



Australian
Competition &
Consumer
Commission

Food labelling guide



Australian Competition and Consumer Commission
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Introduction

Australia's food and beverage industry

As Australia's largest manufacturing sector, the food and beverage industry significantly affects the lives of Australian consumers. It is vital that industry participants understand their legal obligations to consumers when labelling, packaging and promoting their products.

This guideline

The main purpose of this guideline is to educate businesses in the food and beverage industry about their obligation to ensure that their product labelling, packaging and advertising is accurate and is not likely to mislead consumers.

In particular, the *Food labelling guide* highlights the obligation of businesses to avoid making any claims or representations on a food or beverage label, package or advertisement that indicates that an ingredient is a **predominant ingredient** in that product¹, if that is not the case.

This guideline also explains and distinguishes the roles of two key agencies that regulate the food and beverage industry—Food Standards Australia New Zealand (FSANZ) and the Australian Competition and Consumer Commission (ACCC).

This guide seeks to assist you to apply the law in your everyday business practices, by providing you with practical examples of the types of claims and representations you can and cannot make about your products when developing food and beverage labelling, packaging and advertising.

¹ For the purposes of this guide, reference to a **predominant ingredient** should be read as a predominate ingredient of that type, unless otherwise specified.

This guide is divided into three main parts:

1. Responsibilities of the ACCC and FSANZ
2. Australia New Zealand Food Standards Code
3. Trade Practices Act

A checklist on how to avoid breaching the Trade Practices Act is included at the end of the publication.

1. Responsibilities of the ACCC and FSANZ

Australian Competition and Consumer Commission

The ACCC has produced this guide with the assistance of FSANZ. The ACCC is an independent national statutory law enforcement agency responsible for bringing about compliance with the *Trade Practices Act 1974* by encouraging vigorous competition in the marketplace and promoting the Act's consumer protection laws.

Part of the ACCC's compliance role is to ensure that businesses do not make representations about food and beverage products that are false or likely to mislead or deceive consumers. The ACCC has become increasingly concerned about representations on the labels, packaging and advertisements of food and beverage products that imply, without appropriate qualification, that a particular ingredient is predominant when this is not the case.

The ACCC has formed a view, supported by a number of recent Federal Court of Australia decisions, that this practice is likely to mislead consumers and breach the Trade Practices Act. The ACCC will therefore continue to respond when these concerns are raised, and, where appropriate, take legal action for any conduct that breaches the Act.

Other ACCC publications about representations in the food and beverage industry can be downloaded from the Publications page on the ACCC website.

Food Standards Australia New Zealand

Like the ACCC, FSANZ is an independent statutory authority. It develops and reviews food standards under the Australia New Zealand Food Standards Code for foods sold in or imported into Australia and New Zealand.

The *Food Standards Australia New Zealand Act 1991* provides that FSANZ's objectives in developing or reviewing food regulatory measures are (in descending priority) the:

- protection of public health and safety
- provision of adequate information about food to enable consumers to make informed choices
- prevention of misleading or deceptive conduct.

Under its Act, FSANZ's objectives are to achieve a high degree of consumer confidence in the quality and safety of food and to provide adequate information about food within the context of the agency's objectives. However, in contrast to the ACCC's role in regulating a broad range of industries, FSANZ specifically focuses on developing and varying food standards by working in partnership with the governments of Australia and New Zealand.

FSANZ does not enforce the Australia New Zealand Food Standards Code, but aims to:

- protect public health and safety of the people of Australia and New Zealand
- provide Australian and New Zealand consumers with adequate information about food products to help them make informed choices
- prevent misleading or deceptive conduct in the Australian and New Zealand food and beverage industries.

2. Australia New Zealand Food Standards Code

FSANZ is mainly responsible for developing and administering the Australia New Zealand Food Standards Code, a collection of individual food standards that include standards for food composition and labelling.

Standard 1.2.10—Characterising ingredients and components of food sets out the specific requirements for the declaration of the percentage of the characterising ingredients and components of certain food products that must be declared.

Percentage labelling

The code requires that when characterising food ingredients, food manufacturers should use percentage labelling on their products, unless an exemption applies.

Percentage labelling requires that the proportion of the characterising components and/or ingredients of that food or beverage should be declared on the label. This information may be presented in a variety of ways, including within the ingredients list, in conjunction with the product name or in the nutrition information panel.

Distinguishing ingredients from components

Under the code:

- an **ingredient** is used in the preparation of food, manufacture or handling of food
- a **component** is a natural part of an ingredient in a food and so is not usually added to a food on its own (e.g. caffeine is naturally present in coffee and therefore is a component).

A component or ingredient is considered to be characterising and therefore must be declared on the food label as a proportion when the component or ingredient is:

- mentioned in the name of a food (e.g. strawberry may be the characterising ingredient in strawberry yoghurt)
- customarily associated with the name of the food by the consumer (e.g. fish may be the characterising ingredient in fisherman's pie)
- emphasised on the label of a food in words, pictures or graphics (e.g. fruit juice may be the characterising ingredient in real fruit juice sweets).

The code's requirement that characterising ingredients and components be declared on food labels enables consumers to identify how much of a characterising ingredient or component is present in the product. In turn, this assists consumers to compare one product with another and to make informed choices about the foods they purchase.

All food standards within the code are enforceable under the food Acts in each state and territory of Australia, and in New Zealand. It is an offence in both countries to supply food that does not comply with relevant food standards. Agencies responsible for enforcing and interpreting the code within Australia are state and territory health departments and, where the code relates to imports, the Australian Quarantine and Inspection Service. In New Zealand, the New Zealand Government is responsible for this role. Because food standards are given legal effect by state, territory and New Zealand laws, it is important that the code's requirements are considered in conjunction with the relevant local food legislation, including the Trade Practices Act.

3. The Trade Practices Act

The Trade Practices Act has two provisions dealing with representations in food and beverage labelling, packaging or advertising:

1. Businesses must not engage in misleading or deceptive conduct, or conduct **likely to** mislead or deceive consumers. For example, businesses must not make representations likely to mislead or deceive consumers about the most prominent ingredients or characteristics of a food or beverage product. It does not matter whether the conduct has **actually** mislead a consumer or whether the business **intended** to mislead—if the conduct is **likely to** mislead or deceive, the Act is contravened.
2. Businesses must not falsely represent that a food or beverage is of a particular standard, quality, value, grade, composition or style in relation to the supply, or possible supply, of a food or beverage. In short, this means that a food and beverage product must comply with any description or claim made on the labelling, packaging or promotional material, including any representation implying that a particular ingredient is a prominent ingredient in that product.

How the code and the Act work together

While the Australia New Zealand Food Standards Code and the Act seek to address broadly similar conduct within the food and beverage industry, their focus and approach in addressing these issues vary in a number of important ways.

Most importantly, referring to a particular ingredient in the name or packaging of a food when it is not a prominent ingredient of that product may breach the Act. This is the case even if the code may not require the ingredient to be listed on the food's label because it was simply 'used in small quantities for the purposes of flavouring' (an exemption to characterising ingredient under Standard 1.2.10).

Put simply, even when a business ensures a product complies with the code by providing the correct information on the food label, the Act requires further steps be taken to ensure

that the business does not make any representations on the product's labelling, packaging or advertising likely to mislead a consumer into believing that a particular ingredient is prominent when it is not.

Words, images and the overall impression

When a business makes a representation about a food product, it must ensure the **overall impression** of the representation is not misleading or deceptive. Many factors influence whether an ingredient is predominant in the class of ingredients present and whether statements about the ingredient may be misleading. These factors rely on the overall impression conveyed through the words, images and general 'get up' of a product's labelling, packaging and promotional material. An audience may be misled by emphasis on different aspects of the representation or by mistaken—but understandable (and uncorrected)—assumptions and preconceptions.

For example, if a business uses an image of a rare and delicious ingredient on its new product label, minor ingredients should not be given a disproportionately large pictorial emphasis because this is **likely to** mislead consumers.

The ACCC assesses each matter on a case-by-case basis. For example, particular care needs to be paid to the labelling of new products that consumers may be unfamiliar with, while traditional associations and familiarity with a product may lead consumers to make assumptions or apply preconceptions because of the overall impression given by the labelling.

EXAMPLES

In April 2008 the Federal Court declared (by consent) that the packaging of a number of **Arnott's Biscuits Ltd's** Snack Right products, including Snack Right Apple and Blackberry Fruit Pillow and Snack Right Apricot Fruit Slice falsely conveyed a particular overall impression. The court declared the packaging falsely conveyed an overall impression that the filling in the biscuits consisted predominantly of the fruits referred to in the product name and on its packaging when in fact the filling mainly consisted of other fruits. For example, the Apple and Blackberry Fruit Pillow filling only comprised around 1.7 per cent blackberry concentrate, along with almost 40 per cent sultanas, 12.9 per cent apple concentrate and 8.6 per cent dried apple concentrate. In the Apricot Fruit Slice filling only 1.7 per cent was apricot, while 64.8 per cent was sultana.

Arnott's provided an undertaking to the court that it would amend the products' packaging, refrain from similar conduct in the future and publish a corrective notice on its website. It also agreed to review its trade practices compliance program and contribute to the ACCC's legal costs.

ACCC v Arnott's Biscuits Ltd (2008)—re. Arnott's Snack Right Biscuits

In a similar case, the Federal Court declared that **Nudie Foods Australia Pty Ltd** had made misleading claims about two of its juice products, Rosie Ruby and Rosie Blue. The claims were not only made on product labels but in advertising campaigns in Sydney, Melbourne and Brisbane, including on signboards on buses and trams, street posters and postcard flyers.

Nudie represented Rosie Ruby juice was solely Cranberry Cloudy juice when in fact is comprised 80 per cent reconstituted apple juice. Rosie Blue was promoted as solely Cranberry Blueberry juice when it was actually 78 per cent reconstituted apple juice.

The court declared (by consent) that Nudie had breached ss. 52, 53(a) and 55 of the Act. Nudie was ordered to publish corrective advertisements, establish an education, training and trade practices compliance program and to pay the ACCC's costs.

ACCC v Nudie Foods Australia Pty Ltd (2008)—re. Rosie Ruby and Rosie Blue juices

In 2004 the Federal Court found that **Cadbury Schweppes Pty Ltd** had engaged in conduct likely to mislead or deceive consumers by representing that two Cottee's cordial products contained extracts of real fruit depicted pictorially on its packaging.

The labelling on the banana mango-flavoured cordial used the words 'banana mango' in large print, pictures of bananas and mangoes and a 'Go Bananas' motif, when the product did not contain any real banana or mango. The labelling on the apple kiwi-flavoured cordial concentrate used the words 'apple kiwi' in the name of the product and pictures of cut kiwi fruit when there were no kiwi fruit in the product.

The court declared that some reasonable consumers would be misled or deceived by the representations, leading them to believe that the products contained the real fruits represented.

This case demonstrates the importance of the consumers' overall impression when conveying the contents of products.

In 2009 the ACCC acted against **Coca-Cola South Pacific Pty Ltd** (CCSP) regarding its 'myth-busting' advertising campaign featuring promotional material that the ACCC considered could mislead consumers about the nutritional qualities of Coca-Cola. The advertisements sought to correct apparent 'myths' associated with Coca-Cola and appeared by their design to be educative messages or articles.

One advertisement referred to a number of 'myths' about Coca-Cola, including that it 'makes you fat', 'rots your teeth' and is 'full of added preservatives and artificial flavours'. Another advertisement addressed to all Coca-Cola customers said, '... we felt it was time to state the facts and to help you understand the truth behind Coca-Cola'.

In claiming that the advertisements were misleading or deceptive, the ACCC asserted that Coca-Cola is high in calories and simple carbohydrates, which can contribute to weight gain, and that it contains high amounts of sugar and acid, which can contribute to the erosion of tooth enamel.

CCSP provided the ACCC with court enforceable undertakings to refrain from making statements in the future that could not be substantiated, to implement a trade practices law compliance review and to publish corrective notices in newspapers and on its website, where it would also publish the correct levels of caffeine for Coca-Cola drink products.

Target audience

When designing product labels, packaging and other promotional material, it is important that businesses carefully consider how consumers may interpret any representations made.

To avoid misleading consumers, you should consider the potential target audience for the product and how that audience may interpret the product's packaging, labelling or promotional material. Even if you believe the product representations are clear and well structured, customers may still be misled by them. Consumers who purchase your product may not fit the profile of the intended target audience and may interpret the product representations differently. You need to keep in mind that consumers are not expected to have the same level of understanding about product representation as food scientists and chefs.

To reduce the possibility of misunderstanding, your product labels and packaging should be designed on the basis that some consumers may make their purchasing decisions on the basis of the product's labelling and packaging rather than by consulting the ingredients list on the back or side of the package.

A representation need not be intentionally false to breach the Trade Practices Act—a breach can occur where a misrepresentation is careless or unintended. Whether you intend the labelling, packaging or promotional material to be misleading to a consumer is irrelevant to establishing a breach. However, false representations are considered more serious breaches than misleading conduct, and therefore carry higher penalties.

The Act effectively says that businesses must not make erroneous representations about their products or services. Accordingly, businesses need to implement risk management processes to ensure that their product representations are accurate and not likely to mislead consumers.

EXAMPLE

The ACCC was concerned that the overall impression created by the packaging of **Natur-all Pty Ltd's** (trading as Go Natural) fruit pieces in yoghurt implied the products were unprocessed berry and/or apricot pieces coated in yoghurt. In fact, the product was made from a fruit-based mixture consisting of 35 per cent fruit concentrate, 30 per cent sugar and 30 per cent semolina.

Go Natural provided a court enforceable undertaking to the ACCC, agreeing to amend the products' packaging, amend representations about the product that appeared on its website, publish an article for the food industry about its experience, and review and amend its trade practices law compliance program.

Natur-all Pty Ltd (2008)—re. Go Natural berry pieces in yogurt

What about qualifying claims, fine print and disclaimers?

When making representations about the prominence of particular ingredients in food or beverage products, businesses should provide sufficient and appropriate information to enable consumers to make a reasonable and informed judgment about whether to purchase the product. Businesses may, for example, need to include additional information on a label to qualify the emphasis given to a particular ingredient, if this emphasis is potentially false, misleading or deceptive.

Fine-print qualifications and disclaimers (e.g. the use of an asterisk or 'Conditions apply' statement leading to a fine-print disclaimer) are often used in food and beverage labelling. Businesses may sometimes try using them to promote a selling point, while putting the conditions in fine print in an attempt to avoid any misrepresentation.

However, this may not be enough to avoid breaching the Trade Practices Act. 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, packaging or advertisement. If an advertisement conveys an overall impression likely to be misleading and deceptive, it will breach the Act even though aspects or parts of the advertisement can be found that are inconsistent with that impression.

A disclaimer cannot be used to correct a misrepresentation. In effect, the Act says that businesses must not make erroneous representations about their products or services. Businesses cannot therefore make any type of potentially misleading representation and expect to qualify that with a disclaimer or in the fine print. Ultimately a representation will be judged on the overall impression that is created.

Where a qualification is not prominent or clear enough, the advertisement can still be misleading, depending on its overall impression on its audience. The advertisement must clearly direct attention to the most significant terms and conditions, so that consumers can readily have the information they need to make informed purchasing decisions.

Austrimi Seafoods Pty Ltd manufactured a crumbed seafood product called 'Kalamari'. The product's packaging featured a picture of crumbed seafood rings and the ACCC was concerned that this, combined with the name Kalamari, created the impression the rings were made predominantly of squid or calamari. The ingredients list showed that squid was only 4 per cent of product.

Austrimi provided the ACCC with court enforceable undertakings that in future it will not supply the product in the packaging of concern, use the name Kalamari on the product or supply seafood products in packaging and/or labelling that conveys an overall impression that the product consists mainly, or includes a not insubstantial portion, of a particular seafood ingredient when this is not the case.

The company also agreed to place a corrective notice on its website, implement a trade practices law compliance program and to work with its retail customers to place corrective notices at point of sale for 28 days.

Austrimi Seafoods Pty Ltd (2008)—re. Kalamari

Penalties and remedies for breaching the Act

The ACCC, consumers and competitors can all take legal action if representations made on a product's label, packaging or in related advertising potentially breach the Trade Practices Act. The business or person making the representation in contravention of the Act can be sued for damages.

The penalties and remedies available for breaching the unfair practices provisions of the Act are extensive and include:

- monetary penalties of up to \$1.1 million for companies and up to \$220 000 for individuals²
- damages (e.g. payment of money to compensate competitors for the business they have lost as a result of a misleading promotion)
- injunctions to prevent the prohibited conduct continuing, being repeated or to require some action to be taken
- specific performance (ordering a business or individual to do something specific)

2 Monetary penalties are currently only available for a breach of the criminal provisions in Part VC of the Trade Practices Act.

- other orders of various kinds in favour of people who have suffered loss or damage as a result of the conduct, such as refunding money to consumers.

The ACCC can also seek a range of other orders from the court, including adverse publicity and corrective advertising orders.

Avoiding a breach of the law

If a business has a trade practices compliance program in place, it can identify and reduce the risk of breaching the Trade Practices Act and rapidly and effectively remedy any breach that may occur.

A trade practices compliance program involves training and educating management and staff about their obligations under the Act, and is aimed at preventing future breaches occurring because of ignorance of the law. This training will often be accompanied by the establishment of a robust framework—such as stricter approval procedures for labelling, packaging and advertising as well as regular compliance checks throughout the business—to ensure future breaches of the Act do not occur.

Having someone with legal expertise in trade practices law to approve any promotional material can also help avoid any misleading claims and reduce the possibility of any potential breaches.

Important note

The ACCC's views are not a static statement of 'the law', as the interpretation of the Trade Practices Act ultimately depends on decisions of the courts and/or changes to the legislation made by parliament. The ACCC's current views on how the Act generally applies to labelling, packaging and advertising in the food and beverage industry are primarily based on past experience and court decisions about the relevant laws.

Therefore, this guideline should not be used in place of legal advice about a business's particular circumstances. The ACCC approaches each potential enforcement matter on a case-by-case basis, taking all relevant circumstances into account. Businesses may also be subject to action by private parties, including competitors.

The ACCC encourages businesses engaging in food and beverage labelling, packaging and advertising to incorporate the principles set out in this guideline into their everyday practices. 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 manufactured in Australia for export should seek to comply with the country of destination's laws.

Checklist—how to avoid breaching the Trade Practices Act

As you are looking at whether your labelling, packaging or promotion may mislead consumers, consider the following:

- What will consumers think the predominant ingredients of the product are and does this impression match the true facts?
- Do any aspects of the labelling or packaging need stronger emphasis?
- How will consumers interpret the words and the images used?
- What is the overall impression created by these words and images?
- What is the likely conclusion consumers will draw from that impression?
- What could consumers possibly miss or fail to appreciate?
- If you have used a disclaimer or qualification, is it sufficiently prominent and clear to overcome any misleading impressions?
- How will susceptible members of the target audience react?

Contacts

Infocentre: **1300 302 502**

Website: **www.accc.gov.au**

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service **www.relayservice.com.au**

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