–\$12,000 from him. The plaintiff's reputation was harmed, causing him to lose business. The plaintiff brought five causes of action under defamation and one under s 9 of the FTA. Damages for the latter were only awarded for loss of business. *Hay v Chalmers* is, thus, not precedent for damages being awarded for harm to reputation or goodwill under the FTA.

47 *Prudential v Prudential*, above n 27, at 658–659 per Bisson J.

48 *Tot Toys Ltd v Mitchell*, above n 34, at 368 per Fisher J. At 371 his Honour stated "[t]he dominant consideration under this statute is the effect upon consumers."

The Supreme Court has specifically stated that, whether or not an order should be made under the FTA for the defendant to pay for any damage caused depends on a range of factors including:<sup>49</sup>

... whether there is a claimant alleging an injurious consequence already suffered, whether the claimant instead fears future loss for itself or others, or whether the claim is brought by the Commerce Commission or another party which is acting in the interests of those who may be affected by the defendant's conduct.

Overall, the appellate courts have clearly stated that the primary purpose of the FTA is the protection of consumers and the public interest. They have also refused to go beyond the statutory wording of the FTA, declining to introduce a requirement that there was goodwill or damage thereto. The appellate courts have stated that any statutory remedy needs to be determined relative to the Act's primary purpose of protecting consumers. The discretion to award damages is dependent on whether it is a competitor or the Commerce Commission that brings the case. As discussed further below, these arguments are stronger in relation to s 10 of the FTA.

### ***C Section 10 of the Fair Trading Act***

Section 10 of the FTA is arguably even more concerned with the public than s 9. Like s 9, s 10 makes no reference to reputation or goodwill. Nor does s 10 require that the conduct causes damage of any kind. However, while s 9 imposes only civil remedies, s 10 also results in criminal liability, suggesting that it exists to protect the public or is about a wrong against society. Further, s 10 specifically refers to "the public" as the subject of the misleading or deceptive behaviour. Taking these points together, it is clear that s 10 is aimed at protecting the public interest, making business reputation and goodwill even more irrelevant in comparison to s 9.

In *Topline*, however, the Court was concerned with the damage to the "Made in New Zealand" brand and consequently to other traders' reputations.<sup>50</sup> Analogously, in *Mi Woollies* the Court took into account the harm to the "100% Pure" brand and tourism in New Zealand. This is despite the fact that the Commerce Commission brought the cases, the courts were considering criminal penalties, not civil liability, and no specific traders were involved or claimed for personal damages.<sup>51</sup> Indeed, in *Commerce Commission v Budge Collection Ltd*, another alpaca case,<sup>52</sup> the Court noted that "[i]t is

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49 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26].

50 Section 16 of the FTA protects registered trademarks from forgery and false use that is misleading or deceptive. This section, however, was not at issue. We thank Susan Corbett for pointing out this oft-forgotten section.

51 In *Princess Wool*, above n 17, a competing company submitted a victim impact report showing financial harm due to unfair competition caused by the defendants' behaviour, but was not compensated for such.

52 The Commerce Commission appears to be targeting misleading behaviour with respect to alpaca products in the tourist market: see Commerce Commission "Summary of Penalties in Alpaca Related Prosecutions" (23 May 2017) <[www.comcom.govt.nz](http://www.comcom.govt.nz)>. Most, but not all of these, were country of origin cases. Otherwise, the conduct at issue was mislabelling merino or cashmere content.

too difficult to identify or quantify any reputation damage to New Zealand as a tourist destination for that to affect sentencing."<sup>53</sup>

One could perhaps argue that, rather than being about other traders, the protection of the goodwill in the New Zealand brand can be equated with protecting a public good. Harm to that public good might warrant criminal penalties. This is not, however, how the courts have framed the matter.

At least insofar as the appropriate penalty is concerned, it would seem that decisions such as *Topline* and *Mi Woollies* added a "gloss" to the FTA,<sup>54</sup> reflecting "judicial exegesis". In other words, the decisions seem to blur important and fundamental distinctions, without explicitly discussing the matter.

## **D The Issues**

The common law and the interpretation of statutory law influencing one another is not something new.<sup>55</sup> Nor is the challenge of drawing a clear line between consumer protection and business protection.<sup>56</sup> Yet, there is cause for concern in our context from various perspectives.

Methodologically, the tort of passing off protects goodwill in the trade context as property. It thus affords protection to the owner of the goodwill. In contrast, the primary purpose of the FTA is consumer protection.<sup>57</sup> Even when competitors bring FTA claims, they do not argue that they have

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53 *Commerce Commission v Budge Collection Ltd* [2016] NZDC 15542 at [29].

54 The Court of Appeal has specifically refused to add "glosses" to the FTA: see *Taylor v Taylor*, above n 33, at 40 per Cooke P; *Trust Bank Auckland Ltd v ASB Bank Ltd*, above n 40, at 398 per Cooke P; and *Levi Strauss & Co v Kimbyr Investments Ltd*, above n 24, at 382.

55 See also *Taylor v Taylor*, above n 33, at 40 per Cooke P.

56 See for example *Taylor v Taylor*, above n 33; and *Levi Strauss & Co v Kimbyr Investments Ltd*, above n 24.

57 The Court of Appeal has been clear that consumer protection is the primary purpose of the FTA. See for example *Taylor v Taylor*, above n 33, at 39 per Cooke P, stating that the FTA "is primarily consumer-protection legislation". See also *Levi Strauss & Co v Kimbyr Investments Ltd*, above n 24, at 382, stating: "The courts have emphasised the importance of the Act in protecting the consumer"; and *Commerce Commission v Anwer* [2016] NZDC 25266 at [5] per Field J, stating: "The Fair Trading Act is designed to facilitate consumer welfare and effective competition. It is consumer focused and gives force to the notion that traders, who conduct business fairly and lawfully, should not be disadvantaged by those who do not."

Indeed, disturbed by the lack of an explicit reference to consumers in s 9, in *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 (CA) at 323–324, Thomas J (in a strong dissent) stated that: "Where there is nothing adverse or unfair to the relevant group of consumers, the Courts should hesitate before intervening under s 9 to protect one trader from another. Rival traders may bring proceedings under s 9, but that does not mean that a rival trader should be able to obtain the benefit of a statutory provision designed for consumers and thereby to stifle legitimate competition."

been personally aggrieved to prove the cause of action.<sup>58</sup> Irrespective of the plaintiff's identity, the FTA operates to protect consumers from misleading or deceptive conduct in trade. We should, hence, be rather cautious with respect to the incorporation of goodwill or damage principles in the FTA context. This is true when considering contravention of the Act (regardless of the identity of the plaintiff) as well as the fine or penalty for such (if the plaintiff is not the owner of the goodwill). This is especially alarming when done implicitly, with no straightforward and proper discussion.

However, our concerns go beyond analytical and methodological clarity and precision. More generally, the incorporation of goodwill and other tort or property principles into consumer law may dilute consumer law and thereby weaken it. The FTA is undoubtedly central to New Zealand's consumer law, and its importance can hardly be overstated.<sup>59</sup> By targeting unfair and misleading conduct and providing for consumer information, the Act seeks to level the consumer-trader "playing field". Much of the Act's significance lies in the fact that it aspires to regulate consumer markets *ex ante*. The Act's importance is further illustrated by the Commerce Commission's 2016–2017 report.<sup>60</sup> According to this report, the Commerce Commission received 7,270 consumer complaints for the year from 1 July 2016 to 30 June 2017. Of these, 6,798 (approximately 94 per cent) were concerned with the FTA.

Introducing tort or property concepts into consumer law cases may undermine the strength and cohesiveness of consumer law. It might be interpreted as signalling that consumer law is a weak body of law. That is, that consumer law needs the aid of other fields of law in order to fulfil its main objective – protecting consumers. This, we believe, is not the case.

Accordingly, the Court in *Topline, Mi Woollies* and *Princess Wool* need not have focused on the potential damage to the New Zealand brand. Nor should the court be concerned with the potential to damage all other exporters trading on this brand. Instead, courts should explain why and how these kinds of potential damage harm consumers. These cases were, after all, brought by the Commerce Commission and the Crown for the public interest.

Indeed, under the FTA's framework there are various consumer protection explanations that the courts could use and connect in deciding similar cases. First, such misleading behaviour reduces

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58 Specifically affected persons can get damages: FTA, s 43(3)(f). A person who is found to have engaged in misleading or deceptive conduct per ss 9–12 can be ordered to pay a person who suffers damage as a result of this conduct.

59 Some might argue that the FTA does not have the primary function of consumer protection because this was not stipulated in the Act's long title when it was first enacted: see for example Andrea Bather and Jagdeep Singh Ladhar "Fair Trading" in Richard J Varey (ed) *New Zealand Law for Marketers* (2d ed, LexisNexis, Wellington, 2014) 291 at 291. When a purpose section was added in 2013, consumer protection was listed as one purpose among three (albeit listed first): FTA, s 1A. However, see above n 58.

60 For the full consumer issue report see Commerce Commission "Consumer issues report" (13 September 2017) <[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

consumers' ability to make informed decisions, which are based on the information that traders provide. This was acknowledged in *Topline* and numerous other decisions.<sup>61</sup> Second, this misleading behaviour undermines consumers' trust and confidence, which is a protected value in and of itself. The courts acknowledge this problem,<sup>62</sup> yet it could receive more attention and weight.

This is further illuminated by reference to an analogous, but non-country of origin, decision, *Commerce Commission v Anwer*.<sup>63</sup> In this case, the defendant made false statements that all the used cars at the dealership were AA appraised. This was a "complete departure from the truth".<sup>64</sup> In sentencing, Judge Field gave particular weight to the fact that "AA is a highly respected organisation".<sup>65</sup> His Honour further noted that "[t]he importance of the untrue statement of course cannot be underestimated",<sup>66</sup> and that the defendants' behaviour involved a "significant degree of recklessness".<sup>67</sup> Of particular note, Judge Field did not discuss AA's reputation or the reputation of other traders who correctly state that their cars are "AA appraised".

In addition to these two rationales, there are further justifications that courts may use in such cases. A third explanation is that false, misleading or deceptive statements can result in increased transaction costs. The undermining of consumers' trust may result in consumers having to undertake additional precautions before participating in this (and similar) markets. Fourth, this may result in a more rigorously regulated market. Put another way, it may lead to higher or stricter standards employed in relation to traders' statements. While this may reduce the risk of consumers being deceived, it also imposes higher costs on vendors. These costs, at least in part, are likely to be passed on to consumers. Fifth, if a market is characterised by a lack of confidence, a high degree of regulation and increased transaction costs, potential traders might be deterred from participating in this market. This decreases competition. Competitive markets result in better products and lower prices, and are thus believed to serve the "long-term benefit of consumers".<sup>68</sup>

Overall, it is possible for the courts to provide a coherent set of consumer protection rationales to make it clear that decisions like *Topline*, *Mi Woollies* and *Princess Wool* are centred on consumer

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61 *Topline*, above n 3, at [27]; and, for example, *Wild Nature*, above n 6, at [3].

62 See for example *Budge Collection*, above n 53, at [20] and [29].

63 *Commerce Commission v Anwer*, above n 57.

64 At [7].

65 At [6].

66 At [6].

67 At [7].

68 Commerce Act 1986, s 1A inserted, on 26 May 2001, by s 4 of the Commerce Amendment Act 2001. See also *Tru Tone v Festival Records Retailing Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358 per Richardson J; and Lindsay Hampton and Paul G Scott *Guide to Competition Law* (LexisNexis, Wellington, 2013) at 2–6.

protection. It would also have denoted that consumer law sufficiently equips courts with the tools and principles for properly analysing such cases. This renders the use of other, non-consumer law principles redundant and perhaps inappropriate.

### III CONCLUDING THOUGHTS

Policymakers seek to balance protecting consumers' interests on one hand and refraining from excessively intervening and regulating markets on the other. The purposes of the FTA reflect this challenge. It encompasses the protection of consumers' interest while also aspiring to promote competition, trust and confidence.

Decisions such as *Topline*, *Mi Woollies* and *Princess Wool* may portend things to come. On the one hand, there is a general trend to undervalue and under-develop consumer law. On the other hand, there is a general move toward propertisation; that is, to view anything with commercial value as constituting property.<sup>69</sup> These decisions allow the proprietary interest of goodwill to creep into the FTA when there is no property owner involved. Doing so, even if only at the stage of determining the penalty to be imposed, may push the FTA further towards being a means for protecting traders' interests.

The Commerce Commission's protection and enforcement of consumer law is, and should stay, predominantly about consumer protection. Courts should not alter the role of a piece of legislation created mainly to protect consumers. In *Topline*, *Mi Woollies* and *Princess Wool* the Court had no compelling reason to introduce principles associated with goodwill. We are not saying that the misuse of brands and reputations is irrelevant with respect to consumer protection. Rather, the Court could have based its decisions on the desirability that consumers be able to rely on signs used in trade. As detailed above, there are sufficient consumer law values and rationales that could have served such a judicial approach. Addressing the matter from the perspective of communicative agency,<sup>70</sup> rather than

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69 This is in a range of contexts. See for example *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) (regarding fishing quotas); *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at 54 per McGechan J ("contractual rights are intangible property"); *Dixon v R* [2015] NZSC 147 (holding that digital files were property for the purposes of s 249 of the Crimes Act 1961); Emily Hudson "Phillips v Mulcaire [2012]: A Property Paradox?" in Simon Douglas and others (eds) *Landmark Cases in Property Law* (Hart Publishing, Oxford, 2015) 75 at 94–95; Neil Netanel *Copyright's Paradox* (Oxford University Press, Oxford, 2008) at 56; Muireann Quigley "Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials" (2014) 77 MLR 677; Lionel Bently "From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property" in Graeme B Dinwoodie and Mark D Janis (eds) *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar Publishers, Cheltenham, 2008) 3; and Christoph B Graber and JC Lai "Intellectual Property: Law in Context" in *International Encyclopedia of the Social & Behavioral Sciences* (2nd ed, Elsevier, New York, 2015) 266 at 267–268. Compare Justin Hughes "Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson" (2006) 79 S Cal Rev 993.

70 On communicative agency, brands and trademarks, see Alain Pottage "No (more) Logo: Plain Packaging and Communicative Agency" (2013) 47 UC Davis L Rev 515.

property, would have placed the focus on consumers as the subjects of consumer law, especially vis-à-vis the FTA.

Consumer law focuses on prohibiting unfair behaviour and promoting fair conduct and practices. Easier said than done. As illustrated in this article, there is often more to consumer law cases than initially meets the eye. As markets become more complex and multi-dimensional, the need to develop consumer law and bring (and keep) it up-to-speed becomes increasingly important.

However challenging, consumer law does not need the aid of other fields of law in order to protect consumers. It already provides courts with the necessary framework and tools to achieve this essential goal. We hope that this article will contribute to a consistent, holistic and careful use of these tools.

**APPENDIX: "NEW ZEALAND" COUNTRY OF ORIGIN CASES  
UNDER THE FAIR TRADING ACT**

Year	Case Name	Conduct and Outcome
1988	<i>Farmers Trading Co Ltd v Commerce Commission</i> <sup>71</sup>	<p>Goods labelled "Made in NZ" when they were made in China.</p> <ul style="list-style-type: none"> <li>• Charged under FTA, s13(j) – convicted.</li> <li>• Penalty: \$26,000.</li> <li>• Conviction upheld on appeal to the High Court.</li> </ul>
1990	<i>Commerce Commission v Parris (New Zealand) Souvenirs Ltd</i> <sup>72</sup>	<p>Defendant placed "New Zealand" sticker over "made in Taiwan" on 100 "sheep noise" souvenirs.</p> <ul style="list-style-type: none"> <li>• Charged under FTA, ss10(1) and s13(j).</li> <li>• Held: Dismissed.</li> </ul>
1990	<i>Marcol Manufacturers Ltd v Commerce Commission</i> <sup>73</sup>	<p>Leather jackets made in Korea represented as being made in Christchurch. Upon import they had a "Made in Korea" label, which was removed and replaced with "Marcol Christchurch New Zealand" or "Marcol Christchurch".</p> <ul style="list-style-type: none"> <li>• Charged under FTA, s13(j) – convicted.</li> <li>• Conviction upheld on appeal to the High Court.</li> </ul>
2004	<i>Commerce Commission v Brownlie Brothers Ltd</i> <sup>74</sup>	<p>Misleading consumers into believing that "Simply Squeezed" and "Supreme Orange Juice" only comprised squeezed New Zealand and/or Australian orange juice, when a proportion of the juice was concentrate imported from Brazil.</p> <ul style="list-style-type: none"> <li>• Two charges under FTA, s 10 – convicted.</li> <li>• Penalty: \$35,000.</li> </ul>

<sup>71</sup> *Farmers Trading Co Ltd v Commerce Commission* (1988) 3 TCLR 370 (HC).

<sup>72</sup> *Commerce Commission v Parris (New Zealand) Souvenirs Ltd* (1990) 3 TCLR 431 (DC).

<sup>73</sup> *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC).

<sup>74</sup> *Commerce Commission v Brownlie Brothers Ltd* [2005] DCR 219.



2007	<i>Commerce Commission v Knight Business Furniture Ltd</i> <sup>75</sup>	Office chairs built in New Zealand using components manufactured in Taiwan, China and Italy; components built to defendant's specifications. Chairs were advertised as "NZ Made" with a brochure including a silver fern. Held to be "NZ built" but not "NZ made". <ul style="list-style-type: none"> <li>• Four charges under FTA, s 10 – dismissed.</li> <li>• Four charges under FTA, s 13(j) – convicted.</li> <li>• Penalty: \$5000.</li> </ul>
2010	<i>Commerce Commission v Prokiwi International Ltd</i> <sup>76</sup>	Packaging soap and skincare products with New Zealand symbols and "New Zealand" in a manner similar to the "Buy New Zealand Made" campaign. Goods were made from Chinese or Asian ingredients and imported into New Zealand. <ul style="list-style-type: none"> <li>• 17 charges under FTA, s 10 – convicted.</li> <li>• Penalty: \$48,000.</li> </ul>
2012	<i>Commerce Commission v Mi Woollies Ltd</i> <sup>77</sup>	Footwear labelled "UGG New Zealand" and "New Zealand Owned & Operated", when they were made in China and made predominantly from Australian sheepskin. This lasted from February 2011 to September 2011. <ul style="list-style-type: none"> <li>• Five charges under FTA, s 10 – convicted.</li> <li>• Five charges under FTA, s 13(j) – convicted.</li> <li>• Penalty: \$63,000.</li> </ul>
2012	<i>Commerce Commission v Wild Nature NZ Ltd</i> <sup>78</sup>	Sold "New Zealand made" alpaca rugs that were from Peru, and duvets labelled as containing exclusively or predominantly alpaca or merino wool fibre, when the alpaca fibres were only a small part of the duvet mix and the merino duvets had no merino. <ul style="list-style-type: none"> <li>• Company – 37 charges under the FTA – convicted.</li> <li>• Director – 30 charges under the FTA – convicted.</li> <li>• Company penalty: \$243,444.</li> <li>• Director penalty: \$25,000.</li> <li>• Total penalty: \$268,444</li> </ul>

75 *Commerce Commission v Knight Business Furniture Ltd* DC New Plymouth CRN 06043500833, 14 September 2007 and 21 November 2007.

76 *Commerce Commission v Prokiwi International Ltd* DC Christchurch CRI-2010-009-009397, 9 August 2010.

77 *Mi Woollies*, above n 13.

78 *Wild Nature*, above n 6.

<p>2013</p>	<p><i>Commerce Commission v Chen</i><sup>79</sup></p>	<p>Top Sky Holdings labelled alpaca rugs as being made in New Zealand when in fact they were imported from Peru. Top Sky Holdings and Kiwi Wool labelled duvets as being predominantly containing alpaca fibres, when they did not, or containing merino wool when they did not. This occurred over a 20-month period and the defendants made millions of dollars.</p> <ul style="list-style-type: none"> <li>• Top Sky Holdings: 10 charges under the FTA, s 10; and two charges under the FTA, s 13(j) – convicted.</li> <li>• Haidong Chen (Director of Top Sky Holdings): 10 charges under the FTA, s 10 – convicted.</li> <li>• Kiwi Wool Ltd: 18 charges under the FTA, s 13(j) – convicted.</li> <li>• Jinming Chen (Director of Kiwi Wool): 18 charges under the FTA, s 13(j) – convicted.</li> <li>• Haidong Chen (Shareholder of Kiwi Wool): 18 charges under the FTA, s 13(j) – convicted.</li> <li>• Penalties:</li> </ul> <table border="1" data-bbox="804 819 1342 1064"> <tr> <td>Top Sky Holdings</td> <td>\$140,000</td> </tr> <tr> <td>Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)</td> <td>\$24,500</td> </tr> <tr> <td>Kiwi Wool Ltd</td> <td>\$ 84,000</td> </tr> <tr> <td>Jinming Chen (Director of Kiwi Wool)</td> <td>\$10,500</td> </tr> </table> <ul style="list-style-type: none"> <li>• Total penalty: \$259,000</li> </ul>	Top Sky Holdings	\$140,000	Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)	\$24,500	Kiwi Wool Ltd	\$ 84,000	Jinming Chen (Director of Kiwi Wool)	\$10,500
Top Sky Holdings	\$140,000									
Haidong Chen (Director of Top Sky Holdings and Shareholder of Kiwi Wool)	\$24,500									
Kiwi Wool Ltd	\$ 84,000									
Jinming Chen (Director of Kiwi Wool)	\$10,500									
<p>2014</p>	<p><i>Premium Alpaca Ltd v Commerce Commission</i><sup>80</sup></p>	<p>Alpaca rugs labelled and sold as being made in New Zealand when in fact they were imported from Peru. False claims by two of the companies were also made about duvets being 100 per cent alpaca or merino wool or southdown, when they were not. This occurred over a 20-month period and the defendants made millions of dollars.</p> <ul style="list-style-type: none"> <li>• 190 representative charges made under FTA, ss 10 and 13(j) – convicted.</li> <li>• Penalties:</li> </ul>								

79 *Chen*, above n 14.

80 *Premium Alpaca*, above n 14.

		<table border="1"> <tr> <td>Hyeon Company Ltd (importer)</td> <td>\$105,000</td> </tr> <tr> <td>Duvet 2000 Ltd (retailer)</td> <td>\$200,000</td> </tr> <tr> <td>Han Young Chae (Director of Hyeon and Duvet 2000)</td> <td>\$ 24,500</td> </tr> <tr> <td>JM Wool Ltd (retailer)</td> <td>\$182,000</td> </tr> <tr> <td>Jong Myung Lee (Director of JM Wool Ltd)</td> <td>\$ 21,000</td> </tr> <tr> <td>Premium Alpaca New Zealand Ltd (importer)</td> <td>\$ 56,000</td> </tr> <tr> <td>Yun Duk Jung (Director of Premium Alpaca New Zealand Ltd)</td> <td>\$ 6,700</td> </tr> <tr> <td>Bo Sun Yoo (Director of Premium Alpaca New Zealand Ltd)</td> <td>\$ 6,700</td> </tr> </table> <ul style="list-style-type: none"> <li>• Total penalty: \$601,900.</li> <li>• Conviction upheld on appeal to the High Court.</li> </ul>	Hyeon Company Ltd (importer)	\$105,000	Duvet 2000 Ltd (retailer)	\$200,000	Han Young Chae (Director of Hyeon and Duvet 2000)	\$ 24,500	JM Wool Ltd (retailer)	\$182,000	Jong Myung Lee (Director of JM Wool Ltd)	\$ 21,000	Premium Alpaca New Zealand Ltd (importer)	\$ 56,000	Yun Duk Jung (Director of Premium Alpaca New Zealand Ltd)	\$ 6,700	Bo Sun Yoo (Director of Premium Alpaca New Zealand Ltd)	\$ 6,700
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Bo Sun Yoo (Director of Premium Alpaca New Zealand Ltd)	\$ 6,700																	
2014	<i>Commerce Commission v BGV International Ltd</i> <sup>81</sup>	<p>Defendant sold alpaca rugs from Peru as New Zealand made (between January 2010 and August 2011).</p> <ul style="list-style-type: none"> <li>• 10 charges under FTA, s 10 – convicted.</li> <li>• Penalty: \$22,000.</li> </ul>																
2016	<i>Commerce Commission v Hou</i> <sup>82</sup>	<p>Packaged, labelled and sold duvets as "alpaca" and "made in New Zealand" when there was either no or little alpaca content and the duvets were made in China. This lasted from January 2014 to September 2014.</p> <ul style="list-style-type: none"> <li>• Company: 4 + 1 + 2 = six charges under FTA, s 13(a); and three charges under FTA, s13(j) (six under old limit and four under new limit) – convicted.</li> <li>• Company Penalty: \$63,000 + \$28,000 = \$91,000.</li> <li>• Director: one charge under FTA, s 13(a); and three charges under FTA s13(j) (two under old limit and two under new limit) – convicted.</li> <li>• Director penalty: \$5600+\$12,600 = \$18,200.</li> <li>• Total penalty: \$109,200.</li> </ul>																

81 *Commerce Commission v BGV International Ltd* DC Auckland CRI-2012-004-017226, 23 October 2014.

82 *Commerce Commission v Hou* [2016] NZDC 9291.

2016	<i>Commerce Commission v Budge Collection Ltd</i> <sup>83</sup>	<p>Imported duvets from China and repacked them as "made in New Zealand" and "alpaca" when neither was true. Around five and a half month's offending pre-increase and nine and a half months' offending post-increase.</p> <ul style="list-style-type: none"> <li>• Company: four charges under FTA, s 13(a) – convicted.</li> <li>• Company penalty: \$63,000 + \$28,000 = \$57,000.</li> <li>• Director: four charges under FTA, s 13(a) – convicted.</li> <li>• Director penalty: \$5,600 + \$12,600 = \$14,250.</li> <li>• Total penalty: \$71,250.</li> </ul>
2016	<i>Commerce Commission v New Zealand Nutritionals (2004) Ltd</i> <sup>84</sup>	<p>Goats' milk tablets (from January 2008 to September 2013) and goats' milk powder (from August 2012 to October 2012) were labelled as "New Zealand made". The powder was also labelled "100% NZ made &amp; proud of it". The goat's milk powder was sourced from Spain and the Netherlands.</p> <ul style="list-style-type: none"> <li>• Charged under FTA, ss 9, 10 and 13(j).</li> <li>• Declaration of contravention.</li> </ul>
2017	<i>Commerce Commission v Topline International Ltd</i> <sup>85</sup>	<p>"NatureBee Potentiated Bee Pollen" product was labelled as being made in New Zealand. The bee pollen was sourced from China, was turned into potentiated bee pollen in China and was encapsulated in China. After being imported into New Zealand, it was bottled and labelled. As part of this process, Topline used the well-known "New Zealand Made" label, with the red kiwi in a blue and red triangle.</p> <ul style="list-style-type: none"> <li>• Company: 22 charges under FTA, s 10 [12 under old limit and 10 under new limit] – convicted.</li> <li>• Company penalty: \$105,000 + \$300,000 = \$405,000.</li> <li>• Director: 22 charges under FTA, s 10 [12 under old limit and 10 under new limit] – convicted.</li> <li>• Director penalty: \$41,500 + \$80,00 = \$121,500.</li> <li>• Total penalty: \$526,500.</li> </ul>

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83 *Budge Collection*, above n 53.

84 *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832.

85 *Topline*, above n 3.