

29 May 2019

Daniel Ryan

By email only: fyi-request-10008-bfbd4a7b@requests.fyi.org.nz

Dear Mr Ryan

Official Information Act Request #18.187 – Health Claims

1. We refer to your Official Information Act 1982 (OIA) request received on 4 April 2019 for the following information about complaints received by the Commerce Commission (Commission) during the past 12 months in relation to products and services making health claims:
 - 1.1 how many are currently in an investigation;
 - 1.2 how many complaints were received;
 - 1.3 how many complaints were rejected;
 - 1.4 how many complaints were completed;
 - 1.5 what companies are in an investigation;
 - 1.6 what complaints were rejected against which company;
 - 1.7 why were the complaints at paragraph [1.6] rejected;
 - 1.8 which complaints were completed;
 - 1.9 what action was taken against the companies at paragraph [1.8]?
2. On 2 May 2019, in response to our email of 15 April 2019, you clarified your request to complaints received by the Commission during the past 12 months returned by the search phrase “health claims”.
3. Pursuant to section 15(1AA) of the OIA, the Commission treated your clarified request as a new request.

Our Response

4. We have decided to grant your request. We have included an outline of the Commission's complainants screening process below to assist you in understanding our response.

The Commission's complaints screening process

5. When a consumer contacts the Commission with a complaint or enquiry about a trader, this is logged in the Commission's database as a report.
6. The Commission receives thousands of reports each year. The Commission has the power to act on reports but is not required to take action in relation to all possible breaches of the legislation that we enforce.
7. Every report is initially assessed by the Enquiries Team on the basis of the information provided. When conducting an initial assessment, the Enquiries Team considers:
 - 7.1 the likelihood of a breach of the relevant legislation (the Fair Trading Act 1986, Credit Contracts and Consumer Finance 2003, and the Commerce Act 1986);
 - 7.2 the Commission's Enforcement Response Guidelines;¹ and
 - 7.3 the Commission's strategic priorities² and resourcing constraints.
8. Based on the initial assessment, the Enquiries Team makes a recommendation to:
 - 8.1 refer the complaint to a screening panel (see paragraph [10] below);
 - 8.2 add the complaint to a pending or active investigation; or
 - 8.3 close the complaint with no further action.³
9. The Enquiries Team may close a complaint at this stage (without referring it to the screening panel) if it is not deemed to meet certain criteria.⁴ For example, if:
 - 9.1 the Enquiries Team consider that it falls outside the legislation we enforce;
 - 9.2 the Enquiries Team has not received enough evidence or does not consider that the complaint evidences a likely breach of the legislation we enforce;
 - 9.3 the matter has previously been considered by the screening panel and a decision was made not to take further action; or
 - 9.4 it is more appropriate for another agency or better suited for private action.

¹ <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

² <https://comcom.govt.nz/about-us/our-priorities>

³ The Enquiries Team's assessment and recommendation are peer reviewed and, if there is agreement, the complaint is closed with no further action.

⁴ <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/>

10. If a report is deemed to meet the certain criteria,⁵ it is reviewed by a panel of senior managers and subject matter experts from within the Competition and Consumer Branch (the screening panel). The screening panel decides which reports are to be prioritised for further consideration by the Branch.
11. The outcomes of the process are not final and the Commission may revisit any report at a later stage, should we wish to reconsider the issues it presents.
12. For the purposes of your request we have treated “rejected” complaints as those closed by the Enquiries Team or screening panel with no further action.

Complaints

How many complaints were received?

13. In response to paragraph [1.2] and [1.9] of your request, the Commission has received six reports (about seven traders) during the past 12 months⁶ where the record of the report contains the phrase “health claims”.⁷
14. We have provided details of five of the six reports and the action taken by the Commission in respect of each, in the table below.
15. The sixth complaint (ENQ0520239) has been allocated for further consideration and we have withheld details under section 6(c) of the OIA, to prevent prejudice to the maintenance of the law.

Complaint number	Trader(s)	Outcome
ENQ0522491	The Body Bakery	No further action (NFA)
ENQ0521321	Global Testing Labs Test Your Intolerance	Compliance advice letter (CAL)
ENQ0519282	Kangen Water	Information passed to trader (IPTT)
ENQ0515977	Young Living Essential Oils (Australasia) Pty Ltd	IPTT
ENQ0513753	La Croix Sparkling Water	NFA

16. You can find further information about these outcomes and what they mean in the Commission’s Enforcement Response Guidelines.⁸

⁵ See footnote 4.

⁶ The period from 2 May 2018 to 2 May 2019.

⁷ Our email of 15 April 2019 stated 41 complaints; this was with no timeframe.

⁸ See footnote 1.

How many complaints are currently in an investigation?

17. In response to paragraph [1.1] of your request, none of these complaints are currently in an investigation. One complaint (ENQ0520239) has been allocated for further consideration.

How many complaints were rejected?

18. In response to paragraph [1.3] of your request, the Commission decided to close two complaints with no further action.

How many complaints were completed?

19. In response to paragraph [1.4] of your request, five of the six complaints have been completed, in that we have made decisions about what to do with them. The outcomes are listed in the table above.

What companies are in an investigation?

20. In response to paragraph [1.5] of your request, there are no companies currently in an investigation. There is one company which has been allocated for further consideration. We have withheld the name of this company under section 6(c) of the OIA, to prevent prejudice to the maintenance of the law.

What complaints were rejected against which company?

21. In response to paragraph [1.6] of your request, the Commission decided to close reports relating to The Body Bakery and La Croix Sparkling Water with no further action.

Why were the complaints rejected?

22. In response to paragraph [1.7] of your request:

22.1 The Commission decided to close ENQ0522491 about The Body Bakery as NFA. We considered that the matter raised in the complaint was more appropriate for another agency or private action and, in any event, it appeared to be one off and/or accidental behaviour. We noted:

“Issue likely better suited to private action or [C] continuing to purs[u]e T. Conduct is unlikely to affect a large number of consumers and there is no evidence to support C claims. No relevant T history to suggest this behaviour is common.”

22.2 The Commission decided to close ENQ0513753 about La Croix Sparkling Water as NFA. We considered the matter was more appropriate for another agency or private action. We noted:

“This appears to be better suited to MPI [Ministry for Primary Industries] as this relates to labelling of levels of sodium. It is unclear whether MPI can look at the other representations on the box or the can. Recommend NFA Q - and refer to MPI.”⁹

Which complaints were completed?

23. In response to paragraph [1.8] of your request, five of the six complaints have been completed in that we have made decisions about what to do with them. These are the five complaints contained in the table above.

Publication

24. The Commission will be publishing this response to your request on our website. Your personal details will be redacted from the published response.
25. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.
26. If you have any questions about this response, please do not hesitate to contact us at ويا@comcom.govt.nz.

Yours sincerely,

Mary Sheppard
OIA Coordinator

⁹ The complainant was referred to MPI after the Commission's decision to NFA.