



Australian  
Competition &  
Consumer  
Commission

# Food and beverage industry

Food descriptors guideline to the  
Trade Practices Act



November 2006



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Practices Act

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### **Important notice**

Please note that this guideline is a summary designed to give you the basic information you need. It does not cover the whole of the Trade Practices Act and are not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act to that conduct.

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# Foreword

The Australian Competition and Consumer Commission (ACCC) has a pivotal role in ensuring that the Australian economy operates fairly and competitively. The ACCC's job is to ensure compliance with, and enforce when necessary, the nation's competition and consumer protection laws to enable efficient and competitive markets. To do this we apply the Trade Practices Act to all businesses—big and small—for the benefit of consumers, businesses and the economy in general. We all should be supplied competitively, efficiently and honestly.

This guideline provides a trade practices perspective on industry representations about its food and beverage products. It is an important industry sector, with estimated sales of \$92 billion per annum<sup>1</sup>. The guideline is to assist food and beverage businesses in understanding the law as it generally applies to this area, together with examples of the types of claims businesses can, and cannot, make about their products and the context(s) in which such claims can be made.

The guideline reflects the ACCC's view of the law, as applied in a number of examples; as a result, it cannot define every situation likely to be encountered by businesses. The law, and guidelines reflecting it, will continue to evolve as the ACCC, business, business advisers and the community at large learn from experience and international best practice and as businesses continue to innovate in search of a competitive advantage. The recently increased use of 'organic'-type claims is just one example of an emerging trend currently being considered by the ACCC.

The guideline also complements food regulatory guidance already provided by Food Standards Australia New Zealand. It is important that businesses comply with all laws regarding food and beverages.

I extend the appreciation of the ACCC to those stakeholders who participated in the development of this guide.

I encourage businesses to be aware of and use this guide as a reference point for claims about their products, as part of their ongoing compliance strategy. This will benefit both the industry and the broader Australian community.



**Graeme Samuel**

CHAIRMAN

Australian Competition and Consumer Commission

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1 *Australian Food Statistics 2005*, Australian Government Department of Agriculture, Fisheries and Forestry, Commonwealth of Australia.

# What does this guideline cover?

- Part 1 explains why the *Trade Practices Act 1974* (the Act) and the ACCC are relevant to food and beverage labelling issues.
- Part 2 provides practical guidance on what manufacturers and suppliers should do to minimise the risk of breaching laws administered by the ACCC.
- Part 3 discusses specific food and beverage descriptors that may raise issues under the Act.
- Part 4 looks at remedies available for breaches of Part V of the Act.

## Part 1: Using this guideline

### The ACCC's role

This guideline has been produced by the ACCC, an independent national statutory law enforcement agency established in 1995 by the Commonwealth Parliament to protect the rights of consumers and business. It does this by encouraging vigorous competition in the marketplace and enforcing compliance with the Act's consumer protection and fair trading laws.

The Trade Practices Act promotes competition and fair trading and provides for consumer protection to enhance the welfare of Australians. An important part of the ACCC's compliance role is to ensure that businesses and consumers are aware of, and comply with, the Act.

For more information about the ACCC's roles and responsibilities see: *Who we are, what we do, how we work*, an ACCC publication available on the publications page of the ACCC's website.

### Australia's food and beverage industry

The Australian food and beverage industry is Australia's largest manufacturing sector. In 2004–05 the food and grocery sector comprised around 46 per cent of the total retail market, and total consumer expenditure on food rose to nearly \$92 billion.<sup>2</sup> Of this, food and beverage imports comprised \$6.5 billion.

The food and grocery industry is a major user of Australian agricultural products and industry output includes processed meats, dairy products, beverages, fruits and vegetables, flour and cereal products, bakery products, sugar, confectionery and seafood. Most of the products are sold packaged for final consumption through supermarkets, convenience stores and other retail outlets.

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<sup>2</sup> Australian Food Statistics 2005, Australian Government Department of Agriculture, Fisheries and Forestry, Commonwealth of Australia 2006

## Compliance with the Trade Practices Act

Preventing and remedying misleading and deceptive representations about food and beverages are part of the ACCC's role to monitor and enforce compliance with the Act.

The 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 beverages, 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.

For more information about these and other prohibitions in the Act, see part 4.

### This guideline

This guideline will help the relevant industry and consumers to understand and comply with those provisions of the Act that apply to representations (i.e. labels and advertising) made about food and beverages.

The ACCC's current views on how the provisions in the Act generally apply to the food and beverage industry are primarily based on past experience and court decisions on the relevant laws. Examples are provided throughout the guideline.

Two other ACCC publications about representations in the food and beverage industry can be downloaded from the Publications page on the ACCC website. They are:

- *Food and beverage industry: country of origin guidelines to the Trade Practices Act*
- *Genetically modified organisms and foods, news for business*

### Note

The ACCC's views are not a static statement of 'the law', as the interpretation of the Act ultimately depends on decisions of the courts and/or changes to the Act made by parliament. This guideline should therefore not be used in place of legal advice about a business' particular circumstances.

The ACCC must approach each potential enforcement matter on a case-by-case basis, taking account of all relevant circumstances. Businesses may also be subject to action by private parties, including competitors.

The ACCC encourages businesses engaging in food and beverage labelling to follow this guideline and incorporate it into their staff training, both in terms of the text and the spirit of the document. Doing so will minimise the risks of making illegal claims about products and possible ACCC action.

This guideline only applies to goods intended for sale in Australia, any food that is manufactured in Australia for export should seek to comply with the country of destination's laws.

## Role of FSANZ

As noted above, the ACCC's role relates to seeking compliance with the Act. By comparison, Food Standards Australia New Zealand (FSANZ) (formerly ANZFA) protects the health and safety of the people in Australia and New Zealand by maintaining a safe food supply.

FSANZ is a bi-national independent statutory authority that develops food standards for composition, labelling and contaminants. FSANZ works in partnership with the governments of Australia and New Zealand.

The key roles of FSANZ are:

- protecting public health and safety
- providing adequate information about food to enable consumers to make informed choices
- preventing misleading or deceptive conduct in relation to the food and beverages industry.

In April 2004 the ACCC and FSANZ signed a memorandum of understanding (MOU) to facilitate an agreement about how food labelling complaints would be addressed. This MOU can be accessed on the News centre page of the ACCC website: Regulators cooperate to improve food regulation (MR 068/04).

## Part 2: Practical guidance

### The key principles of misleading and deceptive conduct

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 (through words, pictures or other means). This can also occur if a fact relevant to the sale of that good is not mentioned (i.e. a condition or some product content).

For food and beverages, the Act will most likely apply to claims made about a product's:

- quality
- quantity
- composition
- 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.

Disclaimers, qualifications or fine print on a product can still result in a breach of the law if the **overall impression** is misleading or deceptive.

### Example 1

In 2004 the ACCC took court action against Cadbury Schweppes Pty Ltd over pictorial representations it made of real fruit on two Cottees cordial products.<sup>3</sup> The products actually contained flavoured cordial concentrate.

Based on the overall impression of the pictures, packaging and labelling, the Federal Court found that these representations were false; and that Cadbury Schweppes had engaged in misleading or deceptive conduct that contravened the Act.

Justice Gray found that most reasonable consumers would assume that the two products actually contained extracts of the fruit depicted and would therefore be persuaded to buy it.

## Target audience

Products are generally bought by people from different backgrounds who might not all fit the profile of the intended target group. It is therefore necessary to consider whether the advertising or labelling message could mislead susceptible, gullible or vulnerable members of the public.

In the case of *ACCC v Cadbury Schweppes*<sup>4</sup>, the court considered that when dealing with the likely effect of a representation on consumers generally, it is necessary to have in mind some model of consumer. The court stated:

... there is likely to be a significant element among purchasers of cordial products who would prefer to purchase a cordial flavoured by means of real fruit and who are prepared to make their decisions on the basis of a fleeting impression from the labelling and packaging of the product, rather than to consult the ingredients list.

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.

Accordingly, businesses need to implement risk management processes to ensure that product representations are accurate.

<sup>3</sup> *ACCC v Cadbury Schweppes Pty Ltd* [2004] FCA 516; (2004) 61 IPR 270; ATPR 42-001.

<sup>4</sup> *ACCC v Cadbury Schweppes Pty Ltd* [2004] FCA 516; (2004) 61 IPR 270; ATPR 42-001.

## What about fine print and disclaimers?

Fine print and disclaimers (for example the use of an asterisk (\*)) are often used in food and beverage labelling. However, this may not be sufficient to protect businesses from breaching the Act.

This is because the main selling point used for a product may create such a strong impression on a consumer that it cannot be qualified or corrected by a disclaimer or qualification found elsewhere on the label or advertisement. Businesses cannot make an important fact or condition unclear, unreadable or difficult to find, or give a disclaimer or qualification too little prominence when compared to the main selling point or 'pitch'.

### Example 2

In 2001 the ACCC obtained a court order requiring Target Australia to correct a misleading advertising campaign.

Target's advertising included two claims of: '25% off every stitch of clothing', and '15–40% off house wares'. In both cases, fine print in the advertising excluded a number of significant items.

Target had to correct the misleading impression and apologise through costly TV advertisements.

This precedent regarding 'fine print' applies equally to the food and beverage industry, particularly to those products marketed by using headline claims with limited criteria appearing elsewhere on the label in fine print. (Follow the links on the ACCC website's News Centre page to MR 239/00.)

*ACCC v Target Australia*<sup>5</sup> [2001] FCA 1326

<http://www.accc.gov.au/content/index.phtml/itemId/87483>

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.

## Qualifying claims

In *ACCC v Woolworths*<sup>6</sup> (example 8) the court found that if an advertisement conveys an overall impression that is misleading and deceptive, it will breach the Act even though aspects or parts of the advertisement can be found which are inconsistent with that impression.

Therefore, even if qualifications are made about a product, it is always the overall impression that counts. It is still possible to mislead consumers even if there are qualifications to claims made elsewhere on the packaging.

<sup>5</sup> *ACCC v Target Australias Pty Ltd* [2002] FCA 1326; (2001) ATPR 41-840.

<sup>6</sup> *ACCC v Woolworths Pty Ltd* [2002] FCA 1001.

## Silence: things unsaid or omitted

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.<sup>7</sup>

### Example 3

In July 1997 Nestlé Dairy Products provided the ACCC with a court enforceable undertaking under s. 87B of the Act to address concerns that the sugar content stated in the nutritional panel on two of Nestlé's Vitari range of products could be misleading because they claimed zero sugar per 100 ml serving. However, while the product contained no added sugar, the ingredients did contain naturally occurring sugars, particularly the fruit used to manufacture the Vitari products.

The ACCC considered that the incorrect labelling potentially posed a health risk to diabetics and was likely to mislead other health conscious consumers relying on the nutritional information panel.

In the undertaking, Nestlé agreed to quickly:

- amend the nutritional panel on Vitari packaging
- stop wholesale distribution of the incorrect Vitari packaging
- publish explanatory notices in national newspapers and diabetic publications to advise the public, and particularly diabetics, of the actual level of sugars contained in the product
- implement a trade practices compliance program. (Follow the links on the ACCC website's News Centre page to MR 016/97.)

<sup>7</sup> Food and beverage industry-specific codes of practice, for example the Australian Fruit Juice Association Code of Practice, the Australian Bottled Water Institute Model Code and the Pet Food Industry Association of Australia Code of Practice.

#### Example 4

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'
- '100% Orange Juice Squeezed Daily'.

The labels did not mention sugar in the ingredients list or stated 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.

In the undertaking, OJC agreed to remedy its conduct, and to create and maintain at its own expense a trade practices compliance program (Follow the links on the ACCC website's News Centre page to MR 114/03.)

Silence or omission may also occur if the composition or characteristics of products change significantly.



What are the fundamental things that consumers need to know about the product to make an informed choice?

Are there any details that need to be brought to their attention that may significantly change the representation?

## 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.

In the case of *ACCC v Cadbury Schweppes*<sup>8</sup> (example 1), pictures of kiwi fruit on the label of a cordial concentrate gave the impression that the product contained this fruit. 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.

<sup>8</sup> *ACCC v Cadbury Schweppes Pty Ltd* [2004] FCA 516; (2004) 61 IPR 270; ATPR 42-001.

It is the impression and the likely conclusion drawn from the impression that counts for consumers.



- How will susceptible members of the target audience react?
- What will they think the characteristics of the product are?
- How will they interpret the important points?
- What could they possibly miss or fail to appreciate?
- What aspects of the label need a stronger emphasis?

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.

Consumers are not expected to have the same level of understanding as a food technologist.



- What overall impression or likely impression could the message give to its audience?
- Does this impression match the true facts and the real picture?

## 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.

### Example 5

In 2006 Uncle Tobys provided the ACCC with a court enforceable undertaking under s. 87B of the Act regarding its Roll-Ups products.

The ACCC had raised concerns with Uncle Tobys 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, may breach the Act.

In the undertaking, Uncle Tobys agreed that in the future it will not:

- represent that Roll-Ups (as currently composed) are 'Made with 65% real fruit'
- list on the ingredients panel that a Roll-Up (as currently composed) is equivalent to a specified percentage of fresh fruit
- run the advertisement which shows images of an apple being flattened into a Roll-Up (the Roll-Ups Reels Fruit Shrink advertisement)
- make representations that Roll-Ups are made by converting a piece of fruit into a strip with minimal processing or without further processing or other ingredients added.

Uncle Tobys has also undertaken to the ACCC that it will:

- publish an article for the food industry on the importance of accurate advertising
- review and implement recommended changes to its trade practices compliance program in relation to Roll-Ups

Follow the links on the ACCC website's News Centre page to: MR 212/06.

<http://www.accc.gov.au/content/index.phtml/itemId/762460>



When making comparative or equivalence type claims, business and marketers should simply keep the overall impression of representations in mind asking whether such claims are or could be misleading, deceptive or downright false.

# Part 3: Food and beverage descriptors

## Representations about food

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 4 categories:

### 1. Food type assurance claims

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)

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

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

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 '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.

## 1. Food type assurance claims

### Halal, Kosher, Vegan

Claims that give assurances and information about the quality or the particular characteristics of certain foods should have a factual basis.

For example, it may be misleading to represent food as Halal or Kosher if the preparation doesn't meet the criteria for such terms or without an adequate basis to make such a claim. It is important to consider what the consumer would expect the term to mean and not in what way the business may attempt to limit its meaning.

To take this example further: a company labels a food as Kosher, but the food was prepared on equipment that also processed pork meat. It is likely this would be misleading to consumers who specifically want 'kosher assured meat' because of the possible contamination with other, non-kosher, meats. While an average consumer may not be concerned by this type of representation, such a claim would be of concern to the intended target audience and is likely to be in breach of the Act.

Similarly most consumers would understand Vegan produce as not being made from, or perhaps not even coming into contact with any animal product, animal by-product or derivative of animal product.

## 2. Process claims

### Chilled, frozen, concentrated, sweetened

Claims about the processes involved in presenting foods must be true and accurate. If it is claimed that a product is 'frozen', then it should be in its frozen state. Similarly a consumer would expect that a 'sweetened' product has extra sugar or sweetener added to it, while an 'unsweetened' product has no added sugar or sweeteners.

### Example 6

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.

The ACCC 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. (Follow the links on the ACCC website's News Centre page to MR 113/05.)

### Production claims: organic/biodynamic, free range

Irrespective of mandatory or voluntary standards for production claims, manufacturers have to consider what consumers would expect from the claims made on the product.

Consumers would generally expect that fruit and vegetables that are claimed to be organic have not been cultivated with synthetic fertilisers or herbicides. Similarly, organically grown imported fruit, which has been chemically treated as part of the importation and quarantine process, cannot be considered to be organic.<sup>9</sup>

### Example 7

In 2004, following concerns raised by the ACCC, Baiada Poultry Pty Ltd agreed to relabel its Lilydale Select Free Range chicken products. Previously, labels on trays of Lilydale chicken fillets stated that the chickens were 'not genetically modified'.

However, as the feed given to the chickens may have contained genetically modified soy, the ACCC believed that the 'not genetically modified' claim could be misleading, as it potentially conveyed to consumers that the feed used was GM-free. (Follow the links on the ACCC website's News Centre page to MR 268/04.)

Some production labelling systems have standards that prohibit certain inputs or processes. For example, while free range production systems may not exclude the use of genetically modified feed, organically certified production systems prohibit processes and products derived from genetic engineering.

<sup>9</sup> The ACCC understands that the organic industry is presently working with Standards Australia to develop an Australian domestic organic and biodynamic produce standard. For further information, see [www.ofa.org.au](http://www.ofa.org.au).

### 3. 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.

!The guiding principle in making claims is to consider what the consumer may conclude after all the relevant circumstances were taken into account.

#### Example 8

In 2002, following court action undertaken by the ACCC, the Federal Court ruled that Woolworths had published misleading advertisements in breach of the Act in claiming that their beef was fully sourced from local suppliers.

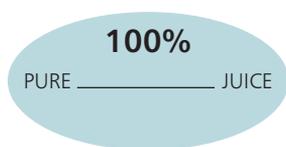
In a colour full-page newspaper advertisement, Woolworths included the words '*WOOLWORTHS. Beefing up the local economy*' alongside the image of a butcher. Woolworths also claimed that all the beef it sold in its local stores came from among 150 cattle suppliers located in the North West and New England regions of New South Wales, when in fact, its Economy beef and some of its Premium beef were sourced from cattle suppliers outside the area. (Follow the links on the ACCC website's News Centre page to MR 199/02.)

Country of origin claims are not dealt with in this publication, 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.

### 4. Standard/style/select claims

These are claims implying a relationship with a particular standard, style or product selection. When there is an objective component to the claim there must also be substantiation of the claim **before** it is made to consumers at large. These requirements apply both to explicit and implied claims.

## Pure [and 100%]



'Pure' as a descriptor is similar to a 100 per cent claim, that is the product does not contain any extra ingredients. The Macquarie Dictionary<sup>10</sup> defines 'pure' as being free from extraneous matter or from mixture with anything of a different, inferior or contaminating kind. The term 'pure' should generally only apply to single ingredient foods<sup>11</sup> as it indicates that nothing has been added to the food and that it is free from additives, preservatives or other artificial additions. Compound foods, mixed foods or imitation foods should not be described as 'pure', nor should foods that have been blended with other ingredients.<sup>12</sup>

Similarly, the '100%' descriptor usually means 'entirely'. In the past, if a fruit juice product claimed '100% juice', consumer expectations would be that the product contains no added preservatives or additives. The descriptors '100% juice' or '100% reconstituted juice' should not be used when additives or preservatives are added. In those cases where products have been reconstituted, a claim of 'pure' can mislead the consumer. For example, reconstituted fruit juices often have certain ingredients such as sodium benzoate, sugar, colour or vitamin C added. Such products are unlikely to meet consumers' understanding of the descriptive claim 'pure'.

The term 'pure' may be used to describe whole ingredients used in a product. For example, if it is claimed that a drink contains 75 per cent pure orange juice, the orange juice should not be blended or contain additives or other ingredients. However, this example might still mislead consumers if the overall impression is false or misleading.

### Example 9

In 2005 Dannon Pty Ltd, the distributor of Ceres fruit juice products in Australia, provided a court enforceable undertaking to the ACCC under s. 87B of the Act to correct claims about the '100 per cent fruit juice' labelling on some of its products.

Dannon's undertaking included agreeing that future representations and illustrations on the packaging of the Ceres range of juices would not:

- create an overall impression that a juice product contained 100 per cent of a particular fruit juice when that was not the case
- represent a fruit juice to be a 100 per cent product when vitamin C had been added.

The ACCC chairman stated: *'The illustrations and representations on the packaging of many of the Ceres range of juices created the overall impression that those juices contained 100 per cent of the characterising fruit, when in fact those juices contained a number of different juices.'* (Follow the links on the ACCC website's News Centre page to MR 319/05.)

10 The Macquarie Dictionary. © 2003 Macquarie University, 2003 Macquarie Library Pty Ltd (online edition)

11 See FSANZ, 'Products that are not single ingredient foods should not be described as "pure".'

12 See FSANZ, 'Representations about food—user guide to standard 1.2.8.'

### Example 10

In 2006 Just Squeezed Group agreed to provide a court enforceable undertaking under s. 87B 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.

The Just Squeezed Group's undertaking required the company to remedy its conduct, create and maintain a trade practices compliance program and publish corrective newspaper notices advising consumers of these undertakings.

The ACCC chairman stated: *'Many consumers of fruit juice have a preference for products that contain only fresh juice and are prepared to pay more for them. Therefore, businesses must be careful about how they label their products to avoid any misrepresentations about their contents.'* (Follow the links on the ACCC website's News Centre page to MR077/06.)

## Fresh

### FRESH

PURE \_\_\_\_\_ JUICE

Claims that goods are 'fresh' are also subject to provisions relating to misleading or deceptive representations. The Macquarie dictionary<sup>13</sup> defines 'fresh' as retaining the original properties unimpaired: not deteriorated; not canned or frozen; not preserved by pickling, salting, drying, etc. The term 'fresh' is used in different contexts and can refer to the nature of a food, its age or taste. The term may even be used as part of a brand name. When used as a brand name, the term should not be used to give an impression that the product is 'fresh' when it is not.

'Fresh' generally refers to food that is put on sale at the earliest possible time and close to the state it would be in at the time of 'picking', 'catching', producing etc. The term fresh generally implies that food has not been frozen or preserved. Some foods stay fresh longer than others and so it is not appropriate to give guidance on all foods.

Generally consumers may understand that a 'fresh' food has not been canned, cured, dehydrated, frozen, processed or preserved. On the other hand, consumers are likely to be aware that milk is a pasteurised product because of the level of disclosure and may still be considered fresh but consumers may not necessarily draw the same conclusion of a pasteurised fruit juice product unless it is disclosed on the label. Similarly, meats, fruits and vegetables which have only been stored for a short time post-harvest are likely to be considered 'fresh' by consumers.

<sup>13</sup> The Macquarie Dictionary, © 2003 Macquarie University, 2003 Macquarie Library Pty Ltd (online edition).

There are several claims such as 'garden fresh', 'oven fresh' or 'fresh from the field' which can be potentially misleading to consumers. For example: fruit advertised as 'fresh from the farm' when it was imported, on a container ship for a month before arriving in Australia, fumigated to clear quarantine before being transported to further cold storage and then to the supermarket produce bin would be unlikely to meet the consumer understanding of a 'fresh-from-the-farm' claim.

### Example 11

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. (Follow the links on the ACCC website's News Centre page to MR049/97.)

## Natural



'Nature', 'natural', 'mother nature' or 'nature's way' are a few terms that may be misused on food and beverage labels. These claims often suggest that a product is superior because it has certain 'natural' characteristics as opposed to being processed or artificial or otherwise removed from its natural form. The Macquarie Dictionary<sup>14</sup> refers to something that existed in, or was formed by nature; i.e. not artificial, or something that is based on the state of things in nature; i.e. constituted by nature, or is true to nature, or closely imitating nature.

'Natural' claims imply that the product is made up of natural ingredients, i.e. ingredients nature has produced, not man made or interfered with by man.

It may be misleading to use the term 'natural' to describe foods that have been altered by chemicals. In some cases, the claim 'natural' is not too dissimilar to the claims of 'contains no added food additives or artificial preservatives', such additional qualification to the claim 'natural' is helpful in producing a label that is unlikely to mislead the consumer.

Consumers may view what is 'natural' differently to manufacturers and food technologists. When providing a label with a claim that the product is 'natural', thought should be given to what the consumer would think. In those cases where the term 'natural' meets a technical definition, a code or a standard, and this information is not available to the consumer, the consumer is left to draw their own conclusion and may therefore be misled.

<sup>14</sup> The Macquarie Dictionary, © 2003 Macquarie University, 2003 Macquarie Library Pty Ltd (online edition).

## Example 12

### *Principles are the same for all goods*

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 on its calico cover 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. (Follow the links on the ACCC website's News Centre page to MR 045/05.)

## Trim/Lean

Terms such as 'trim' and 'lean' have emerged as claims used to describe a food (commonly meat and poultry product) that has significantly less and/or no visible fat. These claims should generally be consistent with the way they are referenced in, among others, the national dietary guidelines.<sup>15</sup>



A statement that is literally true can have a misleading aspect when considered in the context of the whole representation, even if that implication is not intended, or is not the only possible interpretation. .

## Real/true/genuine

The terms 'real', 'true' and 'genuine' should also be used with care. These terms imply that other similar foods or products within the same category might not have the same sorts of characteristics as the one being advertised. The terms should not be used to describe foods or ingredients that are imitations of genuine foods.

<sup>15</sup> *Dietary guidelines for Australian adults*, April 2003, National Health and Medical Research Council.

## Part 4: Remedies

If the ACCC believes conduct has occurred that is a likely breach of the Act there are a number of options available to remedy the conduct. Depending on the extent of consumer or competitive detriment, the ACCC may seek to reach an administrative outcome, accept a court enforceable undertaking under s. 87B of the Act or initiate court action for breaches of the unfair practices provisions of the Act.

In those cases where the trader provides a full and forthright level of cooperation, the ACCC may choose resolution by means of an administrative outcome to stop the conduct identified.

The ACCC will accept s. 87B undertakings, which provide a means of achieving compliance with the Act at a level below court proceedings, only when it is clear that a breach of the Act has occurred and when this outcome offers the best solution available.

In relation to court processes, the Act provides a range of remedies for breaches of the unfair practices provisions of Part V. These include:

- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (proceedings which can be initiated by the ACCC or any other person) (s. 80)
- damages for persons suffering loss or damage because of the conduct (s. 82)
- other orders of various kinds in favour of persons who have suffered, or are likely to suffer, loss or damage because of the conduct, as the court thinks fit, including:
  - declaring whole or parts of contracts void
  - variation of contracts
  - refunds
  - compensation for loss or damage
  - provision of repairs and spare parts (s. 87)
- probation orders, community service orders and corrective advertising orders (s. 86C).

Most of the provisions in Part V (with the exception of s. 52) are replicated as criminal offences in Part VC. Contraventions of these provisions can lead to fines of up to \$220 000 for individuals and \$1.1 million for companies.

Section 83 also provides that if it is proved in a proceeding that a person has contravened a provision of parts of the Act including Parts V and VC, a finding of fact made by a court may be used as prima facie evidence in subsequent related proceedings by a person for compensation.

## Further information and other compliance considerations

### **Food Standards Australia New Zealand (FSANZ)**

[www.foodstandards.gov.au](http://www.foodstandards.gov.au)

### **New South Wales Food Authority**

[www.foodauthority.nsw.gov.au](http://www.foodauthority.nsw.gov.au)

### **New South Wales Office of Fair Trading**

[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

### **State Government of Victoria, Department of Human Services**

[www.health.vic.gov.au/foodsafety](http://www.health.vic.gov.au/foodsafety)

### **Victorian Office of Fair Trading, 'Consumer Affairs Victoria'**

[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)

### **Queensland Government, Queensland Health**

[www.health.qld.gov.au](http://www.health.qld.gov.au)

### **Queensland Office of Fair Trading**

[www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

### **South Australia Department of Health**

[www.health.sa.gov.au](http://www.health.sa.gov.au)

### **South Australia Office of Fair Trading**

[www.ocba.sa.gov.au](http://www.ocba.sa.gov.au)

### **Western Australia Health Department**

[www.health.wa.gov.au](http://www.health.wa.gov.au)

### **Western Australia Office of Fair Trading**

[www.docep.wa.gov.au](http://www.docep.wa.gov.au)

### **Tasmania, State Food Officer, Dept of Health and Human Services**

[www.dhhs.tas.gov.au](http://www.dhhs.tas.gov.au)

### **Tasmania Office of Fair Trading – 'Consumer Affairs & Fair Trading'**

[www.consumer.tas.gov.au](http://www.consumer.tas.gov.au)

### **Australian Capital Territory Health Protection Services, ACT Health**

[www.health.act.gov.au](http://www.health.act.gov.au)

### **Australian Capital Territory Office of Fair Trading**

[www.fairtrading.act.gov.au](http://www.fairtrading.act.gov.au)

### **Northern Territory Environmental Health**

[http://www.nt.gov.au/health/healthdev/enviro\\_n\\_health/enviro\\_n\\_health.shtml](http://www.nt.gov.au/health/healthdev/enviro_n_health/enviro_n_health.shtml)

### **Northern Territory Office of Fair Trading**

[www.nt.gov.au/justice/graphpages/cba/index.shtml](http://www.nt.gov.au/justice/graphpages/cba/index.shtml)

## Stakeholder contribution

The ACCC would like to thank the industry stakeholders whose comments have informed the preparation of this guideline. Those stakeholders are:

ALDI Stores  
Australian Beverage Council Limited  
Australasian Bottled Water Institute  
Australian Chamber of Commerce and Industry  
Australian Consumers' Association  
Australian Food and Grocery Council  
Australian Fruit Juice Association  
Coles Myer Limited  
Department of Agriculture, Fisheries and Forestry  
Food and Beverage Importers Association  
Food Standards Australia New Zealand  
New Zealand Commerce Commission  
The Cancer Council Victoria  
Woolworths

# ACCC Contacts

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Small business helpline 1300 302 021

For food and beverage related media releases, please see the 'News centre' page on the ACCC website.

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[www.business.gov.au](http://www.business.gov.au)





