



Presentation to
8th Annual Food Regulations and Labelling Standards Conference
“Misleading claims and the Trade Practices Act”

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TABLE OF CONTENTS

1. Introduction
2. ACCC Role In Dealing With Misrepresentation
3. Launch Of Industry Guidelines
4. Coverage Of The Food & Beverage Labelling Guideline
5. Key Principles In Truthful Labelling and Representations
6. Problem Areas In Food & Beverage Descriptors
7. Conclusion

1. INTRODUCTION

This conference comes at a challenging time for the Australian food and beverage sector with an ever growing range of products from local and overseas sources crowding supermarket shelves and competing for attention.

At the same time, consumers are becoming increasingly sophisticated and discerning. They are demanding products that offer health benefits, are fresher, or are Australian produced.

Products that can highlight such benefits have a better chance of standing out from the pack and grabbing the attention of shoppers on crowded shelves. But this creates temptation for producers and their marketers to “push the envelope”, and in some cases break the law, in an effort to gain an edge over the competition.

It is not the role of the ACCC to decide what can and cannot be sold in our supermarkets, to rule on which brand of orange juice is fresher or even whether it’s a good idea to put Tim Tams in ice cream.

But it is our job to ensure that there is fair competition in the marketplace, and to protect consumers from misleading and deceptive conduct.

Today I would like to take the opportunity to share with you how we go about protecting consumers from misleading and deceptive conduct and also to introduce our new food descriptor guidelines.

I believe these guidelines will be an important part of our push to inform not only consumers, but also those selling food products, of what our labelling really means.

2. ACCC ROLE IN DEALING WITH MISREPRESENTATION

The ACCC plays a role in relation to the food and beverage industry because of its obligation to ensure all businesses comply with the Trade Practices Act. This means punishing actual breaches of the Act and preventing behaviour that is likely to lead to a breach, namely conduct that is misleading, deceptive, unconscionable or otherwise anti-competitive.

In a perfect world competition would create the best choice and prices for consumers, as businesses sort to offer the best deal to customers. Unfortunately, competition does not always flourish without some assistance from regulators such as the ACCC to ensure everyone is playing by the rules.

As well as keeping an eye on the activity of traders, this means ensuring consumers are given full, accurate information that allows them to make informed decisions about what they buy, without being misled.

This is why education, such as through this guide being launched today, plays such an important part in enforcing the law. Where consumers understand their rights they are

much less likely to be misled, and where businesses understand their responsibilities they are much less likely to inadvertently break the law.

Importantly however, where there are breaches of the Act, and consumers are misled as a result of the misleading and deceptive conduct, the ACCC will not hesitate to use its strong investigative and enforcement powers particularly where conduct is blatant or there has been better regard to effective compliance.

The basic philosophy of the ACCC is that we would much rather have businesses understand and comply with the Trade Practices Act than have to take action to try to rectify a breach.

3. LAUNCH OF INDUSTRY GUIDELINE

Which brings me to the most important part of my address today, the launch of the food descriptors guideline.

This guideline provides a trade practices perspective on how the industry markets its products to consumers. It is a practical document designed to assist food and beverage businesses in understanding the law as it generally applies to their businesses, together with examples of the types of claims businesses can, and cannot, make about their products they sell.

A large number of interested stakeholders have played an important role in bringing about this document and the ACCC acknowledges the input many groups have made.

This publication is also complementary to the regulatory guidance provided by Food Standards Australia New Zealand and it is important that businesses realise they need to comply with all laws regarding food and beverage labelling, not just the broad principles outlined in this guide.

4. COVERAGE OF THE FOOD AND BEVERAGE LABELLING GUIDELINE

The food and beverage industry is Australia's largest manufacturing sector, with annual turnover in excess of \$90 billion. The industry is a major user of Australian agricultural products and most products are sold packaged for final consumption through supermarkets, convenience stores and other retail outlets.

The guideline will help the industry and consumers to understand and comply with those provisions of the Trade Practices Act that apply to representations, labels and advertising, made about food and beverages.

Key prohibitions in the Act relevant to this guideline are that businesses:

- must not engage in **actual or potential misleading or deceptive** conduct in relation to a food or beverage, such as:

- the standard, quality, value, grade, composition, style, model or a particular history or previous use
- the sponsorship, approval, performance characteristics, uses or benefits
- the place of origin
- must not make **false** claims including, but not limited to the content, characteristics, or origin of food or beverages
- must not engage in misleading conduct about the nature, manufacturing process, characteristics, suitability for their purpose or the quantity of any goods

Of course such a document can never spell out every detail of the law - it is the courts that have the final say in interpreting the way the Act applies to food and beverage retailers. As this changes, the Commission will need to update its guidance. The broad aim of the guide however, is to help industry understand the broad principles of fair trading and ensuring they are complying with the general principles of fair trade.

Where there may be some doubt about a business' particular circumstances the guideline should therefore not be used in place of legal advice.

Some of the key issues retailers need to consider in labelling their products include:

- overall impression
- target audience
- intent (covering fine print, disclaimers and qualifying claims)
- silence
- images and pictures,
- comparative and equivalence claims

More specific issues the ACCC also looks at include:

- Food and beverage descriptors including:
- Food type assurance claims (eg Halal, Kosher, Vegan)
- Process/preparation/production claims (such as chilled, frozen, concentrated, sweetened) and Production claims (such as organic/biodynamic, free range)
- Standard/style/select claims such as (Pure (and 100%), Fresh, Natural)
- Origin claims

5. KEY PRINCIPLES IN TRUTHFUL LABELLING AND REPRESENTATIONS

Food and beverage labelling may potentially breach the consumer protection provisions of the Act if the label conveys a misleading or deceptive impression or representation, whether through words, pictures or another means.

For food and beverages, the Act will most likely apply to claims made about a product's quality, quantity, composition or origin.

Overall impression

The key issue to consider for the 'do not mislead' principle is the overall impression that a representation will leave in the mind of the consumer. A selling approach, promotion or label that seems clear and well structured to its designers can still mislead its intended audience.

One of the most common areas where manufacturers encounter problems with their promotions is in the use of disclaimers, qualifications or fine print. While many believe these are sufficient to deal with any ambiguity, they can still result in a breach of the law if the **overall impression** is misleading or deceptive.

For example, in 2004 the ACCC took action against Cadbury Schweppes Pty Ltd over pictorial representations it made of real fruit on two Cottées cordial products. The products actually contained flavoured cordial concentrate. In this matter Justice Gray found, in part, that "In each case it is likely that some reasonable consumers would be misled or deceived by the representation and influenced by it to purchase the product concerned on the basis that it contained the real fruit represented". He also rejected the contention that the use of the phrase 'flavoured cordial' was sufficient to overcome any effect the depiction of real fruit might have.

I would note that Cadbury Schweppes no longer manufactures or supplies the banana mango flavoured cordial and have relabelled the apple kiwi flavoured cordial concentrate.

Target audience

Products are generally bought by people from different backgrounds who might not all fit the profile of the intended target group, particularly relevant given we are all consumers of food and beverage but we don't all do the shopping. It is therefore necessary to consider whether the advertising or labelling message could mislead all classes of consumers from the well-educated to the gullible and everyone in between.

It is important to consider the potential audience of a product and how that audience may interpret its packaging, labelling or advertising. Business should avoid marketing to a discrete or narrow target audience, when the product has broader consumer appeal.

Intent

The 'do not mislead' principle applies to **all** commercial messages, whether they are deliberate, careless or unintended. What a business 'intended' is usually not relevant to liability under the Act. As a result, businesses need to implement risk management processes to ensure that product representations are accurate.

What about fine print and disclaimers and there are plenty of those used in the food business. Fine print and disclaimers (for example the use of an asterisk (*)) are often used in food and beverage labelling to direct the consumer elsewhere on the product. The trouble is consumers don't often realise there is more relevant information to be

found. And care should be practiced because, both fine print and disclaimer may not be sufficient to protect businesses from breaching the Act.

And the same principles apply to qualifications, however more importantly qualifications cannot contradict headline claims. The consumer should not be required to exhaustively search for those facts. Business must clearly direct the consumer's attention to the most significant points of sale, so that the consumer can make a reasonable and informed judgment about whether to buy the product.

Silence

The failure to mention an important fact in the context of an overall representation can sometimes be misleading conduct. The missing fact may be an important element in creating an accurate overall impression about the product or service. Labels which omit key consumer information can mislead consumers and distort consumer choice.

The Act does not stipulate a general duty to disclose information in all situations. However, when failure to disclose information is misleading, there arises some duty to disclose that information. Businesses also need to be aware that there are standards and laws that may require specific disclosures of food and beverage information, such as those prescribed within the Food Standards Code or an industry code of practice.

For example, in 2003 The Outback Juice Company Pty Ltd (OJC) provided the ACCC with a court enforceable undertaking under s. 87B of the Act to the effect that OJC would remedy its conduct relating to misleading claims about its juice products.

OJC had claimed on its labels that its products were '100% Fresh Orange Juice' and '100% Orange Juice Squeezed Daily'. The labels did not mention sugar in the ingredients list or state that 'sugar may be added when new season oranges have a hint of bitterness about them'. Testing of the products showed that sugar was added to the orange juice products, and OJC subsequently admitted that its products did not contain 100 per cent orange juice as represented on its labels, but contained added cane sugar and preservatives.

Images and pictures

Consumers can be misled by images and pictures. Once again, the overall impression of the label is important. If pictures on the label give a misleading impression of the composition of the product, it may breach the Act. Similarly, if food pictured on the label constitutes a small percentage of the product, it might be inappropriate to give it a disproportionately large pictorial emphasis.

For example, in the Cottee's matter discussed earlier the court stated:

The pictures of kiwi fruit are sufficiently prominent, and sufficiently recognisable, to create an impression in the minds of some reasonable consumers as to the presence of extracts of kiwi fruit in the product.

It is the impression and the likely conclusion drawn from the impression that counts for consumers. While technically accurate information is important, it may not always adequately guide or control the overall impression. The message needs to be seen

from the viewpoint of the potential audience to determine what the impression might be.

Comparative and equivalence claims

Comparative claims attempt to promote the superiority of one product over another. In comparing its products with others in its own product stable or with similar products of its competitor, businesses should keep in mind the underlying rule of ensuring that there is a reasonable basis for the comparison. The characteristic of the comparison should be clearly communicated to the consumer and not hidden in half-truths. In *Stuart Alexander & Co (Interstate) Pty Ltd & Anor v Blenders Pty Ltd* (1981), a matter concerning representations about coffee, the court stated:

When a person produces a television commercial that not only boosts his own product but, as in this case, compares it critically with the product of another so that the latter is shown up in an unfavourable light by the comparison, in my view he ought to take particular care to ensure that the statements are correct.'

An emerging food marketing tool is the use of the **equivalence** claim, which should not be confused with the food term 'substantial equivalence'. Equivalence claims are commercial representations that attempt to promote the equality in value, amount and importance of one food attribute to another. For example, claims like 'A, the equivalent to B % of the recommended daily dietary intake' or 'X % equivalent to fresh fruit' or 'Y, the equivalent to Z serves of fruit and vegetables'. Consumers may reasonably ask: what is the basis for the equivalence? Is there an accepted scientific basis for assessing the equivalence between products or has the manufacturer relied on more general empirical evidence? Consumers may reasonably expect an equivalence claim to be based on an accepted scientific approach able to withstand the rigors of expert scrutiny and not simply on a manufacturer-derived formula.

For example, this year Uncle Toby's provided to the ACCC a court enforceable undertaking under s. 87B of the Act regarding its Roll-Ups products. We had raised concerns with Uncle Toby's that by representing that Roll-Ups were 'Made with 65% real fruit' or making representations that created an overall impression that Roll-Ups were made by converting fruit into a Roll-Up with minimal processing, they may have breached the Act.

Uncle Toby's agreed that it will not represent Roll-Ups (as they are currently composed) as being 'Made with 65% real fruit' and agreed to list on the ingredients panel that a Roll-Up (as currently composed) is equivalent to a specified percentage of fresh fruit. Uncle Toby's also agreed that it will not make representations that Roll-Ups are made by converting a piece of fruit into a strip with minimal processing or other ingredients added.

6. PROBLEM AREAS IN FOOD AND BEVERAGE DESCRIPTORS

Representations about food can be any verbal or pictorial message, stated or implied, on a product label or any other commercial platform. For example, a company website, magazine or television advertisement. As consumers use these

representations to help them when they buy food, the representations must not mislead, deceive or be false.

Food and beverage labelling descriptors broadly fall into four categories:

1. Food type assurance claims are those claims referring to specific systems or processes that have been put in place to provide assurance to specific consumer groups/tastes. Claims may be substantiated through well-documented certification processes and certification performed by authorised persons.

For example claims such as: Halal, Kosher and Vegan.

2. Process/preparation/production claims (similar to 1) are those claims referring to a specific process/preparation/production process and/or system related to the final product. Claims should be substantiated through well-documented processes, and the level of substantiation for such claims should reflect a 'seed to supermarket' approach.

For example:

Production claims: organic, biodynamic, free range.

Preparation claims: baked—not-fried, flame-grilled, chilled.

Process claims: concentrated, sweetened.

3. Origin claims are those claims stating or implying a particular relationship with a geographical place, region, state, country or entity. Claims can be as generic as 'locally grown produce' or as specific as 'King Island—born and bred'.
4. Standard/style/select claims are those claims implying a relationship with a particular standard, style or product selection. For example, claims such as: 'Pure', 'Fresh', 'Natural', 'Trim/Lean', 'Original', 'Genuine', 'True', 'Real'.

A fifth category may well fall under the title of puffery. For example: 'Farmhouse', 'Country Style', 'Grandma's Recipe', 'World's Best' and the like. In many circumstances these are simply exaggerated, fanciful or vague claims for a product and are not likely to be meaningful to consumers, or to reasonably influence their choice of product.

The following examples are provided to illustrate the types of concerns the ACCC has.

In 2005 Berri Ltd provided a court enforceable undertaking under s. 87B of the Act to the ACCC to correct claims about its 'Fruitful SuperJuice' range including 'Green Zone', Kickstart and Immune juice products. We had concerns that the compositions of the products were being misrepresented. For example, the 'Green Zone' juice product was represented as containing a 'shot' of wheat grass and barley grass, and the ACCC considered that consumers would conclude that a 'shot' would be equivalent to 30 ml (the same volume as a shot of alcohol). In fact the 'shot' only equated to approximately 2.4 grams of dried green matter per litre (wheat grass and barley grass). The ACCC was also concerned that consumer understanding was influenced by the availability of 30 ml wheat grass shots as sold at juice and health food stores.

Berri agreed to reformulate its 'Green Zone' product from containing 300 mg to 2000 mg and all three products to contain the statement 'no fruit concentrates' as distinct from the general claim 'no concentrates'. Berri also agreed to specify the quantities of 'green matter' and herbal supplements in actual milligrams and volume percentage, thereby providing more accurate information to consumers.

The guideline provides some discussion on the growing use of descriptive claims such as: *Pure (or 100%)*:

This year the Just Squeezed Group agreed to provide a court enforceable undertaking under s87B of the Act to the ACCC for certain of its products. Just Squeezed Group agreed to stop manufacturing fruit juice under the brand name 'Just Squeezed Fruit Juice' after the ACCC raised concerns that the labelling misrepresented the contents of its products. Of the juice products made by the Just Squeezed Group, only one contained fresh juice, ranging from 25 per cent and 75 per cent, depending on seasonal factors. The rest of the range contained reconstituted juice.

Although the ingredients on the product labels listed reconstituted juice, the prominence of the word 'Just Squeezed' on the labels, together with images of fruit and words such as 'Orange Juice' and 'Apple Juice', created an impression that each product was made directly from the fruit shown on the labels and did not contain reconstituted juice.

And Fresh:

In 1997, following court action by the ACCC, the Federal Court granted orders restraining Florida Foods Pty Ltd from making further misleading claims about its 'Florida Fresh' and 'Fresh Premium' orange juice.

The court found that Florida Foods had breached the Act by supplying goods labelled as: 'fresh' when the goods contained reconstituted orange juice and preservatives; 'unsweetened' when the goods contained added sugars; and 'Product of Australia' when the product contained reconstituted orange juice made from imported orange juice concentrate.

And Natural:

As an example, and despite it not being food related, in 2005 Snooza Pet Products Pty Ltd agreed to provide a court enforceable undertaking under s. 87B of the Act to the ACCC to correct misleading claims about its pet futon (a mattress for pets).

Snooza Pet Products supplied the futon labelled as '100% Australian Wool' and 'All Natural Product', when in fact after testing the actual wool content of the filling was on average between 30 and 50 per cent of the total content. The balance of the filling was, and is, polyester and accordingly the futon was not an 'All Natural Product' and the composition of the filling of the product was not '100% Australian Wool'.

Snooza Pet Products subsequently corrected the labels on existing stock, changed its labels on new stock, offered refunds to customers and published corrective notices in daily newspapers.

Other descriptors given some consideration include:

*Trim/Lean and
Real/true/genuine*

Origin claims

Claims about the origin or source of foods used in various products must be accurate and not mislead consumers. This applies not only to the claims ‘Product of ...’ and ‘Made in ...’ claims but equally to those claims for products which purport to originate from a particular geographic area. For example, the term ‘locally grown’ may lead consumers to conclude that the produce was grown in the immediate vicinity of the place of purchase. However, the conclusion drawn from the claim ‘locally grown’ may well be different for the consumer making the purchase in an inner-city grocer, as distinct from a country grocer.

Country of origin claims are not dealt with in the new guideline, but in the ACCC guideline entitled: *Food and beverage industry: country of origin guidelines to the Trade Practices Act*. The guideline comprehensively covers issues relating to labelling, packaging, logo or advertising that makes a statement, claim or implication about which country goods come from. The guideline is available on the Publications page of the ACCC’s website

7. CONCLUSION

For the public to have faith in the way food and beverages are marketed to them there needs to be a clear and universally accepted standard used when labelling or promoting those products.

Without a good understanding of what labels and terms actually mean, consumers may be misled, which leads to distrust, anger and ultimately rejection. This is obviously not a good outcome for customer or seller.

For those creating the products, failing to understand the laws that relate to what they can and cannot include in labels or promotions can see them in breach of the law and potentially having their products removed from sale and possibly facing other penalties.

Which is why I urge everyone here today to embrace the guideline I have just launched. Understanding the law is the key to successful relationships between businesses and their customers and removes the need for regulators like the ACCC to step in and ensure compliance.

The industry should be congratulated for its involvement in bringing about this guide and it is my sincere hope that its creation will make life easier for everyone and will

become a model that other countries will look to as the benchmark when reviewing their own food labelling standards.

Thank you.