

CREDENCE CLAIM CRACK DOWN

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While the consumer watchdog, the Australian Competition and Consumer Commission (ACCC), has always been vigilant in respect of misleading or deceptive conduct and claims, it vowed over 2013 and 2014 that “credence claims” would be on its enforcement priority radar, particularly in relation to the food and beverage industry. With 2014 almost at a close, we take a look at some of the actions taken by the ACCC over the past year and the take-home lessons for advertisers.

What are credence claims?

Credence claims are claims about a product that suggest the product is a premium product or has special characteristics when compared with similar products on the market. For example, that a product originates from a desirable country or location, is “organic”, “free range” or “environmentally friendly”.

Such attributes are seen as desirable by the consumer and are thereby used to justify higher prices. As a result, credence claims represent a competitive advantage for advertisers and have become an increasingly popular marketing tool. However, as with all marketing claims, credence claims must be truthful, accurate and capable of substantiation and this is where the issue lies – consumers are unable to reasonably check for certain that an egg is indeed free range, that frozen berries are organic or that beef is grass fed.

The ACCC does however have investigative powers and can issue a “substantiation notice” which requires a company to give information or produce documents in support of their claims to the ACCC within 21 days of the notice. A substantiation notice may be used, for example, to check that claims are truthful and respond to concerns about a claim as to the country of origin of a good or the characteristics of an ingredient. It is therefore essential that advertisers have credible, reliable and relevant material readily available to prove their credence claims in the event that the ACCC comes knocking, as well as just for their own good governance reasons.

Recent action taken by the ACCC

Below is a recap of action taken by the ACCC over the past year involving false or misleading credence claims:

Basfoods Pty Ltd “Victoria Honey”: The ACCC issued 3 infringement notices to Basfoods (Aust) Pty Ltd totalling \$36,000 after investigations revealed that its product labelled “VICTORIA HONEY” was not actually honey but comprised of sugars. The ACCC considered this misleading on two counts – 1) that the product was called “honey” and the label contained a picture of a honeycomb and two bees which falsely indicated that it was produced by honey bees and 2) that the product originated in Victoria, when it was actually a product of Turkey. Basfoods ceased its supply of the product and gave court enforceable undertakings to the ACCC including in relation to future testing of products, publishing corrective notices, and implementing a compliance program. The ACCC stated that honey suppliers should have a basis for selling a product as “honey”, including tests to confirm the product is in fact honey produced entirely by honey bees. The take home from this example is to ensure that products are correctly described and to obtain testing when in doubt.

CUB Pty Ltd “Byron Bay Pale Lager”: The ACCC issued 2 infringement notices to CUB Pty Ltd, trading as Carlton & United Breweries totalling \$20,400 in relation to claims it made in relation to the product “Byron Bay Pale Lager” which it was licenced to manufacture, market and distribute. The labelling incorporated the name “Byron Bay” and a picture of a lighthouse, a map of the Byron Bay region showing the location of the “Byron Bay Brewing Company” and the following text: *“The Byron Bay Brewing Co is located on Skinner’s Shoot Road in Byron Bay. We’re housed in a historic location, a birthplace of much of the fame and spirit of Byron Bay which has attracted local and international musicians, artists and alternative thinkers since the ‘70s. Next time you’re in town, drop in and have a beer”*. As it turned out, the beer was not produced in Byron Bay but at the CUB brewery in Warnervale, 630km away. The impression given by the label also indicated that the Byron Bay Brewing Company was a small brewery, and the ACCC alleged this was also misleading. CUB gave court enforceable undertakings to cease distributing the misleading labels and provide corrective notices as well as implement a compliance program. It also undertook that it will not make false or misleading representations concerning the scale of the brewery in which its products are brewed or the place of origin. The ACCC commented that some consumers prefer to support small, niche businesses and when large companies portray themselves as small businesses it undermines the unique selling point that small businesses depend on and misleads consumers. The take home message is that marketing and labelling should appropriately reflect where and by whom a product is produced.

Maggie Beer Products: Maggie Beer Products Pty Ltd was investigated by the ACCC in relation to claims made on various products that suggested the products were made in the Barossa Valley and/or South Australia, when they were in fact produced in Victoria and Queensland. This included the logo which contained the words “A Barossa Food Tradition” and the South Australian address stated on pack which gave the overall false impression that the products were produced in Tanunda, the Barossa Valley and/or South Australia. The Barossa Valley is a nationally recognised premium food and wine destination and thus the ACCC was concerned that consumers would be willing to pay a premium price. Maggie Beer Products gave a court enforceable undertaking that it would not make any representations that these products were manufactured in Tanunda, the Barossa Valley or South Australia and that it will update its compliance program, relabel its products and publish corrective notices. Note in this case that a trade mark or logo applied to all products can be considered misleading in combination with other mandatory elements on pack (such as the company address) if it is not true for the particular product in question and so these must be considered in addition to all claims on pack.

Apart from the above action, the ACCC was also successful in claims brought in the Federal Court for false testimonial and country of origin claims, ‘free range’ eggs and ‘freshly baked’ bread:

False testimonial and country of origin claims: The Federal Court ordered by consent in proceedings brought by the ACCC that P & N Pty Ltd (trading as Euro Solar) and Worldwide Energy and Manufacturing Pty Ltd (WEMA, formerly trading as Australian Solar Panel) pay combined penalties of \$125,000 for publishing fake testimonials and making false or misleading claims that their solar panels were made in Australia when they were in fact made in China. The Federal Court found that it was suggested in some advertisements that not only were the solar panels made in Australia but that customers ought to be supporting them because of that fact and these representations were a central part of the business and marketing strategy. In this case, sole Director of P & N and WEMA was also ordered to personally pay a penalty of \$20,000 for his involvement in the conduct. The take home from this is that not only can a company be penalised but individual directors may also be found personally liable when engaging in false and misleading conduct.

Pirovic Enterprises Pty Ltd “free range” eggs: The Federal Court declared by consent that Pirovic Enterprises Pty Ltd engaged in misleading conduct and made misleading representations in its labelling and promotion of eggs as “free range” in an action brought by the ACCC in late 2013. Pirovic used the words “free range” accompanied by images of hens on open pasture on pack and the Court found this represented to consumers that the eggs were produced by hens able to move freely on an open range each day when in fact most of

the hens did not move about freely on an open range on most days because of a combination of the stocking densities inside the barns, the flock sizes and the number, size and placement of exits onto the open range. It was ordered to pay a pecuniary penalty of \$300,000 and contribute to the ACCC's costs. This decision is particularly influential for companies making "free range" claims. While the exact definition of "free range" appears to currently remain in flux in the egg and chicken meat industries, the words "free range" in this instance suggested that stock was able to move freely on an open range each day when this was not the case.

Coles Supermarkets Australia Pty Ltd "Freshly Baked" Bread: The Federal Court found that Coles misled consumers by advertising that its bread was "baked today, sold today" and "freshly baked in-store" when the bread was partially baked and frozen off-site and then transported to Coles where the baking process was finished some time later. The Court found that the representations made by Coles were misleading as they implied that the bread had been baked on the day of sale or baked in a fresh process using fresh not frozen product. A hearing will be held in the Federal Court at a later date to determine the relief that will be ordered but the ACCC is seeking penalties, declarations, injunctions, costs and other orders. The take home message is that the overall impression is key including facts that are omitted – i.e. a claim may be factually correct (such as Coles "baked today, sold today") but may still be misleading when considering the whole product lifecycle.

Final take-home lessons

While these cases do not represent any new law, they serve as a timely reminder to advertisers of the need to make sure that there is adequate substantiation for claims made, particularly in the current regulatory climate where the ACCC is monitoring companies and credence claims closely and using its increased powers to take enforcement action. Although much of the focus has so far been on the food industry, the general principles are still relevant for companies selling other consumer products in Australia. In particular, the ACCC is concerned about larger companies misleading consumers that they are smaller, locally-based provincial companies, such as in the CUB and Maggie Beer examples above.

Claims that give the impression that a product, or one of its attributes, has some kind of added benefit when compared with similar products and services are ultimately acceptable to make, provided that the claims are not false, misleading or deceptive and this necessarily requires that they can be substantiated with evidence.

Contact us

If you would like further information on how this impacts on you or your business or a review of your claims and food packaging, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with clearing advertising material and packaging.

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