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The Effect of Disclaimers on Liability for Misleading or Deceptive Conduct under the Fair
Trading Act 1986.

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Abstract

This paper examines how a disclaimer may affect liability for misleading or deceptive conduct under the Fair Trading Act 1986. While New Zealand courts have generally held that contracting out of liability under the Fair Trading Act 1986 through the use of disclaimers was prohibited, a series of cases has suggested the presence of a disclaimer may indirectly allow a party to avoid liability. This paper explores the background and purpose of the Fair Trading Act 1986 and the relevant sections. The paper then summarises approaches taken by New Zealand courts in giving effect to disclaimers, before suggesting the correct approach in light of the amendments made by the Fair Trading Amendment Act 2013.

I Introduction

The Fair Trading Act 1986 (FTA) is one of the most important consumer protection statutes in New Zealand.¹

The FTA was intended to complement the Commerce Act 1986, as part of a series of statutory developments designed to protect consumer rights.² The idea behind this legislative framework was that consumers are best served in a fair, competitive market where there is adequate prohibition of misleading conduct.³

This paper explores the current New Zealand position regarding the effect of a disclaimer on liability under the FTA. In June 2014, the FTA was amended to include ss 5C and 5D. Contracting out of the FTA is prohibited under s 5C, but a limited exception is provided under s 5D.⁴ Cases prior to the enactment of ss 5C and 5D generally held that contracting out of the FTA was prohibited on public policy grounds. However, a series of New Zealand cases has suggested the use of disclaimers could avoid liability under the FTA by breaking the causal connection between the conduct and loss or affecting whether the conduct was in fact misleading or deceptive.⁵

As of 2018, there have been no cases that have thoroughly considered the effect of a disclaimer following the 2014 amendments. Does s 5C render disclaimers ineffective, or do disclaimers still have relevance to the assessment of liability under the FTA?

The legal background, including the drafting of the FTA and its key purposes, will be outlined first followed by an analysis of liability for misleading or deceptive conduct. The paper then considers the courts' interpretations of disclaimers in relation to the FTA before the 2014 amendments. The final paragraphs consider what is the correct way to approach the relevance of a disclaimer at each stage of the inquiry to assess a claim for damages for loss suffered by reason of misleading or deceptive conduct, and therefore, what impact s 5C has on the law in this area.

II Background and purpose of the Fair Trading Act 1986

A Brief legislative history of the Fair Trading Act 1986

The FTA came into force on 1 March 1987, replacing and consolidating earlier laws relating to trade conduct, consumer information and consumer protection.⁶

¹ Kate Tokely *Consumer Law in New Zealand* (2nd ed, 2014, LexisNexis, Wellington, New Zealand) at 9.

² *Consumer Law in New Zealand*, above n 1, at 8.

³ *Consumer Law in New Zealand*, above n 1, at 128.

⁴ Fair Trading Amendment Act, ss 5C and 5D.

⁵ *ANZ Bank v Unka* [2014] NZHC 1320.

⁶ The Fair Trading Act: A General Guide" (May 2008) Commerce Commission New Zealand <<https://comcom.govt.nz/dmsdocument/1706>>.

Before the FTA, New Zealand consumer law existed in a “hotchpotch” of provisions that had developed in a haphazard fashion throughout the first half of the twentieth century.⁷

This line of consumer legislation began with the Sale of Goods Act 1908, which was the first statute in New Zealand to offer some (limited) consumer protection against faulty or poor-quality goods.⁸ Though the Act was a significant improvement to consumer protection in New Zealand it had several significant limitations. Most notably, parties were free to contract out of the Act.⁹

During the 1960s and 1970s Parliament sought to intervene in the relatively free consumer market, enacting a series of consumer protection statutes, reflecting the protectionist ideals of the government at the time.¹⁰

Parliament continued to enact legislation in favour of consumer rights in the 1980s, despite the government’s general move away from interventionism.¹¹ This included the Fair Trading Act in 1986. Through these Acts Parliament expressed the need for clear, enforceable standards of trading conduct and easily accessible remedies for consumers, determining that these were lacking under the previous statutory regime.¹²

The Fair Trading Bill 1985 was introduced on 7 November 1985 by the Minister of Consumer Affairs Hon. Margaret Shields.¹³ The Bill was modelled on the Australian Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010 (Cth)) with the overall purpose of harmonising consumer protection laws between Australia and New Zealand, with many of the provisions taken verbatim from the Australian law.¹⁴

The Bill was pitched as a long overdue consolidation and revision of consumer law regarding trading conduct and product safety.¹⁵

Political opponents of the Bill contended that it would do little for consumers beyond what the existing legislation already offered. They claimed it would act against the (just introduced) Commerce Bill and that Bill’s intention to promote competition, by impeding trade and production.¹⁶ The overall criticism was of the Bill’s effect of overriding *caveat emptor*- the age-old principle “let the buyer beware”.

Following submissions to the Commerce and Marketing Committee, a few amendments were made though the main components of the Fair Trading Bill were retained. The most

⁷ (1 July 1986) 472 NZPD 2499.

⁸ *Consumer Law in New Zealand*, above n 1, at 8.

⁹ *Consumer Law in New Zealand*, above n 1, at 8.

¹⁰ *Consumer Law in New Zealand*, above n 1.

¹¹ *Consumer Law in New Zealand*, above n 1, at 8.

¹² (1 July 1986) 472 NZPD 2499.

¹³ (17 November 1985) 467 NZPD 7884.

¹⁴ Warren Pengilly “The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of the Australian Experience (1987) 2 NZLJ 59 at 59.

¹⁵ (17 November 1985) 467 NZPD 7884.

¹⁶ (17 November 1985) 467 NZPD 7886.

significant amendment was to include damages as a possible order for remedies rather than as the only remedy.¹⁷

The Bill passed its third reading forty-three to thirty and was given the royal assent on 17 December 1986.¹⁸

B The purpose of the Fair Trading Act 1986 as consumer and business legislation

According to the FTA itself, its purpose is to contribute to a trading environment where consumer interests are protected, businesses compete effectively, and consumers and businesses can participate confidently.¹⁹

More specifically, the purpose of the FTA is to prohibit unfair conduct in trade, provide for the disclosure of consumer information relating to the supply of goods and services, and promote product safety.²⁰

The FTA's underlying purpose has always been to promote fairness in trade.²¹ As consumer protection legislation, the FTA takes a somewhat paternalistic approach, seeking to 'level the playing field' between consumers and traders under the assumption that consumers are inherently at a disadvantage in a bargain.²² The rationale is that traders have more knowledge about their product or service than the average consumer, and therefore adequate disclosure of information is required for the consumer to make an informed decision to purchase.²³

The FTA also aims to promote fairness by providing remedies for consumers who have been taken advantage of by traders. Prior to the FTA, a consumer who was misled by false advertising or unfair conduct could not easily enforce their rights or obtain a refund. The best-case scenario was that the trader in question would be fined under criminal provisions.²⁴

However, fairness under the FTA is not concerned with policing fair exchanges of value.²⁵ Consumers still have a personal responsibility to take care in relation to obtaining a good bargain regarding prices when purchasing goods or services.²⁶

Although the FTA is primarily consumer protection legislation, it was also meant to protect ethical traders from unfair competition caused by misconduct of unscrupulous traders.²⁷ To

¹⁷ (1 July 1986) 472 NZPD 2499.

¹⁸ (17 November 1985) 467 NZPD 6097.

¹⁹ Fair Trading Act 1986, S1A (inserted in 2013).

²⁰ Fair Trading Act 1986, S1A(2).

²¹ *Consumer Law in New Zealand*, above n 1, at 128.

²² *Consumer Law in New Zealand*, above n 1, at 128.

²³ *Consumer Law in New Zealand*, above n 1, at 129.

²⁴ (31 July 1986) 473 NZPD 3283. For example, contravention of s 7(1) or (3) of the Layby Sales Act 1971 is an offence and may attract liability of a fine not exceeding \$200.

²⁵ *Consumer Law in New Zealand*, above n 1, at 129.

²⁶ (31 July 1986) 473 NZPD 3283.

²⁷ (17 November 1985) 467 NZPD 7885.

this end a rival trader who has suffered no loss can take an action to enforce a breach of the FTA as s 43 allows for orders to be made “on the application of any person.”²⁸

In this way, the FTA is also considered business legislation that offers protection to traders from dishonest behaviour by other traders.²⁹ Since its enactment, this area of law has been frequently litigated by traders, against traders.

III Liability for misleading or deceptive conduct

A Section 9 of the Fair Trading Act 1986

Section 9 of the FTA states that “No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”³⁰ It is a general prohibition on misleading conduct. The terms “misleading” and “deceptive” are not defined in the Act and are to be interpreted using the ordinary meaning.³¹

The wording of s 9 gives it a wider scope than both the common law of misrepresentation and s 52 of the Trade Practices Act (its Australian counterpart from which it was modelled).³² Omissions to act fall within the scope of s 9, while misrepresentation under the common law requires a positive statement³³ and Australian law excludes inadvertent omissions.³⁴

Section 9 also does not require falsity to amount to “misleading” conduct. The provision protects against statements that are literally correct but leave a deceiving impression.³⁵

During the early days of the FTA the test applied in New Zealand for a breach of s 9 was an objective one, but not based on reasonableness.³⁶ This test was set out in the Australian case *Taco Co of Australia Inc v Taco Bell Pty Ltd*³⁷ which determined liability under the Australian equivalent to s 9. It considered whether conduct would be misleading or deceptive to “the astute and the gullible” within a relevant section of the public.³⁸ Catching conduct that would mislead “gullible” people set an uncomfortably low threshold for traders to be found liable. However, the rationale was to give effect to the paternalistic consumer protection purpose of the legislation, particularly since advertisements often exploited the gullibility of the public.³⁹

²⁸ Fair Trading Act, s 43.

²⁹ Consumer Law Reform Bill 2011 (287-1) (select committee report) at 10.

³⁰ Fair Trading Act, s 9.

³¹ *Taylor Bros v Taylor Group Ltd* [1988] 2 NZLR 1 at 39.

³² Elizabeth K Paton “A Comparison Between Section 9 of the FTA 1986 and the Common Law” (1988) 6 AukULawRw 14 at 15.

³³ *Peek v Gurney* (1873) LR 6 HL 377 (HL).

³⁴ “A Comparison Between Section 9 of the FTA 1986 and the Common Law”, above n 33, at 16.

³⁵ *Homsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1951] 1 KB 805.

³⁶ “A Comparison Between Section 9 of the FTA 1986 and the Common Law”, above n 33, at 19.

³⁷ *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

³⁸ *Taco Co of Australia Inc v Taco Bell Pty Ltd*, above n 38, at 202.

³⁹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Ptd Ltd* (1982) ATPR para 40-307;43,783.

New Zealand courts eventually rejected the “gullible” threshold and modified the test requiring the plaintiff to show a reasonable level of common-sense.⁴⁰ This is still the case today and is in line with the FTA’s original position which expects consumers have a degree of personal responsibility to take care.

There have been two appellate court approaches in New Zealand to determine whether there is a breach of s 9. The *AMP Finance NZ Ltd v Heaven* (Court of Appeal) test required the conduct to be capable of misleading, have in fact misled the plaintiffs, and asking whether in all circumstances it was reasonable for the plaintiffs to be misled.⁴¹ Though this test is generally now considered to be inconsistent with the FTA, the Supreme Court has left open the possibility that it could still apply in certain circumstances,⁴² and Courts have applied the *Heaven* test on occasion.⁴³

Currently, the leading test for a breach of s 9 is set out by the Supreme Court in *Red Eagle v Ellis*: “Whether a reasonable person in the claimants’ situation- that is, with the characteristics known to the defendant or of which the defendant ought to have been aware- would likely have been misled or deceived.”⁴⁴

The *Red Eagle* test is more consistent with the wording of s 9 as it does not require the plaintiffs to have been misled in fact to determine liability. Instead this is a factor relevant to determining the court order under s 43.

B Section 43 of the Fair Trading Act 1986

Section 43 of the FTA allows a court to make orders to remedy a breach of any provisions of Part 1 through 4 of the Act (this includes s 9). Section 43(3) provides a wide range of remedies which are available as stand-alone remedies or can be awarded in combination. The purpose of s 43 is to provide a just result for any circumstance.⁴⁵

A person must have suffered loss or damage *by* the conduct of another for an order to be made under s 43.⁴⁶

In *Red Eagle* the Court went on to discuss what is required before the Court may make an order under s 43. There must be a “common-sense concept” of causation, the claimant must actually be misled or deceived by the defendant’s conduct, and the defendant’s conduct in breach of s 9 had to be the operating cause of the loss or damage.⁴⁷ It is a subjective inquiry as to whether the plaintiff relied on the misleading conduct, though this is usually inferred

⁴⁰ *AMP Finance v Heaven* (1997) 8 TCLR 144 (CA); see also: *Unilever NZ Ltd v Cerebos Greggs Ltd* (1994) 6 TCLR 187.

⁴¹ *AMP Finance v Heaven* (1997) 8 TCLR 144 (CA) at 157.

⁴² *Red Eagle Corporation Ltd v Ellis* [2010] 2 NZLR 492 at [26].

⁴³ *Consumer Law in New Zealand*, above n 1, at 140; *Pegasus Town v Draper* [2011] NZCA 140, and *Narayan v Arranmore Developments* [2011] NZCA 681, *MacInyre and Williamson Partnership v Fonterra Co-Operative Group Ltd* [2015] NZHC 3012.

⁴⁴ *Red Eagle Corporation Ltd*, above n 43, at [26].

⁴⁵ *Smith & Ors v Tuskers (Yaldhurst Road) Ltd & Ors* (2002) 10 TCLR 417 (HC).

⁴⁶ Fair Trading Act 1986, s 43.

⁴⁷ *Red Eagle Corporation Ltd*, above n 43, at [29].

through evidence.⁴⁸ The reasonability of this reliance is not assessed in determining whether an order may be made under s 43 (i.e. the jurisdictional issue) but is relevant to the calculation of damages.⁴⁹

Damages can be awarded under s 43(3)(f) of the FTA and are discretionary only.⁵⁰ The decision was made to delete the right to statutory damages clause during the drafting of the bill and to include damages under a list of possible orders.

IV The Courts' interpretation of disclaimers before June 2014

A Types of disclaimers

Disclaimers, otherwise known as 'exclusion clauses', are terms inserted into a contract by one party to exclude or limit their liability under that contract.⁵¹

There are various types of disclaimers. Disclaimers may deny any promise was made, deny responsibility for a promise, or exclude all or part of liability for a breach of a promise.⁵²

"No-reliance" clauses and "entire agreement" clauses are common examples of disclaimer clauses. Often these categories overlap.

No-reliance clauses are common in contracts for the provision of services. They might stipulate that any representation made by the party providing the service does not amount to a warranty, or that the person to whom the service is provided has not relied on any representation made by the other party outside of the contract.

"Entire agreement" clauses assert that the contract constitutes the entire agreement between the parties and no other terms or agreements will have any effect.⁵³ They are commonly used in sales, supply and franchise agreements.⁵⁴ Sometimes an entire agreement clause may focus on excluding liability for pre-contractual representations and will also be a no-reliance clause.

In addition to no reliance and entire agreement clauses, a contract may contain a more general disclaimer of liability clause which might state that one party not be liable for the loss of the other party in any circumstances. If the court is asked to determine what type of loss such a clause will extend to (or does not extend to), it will apply the usual rules of contractual

⁴⁸ *Red Eagle Corporation Ltd*, above n 43, at [29].

⁴⁹ *WaikatoLink Ltd v Comvita New Zealand Ltd* (2010) 12 TCLR 808 (HC) at [168]. This is in contrast to the *AMP v Heaven* test which considers reasonability of reliance as a factor in determining a breach of s 9.

⁵⁰ Fair Trading Act 1986, s 43(3)(f).

⁵¹ John Burrows, Jeremy Finn and Matthew Barber *Burrows, Finn and Todd on Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at ch 7.1.

⁵² *Burrows, Finn and Todd*, above n 52, at ch 7.1.

⁵³ Illja Vickovich *New Zealand Forms and Precedents* (online looseleaf ed, LexisNexis) at [9A-22].

⁵⁴ Matthew Barber "Entire Agreement (And Acknowledgments) Clauses, Misrepresentation and the Fair Trading Act (2011) 17 NZBLQ 393 at 393.

interpretation.⁵⁵ Such clauses will generally be construed narrowly.⁵⁶ They will not be interpreted as excluding liability in negligence unless the wording is clear.⁵⁷

Exclusion clauses are more likely to be used in an exploitative manner in cases where the consumer has little bargaining power and is unable to negotiate terms with the business in trade.⁵⁸ Statutory intervention has been aimed at addressing this issue, particularly provisions recently inserted in the FTA⁵⁹ and more generally, the Consumer Guarantees Act 1993.⁶⁰

B New Zealand Courts' interpretation of disclaimers

Several New Zealand cases considered the effect of a disclaimer in the context of a s 9 claim prior to the 2014 amendments. These cases have considered the effect of disclaimers in a haphazard fashion, being decided on a case-by-case basis. In analysing how each case considered a disclaimer's effect, it is helpful to assess the courts' decisions in terms of the three stages of assessing a claim for damages for a breach of s 9. These stages are: whether there has been a breach of s 9 under the *Red Eagle* test; if so, whether there was a causal connection between conduct and loss to allow an order for a remedy under s 43, and if so, whether the court should exercise its discretion to award damages under s 43.

*Smythe v Bayleys Real Estate Ltd*⁶¹ involved a "veritable forest of such clauses". An information sheet relating to a property the claimants were looking to purchase included a disclaimer that accepted no responsibility for the accuracy of any of the information contained. The disclaimer appeared to be a no-reliance clause, which advised that interested persons must make their own inquiries and could not rely on the information sheet. The conditions of sale also included several exemptions of liability that required the claimant to acknowledge that their purchase was solely upon reliance of their own judgment, and the vendor did not warrant the accuracy of any of the representations made by the vendor, real estate agent, or auctioneer.⁶² Thomas J considered the disclaimers in relation to the second stage of the analysis (in other words, when assessing if the misleading conduct caused the plaintiff's loss), ultimately finding that all of the disclaimer clauses were ineffective, stating:

"The requirements of the [Fair Trading] Act are mandatory. In enacting the legislation, Parliament sought to protect the consumer from unfair trading and it would be inconsistent with that objective to permit a person engaged in trade to exempt him or herself from liability under the Act."

⁵⁵ *Burrows, Finn and Todd*, above n 52, at ch 7.2.1. A disclaimer will have a contractual effect when a reasonable person would have known it was intended to have a contractual effect, and timely notice of the disclaimer had been given. However, a disclaimer will not operate if its effect has been misrepresented.

⁵⁶ *Burrows, Finn and Todd*, above n 52, at ch 7.3.1.

⁵⁷ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717H per Lord Diplock.

⁵⁸ *Burrows, Finn and Todd*, above n 52, at ch 7.4.4.

⁵⁹ Fair Trading Act 1986, s 26A

⁶⁰ Consumer Guarantees Amendment Act 2013 inserted ss 5A, 7A, 7B, 23A and 39A into the Consumer Guarantees Act 1993.

⁶¹ *Smythe v Bayleys* (1993) 5 TLCR 454.

⁶² *Smythe v Bayleys*, above n 62, at 472.

The disclaimers as a defence were not raised in respect of finding liability under s 9 therefore it was not considered under the first stage of the test.

Despite the disclaimers, Thomas J awarded the full measure of damages to the claimants and held that the claimants had not been contributorily negligent for accepting the representations made by the defendant as correct.⁶³

*Body Corporate 202254 v Taylor*⁶⁴ involved the sale of apartment units which suffered from leaky building syndrome. The claimants argued that the promotional material prepared by the defendant (which contained statements regarding the high standard of workmanship) were misleading and deceptive in breach of s 9.⁶⁵ There was a disclaimer that stated that the information contained within the brochure did not constitute representations inducing the purchaser to enter the agreement.⁶⁶ In the High Court, Keane J declined to strike out the s 9 claim.⁶⁷

On appeal, the Court of Appeal first accepted that it was clear that s 9 cannot be contracted out of. As the case was an appeal against a strike-out application, the Court only had to decide whether there was a tenable claim for s 9 liability. The Court found that the representations made by the promotional brochure were “not necessarily undone by a broadly expressed disclaimer” and held that the claim under the FTA was therefore not susceptible to strike-out. The Court did not consider the disclaimers in detail regarding s 9 liability stating that this issue must be determined at trial.⁶⁸

In *TFAC Ltd v David*⁶⁹ the claimant alleged misleading or deceptive conduct by the defendant in selling a franchise authorising the claimants to sell sub-franchises. A disclaimer on a specimen business plan required those using the information to “carry out their own due diligence” and independently verify all figures and content. It further specified that the defendant made no representations or guarantees as to the individual performance or income potential of the franchisees. Baragwanath J considered the disclaimer in light of other representations made by the defendant such as claiming there was high demand for sub-franchises and every franchise business operator would receive support from a business coach. A disclosure document also required independent legal, accounting and business advice to be obtained before signing. The claimants sought independent legal and accounting advice but did not elect to obtain independent business advice. The defendant had successful operations in three Australian states and therefore the representations made leading the claimants to believe they could sell a sub-franchise a month were seemingly backed by the

⁶³ *Smythe v Bayleys* (1993), above n 62, at 478 and 479.

⁶⁴ *Body Corporate 202254 v Taylor* [2008] NZCA 317.

⁶⁵ *Body Corporate 202254 v Taylor*, above n 65, at [8].

⁶⁶ *Body Corporate 202254 v Taylor*, above n 65, at [60].

⁶⁷ *Body Corporate No 202254 v ABC Ors* HC Auckland CIV 2003-404-3116, 13 April 2005 and 29 August 2006) at [27].

⁶⁸ *Body Corporate 202254 v Taylor*, above n 65, at [91].

⁶⁹ *TFAC Ltd v David* [2008] NZCCLR 38.

experience and knowledge of the defendant. Baragwanath J found that no solicitor, accountant or any business advisor could reasonably be expected to challenge those representations made by the defendant. Therefore, the judge was satisfied that there was a breach of s 9 considering the overall effect of the defendant's conduct, though he did not discuss whether the decision turned on the issue of causation or reasonableness of reliance.⁷⁰ There was also no contributory negligence on the part of the defendant and full damages were awarded.

On appeal however, the Court of Appeal took a different view. Though the Court accepted the law in *Smythe* that it is not possible to contract out of the FTA for consumer protection purposes, it stated that in the context of commercial transactions involving substantially independently advised parties negotiating from positions of equality, any resulting contract was expected to reflect the parties' desired allocation of risk. Therefore, where the parties are both businesses there is no justification for why the parties cannot contract out of the FTA.

The Court of Appeal also stated that Baragwanath J did not properly consider the effect of the independent advice requirement and acknowledgment clause and found that it was unreasonable for the claimants to have relied on the assurances of the defendant rather than an independent business advisor. Due to the Court's finding that there was no misleading conduct, it did not have to consider the disclaimer. However, the Court addressed the disclaimers regardless, finding that they would have made it unreasonable for the claimants to have relied on the representations made.⁷¹ In other words, the disclaimers would have been relevant at the second stage of the FTA inquiry and have broken the chain of causation.

In *PAE (New Zealand) Ltd v Brosnahan*⁷² the claimant had purchased shares in two related companies based on the financial information of the parent company. However, the information was highly inaccurate, and the claimant brought proceedings under s 9- for exaggerated claims about the profitability of the companies and misrepresenting the value of the companies. The agreement contained an entire agreement clause specifying that no other representations outside of the agreement (prior or otherwise) were to be relied on. In the High Court, Mallon J held that the claimant had opportunities to make further inquiry and failed to do so, and therefore held the entire agreement clause to be effective. Mallon J found that either the defendant's conduct was not misleading as it was precluded by the entire agreement clause, or that the clause broke the causal connection between the conduct and the claimant's loss. Her Honour held that the cause of action failed on either basis.

The Court of Appeal upheld the findings in the High Court. The Court acknowledged the law was settled that a party cannot contract out of s 9 citing *Smythe*. However, it saw that policy factor as a starting point and not an absolute rule in commercial transactions that involve independently advised parties in equal bargaining positions citing *David v TFAC*.⁷³ The Court said the context of the case distinguishes it from other 'disclaimer cases' as it involved

⁷⁰ *TFAC Ltd v David* [2008] NZCCLR 38 at [99].

⁷¹ In the case, the Court doubted that there would have been a causal connection to justify relief under s 43 but this was not properly analysed as it found no misleading or deceptive conduct (there was no breach of s 9).

⁷² *PAE (New Zealand) Ltd v Brosnahan* HC Wellington CIV-2005-484-843, 10 September 2008.

⁷³ *PAE v Brosnahan* [2009] NZCA 611 at [43].

two parties who were both in trade. The Court referred to Elias J's statement in *Des Forges v Wright*⁷⁴ that s 9 should not be treated as a "general warranty" in business-to-business transactions.

In summary, prior to the 2014 amendments, courts in New Zealand have approached disclaimers in relation to s 9 in a somewhat eclectic manner. *Smythe* has often been cited as authority for the proposition that it is not possible to contract out of s 9. In that case, the disclaimer was assessed in regard to the second stage of the analysis pertaining to the causation between the misleading conduct and the loss. It was not assessed in the inquiry as to whether there was misleading or deceptive conduct as this argument was not pleaded in the case. In later cases however, courts have assessed disclaimers at the first and second stage of the analysis, confirming that disclaimers are also relevant to the determination of misleading or deceptive conduct.

PAE and *David v TFAC* both involved situations where both parties to the contract were businesses. Where the parties are both in trade the consumer protection purpose of the prohibition on contracting out of s 9 is no longer relevant. This is reflected in s 5D of the FTA as will be discussed later. However, in *PAE* in the trial court, the judge did not consider the business-to-business transaction as a material consideration. The judge considered the disclaimer at the first and second stages of the analysis, finding that the claimant's case failed on either basis. This is contrary to the law in *Smythe* which prohibits disclaimers from having the effect of contracting out of s 9. The Court of Appeal in *PAE* upheld the decision in the High Court but for a different reason, acknowledging the law in *Smythe* and distinguishing the situation in *PAE*. The author believes this is the correct application of the law, however the Court of Appeal was not clear in the judgment that the High Court's reasoning was erroneous. The approach taken in *PAE* must therefore be confined to cases where both parties are in trade.

V *The Fair Trading Amendment Act 2013*

A *Background*

In April 2011 the Consumer Law Reform Bill 2011 (the Bill) was introduced. It was an omnibus Bill seeking to amend various consumer laws including the FTA and the CGA.⁷⁵ The Bill aimed to achieve alignment with Australian consumer law and sought to modernise consumer law in New Zealand as part of the Government's Regulation Review programme.⁷⁶ At the time of its introduction, the three main consumer law statutes (the Fair Trading Act

⁷⁴ *Des Forges v Wright* HC Auckland HC73/95, 7 March 1996. *Des Forges* did not involve a disclaimer, but the effect of s 9 in a situation where both parties were in trade was discussed.

⁷⁵ John McSoriley "Consumer Law Reform Bill 2011" (10 May 2011) New Zealand Parliament <<https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/49PLLawBD18571/consumer-law-reform-bill-2011-bills-digest-no-1857>>.

⁷⁶ "Consumer Law Reform Bill 2011", above n 76.

1986, the Consumers Guarantees Act 1993 and the Weights and Measures Act 1987) had not been updated in over 20 years.⁷⁷

The Bill was split into six separate bills before its third reading.⁷⁸ One of these bills was the Fair Trading Amendment Act 2013 (FTAA). All six were given the Royal Assent on 17 December 2013 and the FTAA came into force in June 2014.

B Section 5C

Section 8 of the FTAA inserts s 5C into the FTA.⁷⁹ Section 5C legislates a general prohibition on contracting out of the FTA⁸⁰:

5C No contracting out: general rule

- (1) The provisions of this Act have effect despite anything to the contrary in any agreement.
- (2) A provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable.

The sweeping language in s 5C(1) indicates that it is intended to be a wide catch-all provision that explicitly prohibits provisions purporting to indirectly circumvent the FTA. However, the use of the word “unenforceable” in s 5C(2) may be interpreted to mean that the terms of a disclaimer are only prohibited from being enforced, as opposed to rendering disclaimers completely ineffective.

This section was not considered one of the key changes to the FTA. During the Select Committee stage no submissions opposed s 5C.⁸¹ The section was seen as an overdue codification of what was already the accepted position in New Zealand.

However, it is unclear whether this refers to the orthodox law in *Smythe* which prohibits giving disclaimers any effect, or to the recent developments in cases such as *Body Corporate 90315 v Redican Allwood Ltd*⁸² (discussed below) where disclaimers have been considered during the inquiry to determine liability under the FTA. These points will be discussed later in detail.

C Section 5D: Exceptions to s 5C

Section 5D is the more controversial addition to the FTA which was also inserted by s 8 of the FTAA. Section 5D provides a limited exception to the s 5C prohibition where both parties

⁷⁷ (9 February 2012) 677 NZPD 283.

⁷⁸ “Schedule of Divided Bills” (1 August 2014) New Zealand Parliament <<https://www.parliament.nz/en/pb/bills-and-laws/schedule-of-divided-bills/document/50HOOOCDividedBills1/schedule-of-divided-bills-50th-parliament>>.

⁷⁹ Fair Trading Amendment Act 2013, s 8.

⁸⁰ Fair Trading Act 1986, s 5C.

⁸¹ Consumer Law Reform Bill 2011 (287-1), above n 30, at 3, 4 and 5.

⁸² *Body Corporate 90315 v Redican Allwood Ltd* [2014] NZHC 1212.

are in trade.⁸³ It appears to be a codification of the obiter statements made in *Des Forges* and *PAE* regarding the ability to contract out in business-to-business transactions.

The section specifically allows the use of entire agreement clauses and no-reliance clauses which may directly or indirectly circumvent the FTA provisions that prohibit misleading or deceptive conduct.⁸⁴ However several strict conditions must be satisfied to utilise this exception, as set out in s 5D(3):⁸⁵

- (a) the agreement is in writing; and
- (b) the goods, services, or interest in land are both supplied and acquired in trade; and
- (c) all parties to the agreement—
 - (i) are in trade; and
 - (ii) agree to contract out of section 9, 12A, 13, or 14(1); and
- (d) it is fair and reasonable that the parties are bound by the provision in the agreement.

What is ‘fair and reasonable’ as per s 5D(3)(d) is initially determined by the parties. However, one party’s view can be challenged by taking the matter to court. In this case, the court must take into account all circumstances of the agreement.⁸⁶

Section 5D allows for greater freedom of contract between parties in trade but that freedom is circumscribed. The intention of its drafting was to codify the existing law, and submissions suggesting loosening the requirements for s 5D were rejected.⁸⁷

There were many criticisms of s 5D. The New Zealand Law Society was divided in its view of the section, with some accepting that s 5D merely codifies the existing law and others viewing it as a license for businesses to breach the FTA without remedy.⁸⁸ The official’s response clarified that s 5D was not intended to change the law regarding business-to-business transactions affirming that the statements made in *PAE* and *Des Forges* were correct law.⁸⁹

Submissions against s 5D generally took the view that the prohibition on misleading and deceptive conduct should never be allowed to be contracted out of.⁹⁰ Many focused on the potentially negative effect this section would have on franchisees.

VI *The effect of s 5C*

A *How the disclaimer affects a claim for damages for a breach of s 9*

⁸³ Fair Trading Act 1986, s 5D.

⁸⁴ Section 5D(2).

⁸⁵ Section 5D(3).

⁸⁶ Section 5D(4).

⁸⁷ Consumer Law Reform Bill 2011 (287-1), above n 30, at 10 and 11.

⁸⁸ Consumer Law Reform Bill 2011 (287-1), above n 30, at 7.

⁸⁹ Consumer Law Reform Bill 2011 (287-1), above n 30, at 7.

⁹⁰ Consumer Law Reform Bill 2011 (287-1), above n 30, at 7.

As discussed earlier, a Court must perform three stages of analysis when determining whether a person may claim damages for loss suffered by reason of misleading or deceptive conduct under s 9. The relevance of a disclaimer must be considered at each stage. Those stages are:

- First Stage: whether there was misleading or deceptive conduct under s 9;
- Second Stage: whether there was causation between the conduct and the loss; and
- Third Stage: whether damages should be awarded under s 43.

1 Was there misleading or deceptive conduct under s 9?

Firstly, the Court must determine whether the conduct was misleading or deceptive. The inquiry asks whether a reasonable person in the claimant's situation would likely have been misled or deceived.⁹¹ If so, a breach of s 9 is established.

The New Zealand courts have generally been consistent in finding that disclaimers are relevant to this first stage. In *Taylor*, the Court of Appeal held, “an appropriately worded disclaimer may be material to the nature of the alleged misleading and deceptive conduct”,⁹² refusing to strike out a claim under s 9 where a disclaimer was involved stating, “[w]hether the key representations were misleading and deceptive...must be determined at trial.”⁹³

In *Redican*,⁹⁴ Kós J recognised that a disclaimer clause may affect statutory liability under “either or both of the *Red Eagle* steps” and expressly rejected the submission that disclaimer clauses should only be considered under the second question (causation).⁹⁵ This is also the accepted view in Australia.⁹⁶

However, in *Fonterra v MacIntyre*⁹⁷ the Court of Appeal upheld the decision of Muir J in the High Court to reject submissions that an entire agreement clause was relevant to the question of a breach of s 9.⁹⁸ Muir J cited *PAE*, however in *PAE* in both the High Court and Court of Appeal the disclaimers were clearly relevant to the question of s 9 liability suggesting Muir J erred in his judgment.⁹⁹ While the Court of Appeal in *Fonterra* upheld Muir J's judgment that the disclaimer was not relevant at the first stage, the Court stated this was appropriate because on the facts the parties had specifically left issues of reliance and relief for later determination. Therefore, while the disclaimer was held not to be relevant to the first stage in *Fonterra*, the decision must be confined to the facts of the case.

⁹¹ *Red Eagle Corporation Ltd v Ellis* [2010] 2 NZLR 492 at [28].

⁹² *Body Corporate 202254 v Taylor*, above n 65, at [61].

⁹³ *Body Corporate 202254 v Taylor*, above n 65, at [91].

⁹⁴ *Body Corporate 90315 v Redican Allwood Ltd* [2014] NZHC 1212.

⁹⁵ *Body Corporate 90315 v Redican Allwood Ltd*, above n 95, at [69].

⁹⁶ *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059.

⁹⁷ *Fonterra Co-operative Group Ltd v MacIntyre and Williamson Partnership* [2016] NZCA 538.

⁹⁸ *Fonterra Co-operative Group Ltd v MacIntyre and Williamson Partnership* [2016] NZCA 538 at [149] and [180]; *MacIntyre and Williamson Partnership v Fonterra Co-Operative Group Ltd* [2015] NZHC 3012 at [165].

⁹⁹ *PAE v Brosnahan*, above n 74, at [46]: “the parties were agreeing, in unequivocal terms at PAE's instigation, that what the directors had said and done before the agreement no longer mattered. Effectively they drew down the curtain of liability, excluding from it all preceding conduct.”

If a disclaimer is relevant to this stage of the inquiry then it appears to contradict the law in *Smythe* that the FTA cannot be contracted out of as it allows a party to directly avoid breaching s 9, or at least minimise its chances of breaching s 9.

In the cases where the courts held that a disclaimer could have an impact on whether conduct was misleading, the courts considered that it was possible for the nature and presence of the disclaimer to be such that it would deprive the alleged conduct of a misleading quality to the mind of a reasonable person. In *Taylor* the court accepted that a disclaimer could be material to the nature of the misleading conduct citing *Butcher v Lachlan*.¹⁰⁰ In *Butcher* the nature of the parties, transaction and disclaimer were all held to be relevant to whether the disclaimer could deprive the conduct of a misleading quality. The inquiry was ultimately whether the claimant, given the nature of the transaction and disclaimer, would have reasonably been misled.

Effectively, the use of a disclaimer may allow a party to avoid liability under s 9 if a court finds that a reasonable person would not rely on information when an express disclaimer stipulates that the information cannot be relied on. Given that s 5C was not intended to be a fundamental change to the legislative regime and merely a codification of the existing law, the resulting effect must be that s 5C will have little impact on the current law regarding the first stage inquiry. Disclaimers will still be able to assist a defendant in a claim of breach of s 9.

This is arguably incompatible with s 5C if the section is intended to absolutely prohibit any form of contracting out (including indirectly). However, s 5C could merely intend for disclaimers to be directly “unenforceable”, as is the wording used in s 5C(2).¹⁰¹ This could be interpreted to mean that a disclaimer could still be considered in relation to determining whether conduct was misleading, or whether it could break the requisite causal connection, so long as the terms of the disclaimer were not actually enforced. If this is the correct interpretation, then this is consistent with law prior to 2014 and the intention of s 5C to merely be a codification of the existing law.

The term “unenforceable” is an intermediate position for contracts or contractual terms which has been created through statutory intervention. A contract may be valid yet “unenforceable” by an action at law unless certain technical requirements have been satisfied.¹⁰² In the context of s 5C(2) this suggests that Parliament did not intend for disclaimers to be void as they deliberately chose not to use that term, though the issue of interpretation of s 5C would unlikely be resolved by a straight analysis of the wording. Even if the term “void” had been used, courts may still interpret s 5C(2) to mean the terms of the disclaimer are void, but the mere presence of the disclaimer could still affect liability under s 9.

In short, the weight of legal authority suggests that a disclaimer of any sort will be relevant to the issue of whether conduct was misleading. The reference point is the reasonable person in the claimant’s situation.

¹⁰⁰ *Butcher v Lachlan Elder Realty Pty Limited* [2004] HCA 60.

¹⁰¹ Fair Trading Act 1986, s 5C(2).

¹⁰² *Burrows, Finn and Todd*, above n 52, at ch 9.1.

2 *Was there causation between the conduct and the loss?*

The second stage of the inquiry is determining causation. This involves a “common-sense concept of causation” and requires that the claimant was actually misled or deceived by the relevant conduct.

“An exclusion clause will affect liability for misleading or deceptive conduct only if it deprives the conduct of its misleading or deceptive quality, or breaks the causal connection between the conduct and loss.”¹⁰³ This statement of law from the Australian Full Federal Court in *Kewside Pty Ltd v Warman International Ltd*¹⁰⁴ has been widely cited by New Zealand courts. New Zealand courts have generally been consistent with their approach to disclaimers regarding the second stage of the test; most cases have held that disclaimers are relevant to the inquiry of causation. If the plaintiff did not in fact rely in the defendant’s misleading conduct because of the disclaimer then the causal connection will be broken.

The Court of Appeal in *Taylor* held that the disclaimer would need to be considered in relation to whether the representations were causative of the losses suffered.¹⁰⁵ In *PAE*, an entire agreement clause was held to have broken the necessary chain of causation, though this case is to be treated with caution as an authority as it involved two parties both in trade and of equal bargaining position. In *David v TFAC*, it was held that the presence of a disclaimer stipulating that the claimant must perform their own due diligence would make it unreasonable to rely on the representation.

In *Redican*, a clause disclaiming liability for negligence or errors was found to have broken the required causal connection. In this case, the disclaimer was brought to the claimant’s immediate attention and precluded the claimant from asserting reliance, therefore precluding causation. Kós J held that disclaimers are “less effective” under the FTA than tort or contract due to its consumer protection purpose.¹⁰⁶ His Honour explained that under contract law a supplier may “simply” contract out of liability using a disclaimer, however under the FTA a disclaimer will generally be unable to displace liability except where the disclaimer breaks the causal connection between conduct and loss.¹⁰⁷ This appears to be an express dilution of the law in *Smythe* which held that it is not possible to contract out of the FTA.

Following this line of cases, the law has developed such that a disclaimer can in fact break the chain of causation. Courts may find that if the claimant was aware of a disclaimer it would preclude their ability to assert reliance. The rationale is that a claimant could not *actually* be misled or deceived by information when they have simultaneously acknowledged, for example, a disclaimer that does not guarantee its accuracy.

¹⁰³ *Kewside Pty Ltd v Warman International Ltd*, above n 97, at 53,222.

¹⁰⁴ *Kewside Pty Ltd v Warman International Ltd*, above n 97.

¹⁰⁵ *Body Corporate 202254 v Taylor*, above n 65, at [91].

¹⁰⁶ *Body Corporate 90315 v Redican Allwood Ltd*, above n 95, at [69].

¹⁰⁷ *Body Corporate 90315 v Redican Allwood Ltd*, above n 95, at [69].

If s 5C is not intended to alter the existing law and only prohibits the literal enforceability of a disclaimer then it is consistent with this development of the law away from the principle in *Smythe*.

It is suggested, as discussed below, that the development of the law in this way undermines s 5C if the section is intended to render disclaimers completely ineffective. This is because the courts' approach allows a disclaimer to, in effect, still be a useful device for retailers as it leaves open the possibility for them to argue that the disclaimer has broken the chain of causation, and therefore ultimately avoid liability for a breach of s 9.

3 *Should damages be awarded under s 43?*

The third stage of the inquiry pertains to the quantum of damages awarded. If causation can be established, then the Court must decide whether or not to exercise its discretion to award damages under s 43, and the amount of damages. The proper exercise of that power is a “matter of doing justice to the parties in the circumstances of the particular case and in term of the policy of the Act.”¹⁰⁸ This may mean that only a partial award will be made, or in some cases, no order for payment at all.¹⁰⁹

In the majority of the cases involving disclaimers and s 9, courts have considered disclaimers at the third stage. In *Leigh v MacEnnogy Trust Ltd*¹¹⁰ and *Fonterra Co-operative Group Ltd v MacIntyre and Williamson Partnership*¹¹¹, entire agreement clauses were held to be relevant to the assessment of remedy under s 43 but in both cases there was no discussion as to how a disclaimer would affect quantum of damages.

In *Phillips v King Pie*,¹¹² the disclaimer was also considered at the third stage of the inquiry. The court found that the claimants' attitudes and interpretations towards the disclaimers were reasonable given the circumstances, and they had acted in a commercially responsible fashion, therefore damages were not reduced.¹¹³ Similarly, in *Cornfields v Gourmet Burger*,¹¹⁴ the court considered the disclaimer at the third stage and found that it did not warrant a deduction of damages as the disclaimer had been “overwhelmed by oral assurances”.¹¹⁵

An award made under s 43 is purely at the court's discretion¹¹⁶ and the courts have said that s 43 should not be interpreted restrictively.¹¹⁷ Therefore it is consistent with the purpose of s 43 for courts to consider all factors, including the use of disclaimers when determining quantum

¹⁰⁸ *Goldsbro v Walker* [1993] 1 NZLR 394 at 404.

¹⁰⁹ *Red Eagle Corporation Ltd v Ellis*, above n 42, at [30].

¹¹⁰ *Leigh v MacEnnogy Trust Ltd* (2010) 12 TCLR 790.

¹¹¹ *Fonterra Co-operative Group Ltd v MacIntyre and Williamson Partnership* [2016] NZCA 538.

¹¹² *Phillips v King Pie NZ Ltd* HC Auckland CP165/98, 17 September 1999.

¹¹³ *Phillips v King Pie*, above n 113, at 37.

¹¹⁴ *Cornfields Ltd v Gourmet Burger Co Ltd* (2000) 9 TCLR 698.

¹¹⁵ *Cornfields Ltd v Gourmet Burger*, above n 115, at [41].

¹¹⁶ *Smythe v Bayleys* (1993), above n 62, at 476.

¹¹⁷ *Goldsbro v Walker*, above n 108, at 193.

of damages at the third stage of the inquiry. As the statutory right to damages was removed from s 43 during its drafting suggesting remedies under the FTA are to be flexible, and s 43 was designed to give the court the discretion to give the most just results in the circumstances, it would be consistent with the FTA for a disclaimer to be considered at the third stage.

B Analysis: What is the correct approach?

Tying together the above exposition of the background to the FTA and the relevant case law, the correct approach to a disclaimer should have regard to the purpose of the FTA, the wording of s 5C and the implications of applying the approach in future business to consumer cases.

If s 5C renders disclaimers completely ineffective regarding misleading or deceptive conduct (i.e. disclaimers are to be treated as if they did not exist), this would mean parties in trade would be liable for making inaccurate or misleading representations and could not disclaim any liability if a consumer relied on it. In the author's view, this is too harsh on traders as they cannot offer any representations without assuming all liability for any loss or damage that arises from it. While the FTA has a clear consumer protection purpose, this cannot be the intention of Parliament as the FTA's purpose was to promote fairness in trade, and not to be over-protective of consumers. Therefore, this interpretation of s 5C cannot be correct.

It is suggested that it is incorrect for a court to consider a disclaimer at the first stage, in other words in relation to the question of whether the defendant's conduct was misleading, in the context of a business to consumer transaction.

Prior to 2014, the courts in New Zealand have been consistent but vague in their reasoning in applying a disclaimer at the first stage. Most courts do not give much reasoning beyond citing the Australian law in *Kewside*.

The purpose of the FTA is to level the playing field for consumers as they are inherently disadvantaged in a business-to-consumer transaction. If a disclaimer could deprive conduct of being misleading at the first stage this would give retailers too much power as the mere acknowledgement of a disclaimer could be taken to have affected the mind of a reasonable person such that they could not have reasonably be misled or deceived. This is a mixed question of fact and law. The *Red Eagle* test suggests that the test is objective as it asks whether a reasonable person would be misled. If the inquiry is merely a question of fact under this test, it is entirely possible for the presence of a disclaimer to be relevant to whether a reasonable person may be misled. However, this should not be the correct approach therefore it is also a question of law as to whether this is the correct first stage inquiry.

The implications of not considering a disclaimer at the first stage would not tip the scales too far in favour of consumers as a disclaimer may still affect reasonability of reliance at the second stage. In the author's view, this is the correct approach as it is consistent with the wording of s 5C(1). Section 5C(1) prohibits anything from precluding a provision of the FTA having effect, and the effect of s 9 is that a retailer is prohibited from engaging in conduct that is misleading or deceptive. The broad wording of section 5C(1) which states that the provisions of the FTA must have effect despite *anything* to the contrary in any agreement suggests that it is intended to catch any form of indirect contracting out. However, this

contradicts the use of the term “unenforceable” in s 5C(2) which suggests that Parliament did not intend disclaimers to be void. Therefore, for these reasons, New Zealand courts should not follow *Kewside* and should not give any effect to a disclaimer when assessing whether there has been misleading conduct under s 9.

As to the second stage (causation), the cases prior to 2014 have been fairly consistent in finding that a disclaimer is relevant to assessing causation for an order under s 43. This is a question of fact, as the presence of a disclaimer may preclude the misleading conduct from being an operating cause of the loss. While the FTA has a strong consumer protection purpose, modification of the law by the courts and Parliament have indicated that the FTA is not intended to coddle consumers and will not protect those who are gullible and unreasonable. Therefore, it is consistent with the purpose of the FTA for consumers to be expected to act reasonably when faced with a disclaimer.

The approach taken in *Redican* to allow a disclaimer to affect the second stage but to give the disclaimer less effect (meaning, a disclaimer will not preclude liability unless the causal connection can be broken), strikes a balance between protecting reasonable consumers and allowing retailers to avoid liability for disproportionate or unjustified reliance on conduct, although the conduct may have had misleading or deceptive qualities.

A disclaimer should have relevance under the third stage as the court should have full discretion when awarding damages under s 43. Section 5C prohibits overriding a provision of the FTA therefore it should not limit the court’s discretion to make an order under s 43. This outcome would suggest that a disclaimer would allow a party to effectively contract out of at least some portion of liability. If disclaimers may still have an effect on liability for an s 9 claim, then considering a disclaimer when assessing quantum of damages means a court can always give a remedy for breach of s 9, while still having discretion to adjust an award for damages if the presence of the disclaimer made it such that the circumstances required it.

Section 5C(2) should be deleted as it does not add to what s 5C(1) already states. The use of the words “directly or indirectly” may cause confusion when s 5C(1) already states that “The provisions of this Act have effect despite anything to the contrary in any agreement.” The term “unenforceable” is also confusing as courts may interpret the term to mean “void”, however it is unclear which meaning Parliament intended in the first place. This would allow for s 9 of the FTA to “have effect” under s 5C(1) (i.e. misleading or deceptive conduct would be prohibited) while still allowing disclaimers to affect liability for misleading or deceptive conduct if a consumer does not act reasonably towards a disclaimer, such as unjustified or disproportionate reliance on conduct (although it was misleading or deceptive). Section 5(2) was inserted to stipulate the FTA’s effect on a provision that conflicts with the provisions of the FTA (that it would be unenforceable).¹¹⁸ However the wording of s 5C(1) is clear that the FTA provisions will override a conflicting provision, and under the suggested approach a

¹¹⁸ Consumer Law Reform Bill (287-1) (explanatory note) at 4.

disclaimer will not necessarily be rendered unenforceable where it would be just for the disclaimer to have an effect on liability.

IX Conclusion

Disclaimers exist to allocate risks between parties in an agreement where there is freedom of contract. However in the context of a business to consumer transaction the effect of a disclaimer is unclear due to the statutory intervention of the FTA. The current judicial approach to disclaimers when assessing a claim for a liability for breach of s 9 of the FTA for misleading or deceptive conduct is not compatible with the consumer protection purpose of the FTA.

This article has briefly outlined the background and purpose of the FTA, and its relevant sections. It explores the cases in this area of law to explain how the law is developing away from the orthodox law stipulating absolute prohibition of contracting out under the FTA through the courts' approach of allowing disclaimers to indirectly avoid liability for breach of s 9. Considering the original purpose of the FTA, subsequent amendments, current wording of the relevant sections and developments in case law, an approach is suggested that would allow courts to strike a balance between consumer protection and freedom of business.