

# NOT FREE TO ROAM: MISLEADING FOOD CREDENCE CLAIMS, THE ACCC AND THE NEED FOR CORPORATE SOCIAL RESPONSIBILITY

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## ABSTRACT

*This article explores misleading food credence claims. The article commences by drawing attention to a concomitant increase in differentiated foods (eg locally sourced, free-range or 'healthy') and information asymmetry (ie where food businesses possess more accurate and useful information than consumers). The article then examines attempts by the Australian Competition and Consumer Commission ('ACCC') to deter misleading food credence claims and identifies a taxonomy of misleading food credence claims including those made about a food's: (i) provenance; (ii) manufacture or production; and (iii) qualities or characteristics. The article then situates the ACCC's efforts within the dialectic of Corporate Social Irresponsibility ('CSI') and Corporate Social Responsibility ('CSR'), and in so doing, within regulatory theory that espouses a mix of deterrence and cooperation. We argue that while the ACCC plays a crucial role in deterring misleading food credence claims its focus is on CSI: meaning that more needs to be done to encourage CSR in relation to accurate and unbiased food credence claims. By treating food credence claims as a matter of CSR, food businesses can support informed decision-making and perhaps even contribute to better health outcomes. Indeed, conceptualising food credence claims as CSR is an important and necessary step in ensuring that honest and accurate food credence claims become the norm, not just the law.*

## I INTRODUCTION

Consumers increasingly demand foods with certain qualities or characteristics.<sup>1</sup> As a result, there has been a proliferation of information and claims on food labelling, packaging and advertising, with foods commonly accompanied by

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1 See generally Ellen Van Kleef and Hans Dagevos, 'The Growing Role of Front-of-Pack Nutrition Profile Labeling: A Consumer Perspective on Key Issues and Controversies' (2015) 55 *Critical Reviews in Food Science and Nutrition* 291.

claims about whether they are ethically produced, locally sourced, free-range, organic, GMO free or healthy.<sup>2</sup> Over the years, numerous government and industry initiatives have been introduced with the intent of simplifying, clarifying and improving the information and claims placed on food products.<sup>3</sup> Despite these initiatives, it is still often difficult, if not impossible, for consumers to verify the information and claims placed on foods.<sup>4</sup> This places consumers in a vulnerable position.

If the information or claims on foods is inaccurate, consumers may be misled or deceived into purchasing foods that they do not want, or into paying more for the foods they do. Indeed, research in food studies and consumer behaviour has found that there is often an ‘information asymmetry’ in relation to food products. This means that food businesses have more accurate and useful information about the foods they sell than consumers.<sup>5</sup> In relation to ‘free-range’ claims, for example, Lander J noted the trust consumers put in food businesses by explaining that ‘[o]nce the cage eggs were placed or mixed in the cartons or boxes ... the customers had no opportunity to determine whether the eggs were free range or cage eggs’.<sup>6</sup> The food information asymmetry is further exacerbated by the sheer volume and nature of information and claims accompanying food; often leading to consumer confusion, misunderstanding and ambivalence.<sup>7</sup>

In addition to the various government and industry initiatives attempting to simplify, clarify and improve the information placed on food products, the Australian Competition and Consumer Commission (‘ACCC’) has prioritised the scrutiny of food credence claims. According to the ACCC, credence claims are claims made on food products that suggest a premium or quality to food

- 2 See, eg, Fredrik Fernqvist and Lena Ekelund, ‘Credence and the Effect on Consumer Liking of Food — A Review’ (2014) 32 *Food Quality and Preference* 340; Renée Shaw Hughner et al, ‘Who Are Organic Food Consumers? A Compilation and Review of Why People Purchase Organic Food’ (2007) 6 *Journal of Consumer Behaviour* 94; Peter Williams, ‘Consumer Understanding and Use of Health Claims for Foods’ (2005) 63 *Nutrition Reviews* 256.
- 3 Some recent government initiatives include the introduction of: (i) *Country of Origin Food Labelling Information Standard 2016* (Cth); (ii) *Standard 1.2.7 — Nutrition, Health and Related Claims 2013* (Cth); and (iii) a voluntary front-of-package health star rating scheme.
- 4 See Jane Kolodinsky, ‘Persistence of Health Labeling Information Asymmetry in the United States: Historical Perspectives and Twenty-First Century Realities’ (2012) 32 *Journal of Macromarketing* 193.
- 5 See, eg, Elise Golan et al, ‘Economics of Food Labeling’ (2001) 24 *Journal of Consumer Policy* 117; Julie A Caswell and Eliza M Mojduszka, ‘Using Informational Labeling to Influence the Market for Quality in Food Products’ (1996) 78 *American Journal of Agricultural Economics* 1248.
- 6 *Australian Competition and Consumer Commission v Bruhn* [2012] ATPR ¶42-414, 45 772 [50]. In October 2015, the ACCC released a free-range egg guide detailing how it deals with misleading free-range egg claims: Australian Competition and Consumer Commission, *ACCC Enforcement Guidance — Free Range Hen Egg Claims* (October 2015) <[https://acc.gov.au/system/files/1029\\_Free%20range%20Eggs%20guidelines\\_FA.pdf](https://acc.gov.au/system/files/1029_Free%20range%20Eggs%20guidelines_FA.pdf)>. In October 2016, the Federal Government started consultation on a national, legally enforceable free-range egg standard: Treasury, Australian Government, ‘Free Range Egg Labelling’ (Consultation Paper, October 2015) <[http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Free%20range%20egg%20labelling/Key%20Documents/PDF/free\\_range\\_egg\\_labelling\\_RIS.ashx](http://treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Free%20range%20egg%20labelling/Key%20Documents/PDF/free_range_egg_labelling_RIS.ashx)>.
- 7 See, eg, Emma Tonkin et al, ‘Trust in and through Labelling — A Systematic Review and Critique’ (2015) 117 *British Food Journal* 318; Norman J Temple and Joy Fraser, ‘Food Labels: A Critical Assessment’ (2014) 30 *Nutrition* 257.

that ‘the consumer cannot independently verify ... themselves.’<sup>8</sup> These types of claims are a priority area for the ACCC largely because misrepresentations about food products allow companies to profit at the expense of both consumers and competitors, and in so doing may deprive consumers of the opportunity to make properly informed decisions about the foods they are purchasing.<sup>9</sup> In cracking down on misleading food credence claims, the ACCC has used a combination of warnings, negotiation, infringement notices, court-enforceable undertakings and litigation to ensure that consumers are not misled or deceived about the qualities or characteristics of a range of food products including beer,<sup>10</sup> ducks,<sup>11</sup> honey,<sup>12</sup> bread,<sup>13</sup> eggs<sup>14</sup> and water.<sup>15</sup>

This article examines attempts to deter food businesses making misleading food credence claims. The article begins, in Part II, by highlighting the increased consumer demand for differentiated foods and the concomitant rise in claims about food qualities or characteristics such as ‘free-range’, ‘healthy’, and ‘locally sourced’. As the information asymmetry makes it difficult for consumers to verify such food claims, the ACCC plays a crucial role in protecting consumers from misleading or deceptive food claims. Part III of the article identifies and considers a taxonomy of misleading or deceptive food claims targeted by the ACCC including claims that relate to the provenance of foods, the production or manufacturing of foods, and the qualities or characteristics of food. Part IV of the article locates the ACCC’s actions against misleading food credence claims within the dialectic of Corporate Social Irresponsibility (‘CSI’) and Corporate

- 8 ACCC, *Advertising and Selling Guide — Marketing Claims that Require Extra Care — Premium and Credence Claims* <<https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/marketing-claims-that-require-extra-care-premium-and-credence-claims>>.
- 9 Sarah Court, ‘Enforcement Priorities at the ACCC’ (Speech delivered at the Commonwealth Club of Adelaide, 24 September 2013) <<https://www.accc.gov.au/speech/enforcement-priorities-at-the-accc>>. For a discussion of the ‘harm’ of misleading or deceptive food credence claims see Felicity Lee, ‘False or Misleading Credence Claims: What’s the Harm and Why Should Businesses Care?’ (2014) 22 *Australian Journal of Competition and Consumer Law* 5.
- 10 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition & Consumer Commission Given for the Purposes of Section 87B by CUB Pty Ltd (t/a Carlton & United Breweries) ACN 004 056 106* (29 April 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1176567&nodeId=fa653d5c6aa63c57dd405d7c14f9c142&fn=Undertaking.PDF>> (‘Undertaking by CUB Pty Ltd’).
- 11 *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] ATPR ¶42-455; *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] ATPR ¶42-441.
- 12 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Basfoods (Aust) Pty Ltd ACN 115 242 281* (20 June 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1179354&nodeId=df703d0fc54b10d80ae66fbacc7d16f9&fn=Undertaking.PDF>> (‘Undertaking by Basfoods (Aust) Pty Ltd’).
- 13 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)* (2014) 317 ALR 73.
- 14 *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* [2014] ATPR ¶42-483.
- 15 In 2013, the ACCC negotiated with a number of water manufacturers to remove ‘organic’ claims from labelling and marketing because ‘organic’ is an agricultural term and, therefore, water cannot be ‘organic’: ACCC, ‘ACCC Negotiates Removal of Misleading “Organic” Water Claims’ (Media Release, 16/5/13, 16 July 2013) <<https://www.accc.gov.au/media-release/accc-negotiates-removal-of-misleading-%E2%80%98organic%E2%80%99-water-claims>>.

Social Responsibility ('CSR'), as well as the responsive regulatory frameworks espoused by Ayres and Braithwaite, and Parker and Nielsen.<sup>16</sup> In so doing we argue that, while the ACCC goes some way to protect consumers from misleading food credence claims, nevertheless, the ACCC is only part of the regulatory response to misleading food credence claims. According to Nielsen and Parker, 'responsive regulation proposes a principled way in which to combine the insights from plural theories of compliance and enforcement'.<sup>17</sup> By situating the ACCC's actions against misleading food credence claims in the dialectic of CSI and CSR, we argue that there is a social responsibility for food businesses to avoid misleading claims about foods' provenance, production or manufacturing, or qualities or characteristics. The argument for food businesses integrating CSR around food credence claims is justified on the basis of two dimensions of existing CSR: consumer issues and health impacts. By treating food credence claims as a matter of CSR, food businesses can support consumers making informed decisions, and help to minimise negative health impacts and support healthier food choices. Importantly, too, conceptualising food credence claims as CSR is an important step in making honest and accurate credence claims the norm, not just the law.

## II DIFFERENTIATED FOODS, INFORMATION ASYMMETRY AND THE ROLE OF THE ACCC

Consumers increasingly make value-driven food choices. In so doing consumers regularly differentiate foods based on qualities or characteristics that the foods possess.<sup>18</sup> A 2015 global survey of over 30 000 individuals, for example, found that the characteristics of foods were crucial to consumer choices, with 80 per cent of North American respondents, 79 per cent of European respondents and 93 per cent of Asia-Pacific respondents willing to pay more for products that claimed health benefits;<sup>19</sup> approximately 34 per cent of the respondents stated that whether foods were sustainably sourced or organic was important in their purchasing decisions; and more than 25 per cent of the respondents claimed that local ingredients were desirable.<sup>20</sup>

16 For a summary see, eg, Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7 *Regulation & Governance* 2.

17 Vibeke Lehmann Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 *Regulation & Governance* 376, 376.

18 See, eg, Ekaterina Volkova and Cliona Ni Mhurchu, 'The Influence of Nutrition Labeling and Point-of-Purchase Information on Food Behaviours' (2015) 4 *Current Obesity Reports* 19; Alessandro Banterle, Alessia Cavaliere and Elena Claire Ricci, 'Food Labelled Information: An Empirical Analysis of Consumer Preferences' (2012) 3 *International Journal on Food System Dynamics* 156; Nadia Prinsloo et al, 'A Critical Review of the Significance of Food Labelling During Consumer Decision Making' (2012) 40 *Journal of Family Ecology and Consumer Sciences* 83.

19 The Nielsen Company, *We Are What We Eat — Healthy Eating Trends Around the World* (January 2015) <http://www.nielsen.com/content/dam/nielsen-global/eu/nielseninsights/pdfs/Nielsen%20Global%20Health%20and%20Wellness%20Report%20-%20January%202015.pdf>> 12.

20 Ibid 7–8.

Because of the desire for differentiated food products, consumers have demanded more information on food packaging and labels.<sup>21</sup> Consumers want to make informed decisions regarding food characteristics and qualities, and they want to make informed choices that support their lifestyle and food philosophy. In order to make such decisions consumers often rely on information provided by food businesses. In many cases, making informed choices about foods is only possible when the information about the food is provided by the food business. Information about the qualities or characteristics of food is generally provided on food packaging and labelling or in broader advertising strategies such as internet and television commercials, websites, slogans and so on. Not only does packaging and labelling have the potential to inform consumers about foods,<sup>22</sup> but when consumers seek foods with particular characteristics or qualities the information and claims on packages and labels can effectively become the product.<sup>23</sup> Think, for example, Fair Trade, Yakult and free-range eggs. Significantly, then, food businesses devise the claims and information they place on foods so as to influence consumers' decision-making and thus improve sales.<sup>24</sup>

The obvious corollary of this is that food businesses — who want to seek a comparative advantage and sell more of their food products — are only too willing to provide this information. However, as we mentioned in our introduction, one of the difficulties for consumers in making food choices is information asymmetry. This is the situation in which food businesses possess more accurate and useful information than consumers and, thus, consumers must often rely on food businesses for their information.<sup>25</sup> Asymmetry of information tends to be associated with characteristics of the food such as features, functionality, ingredients or provenance.<sup>26</sup> In order to make decisions about the characteristics of foods consumers must rely on the food businesses' statements and claims about those foods. Without the help of food businesses, therefore, consumers cannot make properly informed decisions about the foods they are purchasing, and may

- 21 See Klaus G Grunert, 'Food Quality and Safety: Consumer Perception and Demand' (2005) 32 *European Review of Agricultural Economics* 369.
- 22 The impact of food credence claims is not uniform across all food types and for all consumers and some credence claims are more trusted and effective than others. See, eg, Kar H Lim et al, 'US Consumers' Preference and Willingness to Pay for Country-of-Origin-Labeled Beef Steak and Food Safety Enhancements' (2013) 61 *Canadian Journal of Agricultural Economics/Revue Canadienne d'Agroeconomie* 93; Lucie Sirieix et al, 'Consumers' Perceptions of Individual and Combined Sustainable Food Labels: A UK Pilot Investigation' (2013) 37 *International Journal of Consumer Studies* 143.
- 23 See Robert L Underwood and Noreen M Klein, 'Packaging as Brand Communication: Effects of Product Pictures on Consumer Responses to the Package and Brand' (2002) 10(4) *Journal of Marketing Theory and Practice* 58.
- 24 See Rita Kuvykaite, Aistė Dovaliene and Laura Navickiene, 'Impact of Package Elements on Consumer's Purchase Decision' (2009) 14 *Economics & Management* 441; Pinya Silayoi and Mark Speece, 'Packaging and Purchase Decisions: An Exploratory Study on the Impact of Involvement Level and Time Pressure' (2004) 106 *British Food Journal* 607.
- 25 Marco A Palma, Alba J Collart and Christopher J Chammoun, 'Information Asymmetry in Consumer Perceptions of Quality-Differentiated Food Products' (2015) 49 *Journal of Consumer Affairs* 596; Caswell and Mojdzuska, above n 5.
- 26 See Palma, Collart and Chammoun, above n 25.

either purchase a food that they do not want or pay more for the foods they do.<sup>27</sup> The problem of information asymmetry is made worse by the proliferation of food credence claims, which makes it especially difficult for consumers to verify the claims made on foods without extensive research or third-party intervention.<sup>28</sup> While consumers can determine taste and smell by eating foods, they are not able to determine credence claims. For example: How do consumers verify whether food is produced in or sourced from the Barossa Valley or King Island? How do consumers verify whether the chicken they purchased has been free to roam in an open paddock?

One of the main ways in which information asymmetry is ameliorated is through consumer law. In response to problematic claims on food products, the ACCC has prioritised the scrutiny of food credence claims in relation to the *Australian Consumer Law* ('ACL'), contained in sch 2 of the *Competition and Consumer Act* 2010 (Cth).<sup>29</sup> The ACCC acknowledges that credence claims may adversely influence consumers' purchasing decisions if they give the impression that the food products carrying them are a better choice than those without the claimed characteristic or benefit.<sup>30</sup> Because consumers are often unable to assess the accuracy of credence claims, food businesses must ensure that the claims they make are accurate and can be substantiated.

The ACCC has the power to take a range of actions against food businesses that mislead or deceive consumers including to initiate civil proceedings, with action by the ACCC having the potential to end in the issuing of infringement and public warning notices, accepting court-enforceable undertakings or instigating litigation before the Federal Court of Australia.<sup>31</sup> Since making food credence claims a priority in early 2014,<sup>32</sup> the ACCC has taken various actions against contravening food businesses. In 2015, for example, the ACCC investigated and entered into five court-enforceable undertakings from food businesses found to be in contravention of the *ACL*, and initiated proceedings in the Federal Court of Australia in relation to actions for misleading and deceptive food credence claims against several companies. Appendix I contains a summary of the ACCC's court-enforceable undertakings and Appendix II a summary of the ACCC's litigation related to food credence claims in the calendar year period 2010–15.

27 See, eg, *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd* (2013) 99 IPR 548 [32] (Murphy J). It has also been argued that 'information asymmetry' leads to inefficient markets, and to unsatisfactory consumer purchasing decisions, poorer product offerings, inadequate consumer-oriented communication and decreased consumer satisfaction: Debi Prasad Mishra, Jan B Heide and Stanton G Cort, 'Information Asymmetry and Levels of Agency Relationships' (1998) 35 *Journal of Marketing Research* 277.

28 Michael R Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 *Journal of Law and Economics* 67.

29 Rod Sims, 'Australian Competition and Consumer Commission Priorities' (2014) 22 *Australian Journal of Competition and Consumer Law* 184, 189. See Appendices I and II for a summary of the ACCC's court-enforceable undertakings and litigation related to food credence claims (2010–16).

30 *Ibid* 189.

31 *ACL* pt 5.1.

32 ACCC, above n 8.

### III A TAXONOMY OF MISLEADING AND DECEPTIVE FOOD CLAIMS

In this Part of the article we consider the ACCC’s attempts to penalise and discourage misleading or deceptive credence claims by identifying and discussing a taxonomy of food claims. Our taxonomy of misleading and deceptive food claims is set out in Table 1, and reflects the broad ‘types’ of claims that are commonly made about foods including those that relate to: (i) the provenance of foods; (ii) the production or manufacture of foods; and (iii) the qualities or characteristics of food.

**Table 1: Taxonomy of misleading and deceptive food claims**

Categories	Types of claims	Relevant sections of the <i>ACL</i> <sup>33</sup>
Provenance of foods	Claiming that foods are sourced from, or made in, a particular location when they are not. For example: claiming that a food is manufactured or produced in the Barossa Valley or King Island when it is not.	Sections 18 and 29(1)(k)
Manufacture and production of foods	Claiming that foods are produced or manufactured in a particular way when they are not. For example: claiming that food is ‘free-range’ or ‘free to roam’ when it is not.	Sections 18, 29(1)(a) and 33
Qualities and characteristics of foods	Claiming that foods have a particular standard, quality or value when they do not. For example: claiming that a beverage contains ‘real’ fruit or is ‘healthy’ when it does not.	Sections 18 and 29(1)(a)

While Parts III(A)–(C) of this article deal with misleading and deceptive food claims as if they are distinct ‘types’, it is important to note that there is often an overlap between ss 18, 29 and 33 of the *ACL*. Misleading food credence claims may simultaneously relate to provenance, production and characteristics. For example, in *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]*,<sup>34</sup> the respondent (‘Pirovic’) contravened ss 18, 29(1)(a) and 33 of the *ACL*. Pirovic supplied and sold eggs bearing the brand ‘Pirovic Free Range Eggs’, and promoted the eggs on its website by stating: ‘Our hens feed on wholesome natural grains, roam freely on green pastures during the day and return to the safety of large barns at night’.<sup>35</sup> This statement, and others to a similar effect, were

33 The *ACL* applies to conduct engaged in after 1 January 2011, while the *Trade Practices Act 1974* (Cth) (‘*TPA*’) applies to conduct prior to January 2011 (specifically *ACL* ss 18, 19 and 33 mirror *TPA* ss 52, 53 and 55).

34 [2014] ATPR ¶42-483.

35 Ibid 44 467 [9].

included with images of hens in an open field on the egg cartoons and their website in conjunction with the words ‘Free Range Eggs’. In 2014, Flick J agreed that in using the brand and making the statements, Pirovic represented to consumers that the eggs were produced by hens that were free to roam in an open field. Flick J found that claiming the eggs were ‘Free Range’ was misleading because the hens had limited capacity to leave the barns and move about because of ‘a combination of: (a) the stocking densities of the barns; (b) the flock sizes in the barns; and (c) the number, size, placement and operation of the physical openings to the open range’.<sup>36</sup> As a consequence, Pirovic had engaged in misleading or deceptive conduct (contravening s 18), made misleading representations that the eggs were of a particular quality or had a particular history (contravening s 29(1)(a)), and engaged in conduct that was likely to mislead the public as to the nature or characteristics of the eggs (contravening s 33).

## **A Provenance of Foods**

One of the main ways in which food businesses represent their foods is through provenance or place of origin claims. So important to food production and marketing is provenance that since the late nineteenth century, some countries have protected Geographical Indications (‘GIs’), which indicate that products possess a special quality or qualities of some kind by virtue of its origin in a particular place.<sup>37</sup> Well-known examples of GIs include ‘Darjeeling’ tea, Mexico’s ‘Tequila’, and ‘Cornish’ pasties. While Australia does not have a GI scheme in place for food products (other than wines and spirits), businesses commonly use place of origin names on their foods and see this as a way to add value to a food product.<sup>38</sup>

In Australia, there are limited regulations around provenance claims and those that exist tend to focus on ‘country of origin’ labelling. In this regard, the main intent of the legislators has been to enable consumers to clearly identify and distinguish goods made in Australia from those that have been imported.<sup>39</sup> Yet the *ACL* and ACCC recognise that food provenance claims do not merely relate to ‘made in Australia’ but also to regional characteristics or locality. Put simply, if the food does not have the provenance claimed then the food business has contravened the *ACL*. Specifically, s 29(1)(k) of the *ACL* makes it an offence for food businesses to ‘make a false or misleading representation concerning the place of origin of goods’. More generally, claims as to place of origin may

36 Ibid 44 474 [36].

37 See Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012).

38 For a discussion of the potential advantages of adoption of an Australian regime to allow the registration of Geographical Indications of Origin (GIs) for food products other than wine, see William van Caenegem, Peter Drahos, and Jen Cleary, ‘Provenance of Australian Food Products: Is There a Place for Geographical Indications?’ (Publication No 15/060, Rural Industries Research and Development Corporation, July 2015).

39 See Department of Industry, Innovation and Science, Australian Government, *Country of Origin Labelling* <<https://industry.gov.au/industry/IndustrySectors/FoodManufacturingIndustry/Pages/Country-of-Origin-Labeling.aspx>>.



also contravene s 18 of the *ACL* which prohibits ‘conduct that is misleading or deceptive or is likely to mislead or deceive’. There are a number of instances in which the ACCC has found contraventions of the place of origin provisions of the *ACL*. In 1994, in the case of *Australian Competition and Consumer Commission v Harvey Fresh (1994) Ltd (ACN 065 591 219)*,<sup>40</sup> Harvey Fresh was found to have contravened s 52 of the *Trade Practices Act 1974 (Cth) (‘TPA’)* because it had represented on two occasions that its cheese was produced in Western Australia when in fact it was produced in Victoria. More recently, in 2014, the ACCC accepted a court-enforceable undertaking from Maggie Beer Products Pty Ltd in which Maggie Beer Products acknowledged that its conduct was likely to have been misleading, and thus in breach of s 18 of the *ACL*.<sup>41</sup> Specifically, the logo and information on some of Maggie Beer’s products including ‘Maggie Beer: A Barossa Food Tradition’ and the address on the labels represented ‘that the “Maggie Beer” products were manufactured in Tanunda, the Barossa Valley and/or South Australia’ when, in fact, they were not. The foods in question were manufactured in Victoria or Queensland.<sup>42</sup> Likewise, in 2011 Aldi Foods Pty Ltd gave an undertaking to the ACCC that it would discontinue incorrectly promoting the ‘Just Organic’ honey which was manufactured by Spring Gully Foods and sold exclusively throughout the supermarket chain as being produced on Kangaroo Island when, in fact, it contained only a small portion of Kangaroo Island honey.<sup>43</sup> Another recent example of misleading provenance claims includes Basfoods representing to its customers that the place of origin of its honey was Victoria, when in fact it was from Turkey.<sup>44</sup>

From the cases and undertakings on misleading or deceptive provenance claims a number of observations can be made. First, the totality of representations is important. In 2014 the ACCC accepted a court-enforceable undertaking from CUB Pty Ltd (‘CUB’), in which CUB acknowledged that it had likely contravened s 29(1)(k) of the *ACL*.<sup>45</sup> Put simply, CUB represented that its Byron Bay Pale Lager was brewed by a small brewer in Byron Bay when it was not: it was brewed over 600 km south of Byron Bay. The combination of the representations used by CUB represented the product as being from a place of origin entirely different from its actual place of origin. The lighthouse, in particular, is a well-known landmark in Byron Bay and is known throughout Australia. More specifically, the ACCC and CUB agreed that

40 (2009) 82 IPR 6.

41 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the purposes of section 87B by Maggie Beer Products Pty Ltd (ACN 080 083 058)* (18 August 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1180754&nodeId=0d1b08729364681391a0606b107c6a02&fn=Undertaking.pdf>> (‘Undertaking by Maggie Beer Products Pty Ltd’).

42 Ibid 2.

43 ACCC, *Trade Practices Act 1974 and Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B by Aldi Foods Pty Ltd 086 210 139* (28 July 2011) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1000928&nodeId=34264915cdae2c38d5744f9f5122e340&fn=Undertaking.pdf>>.

44 ACCC, *Undertaking by Basfoods (Aust) Pty Ltd*, above n 12.

45 ACCC, *Undertaking by CUB Pty Ltd*, above n 10, 2 [3.2]–[3.4].

[t]he Product was marketed by CUB with bottle labelling, designed in consultation with BBBC [Byron Bay Brewing Company], that made references to the Byron Bay region. In particular, the labelling incorporated the name Byron Bay Pale Lager, a pictorial representation of a lighthouse, text regarding Byron Bay and BBBC, and a map of the Byron Bay region showing the location of BBBC ...<sup>46</sup>

Secondly, to be able to use provenance claims a significant proportion of the foods must be sourced from that location. In *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd*,<sup>47</sup> the ACCC brought proceedings against Kingisland Meatworks & Cellars Pty Ltd ('King Island Meatworks'), alleging it made false or misleading representations about the place of origin of the meat it sold. The ACCC contended that the use of the name 'King Island' on products and in advertising gave the impression that the meat, or at least a significant proportion of the meat, being sold was from King Island. The Federal Court of Australia agreed with the ACCC, finding that King Island Meatworks contravened both ss 18 and 29(1)(k) of the *ACL*. Evidence was provided to the Court 'that King Island Beef is positioned in the premium end of the Australian beef market, ... that it has strong brand recognition across Australia', and that it 'commands a price premium in the market due to its quality'.<sup>48</sup> The name 'King Island Meatworks and Cellars', therefore, was chosen because of the reputation of meat from King Island. While there is no definitive percentage or ratio of food that needs to come from the place of origin for it to be a 'significant portion', Murphy J suggested in obiter that if 70 per cent or more of the goods of a business is sourced from the place of origin, marketing or advertising the place of origin will not be misleading.<sup>49</sup> The corollary of this is that if a lower portion (that is <70 per cent) of food is sourced from that location, food businesses may be engaging in misleading or deceptive conduct.

Thirdly, food businesses who originally source a significant portion of food from the place of origin may contravene the *ACL* if that portion decreases over time. Again, the case of *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd* is instructive on this point.<sup>50</sup> The Federal Court of Australia held that when the manager and sole director first chose and used the name King Island Meatworks and Cellars, the conduct was not misleading because the majority of the meat sold came from King Island. When King Island Meatworks began trading in 2001, they sourced a significant portion of its beef from King Island, as '70 per cent of the beef it sold was sourced from ... King Island'.<sup>51</sup> However, when they stopped sourcing meat from King Island

46 Ibid 2 [3.2].

47 [2012] ATPR ¶42-412. See also the orders decision in *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd* (2013) 99 IPR 548.

48 *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd* [2012] ATPR ¶42-412, 45 746 [23].

49 *Australian Competition and Consumer Commission v Kingisland Meatworks & Cellars Pty Ltd* (2013) 99 IPR 548, 555.

50 Ibid 45 753 [65]–[66].

51 Ibid 45 745 [14].

from mid-2002, they needed to amend their claims and advertising so as not to (mis)represent the provenance of their beef.

Lastly, food businesses must be careful about using one label, logo or advertising claim on all of their products. Maggie Beer Products sold a range of products and relied on their labels and business history to imply that all of these products were from the Barossa Valley. However, not all food was made in, or sourced from, South Australia's Barossa Valley. As we have already noted, in 2014, the ACCC accepted a court-enforceable undertaking that the use of the words 'A Barossa Food Tradition' and the address 'Maggie Beer Products: 2 Keith Street Tanunda South Australia 5352' were likely to be misleading or deceptive when used in relation to Maggie Beer Products' ice cream, aged red wine vinegar, extra virgin olive oil, and rosemary and verjuice biscuits.<sup>52</sup> While many of Maggie Beer Products' foods were from the Barossa Valley, the foodstuffs in question were not.

The issue of provenance is becoming increasingly complex and challenging for food businesses who conduct their businesses on a global scale. Some foods are made up of ingredients from many different countries and companies need to be careful how they market their products. On this point, the ACCC has issued some guidelines as to how companies can market their products without contravening provenance provisions.<sup>53</sup> In particular, where an unequivocal representation about the provenance of a food cannot be supported, a food business should use accurate, relevant, and qualifying information.<sup>54</sup> Examples could include, '[m]anufactured in Australia from premium imported components' or '[a]ssembled in Australia from 70 per cent Australian parts'.<sup>55</sup> According to the ACCC, any such qualifications should be drawn to the consumers' attention in all claims, promotional information, and labels.<sup>56</sup>

## **B Manufacture and Production of Foods**

Another way in which food businesses can mislead or deceive consumers is in regard to the manufacture or production of the foods they produce and sell. Section 33 of the *ACL* makes it an offence 'to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods'.

52 ACCC, *Undertaking by Maggie Beer Products Pty Ltd*, above n 41.

53 ACCC, 'Country of Origin Claims and the Australian Consumer Law' (Guide, ACCC, 24 April 2017) <[https://www.accc.gov.au/system/files/1168\\_Country%20of%20Origin%20and%20the%20ACL\\_FA.pdf](https://www.accc.gov.au/system/files/1168_Country%20of%20Origin%20and%20the%20ACL_FA.pdf)>.

54 Ibid. See also ACCC, *Advertising and Selling Guide — Country and Place of Origin Claims* <<https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/marketing-claims-that-require-extra-care-premium-and-credence-claims/country-and-place-of-origin-claims>>.

55 ACCC, 'Country of Origin Claims and the Australian Consumer Law', above n 53, 17. See also ACCC, 'Avoiding Unfair Business Practices — A Guide for Businesses and Legal Practitioners' (22 April 2016) <<http://www.accc.gov.au/publications/avoiding-unfair-business-practices-a-guide-for-businesses-legal-practitioners>>.

56 ACCC, 'Country of Origin Claims and the Australian Consumer Law', above n 53, 16–7.

Perhaps the first, and most obvious, point to make in relation to s 33 is that food businesses should not make representations about manufacture or production methods that are false. A number of instances of misleading ‘free-range’ styled claims have been used on foods — including ducks, chickens, and eggs — which makes this problem clear.<sup>57</sup> A Melbourne-based company, Luv-a-Duck, misled consumers into thinking its ducks had substantial access to outdoor areas and were ‘[g]rown and grain fed in the spacious Victorian Wimmera wheatlands’.<sup>58</sup> The Federal Court of Australia found this claim to be misleading and deceptive conduct under the *ACL* because the ducks did not have access to outdoor areas.<sup>59</sup> There are a number of other examples of ‘free-range’ styled claims being misleading or deceptive, including: Pepe’s Ducks, claiming its ducks were ‘Open Range’ and ‘Grown Nature’s Way’ when in fact the ducks did not spend time ranging outdoors;<sup>60</sup> and Baiada Poultry Pty Ltd and Barter Enterprises Pty Ltd, the processors and suppliers of Steggles branded chicken products, were found to have been making misleading claims that their chickens were ‘free to roam’.<sup>61</sup>

Another significant case dealing with misleading claims about the manufacture or production process of foods is that of *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)*.<sup>62</sup> Coles used the following phrases to advertise and sell their bread: ‘Baked Today, Sold Today’, ‘Freshly Baked’, ‘Baked Fresh’, ‘Freshly Baked in Store’, and ‘Coles Bakery’.<sup>63</sup> By using these phrases to advertise its bread, Allsop CJ found that Coles was trying ‘to increase its market share by appealing to those [consumers] who might otherwise buy bread from specialist bakeries’.<sup>64</sup> The representations gave consumers the belief that the bakery products had either been baked from scratch or entirely baked on the day of purchase, which was not the case. The truth, however, was quite different. While Coles employed three production methods to bake their bakery products, it was representing that all of their bakery products were baked fresh from scratch. Most of Coles’ bakery lines used two production methods. They were: (i) heating in an oven thawed dough that was supplied frozen; and (ii) heating in an oven dough which had been previously partly baked.<sup>65</sup> It was found that Coles contravened ss 18(1), 29(1)(a) and 33 of the *ACL* in that Coles represented that the bread had been manufactured a particular way it was not. Specifically, Allsop CJ found that Coles made misleading

57 *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] ATPR ¶42-455; *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] ATPR ¶42-441.

58 *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] ATPR ¶42-455, 43 804–5, 43 812.

59 *Ibid* 43 814–15 [39]–[42].

60 *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] ATPR ¶42-441, 43 342 [7]–[10].

61 *Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 4]* [2013] ATPR ¶42-448, 43 487–91.

62 (2014) 317 ALR 73.

63 *Ibid* 74 [1].

64 *Ibid* 75 [14].

65 *Ibid* 75 [9], 76 [23], 80 [30].

representations that their goods were ‘baked on the day of sale, or baked in a fresh process, using fresh, not frozen, product’.<sup>66</sup>

Importantly, too, an intent to mislead or deceive consumers about manufacture or production methods is not required.<sup>67</sup> This means that food businesses cannot carelessly or recklessly make claims about food, but must instead actively take steps to verify the accuracy of the representations they make about the manufacture or production of food they sell. The consequence of a food business not verifying the representations made about food manufacture and production is illustrated by the 2014 court-enforceable undertaking from Barossa Farm Produce Pty Ltd (‘Barossa Farm Produce’).<sup>68</sup> In relation to their pork products, Barossa Farm Produce represented on packaging, websites and other advertising material that it was ‘free range’ and a ‘Heritage Berkshire/Black Pig’, and that they knew the provenance of every animal used in the production of their smallgoods.<sup>69</sup> Barossa Farm Produce, however, did not have a reasonable basis for making these representations.<sup>70</sup> And while it may not have been Barossa Farm’s intention to mislead or deceive customers, it ‘acknowledge[d] that it did not have adequate systems in place to verify the accuracy of the representations’.<sup>71</sup>

### **C Qualities or Characteristics of Foods**

Another way in which food businesses may mislead or deceive consumers is in regard to the quality or character of their foods. Section 29(1)(a) of the *ACL* prohibits businesses from making ‘false or misleading representation[s] that [f]oods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use’. For example, claiming that an ingredient is a significant ingredient in foods can be deceptive if that ingredient only constitutes a small portion of the food. In the case of *Australian Competition and Consumer Commission v Nudie Foods Australia Pty Ltd*, Nudie Foods represented that the fruit juice they were producing consisted primarily of cranberry juice when it in fact only contained 20 percent cranberry juice.<sup>72</sup> The problem was that the labelling featured pictures of cranberries and Nudie had also displayed prominent advertising billboards on buses and trams, which made out that the juice was predominately cranberry when it was not.<sup>73</sup>

66 Ibid 100 [159].

67 For example, in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199, Gibbs CJ observed that conduct not intended to mislead or deceive and which was engaged in “honestly and reasonably” might nevertheless contravene section 52 of the *Trade Practices Act 1952* (Cth).

68 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Barossa Farm Produce Pty Ltd (ACN 095 717 347)* (13 June 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1179205&nodeId=498c19e07ef9f6b44d09013edac3c477&fn=Undertaking.pdf>>.

69 Ibid 3 [9]–[11].

70 Ibid

71 Ibid 4 [12].

72 [2008] ATPR ¶42-245.

73 Ibid 49 405–6.

Likewise, in 2014, the ACCC accepted a court-enforceable undertaking from Basfoods (Australia) that its honey product, labelled as ‘Victoria Honey’, was likely to mislead or deceive consumers because it was not honey produced from honey bees, rather the honey was predominantly sugars from C-4 plants including corn and sugar cane.<sup>74</sup>

Importantly, when determining whether there have been misleading or deceptive claims about foods’ qualities or characteristics, the advertising strategy is viewed in its entirety. That said, it may be misleading or deceptive conduct to include merely one picture, image or slogan if that gives a consumer a false impression about the qualities or characteristics of foods. In *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd*, Schweppes had breached the TPA by labelling and packaging cordials using descriptions of real fruit, yet there was no real fruit of those kinds used in the cordials.<sup>75</sup> Likewise in *Australian Competition and Consumer Commission v Arnott’s Biscuits Ltd*,<sup>76</sup> Arnott’s had falsely and misleadingly packaged and advertised that some of its fruit-filled biscuits contained far less fruit than what was claimed. Further, the marketing slogan was ‘snack right’ when in fact the biscuits were high in sugar and minimal in fruit.

It is not merely the accuracy of the claims about foods’ qualities or characteristics that are important, but also whether the claims can be substantiated. Yet while food businesses should be able to substantiate claims that their foods have particular qualities or characteristics, this is not always feasible; particularly with claims that are equivocal and vague.<sup>77</sup> In 2012, for example, the Australian consumer group CHOICE published a review of various food products that carry ‘healthy’ claims and trademarks.<sup>78</sup> In finding that approximately half of those products reviewed were high in ‘unhealthy’ ingredients, CHOICE acknowledged that food labelling and consumer protection laws prohibit health claims that might mislead consumers. Referring to the use of ‘healthy’ claims and trademarks, and an earlier study conducted by the George Institute, the CHOICE report highlighted both the importance and challenge of substantiating claims related to health characteristics, stating:

Many products you’ll find in the supermarket have connotations of being ‘natural’ by virtue of their trademarked brand names — for example, All Natural, Be Natural, Go Natural, Nice & Natural. The George Institute for Global Health’s database lists close to 1300 products and brands that use the word ‘natural’ in

74 ACCC, *Undertaking by Basfoods (Aust) Pty Ltd*, above n 12, 2–3 [9]–[12].

75 (2004) 61 IPR 270, 281 [34].

76 [2008] FCA 590 (29 April 2008).

77 For an example of a matter in a different context, in a case involving health services, see *Australian Competition and Consumer Commission v NuEra Health Pty Ltd (in liq)* [2007] ATPR (Digest) ¶46-273. It was found that the respondent had misrepresented the quality of the services by stating that their treatment could cure cancer.

78 Elise Dalley, *Healthy Labelling or Healthy Marketing?* (4 September 2014) CHOICE <<http://www.choice.com.au/reviews-and-tests/food-and-health/labelling-and-advertising/nutritional-labelling/rise-of-nutritional-trademarking/page/compare%20the%20products.aspx>>.

their product name or package marketing — but in many cases the ingredients are far from it.

A ‘natural’ trademarked product might actually contain additives such as preservatives, and while others may be technically natural, they can still be laden with sodium and saturated fats.<sup>79</sup>

Finally, it is worth noting something more about the overlap between misleading or deceptive food claims. As we saw in the opening of Part III of this article, there is often considerable overlap between ss 18, 29 and 33 of the *ACL* and conduct may contravene all of these provisions. However, this will not always be the case. For instance, misrepresentations as to production and manufacture will not necessarily be misrepresentations about the quality or characteristics of foods, unless the manufacture process goes to the ‘inherent’ qualities or characteristics of the foods. In *Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 4]*,<sup>80</sup> for example, the ACCC claimed that the respondents had misled and deceived the public by labelling chickens ‘free to roam’ in advertising, packaging, and publication materials. In making representations that their chickens were ‘free to roam’, the ACCC claimed that the respondents engaged in misleading and deceptive conduct in contravention of both ss 18 and 29(1)(a) and also argued that — by claiming the chickens raised on their behalf were ‘free-range’ — they had misrepresented the nature and/or characteristics of the meat in breach of s 33.<sup>81</sup> More specifically, the ACCC claimed that the population density of meat chickens raised in barns by the respondents did not allow for chickens to roam freely, and that the high number of young chickens in each shed meant that each chicken had a living area of equal to or less than an A4 sheet of paper.<sup>82</sup> It was found that the stocking densities of meat chickens in the respondents’ facilities did not allow for chickens to roam freely.<sup>83</sup> While the Federal Court of Australia found the respondents engaged in misleading or deceptive conduct, in contravention of ss 18 and 29 of the *ACL*, it found that s 33 was not contravened because ‘[t]he “free to roam” representations did not relate to the inherent qualities of the chickens’, but rather ‘to the circumstances in which the chickens were raised’.<sup>84</sup>

#### **IV MISLEADING FOOD CREDENCE CLAIMS AND THE DIALECTIC OF CSI AND CSR**

In the previous Part we showed how the ACCC plays a crucial role in tackling misleading food credence claims, and, therefore, helping to balance the

79 Ibid [4]–[5].

80 [2013] ATPR ¶42-448.

81 Also, for the conduct prior to 1 January 2011, the respondents contravened *TPA* ss 52, 53(a), 55.

82 *Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 4]* [2013] ATPR ¶42-448, 43 477 [18]–[19], 43 483 [54].

83 Ibid 43 490 [112]–[114].

84 Ibid 43 491 [128].

information asymmetry. We also set out a taxonomy of misleading food credence claims around provenance, manufacture and production, and qualities and characteristics. In this Part of the article we highlight some of the specific benefits and limitations of the ACCC's efforts against misleading food credence claims. On the one hand, the ACCC's focus on enforcement (ie likelihood of detection and enforcement actions) and penalties (ie financial penalty, legal costs, bad publicity) deters some food businesses from making misleading food credence claims. On the other hand, by its very nature the ACCC must focus on those food businesses that have already misled or deceived consumers and, in this way, tends to be reactive. In making the argument that more needs to be done to encourage socially responsible business behaviour in relation to accurate and unbiased food credence claims, we situate the ACCC's action against misleading food credence claims within the dialectic of Corporate Social Irresponsibility ('CSI') and Corporate Social Responsibility ('CSR'). Informed by responsive regulation — as espoused by Ayres and Braithwaite<sup>85</sup> and Parker and Nielsen<sup>86</sup> — we argue for a mix of regulatory approaches to food credence claims: approaches that encourage and facilitate socially responsible food credence claims; and approaches that combine government and non-state action and initiatives.

## **A Regulating Corporate Social Irresponsibility (CSI)**

Action against food businesses who engage in misleading food credence claims by the ACCC is concerned largely with CSI.<sup>87</sup> CSI refers to businesses acting in less than ideal ways in regard to legal, ethical or social obligations.<sup>88</sup> Some well-known examples of irresponsible business practices include price-fixing and flouting environmental laws and regulations. Perhaps at the most extreme end of CSI are those practices that are contrary to the law such as contravening financial or environmental regulations or, as we argue in this article, using misleading food credence claims in contravention of the *ACL*. Taking swift and firm action against food businesses that act irresponsibly is important because their conduct has the potential to disadvantage or harm consumers and other businesses. According to the ACCC, misrepresentations about food products allow companies to profit at the expense of both consumers and competitors, and in so doing may deprive consumers of the opportunity to make properly informed decisions about the foods they are purchasing.<sup>89</sup>

85 See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation — Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

86 See, eg, Parker, 'Twenty Years of Responsive Regulation', above n 16; Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance — Business Responses to Regulation* (Edward Elgar, 2011).

87 For an understanding of CSI, see generally Brian Jones, Ryan Bowd and Ralph Tench, 'Corporate Irresponsibility and Corporate Social Responsibility: Competing Realities' (2009) 5 *Social Responsibility Journal* 300.

88 See William Sun (ed), *Critical Studies on Corporate Responsibility, Governance and Sustainability* (Emerald Group Publishing, 2010–16) vol 4.

89 Court, above n 9.



Crucial to the ACCC's fight against misleading food credence claims is deterrence and cooperation. It is generally accepted within regulatory theory that a combination of deterrent and cooperative approaches forms the basis of 'effective, efficient, and legitimate, regulatory policy'.<sup>90</sup> By enforcing the *ACL* and penalising food businesses who use misleading food credence claims, the ACCC hopes it will deter food businesses, encourage them to cooperate with the *ACL*, and make honest and accurate food credence claims. Indeed, the ACCC has specifically highlighted the significance of enforcement action as an effective deterrence to misleading and deceptive practices in their compliance and enforcement policy.<sup>91</sup> The ACCC is committed to taking strong measures against possible non-complying food businesses through investigations, infringement notices, court-enforceable undertakings, and litigation.<sup>92</sup>

Part of the effectiveness of the ACCC's approach to food credence claims stems from the fact that legal action can be time-consuming and costly for food businesses. This alone can be a deterrent for food businesses and help to ensure that they comply with the *ACL*, and cooperate with the ACCC. Importantly, food businesses are exposed not only to penalty fees but also may be subject of adverse cost findings: it is not uncommon for businesses to be ordered to pay the legal costs associated with the ACCC's investigations and litigation. Central to determining the quantum of penalties against food businesses is the need for specific and general deterrence and consistency with other consumer law cases. For example, Lander J in *Australian Competition and Consumer Commission v Bruhn* concluded that a penalty 'of \$50,000 would adequately bring to the attention of those like-minded persons in this industry who intended to engage in similar conduct that such conduct is unprofitable'.<sup>93</sup> And in the decision of *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*, Coles was ordered to pay \$2.5 million in pecuniary penalties as well as the ACCC's legal costs.<sup>94</sup> Other factors taken into account when determining the amount of the penalty for breaching the *ACL* include the number of offences committed against the *ACL*, the loss and damage suffered, whether the business had engaged in previous similar conduct, and the financial size and position of the business.<sup>95</sup>

ACCC action also raises broader concerns for food businesses that may deter them from making misleading food credence claims. Publicity around misleading and deceiving consumers can damage the reputation and profitability of food businesses, with businesses aware that bad publicity about their practices —

90 Nielsen and Parker, 'Testing Responsive Regulation in Regulatory Enforcement', above n 17, 376, introducing a collection of articles on the influence of Ayres and Braithwaite's version of responsive regulation: Ayres and Braithwaite, *Responsive Regulation*, above n 85.

91 Sims, above n 29, 184.

92 Ibid.

93 [2012] ATPR ¶42-414, 45 772-3 [60]. Other penalties have included: \$360 000 pecuniary and \$15 000 costs: *Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd* [2013] ATPR ¶42-455, 43 807.

94 (2015) 327 ALR 540, 562-3 [103]-[104].

95 See *ACL* ss 224-225.

whether false or not — damages perceptions of the business and its products in the eyes of consumers.<sup>96</sup> For example, after Coles was found guilty of misleading consumers about the ‘freshness’ of their bread, there was significant negative discourse and publicity in a range of media, with titles including ‘Coles Slapped with a Fresh Bread Ad Ban’, ‘Coles’ “Fresh” Baked Products up to Six Months Old’, and ‘False Fresh Bread Claims Cost Coles \$2.5M’.<sup>97</sup> Similarly there has been negative publicity around misleading ‘free-range’ styled claims including ‘Snowdale Holdings Found Guilty of Misleading Public over “Free-range” Eggs’ and ‘Egg Companies Count the Cost of Dodgy Claims’.<sup>98</sup>

Another way in which the ACCC facilitates compliance is through cooperation. More specifically the ACCC facilitates and emboldens cooperation through enforceable undertakings and infringement notices. The ACCC also plays an educative function. By working with food businesses engaged in misleading conduct, the ACCC raises awareness and education about the need for food businesses to avoid misleading or deceptive claims, and to establish effective compliance strategies.<sup>99</sup> Taken together, the ACCC’s guidance, undertakings, notices and litigation highlight that food businesses must ensure that they do not promote their food products in a way that is misleading or deceptive. It is, therefore, clear that food businesses need a consumer law compliance system whereby staff training is provided, reviews are regularly conducted and risk assessments are performed. The ACCC suggests that all businesses voluntarily implement a consumer law compliance system. The ACCC assists businesses with this through, for example, the provision of templates on how different sized businesses can comply with the *ACL*.<sup>100</sup> Food businesses that have an effective compliance program in place are likely to be treated more leniently by the ACCC; nonetheless, any compliance system must be effective rather than merely present. In the case of Maggie Beer Products, a consumer law compliance system was in place but it was found to be ineffective. As a consequence, Maggie Beer Products undertook to:

96 Dwane Hal Dean, ‘Consumer Reaction to Negative Publicity — Effects of Corporate Reputation, Response, and Responsibility for a Crisis Event’ (2004) 41 *Journal of Business Communication* 192.

97 See, eg, ‘Coles Slapped with Fresh Bread Ad Ban’, *SBS News* (online), 29 September 2014 <<http://www.sbs.com.au/news/article/2014/09/29/coles-slapped-fresh-bread-ad-ban>>; Danielle Bowling, ‘Coles’ “Fresh” Baked Products up to Six Months Old’, *Food & Beverage* (online), 14 June 2013 <<https://foodmag.com.au/coles-fresh-baked-products-up-to-six-months-old/>>; Greg Roberts, ‘FED: Court Rules Coles Bread is Not Fresh’, *AAP General News Wire* (Sydney), 18 June 2014; ‘False Fresh Bread Claims Cost Coles \$2.5M’, *news.com.au* (online), 10 April 2015 <<http://www.news.com.au/finance/business/retail/false-fresh-bread-claims-cost-coles-25m/news-story/b2b3cc81271f26fba2e177c7b520510>>.

98 See, eg, Courtney Bembridge, ‘Snowdale Holdings Found Guilty of Misleading Public over “Free-range” Eggs’, *ABC News* (online), 18 May 2016 <<http://www.abc.net.au/news/2016-05-18/snowdale-holdings-eggs-misleading-public-verdict-delivered-acc/7425054>>; ‘Egg Companies Count the Cost of Dodgy Claims’, *Food & Drink Business* (online), 19 April 2016 <<http://www.foodanddrinkbusiness.com.au/news/egg-companies-count-the-cost-of-dodgy-claims>>.

99 Sims, above n 29, 184.

100 See ACCC, *Implementing a Compliance Program* <<https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program>>.

instruct a law firm with competition and consumer law expertise or another suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**), to undertake a review of Maggie Beer Products' procedures, as they relate to the application of sections 18 and 29(1)(k) of the ACL to Maggie Beer Products' labelling, promotional and marketing strategies; [and]

...

implement, as soon as reasonably practicable, any reasonable and appropriate recommendation made by the Reviewer ...<sup>101</sup>

The ACCC plays a crucial role in balancing the information asymmetry, and reducing misleading food credence claims; yet more needs to be done. By its very nature, the ACCC must wait until food businesses engage in misleading conduct about their food products. In addition to this, the ACCC has limited resources. Indeed, the ACCC has a wide-ranging role in enforcing the *Competition and Consumer Act 2010* (Cth), promoting competition and efficiency, and protecting consumers.<sup>102</sup> It not only regulates food businesses but all sorts of businesses, from petrol stations and health insurance providers, to supermarkets and pharmaceutical companies. Significantly, in relation to misleading food credence claims 'it is expected that the number of complaints received by the ACCC is not indicative of the extent and significance of false or misleading credence claims'.<sup>103</sup>

We are not necessarily suggesting that the ACCC needs to take on extra responsibility. Instead, in the remainder of the article we argue for more cooperative, non-government approaches to food credence claims. This is justified on numerous grounds. First, and as we noted earlier, it is generally accepted that mixed and pluralistic regulatory strategies are the best way to regulate businesses.<sup>104</sup> Indeed, one of the most influential and enduring accounts of regulatory theory is Ayres and Braithwaite's notion of responsive regulation in which the most suitable action responsive to the problem is sought, and where there is synergy between deterrent and cooperative regulatory strategies.<sup>105</sup> Secondly, it is accepted that food businesses have varying motivations for using (or not using) honest and accurate food credence claims. Not all food businesses will heed the ACCC's actions against misleading food credence claims. As a consequence of the first and second points, to be effective and efficient the regulation of food credence claims requires a combination of deterrence (eg prosecution and punishment) and compliance (i.e. persuasion, self-regulation, voluntary agreement and education).<sup>106</sup> Thirdly, cooperative strategies must

101 ACCC, *Undertaking by Maggie Beer Products Pty Ltd*, above n 41, 4–5 [19].

102 ACCC, *Compliance & Enforcement Policy* <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

103 Lee, above n 9, 8.

104 See Ayres and Braithwaite, *Responsive Regulation*, above n 85; Braithwaite, *Restorative Justice and Responsive Regulation*, above n 85.

105 Ibid. See also Parker, 'Twenty Years of Responsive Regulation', above n 16.

106 For a discussion of 'holistic' compliance-oriented regulation, see Christine Parker, 'Reinventing Regulation Within the Corporation — Compliance-Oriented Regulatory Innovation' (2000) 32 *Administration & Society* 529.

underpin and sustain the regulation of food credence claims, not policies and strategies aimed at punishment and deterrence.<sup>107</sup> Fourthly, the effective regulation of businesses requires input and involvement of non-state actors and private entities such as food businesses.<sup>108</sup> Taken together, this means that the effective regulation of food credence claims requires a nuanced view of regulatory policy: including consideration of the social, political and economic environment in which regulation is situated.<sup>109</sup> As Christine Parker points out: ‘The critics [of compliance-oriented policies] are correct in their analyses of the shortcomings of compliance-oriented policy and scholarship that focus on only one type of strategy among the whole of regulatory design and implementation.’<sup>110</sup>

One of the ways in which to shift the focus of food credence claims to cooperative strategies is to encourage and facilitate responsible behaviour around food credence claims. In the remainder of the article we draw attention to responsible food credence claims through the concept of CSR. In contrast to CSI, CSR is principally anticipatory. CSR is increasingly seen as a way for businesses to behave in ways that are ‘right, just, and fair’,<sup>111</sup> make positive contributions to society and in so doing gain a competitive advantage and increase profits. Significantly, too, consumers and civil society increasingly want companies to consider the social and environmental consequences of their activities and to provide more transparency and openness with respect to their businesses.<sup>112</sup>

## B Food Credence Claims as CSR

Despite the increasing interest in CSR there is no unanimity on the meaning of CSR.<sup>113</sup> One of the clearest definitions of CSR comes from the International Organization for Standardization’s (‘ISO’) *Guidance Standard on Social Responsibility*, ISO 26000:

[the] responsibility of an organization for the impacts of its decisions and activities on society and the environment that through transparent and ethical behaviour —

107 See Nielsen and Parker, ‘Testing Responsive Regulation in Regulatory Enforcement’, above n 17, 378–9.

108 See, eg, Peter Grabosky, ‘Beyond *Responsive Regulation*: The Expanding Role of Non-State Actors in the Regulatory Process’ (2013) 7 *Regulation & Governance* 114.

109 Parker and Nielsen (eds), *Explaining Compliance*, above n 86.

110 Parker, ‘Reinventing Regulation Within the Corporation’, above n 106, 560.

111 Archie B Carroll, ‘The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders’ (1991) 34(4) *Business Horizons* 39, 42. Also known as corporate citizenship, corporate consciousness, or responsible business.

112 R Edward Freeman et al, *Stakeholder Theory — The State of the Art* (Cambridge University Press, 2010).

113 See, eg, Shallini S Taneja, Pawan Kumar Taneja and Rajen K Gupta, ‘Researches in Corporate Social Responsibility: A Review of Shifting Focus, Paradigms, and Methodologies’ (2011) 101 *Journal of Business Ethics* 343.

- contributes to sustainable development, including health and the welfare of society,
- takes into account the expectations of stakeholders,
- is in compliance with law and consistent with international norms of behaviour, [and]
- is integrated throughout the organization and practiced in its relationships.<sup>114</sup>

How can misleading food credence claims be conceptualised as a CSR? Broadly speaking, up until now, many of the international and national CSR initiatives have focused on three key areas: the environment, animal welfare and labour practices.<sup>115</sup> See Table 2 for a summary of some of the international and national initiatives around CSR. This does not, however, mean that honest and accurate food credence claims are inconsistent with CSR. When thinking about how misleading or deceptive food credence claims might be situated within CSR food businesses, we can focus on two areas of responsibility: consumers and health.

First, conceptualising food credence claims as a socially responsible consumer issue is consistent with international and national initiatives around CSR, as well as the ACCC's approach to and justification for scrutinising food credence claims. ISO 26000, for example, sets out consumer issues as one of the seven 'core subjects' of social responsibility and in so doing advocates specifically for fair marketing and the provision of factual and unbiased information.<sup>116</sup> Taking this further, in the context of food businesses, CSR requires food businesses to commit to making honest and accurate food credence claims that respect consumers. More specifically, in order to operate with CSR, food businesses must commit to honestly and accurately informing customers about the qualities of their products and to take all measures possible to not misinform the consumers. These kinds of socially responsible food credence claims will help to accurately inform customers about their foods so they can make educated choices, and minimise the risks of consumers buying foods they do not want or paying more for the foods that they do.

114 ISO, *ISO 26000 Social Responsibility*, International Organization for Standardization <[http://www.iso.org/iso/iso26000\\_sr.pdf](http://www.iso.org/iso/iso26000_sr.pdf)>.

115 See Alexander Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1; Carroll, above n 111.

116 ISO, *Discovering ISO 26000* (2014) International Organization for Standardization, 13 <[http://www.iso.org/iso/discovering\\_iso\\_26000.pdf](http://www.iso.org/iso/discovering_iso_26000.pdf)>, citing ISO, 'ISO 26000:2010 — Guidance on Social Responsibility' (Guide, International Organization for Standardization, 2010) sub-cl 6.7.3 <<https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en:sec:6.7.3>>.

**Table 2: Examples of international and national CSR initiatives**

Initiative	Summary
Guiding Principles for Business and Human Rights	Established in 2011, the United Nations' <i>Guiding Principles for Business and Human Rights</i> sets out standards and guiding principles on business and human rights. <sup>117</sup> The Guiding Principles seek to provide a global standard for preventing and addressing the risk of negative human rights impacts associated with business activity.
Global Compact	Launched in 2000, the United Nations' Global Compact is the 'world's largest corporate sustainability initiative'. It is underpinned by ten principles in various areas (eg human rights, labour, the environment and anti-corruption) and provides a practical framework by which businesses can demonstrate their commitment to sustainability, non-discrimination and inclusivity. <sup>118</sup>
Guidelines for Multinational Enterprises	The OECD's <i>Guidelines for Multinational Enterprises</i> provide voluntary, 'non-binding principles and standards for responsible business conduct' towards economic, environmental and social progress. <sup>119</sup>
Guidance Standard on Social Responsibility (ISO 26000)	The International Organization for Standardization's ('ISO') standard ISO 26000 identifies a set of social responsibility core subjects on human rights, labour practices, the environment, fair operating practices, consumer issues, and community involvement and development. <sup>120</sup>
Global Compact Network Australia	Bringing together signatories to the UN Global Compact — including a number of Australia's leading companies, non-profits and universities — the Global Compact Network Australia seeks to advance corporate sustainability and the private sector's contribution to sustainable development. <sup>121</sup>

117 Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights — Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc HR/PUB/11/04 (2011, endorsed 16 June 2011) <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>.

118 United Nations Global Compact, *Who We Are* <<https://www.unglobalcompact.org/what-is-gc>>.

119 Organisation for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises' (Organisation for Economic Co-operation and Development, 2011) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

120 ISO, *Discovering ISO 26000*, above n 116.

121 Global Compact Network Australia, *UN Global Compact* <<http://www.unglobalcompact.org.au/about/un-global-compact/>>.

Initiative	Summary
Australian Human Rights Commission	The Australian Human Rights Commission encourages and assists Australian companies to integrate human rights considerations into their everyday business practices. Importantly, the Australian Human Rights Commission recognises that social responsibility exists over and above legal obligations. <sup>122</sup>
Australian Corporate Responsibility Index	Launched in 2004, the Australian Corporate Responsibility Index provides a ‘strategic management tool to enhance the capacity of businesses to develop, measure and communicate best practice in the field of corporate social responsibility’. <sup>123</sup> The Australian Corporate Responsibility Index is concerned primarily with climate change and global warming, particularly gas emissions, renewable energy and protection of wildlife. <sup>124</sup>

Another justification for food businesses committing to socially responsible food credence claims is consumer health and improved eating habits. Extending CSR to the food supply chain has not been lost on academics and policy makers, and supporting healthier eating with accurate food credence claims is an important dimension of this.<sup>125</sup> Further, conceptualising CSR around food credence claims is consistent with ISO 26000’s ‘core subject’ of community involvement and development.<sup>126</sup> In Australia, lifestyle-related diseases, such as Type II diabetes, hypertension, heart disease, cancer, and osteoporosis are increasing.<sup>127</sup> While ‘lifestyle’ includes a range of factors — such as smoking, obesity, alcohol consumption, inactivity, sun exposure — food choices are becoming increasingly significant. In 2016, for example, the Australian Institute of Health and Welfare (‘AIHW’) found that nearly a third of ‘overall disease burden’ could be prevented by removing exposure to risk factors broadly categorised as behavioural, metabolic,

122 Australian Human Rights Commission, *Corporate Social Responsibility & Human Rights* (2008) <<https://www.humanrights.gov.au/publications/corporate-social-responsibility-human-rights>>.

123 Our Community Group, *Corporate Responsibility Index*, Our Community: Where Not-for-Profits Go for Help <[http://www.ourcommunity.com.au/business/view\\_article.jsp?articleId=2856](http://www.ourcommunity.com.au/business/view_article.jsp?articleId=2856)>.

124 *Corporate Responsibility: Make Business Work for People and Planet* <[www.corporate-responsibility.com.au](http://www.corporate-responsibility.com.au)>.

125 See Louise Manning, ‘Corporate and Consumer Social Responsibility in the Food Supply Chain’ (2013) 115 *British Food Journal* 9; Michael J Maloni and Michael E Brown, ‘Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry’ (2006) 68 *Journal of Business Ethics* 35.

126 ISO, *Discovering ISO 26000*, above n 116, 13 citing ISO, ‘ISO 26000:2010’, above n 116, sub-cl 6.8.

127 Australian Institute of Health and Welfare, *Australia’s Health 2014 — The 14th Biennial Health Report of the Australian Institute of Health and Welfare* (2014) <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548150>>.

environmental and dietary.<sup>128</sup> This means that honest and accurate food credence claims may help to minimise some negative health impacts by ensuring that food credence claims allow consumers to make accurate and informed choices.

It is also worth pointing out that treating food credence claims as a matter of CSR is not just a matter of social or ethical concern. Many businesses and managers have traditionally viewed CSR as secondary to financial imperatives and the need to prioritise economics and profits. Now, however, businesses are increasingly aware of the pecuniary and non-pecuniary benefits of acting in socially responsible ways. CSR is not driven by merely ethical rationales, but acting in socially responsible ways may be directly linked to the success of businesses. According to s 181(1) of the *Corporations Act 2001* (Cth), directors have a duty to act ‘in the best interests of the corporation’. While this has principally been taken to mean that directors must prioritise the financial interests of the company’s shareholders, it is acknowledged that CSR is not mutually exclusive to businesses’ financial imperative. In fact, research has shown that CSR is not only beneficial to society but, given the right circumstances, is valuable to businesses themselves, and can, for example, increase a business’s profits.<sup>129</sup> Findings from consumer polls and scholarly research suggest that consumers and investors are ever more likely to reward businesses that act with CSR.<sup>130</sup> For example, studies even suggest that consumers are willing to pay more for products that are socially or environmentally responsible.<sup>131</sup>

## V CONCLUSIONS AND FUTURE RESEARCH

The proliferation of food product differentiation and increase in value-driven consumer decision-making means that the information provided on food products is crucial in consumer decision-making. Unfortunately, food businesses sometimes provide (either intentionally or unintentionally) inaccurate, misleading or false credence claims on their foods. In this article, we provided an overview of the ACCC’s attempts to ensure that food credence claims are accurate and useful, and that consumers are not misled or deceived when it comes to their food choices. In so doing, we identified and considered a taxonomy of misleading and deceptive food claims — including claims that relate to the provenance of foods;

128 Australian Institute of Health and Welfare, *Australian Burden of Disease Study — Impact and Causes of Illness and Death in Australia 2011* (10 May 2016) <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129555476>>.

129 See, eg, Herman Aguinis and Ante Glavas, ‘What We Know and Don’t Know about Corporate Social Responsibility: A Review and Research Agenda’ (2012) 38 *Journal of Management* 932; Marc Orliutzky, Frank L Schmidt and Sara L Rynes, ‘Corporate Social and Financial Performance: A Meta-Analysis’ (2003) 24 *Organization Studies* 403.

130 See, eg, Simone Mueller Loose and Hervé Remaud, ‘Impact of Corporate Social Responsibility Claims on Consumer Food Choice — A Cross-Cultural Comparison’ (2013) 115 *British Food Journal* 142; P Martin Dumas, ‘Consumarchy & CSR’ (2006) 2(3/4) *Social Responsibility Journal* 308, 315–6; Elizabeth H Creyer and William T Ross Jr, ‘The Influence of Firm Behaviour on Purchase Intention: Do Consumers Really Care About Business Ethics?’ (1997) 14 *Journal of Consumer Marketing* 421.

131 *Ibid.*



the production or manufacturing of foods; and the qualities or characteristics of foods.

While the current scheme of consumer laws in Australia means that the ACCC plays a pivotal role in protecting consumers from misleading food credence claims, more needs to be done to ensure the use of honest and accurate food credence claims. We have argued for going beyond current ACCC enforcement and compliance efforts in relation to misleading food credence claims by treating such claims as a matter of CSR.

So far, research on food credence claims and CSR is scarce. Further research is needed to understand how food credence claims can be positioned within the concept of CSR. More specifically, further work is needed to determine how to design and implement an effective CSR framework around food credence claims. One area of future research is on the identification and impact of the factors that may influence CSR around food credence claims. Not all food businesses are the same, with the requirements of CSR around food credence claims likely to vary according to the size of food businesses and enterprises, the types of food products sold, and consumer preferences and demand.

Another area for future research is establishing what a CSR food credence scheme might look like. One option is for the ACCC to encourage and require CSR around food credence claims. Perhaps discussions and negotiations around enforceable undertakings and infringement notices provide an opportunity to build CSR into food businesses. Indeed, often the ACCC looks to the presence and effectiveness of internal compliance systems (see Appendices I and II) and this provides the opportunity for the ACCC to build in more explicit and thorough CSR around food credence claims. Another option is a code of conduct around honest and accurate food credence claims. A code of conduct for food credence claims could, for example, define and document responsible best practice around food credence claims such as the provenance of foods, the production or manufacturing of foods and the qualities or characteristics of foods.<sup>132</sup> A code of conduct on food credence claims could provide an overarching set of principles with which all food businesses should comply. Yet another option is a third-party certification scheme that aims to provide an assurance on credence claims. One of the best examples of food-related CSR is Fairtrade.<sup>133</sup> Originating in the mid-1990s,<sup>134</sup> Fairtrade advocates for better working conditions and improved terms of trade for farmers and workers in developing countries.<sup>135</sup> More specifically, the Fairtrade

132 This could be similar to the existing code of conduct around advertising and marketing or the free-range code of conduct currently being investigated by the Australian government: see Australian Association of National Advertisers ('AANA'), *Codes* <<http://aana.com.au/self-regulation/codes/>> and Treasury, Australian Government, above n 6.

133 See Sushil Mohan, 'Fair Trade and Corporate Social Responsibility' (2009) 29(4) *Economic Affairs* 22.

134 See Geoff Moore, 'The Fair Trade Movement: Parameters, Issues and Future Research' (2004) 53 *Journal of Business Ethics* 73; Laura T Reynolds and Michael A Long, 'Fair/Alternative Trade — Historical and Empirical Dimensions' in Laura T Reynolds, Douglas L Murray and John Wilkinson (eds), *Fair Trade — The Challenges of Transforming Globalization* (Routledge, 2007) 15.

135 Fairtrade Australia New Zealand, *What Fairtrade Does* <<http://fairtrade.com.au/en-au/what-is-fairtrade/what-fairtrade-does>>.

certification system allows consumers to identify goods (for example, tea, coffee, rice, cotton and bananas) that have met internationally-agreed standards according to the Fairtrade system, such as small-scale farming, protection of workers' rights and children, the preservation of the environment and the payment of a 'fair' minimum price.<sup>136</sup> Perhaps, then, a certification scheme around 'Honest Claims' could be introduced both to encourage food businesses to use honest and accurate food credence claims, and to assure consumers that the foods they are purchasing have the provenance, qualities or characteristics represented.

It is no longer appropriate for food businesses to overlook consumer and health issues and there is an increasing social responsibility on food businesses to avoid making misleading food credence claims. Thinking about food credence claims as a vital dimension of CSR will help to encourage food businesses to support accurate and unbiased food claims. Then, at the very least, consumers can make informed choices about the foods they purchase and consume. Perhaps, too, socially responsible food credence claims will help promote healthy food choices and will, even in a small way, contribute to better health outcomes. Conceptualising food credence claims as CSR will also help ensure that honest and accurate food credence claims become the norm, not just the law.

136 For a contextual discussion of Fair Trade: see Keith R Brown, *Buying into Fair Trade — Culture, Morality, and Consumption* (New York University Press, 2013).

## APPENDIX I: ACCC'S COURT-ENFORCEABLE UNDERTAKINGS RELATED TO FOOD CRENDENCE CLAIMS, 2010-16

Year	Court-Enforceable Undertakings	Undertaking
<b>2010</b>	<b>National Foods Ltd</b> , 22 December 2010: <sup>1</sup> National Foods accepted that its packaging was likely to have misled some consumers into believing that its juices were recently squeezed, when in fact they contained a blend of fresh and stored juice.	National Foods undertook to, within three months, cease to supply and promote the relevant juices if they were not 'fresh' (ie aseptically stored); supply corrective notices; and establish a compliance program.
	<b>Australian Health &amp; Nutrition Association Ltd, trading as Sanitarium</b> , 10 December 2010: <sup>2</sup> Claims made by Sanitarium misled customers into believing breakfast cereals contained a significant portion of fruit when they did not.	Sanitarium agreed to take a range of measures including cease using colours, words or images that might mislead consumers as to the prominence of foods as an ingredient of its cereals; accurately list the fruit content on the ingredient panels of its breakfast cereals; change the ingredient panel labelling of its cereals; and revise and enhance its Trade Practices Compliance Program.
	<b>H J Heinz Company Australia Ltd</b> , 17 March 2010: <sup>3</sup> The Heinz Company admitted that it had engaged in misleading conduct by representing that Golden Circle was 'Proudly Australian owned', when in fact it was owned by a United States company.	Heinz's undertaking included to stop selling products carrying the misleading representations; display and publish corrective notices; and strike out all misleading representations featured on Heinz vehicles and other promotional property.
<b>2011</b>	<b>Spring Gully Foods Pty Ltd</b> , 28 July 2011: <sup>4</sup> The ACCC accepted court-enforceable undertakings from Spring Gully Foods Pty Ltd and Aldi Foods Pty Ltd in relation to misleading claims about the composition of Aldi's 'Just Organic' honey.	Spring Gully Foods agreed to take a range of measures including ceasing to represent that its honey products were sourced, or a blend, from a particular location or region when those products were not 100 per cent sourced from those particular locations or regions; publish corrective notices; and establish a Trade Practices Compliance Program.

- 1 ACCC, *Trade Practices Act 1974: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by National Foods Limited ACN 004 486 631* (22 December 2010) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=964195&nodeId=1f2949f77a154ba87bbb5f1a50807e70&fn=Undertaking.pdf>>.
- 2 ACCC, *Trade Practices Act 1974: Undertaking to the Australia Competition and Consumer Commission Given for the Purposes of Section 87B by Australian Health & Nutrition Association Limited ACN 096 452 872* (10 December 2010) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=962377&nodeId=7900d263c31leadf60b046e02d8b0ba4&fn=Undertaking.pdf>>.
- 3 ACCC, *Trade Practices Act 1974: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by H J Heinz Company Australia Limited ACN 004 200 319* (17 March 2010) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=919506&nodeId=1b6bc05ec31ab64a460d1d9db91e6368&fn=Undertaking.pdf>>.
- 4 ACCC, *Trade Practices Act 1974 and Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Spring Gully Foods Pty Ltd ACN 007 654 211* (28 July 2011) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1000817&nodeId=9341d634c063bdfd51b43cf6baa03c90&fn=Undertaking.pdf>>.

Year	Court-Enforceable Undertakings	Undertaking
	<b>Aldi Foods Pty Ltd</b> , 28 July 2011: <sup>5</sup> The ACCC accepted court-enforceable undertakings from Spring Gully Foods Pty Ltd and Aldi Foods Pty Ltd in relation to misleading claims about the composition of Aldi's 'Just Organic' honey.	Aldi Foods undertook that it would cease the representation that its 'honey products [were] sourced from a particular location or region when those products [were] not sourced 100% from the particular location or region'; cease the representation that its 'honey products [were] a blend of honey with reference to a particular location or region when those products contain an insignificant amount of honey from the particular location or region'; <sup>6</sup> publish corrective notices; and establish a Trade Practices Compliance Program.
2012	Nil	
2013	<b>Game Farm Pty Ltd</b> , 26 November 2013: <sup>7</sup> Representations on Game Farm's packaging and website that the birds — quail, spatchcock, duck, chicken and turkey — it raised were 'range reared' were misleading or deceptive because the birds were grown in commercial sheds with no access to the outdoors.	Game Farm undertook that it would not make a false, misleading or deceptive representation that its products were of a particular quality, value, grade or composition; publish corrective notices; and establish, a Trade Practices Compliance Program.
2014	<b>Maggie Beer Products Pty Ltd</b> , 18 August 2014: <sup>8</sup> Maggie Beer Products acknowledged that place of origin representations on the labelling of some 'Maggie Beer' branded food products were likely to have been misleading.	Maggies Beer Products undertook that it would not 'make a false or misleading representation that the "Maggie Beer" products are manufactured in Tanunda, the Barossa Valley and/or South Australia'; <sup>9</sup> employ a professional marketing team or law firm to amend its false advertising practices and provide advice about appropriate future advertisements; and publish a corrective notice through an article in the <i>Foodmagazine</i>

5 ACCC, *Trade Practices Act 1974 and Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Aldi Foods Pty Ltd ACN 086 210 139* (28 July 2011) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1000928&nodeId=34264915cdae2c38d5744f9f5122e340&fn=Undertaking.pdf>>.

6 Ibid [1(i)].

7 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Game Farm Pty Ltd ACN 001 417 465* (26 November 2013) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1128332&nodeId=3caaf9a4debd2c5605ff2be0fc1b3&fn=Undertaking.pdf>>.

8 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Maggie Beer Products Pty Ltd ACN 080 083 058* (18 August 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1000928&nodeId=34264915cdae2c38d5744f9f5122e340&fn=Undertaking.pdf>>.

9 Ibid [18].

Year	Court-Enforceable Undertakings	Undertaking
	<p><b>Basfoods (Aust) Pty Ltd</b>, 20 June 2014.<sup>10</sup> Basfoods admitted that it had represented that its product labelled ‘Victoria Honey’ was honey produced by honey bees (when in fact it was comprised predominantly of sugars of corn and sugar cane) and that its provenance was Victoria (when in fact it was Turkey).</p>	<p>Basfoods agreed to take a range of measures including to not ‘represent that a product it supplies ... is honey unless the product is entirely produced by honey bees’;<sup>11</sup> ‘every six months, obtain written evidence from a laboratory ... which confirms that the laboratory has tested one sample of each product represented as honey and found each sample was a product entirely produced by honey bees’;<sup>12</sup> not ‘represent that any honey in a product originates from a particular location or region, unless all, or virtually all, processes involved in the production or manufacture of that honey happened in that location or region’;<sup>13</sup> not ‘represent that a product is of a certain standard, quality, value, grade or composition without a reasonable basis for making such a representation’;<sup>14</sup> ‘establish and implement a process for annual testing of the composition of random samples of products supplied by Basfoods’;<sup>15</sup> send, display and publish corrective notices; and establish a Trade Practices Compliance Program.</p>
	<p><b>Barossa Farm Produce Pty Ltd</b>, 13 June 2014.<sup>16</sup> Barossa Farm Produce made misleading representations and engaged in misleading or deceptive conduct by making representations that the pork used in its ‘The Black-Pig’ smallgoods was from heritage Berkshire pigs or free-range pigs, when they were not.</p>	<p>Barossa Farm Produce undertook that it would not ‘make any representations ... about the breed or type of pigs used in Black Pig labelled smallgoods, in circumstances where it does not know the breed or type of pigs used; and [not make any representations] that it knows the origin of every animal used in the production of Black Pig labelled smallgoods, in circumstances where it does not know the origin of every animal used’.<sup>17</sup></p>

10 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Basfoods (Aust) Pty Ltd ACN 115 242 281* (20 June 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1179354&nodeId=df703d0fc54b10d80ae66fbacc7d16f9&fn=Undertaking.PDF>>.

11 Ibid [20.1(a)].

12 Ibid [20.1(b)].

13 Ibid [20.1(c)].

14 Ibid [20.1(d)].

15 Ibid [20.1(e)].

16 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Barossa Farm Produce Pty Ltd ACN 095 717 347* (13 June 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1179205&nodeId=498c19e07ef9f6b44d09013edac3c477&fn=Undertaking.pdf>>.

17 Ibid [18].

Year	Court-Enforceable Undertakings	Undertaking
	<b>CUB Pty Ltd</b> , 29 April 2014: <sup>18</sup> CUB misrepresented that its Byron Bay Pale Lager was brewed by a small brewer in Byron Bay when it was brewed by CUB over 600km away from Byron Bay.	CUB agreed to take a range of measures including not to make any misleading or deceptive representations ‘concerning the scale of the brewery in which the product is brewed’ or ‘concerning the place of origin of its products’; <sup>19</sup> to cease using the existing labelling; to publish corrective notices; to demonstrate evidence of its compliance with these undertakings to the ACCC; and to establish a Trade Practices Compliance Program.
2015	<b>Arnott’s Biscuits Ltd</b> , 20 November 2015: <sup>20</sup> Arnott’s Biscuits made false or misleading representations that its ‘Shapes Light & Crispy’ contained 75 percent less saturated fat than Arnott’s original Shapes biscuits. However, they contained approximately 60 percent less saturated fat than the original Shapes biscuits.	Arnott’s undertook that it would not ‘make a claim comparing its product with a third party company without ... clearly identifying the products that are subject of the comparison in a sufficiently prominent manner’ and ‘ensuring the comparison is appropriate having regard to all facts and circumstances’; <sup>21</sup> publish corrective notices; establish and implement a supplementary compliance program.
	<b>Pastoral Pork Company Pty Ltd (trading as Otway Pork)</b> , 2 September 2015: <sup>22</sup> By making the claim that its pigs were ‘bred free range’ on its packaging, labelling, and sale material, Pastoral Pork misled customers into thinking that the pigs were ‘free range’ and were able to move about freely, when in fact they were not.	Pastoral Pork agreed to take a range of measures including not using the statement ‘bred free range’, make any representation to the effect that pigs used for the production of any pork product sold by Pastoral Pork is ‘born and raised, for the duration of their lives, in an environment where pigs are able to move about freely in an outdoor paddock’; <sup>23</sup> establish a Competition and Consumer Law Act Compliance Program; publish and send corrective notices.

18 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by CUB Pty Ltd (t/a Carlton & United Breweries)* ACN 004 056 106 (29 April 2014) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1176567&nodeId=fa653d5c6aa63c57dd405d7c14f9c142&fn=Undertaking.PDF>>.

19 Ibid [5.1].

20 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Arnott’s Biscuits Ltd* ACN 008 435 729 (20 November 2015) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1190930&nodeId=55fb92d5ca31188578eb5e116bf282&fn=87B%20Undertaking%20-%20Arnott%20s%20Biscuits%20Ltd%20-%20Signed%2020%20November%202015.PDF>>.

21 Ibid [8.1].

22 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 by Pastoral Pork Company Pty Ltd* ACN 055 017 680 (2 September 2015) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1188920&nodeId=17ceac2550af79f98cdc2210cf58178&fn=87B%20Undertaking%20-%20Pastoral%20Pork%20Company%20Pty%20Ltd%20-%20Signed%202%20September%202015.PDF>>.

23 Ibid [12].

Year	Court-Enforceable Undertakings	Undertaking
	<p><b>George Weston Foods Limited (trading as KR Castlemaine)</b>, 2 September 2015:<sup>24</sup> George Weston Foods misled customers that its pigs were ‘bred free range’ when they were not.</p>	<p>KR Castlemaine undertook that it would not use the statement ‘bred free range’ to make any representation to the effect that pigs used for the production of any pork product sold by George Weston is ‘born and raised, for the duration of their lives, in an environment where the pigs are able to move about freely in an outdoor paddock’;<sup>25</sup> establish a Competition and Consumer Law Act Compliance Program; publish and send corrective notices.</p>
	<p><b>P&amp;M Quality Smallgoods Pty Ltd (trading as Primo Smallgoods)</b>, 24 July 2015:<sup>26</sup> The ACCC accepted an undertaking from P&amp;M Quality Smallgoods that it misled or deceived customers by claiming that its food products were ‘free range’.</p>	<p>Primo Smallgoods undertook that it would cease making the Free Range Claim in relation to pork products unless the pigs used in the production of those products have been born and raised, for the duration of their lives, in an environment where the pigs are able to move about freely in an outdoor paddock; not make any representation that any of its pork-based products are ‘free range’ unless the pigs used in the production of those products have been born and raised, for the duration of their lives, in an environment where the pigs are able to move about freely in an outdoor paddock; establish a Competition and Consumer Law Act Compliance Program; publish and send corrective notices.</p>
	<p><b>Conroys Pty Ltd</b>, 19 August 2015:<sup>27</sup> The ACCC issued an infringement notice and accepted an undertaking from Conroys after they had labelled their bacon product as a ‘Product of Australia’ when in fact it was produced using imported pig meat.</p>	<p>Conroys undertook that it would not ‘represent that any product it produces is produced in Australia, unless ... Australia was the country of origin of each significant ingredient or significant component of the product’ and ‘all, or virtually all, processes involved in its production or manufacture happened in Australia’;<sup>28</sup> publish and send corrective notices; demonstrate evidence of its compliance with these undertakings to the ACCC; establish a Competition and Consumer Law Act Compliance Program.</p>

24 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 by George Weston Foods Limited ACN 008 429 632* (2 September 2015) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1188919&nodeId=b1fa6d17d7ecl373581b8143cc9e46a4&fn=87B%20Undertaking%20-%20George%20Weston%20Foods%20Limited%20-%20Signed%202%20September%202015.PDF>>.

25 Ibid [12].

26 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 by P&M Quality Smallgoods Pty Ltd (trading as Primo Smallgoods) ACN 002 781 142* (24 July 2015) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1188918&nodeId=7d39afa8c2b8d0ddb4f6eea53912cb98&fn=Primo%20accepted%20section%2087B%20Undertaking%20-%2024%20July%202015.pdf>>.

27 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by Conroys Pty Ltd ACN 007 822 719* (19 August 2015) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1188639&nodeId=901653c32c435995a1a864096f10418e&fn=Undertaking%2087B%20-%20Conroys%20Pty%20Ltd%20-%20Signed%2019%20August%202015.PDF>>.

28 Ibid [11].

Year	Court-Enforceable Undertakings	Undertaking
2016	<b>Easy Meals by Flavour Makers Pty Ltd</b> , 16 August 2016: <sup>29</sup> The ACCC accepted an undertaking from EasyMeals in relation to false or misleading representations about the uses or benefits of the meals it supplies.	EasyMeals made a number of undertakings including that it would comply with the ACL in relation to representations about the suitability of its products for persons suffering diabetes; publish a corrective notice on its website; and implement an ACL compliance program.
	<b>ALDI Foods Pty Limited</b> , 8 November 2016: <sup>30</sup> The ACCC accepted an undertaking from ALDI in relation to false representations that its Stonemill branded oregano product contained 100 per cent oregano when, in fact, it did not.	ALDI made a number of undertakings to the ACCC including to obtain evidence from an internationally accredited testing laboratory, and establish and implement annual testing of the composition of random samples of herb and spice products supplied by ALDI.
	<b>Monde Nissin (Australia) Pty Ltd trading as Menora Foods</b> , 8 November 2016: <sup>31</sup> The ACCC accepted an undertaking from Menora in relation to falsely representing to consumers that its oregano product contained only oregano and traces of tree nuts, peanuts, wheat, sesame seeds and soy, when it did not.	Menora made numerous undertakings including that it will not represent that its products are only oregano unless the product contains only traces of tree nuts, peanuts, wheat, sesame seeds and soy; annually obtain written evidence from a laboratory in Australia; and not represent any of its herb or spice products are of a certain standard, quality, value, grade or composition without a reasonable basis for making such a representation.
	<b>Anchor Foods Pty Ltd trading as Spencers Gourmet Trading</b> , 15 December 2016: <sup>32</sup> The ACCC accepted an undertaking from Spencers Gourmet Trading in relation to falsely representing that its oregano product only contained oregano, when it did not.	Spencers Gourmet Trading made a number of undertakings including: obtaining (annual) written evidence from a laboratory, which confirms that the laboratory has tested one sample of the product supplied and represented by Spencers as only oregano and found each sample was a product containing only oregano; and establishing and implementing a process for annual testing of the composition of random samples of herb or spice products supplied by Spencers, other than oregano.

29 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B by EasyMeals By Flavour Makers Pty Ltd* (16 August 2016) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1197876&nodeId=1042877207a4d929be47b0138d9a19b4&fn=Easy%20Meals%20-%20section%20%2087B%20Undertaking%20-%20signed%2016%20August%202016.pdf>>.

30 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 (Cth) by ALDI Foods Pty Limited* (16 August 2016) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1199561&nodeId=4e025698e7d77fcd0d60f174046882c4c&fn=Undertaking%20-%20s87B%20-%20Oregano%20-%20Aldi%20Foods%20Pty%20Limited%20-%20signed%208%20November%202016.PDF>>.

31 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 (Cth) by Monde Nissin (Australia) Pty Ltd trading as Menora Foods* (8 November 2016) ACCC Public Registers <[http://registers.accc.gov.au/content/item.phtml?itemId=1199755&nodeId=137b8b9316b022b1e00ec3fbdec65772&fn=Undertaking%20-%20s87B%20-%20Oregano%20-%20Monde%20Nissin%20\(Australia\)%20Pty%20Ltd%20-%20signed.pdf](http://registers.accc.gov.au/content/item.phtml?itemId=1199755&nodeId=137b8b9316b022b1e00ec3fbdec65772&fn=Undertaking%20-%20s87B%20-%20Oregano%20-%20Monde%20Nissin%20(Australia)%20Pty%20Ltd%20-%20signed.pdf)>.

32 ACCC, *Competition and Consumer Act 2010: Undertaking to the Australian Competition and Consumer Commission Given for the Purposes of Section 87B of the Competition and Consumer Act 2010 (Cth) by Anchor Foods Pty Ltd trading as Spencers Gourmet Trading* (15 December 2016) ACCC Public Registers <<http://registers.accc.gov.au/content/item.phtml?itemId=1200238&nodeId=97cd2536815dd030993243526485dcaa&fn=Oregano%20-%20Anchor%20Foods%20-%20signed%2015%20December%202016.PDF>>.



## APPENDIX II: TABLE 2. ACCC'S LITIGATION RELATED TO FOOD CREDENCE CLAIMS, 2010–16

Year	Litigation	Court Orders
2010	<i>Australian Competition and Consumer Commission v CI &amp; Co Pty Ltd</i> [2010] FCA 1511 (23 December 2010): the respondents supplied eggs labelled as free-range eggs when in fact the eggs were produced by caged hens.	CI & Co Pty Ltd were subject to an injunction restraining their ability to engage in similar conduct in the future; an order to publish notice of their conduct; an order to pay a \$50 000 fine; and an order to pay the ACCC's costs.
2011	Nil.	
2012	<i>Australian Competition and Consumer Commission v Kingisland Meatworks and Cellars Pty Ltd</i> [2012] ATPR ¶42-412: for a period of time Kingisland Meatworks & Cellars represented to consumers that its meat was raised or otherwise from King Island. This was not the case, however, as little if any of the meat was from King Island.	King Island Meatworks was subject to an injunction for a period of three years restraining its ability to engage in the supply, promotion or sale of any meat product; an order to publish, within seven days of the order, corrective notice of its conduct on the premise of all of its locations; and an order to pay a \$50 000 fine.
	<i>Australian Competition and Consumer Commission v Bruhn</i> [2012] ATPR ¶42-414: the FCA fined Rosie's Free Range Eggs, for representing that eggs supplied were all free-range when some had been produced from caged hens.	The Court approved the declaration agreed to by the parties. Bruhn was subject to a five-year prohibitory injunction with respect to the misleading conduct; an order to, at its own expense, send corrective notice of conduct to all effected customers within 28 days and publish a corrective notice in an advertisement in <i>The Advertiser</i> newspaper (within first 10 pages) within 28 days; an order to, within six months, attend, at its own expense, a training session regarding a distributor's obligations under s 33 of the <i>ACL</i> ; an order to pay a \$50 000 fine; and an order to pay the ACCC's costs.
2013	<i>Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 4]</i> [2013] ATPR ¶42-448: the FCA found that the respondent had engaged in misleading and deceptive conduct by claiming its chickens were 'free to roam', giving the impression that chickens were raised in more spacious conditions than was the case.	Turi Foods was ordered by consent to pay a pecuniary penalty of \$100 000, publish corrective advertisements and implement a compliance training program.

Year	Litigation	Court Orders
	<p><b><i>Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd</i> [2013] ATPR ¶42-455:</b> the respondent had engaged in misleading and deceptive conduct by claiming that its ducks were ‘grown and grain fed in the spacious Victorian Wimmera Wheatlands’ and ‘range reared and grain fed’. The ducks did not spend any time outside their barns.</p>	<p>Luv-a-Duck was subject to a three-year prohibitory injunction with respect to the misleading conduct; a probation order which required Luv-a-Duck to establish a Trade Practice Compliance Program; a publication order which required Luv-a-Duck to: send corrective notice to all affected customers within 14 days; publish a corrective notice on its Australian website homepage for 90 days; and display a corrective notice form at the front of each of its business premises, viewable to the public, within 14 days and keep it there for 90 days; an order to pay a fine of \$360 000; and an order to pay the ACCC’s costs.</p>
	<p><b><i>Australian Competition and Consumer Commission v Pepe’s Ducks Ltd</i> [2013] ATPR ¶42-441:</b> the FCA found that Pepe’s Ducks misled consumers by claiming that its ducks were ‘open range’ and ‘grown nature’s way’, when the ducks were raised in barns and did not spend any time outdoors.</p>	<p>Pepe Ducks was subject to a three-year prohibitory injunction with respect to the misleading conduct; a probation order which required Pepe Ducks to establish a Trade Practice Compliance Program; a publication order which required Pepe Ducks to: send corrective notice to all affected customers within 14 days; publish a corrective notice on its Australian website homepage for 90 days; and display a corrective notice form at the front of each of its business premises, viewable to the public, within 14 days and keep it there for 90 days; an order to pay a fine of \$375 000; and an order to pay the ACCC’s costs.</p>
2014	<p><b><i>Australian Competition and Consumer Commission (ACCC) v Pirovic Enterprises Pty Ltd [No 2]</i> [2014] ATPR ¶42-483:</b> the respondent was found to have engaged in misleading and deceptive conduct by claiming its eggs were ‘Free Range Eggs’. The Court found that most of the hens did not move about freely.</p>	<p>Pirovic was ordered to: pay a \$300 000 fine; establish a Trade Practice Compliance Program within 3 months and maintain the program for three years; and pay the ACCC’s costs.</p>
	<p><b><i>Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)</i> (2014) 317 ALR 73:</b> Allsop CJ found that Coles had engaged in misleading and deceptive conduct by claiming that its bread was made or baked on the same day it was sold when it was not.</p>	<p>Coles was ordered to pay a \$2.5 million fine; and pay the ACCC’s costs.</p> <p><b><i>(See Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540)</i></b></p>
2015	<p><b><i>Australian Competition and Consumer Commission v RL Adams Pty Ltd</i> [2015] FCA 1016 (11 September 2015):</b> the respondent had engaged in misleading and deceptive conduct by claiming that its eggs were ‘mountain range’ and ‘free range’, when in fact the hens were unable to move about freely.</p>	<p>RL Adams was order to pay a \$250 000 fine; comply with a publication order, that being, within 14 days and for a period of 90 days, RL Adams was required to post a corrective notice on the homepage of its website and within 21 days; publish, at its own expense, a corrective notice in each of the major metropolitan newspapers in each State or Territory where it committed the relevant conduct; establish a Trade Practice Compliance Program within three months and maintain the program for three years; and pay the ACCC’s costs.</p>

Year	Litigation	Court Orders
	<p><b><i>Australian Competition and Consumer Commission (ACCC) v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540:</i></b>                      The FCA imposed \$2.5 million in pecuniary penalties against Coles Supermarkets Australia Pty Limited for contravening ss 18(1), 29(1)(a) and 33 of the <i>ACL</i>. See <i>Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (ACN 004 189 708) (2014) 317 ALR 73</i>.</p>	<p>Coles was ordered to pay a \$2.5 million fine; and pay the ACCC's costs.</p>
2016	<p><b><i>Australian Competition and Consumer Commission (ACCC) v Snowdale Holdings Pty Ltd (2016) 339 ALR 455:</i></b> The FCA held that Snowdale had engaged in misleading and deceptive conduct by advertising its eggs as 'free range eggs'. The eggs were, in fact, laid by hens that had limited ability to move around freely on an open range.</p>	<p>Justice Siopis found that by making the 'free range' representations in its advertising, Snowdale contravened ss 18(1), 29(1)(a) and 33 of the <i>ACL</i>, with the making of orders and fixing of penalties to be made on a date to be fixed.</p>
	<p><b><i>Australian Competition and Consumer Commission (ACCC) v Derodi Pty Ltd [2016] FCA 365 (14 April 2016):</i></b> The FCA held that the respondents engaged in misleading and deceptive conduct by advertising its eggs as 'free range'. The FCA found that the eggs were produced by hens, many of which were not able to move around freely on an open range on an ordinary day and did not move about freely on an open range on most days.</p>	<p>Justice Edelman found that the respondents — Derodi Pty Ltd and Holland Farms Pty Ltd — contravened ss 18, 29(1)(a) and 33 of the <i>ACL</i>. The respondents were ordered to pay a pecuniary penalty of \$300 000, as well as publish corrective advertising and establish and maintain a compliance program.</p>