



Food Law Bulletin

December 2018

In this edition: how new technologies can assist in preventing food fraud; two recent cases of interest to food and beverage companies seeking to distinguish their marks from competitors'; what happens when an offshore giant attempts to take on a longstanding local user of a mark; and confirmation from the Federal Court that food and beverage industry participants can be found to have engaged in misleading or deceptive conduct for not complying with relevant regulatory regimes.

Food fraud and technology – opportunities and limitations

The high-profile ‘fake honey’ scandal has made food fraud front-page news in Australia in 2018. With the ACCC having now concluded its honey investigation, due to ‘testing uncertainty’, Managing Associates Alison Beaumer and David Rountree explore how new technologies like blockchain could potentially assist in preventing food fraud.

What is food fraud?

According to the Codex Alimentarius Commission,¹ food fraud is the intentional adulteration of food for financial gain. This can include deliberate substitution, dilution, counterfeiting; misrepresentations about food, ingredients or packaging; or false and misleading statements about a product.

Food fraud is big business. It has been estimated that it costs the global food industry more than \$50 billion each year.

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The ‘fake honey’ scandal

Under the Food Standards Code, products sold as honey in Australia must be ‘the natural sweet substance produced by honey bees from the nectar of blossoms ...’ This means that products sold as honey cannot be adulterated with sugar syrups that are not honey.

In September 2018, claims emerged in the media that certain honey sold in Australian supermarkets was adulterated. Germany’s Quality Services International Laboratory had been commissioned to conduct two types of tests on 28 samples of honey, each containing a blend of Australian and imported ingredients. One type of test was the official C4 test that the Department of Agriculture in Australia uses, and the other was nuclear magnetic resonance screening (**NMR**).

The C4 test analyses the plant source of the sugars. Bees most commonly feed on flowers that produce sugars using the C3 pathway. Cane sugar or corn syrup, commonly used to dilute honey, are C4 sugars and will be picked up by the C4 test. The C4 test may be inadequate, however, for picking up newer forms of substitution.

¹ The international food standards setting body established by the United Nation’s Food and Agriculture Organization and World Health Organization.

² McLeod, R (2017) *Counting the Cost: Lost Australian food and wine export sales due to fraud*. Food Innovation Australia Ltd.

For example, rice, beet and wheat syrups all come from C3 plants, and could potentially pass the C4 test undetected.

The results of the German NMR testing indicated that 12 out of the 28 samples had been mixed with wheat and beet syrup. All 28 samples passed the C4 test. The most high-profile brand affected by the German testing was Capilano, whose ‘Allowrie’ branded products (of blended Australian and imported honey) were found to be adulterated.

Following the release of the German results, a study that Macquarie University conducted using NMR purported to show that 18 per cent of 38 samples of Australian-sourced honey showed adulteration.

ACCC honey investigation

In light of the claims in the media, the ACCC launched an urgent investigation into the Australian honey industry. In particular, it sought to investigate allegations that Capilano breached the Australian Consumer Law in relation to representations about its ‘Allowrie’ honey and other products (labelled ‘pure’ and ‘100% honey’).

On 17 November 2018, the ACCC announced that it had concluded its investigation. Capilano had taken steps to provide assurance, and the ACCC’s investigation did not uncover any other evidence that supported the allegation ‘Allowrie’ honey was adulterated with sugar syrup. Critically, the ACCC had been advised that NMR testing is not yet reliable enough to determine whether honey is adulterated and (consistently with the approach of regulators in the UK, US and EU) should not be used as a basis to support legal action. It was also evident to the ACCC that there is low confidence in the current C4 test method.

Challenges in supply chain management

The ‘fake honey’ scandal nevertheless highlights the difficulties that companies may face when trying in good faith to secure their supply chains, particularly for imports with limited upstream visibility. Food fraud, by its very nature, is designed to be hard to detect. Detection can be further complicated in the case of products like honey, where, as the outcome of the ACCC investigation confirms, testing can produce uncertain results.

Historically, supply chains have been managed through a combination of legal and commercial arrangements, which has resulted in a proliferation of documentation without necessarily providing transparency. Increasingly, businesses are turning to technological solutions to provide additional surety as to the authenticity and provenance of goods moving through their supply chain.

Blockchain

One technology that has been the subject of significant attention is 'blockchain', or distributed ledger technology. At its simplest, a blockchain, or distributed ledger, can be described as a shared information record, which records and validates information across the entire network of participants. Unlike centralised databases, each member of the network has an authentic copy of the data that is shared across the network; and that is updated and verified against all other users' versions of the ledger, to ensure veracity. While there have been many different proposed use cases for the implementation of blockchain technology, it appears to be particularly well suited to assisting with ensuring trusted data exchange between multiple third parties that are invested in the same data set. This is particularly so for business processes that require transparency, or the reconciliation and confirmation of data between different sources.

How can blockchain help the food industry?

In the context of the food industry, the blockchain has the potential to track and trace food products as they move through the relevant parts of the supply chain. The goal of this will be to improve supply chain management, better monitor the provenance and source of food for the purpose of quality and fraud control, and increase consumer confidence in the origin and characteristics of the products they are buying.

Significant players in the food industry are in the process of trialling and implementing blockchain to track and trace food products throughout the supply chain. For example, French retailer Carrefour has implemented blockchain solutions to track and trace chickens, eggs and tomatoes from primary producers, to enable them to better trace the origin of products, identify the source of any potential food hazards, more narrowly manage the fallout of any recalls, and reduce risk to consumers.³ This also plays a key role in combatting food fraud, as with better data, entities are better able to identify and resolve issues of fraud from participants in the supply chain. Carrefour, along with other companies like Walmart, is implementing IBM's 'Food Trust' system, which is a solution for food supply chain management.

However, like many technology solutions to business problems, blockchain is not a silver bullet to solve the issue of food fraud. While it offers potentially significant improvements in information exchange and transparency, ultimately its effectiveness at preventing food fraud depends on the quality of data entered into the system. The technology itself cannot prevent fraudulent information being supplied/entered, and the method of data entry into the system will have a direct impact on its effectiveness. For example, if the data entry is manual, significant opportunity for mischief will remain. As data capture and verification become more automated, these risks will be reduced. However, even when data is directly entered through technical means, such as through the scanning of a barcode on a package, this still relies on the source of data (the barcode) accurately reflecting the contents (the ultimate product).

These outcomes will continue to improve, with the addition of other technologies to better scan and test food products, to either link directly to the product (rather than a package), or even to run forms of qualitative assessment as part of passing through the supply chain. For example, the Australian beef industry is already using edible barcodes applied to Australian meat for export, in an effort to counter fraudulent sales of meat passed off as Australian. Further, the combination of blockchain technology with 'smart contracts' that can take a data input from an external measurement or sensor and use the data to assess whether a payment should be made, or title should pass, may result in fraudulent or low-quality food being identified, or even rejected, at a much earlier stage.

Could blockchain have helped honey producers avoid or answer the 'fake honey' scandal? The answer is probably 'not yet', given the significant testing requirements to identify the issues (although it might be able to assist in pinpointing the source of the alleged adulteration). Over time, as data from testing and measurement systems combines with blockchain and smart contracts, we are likely to see the food industry and consumers have far greater oversight and control over food supply chains than they have at present.

³ <https://www.businessinsider.com/r-chickens-and-eggs-retailer-carrefour-adopts-blockchain-to-track-fresh-produce-2018-10/?r=AU&IR=T>

Meat marks update

Two recent trade mark disputes in the meat industry illustrate that even where marks share similar elements, they are unlikely to be deceptively similar if the overall impression created by each mark is substantially different. Managing Associate Alison Beaumer and Associate Anna Conigrave review two cases that give guidance to food and beverage companies seeking to distinguish their marks from competitors¹.

Australian Meat Group Pty Ltd v JBS Australia Pty Limited

This¹ was a successful appeal to the Full Federal Court from a Federal Court decision, in which each of the Australian Meat Group Pty Ltd (**AMG**) marks was found to be deceptively similar to, and therefore infringe, two registered trade marks (one for the word mark AMH and the other for the AMH device) that JBS Australia Pty Limited (**JBS**) owned. The AMH brand has a long-standing and significant reputation in the meat industry and with customers. It has been in existence since 1989, and is widely known at the wholesale, retail and consumer levels. Images of the principal AMH and AMG device marks appear below:



The Full Court held that the primary judge erred in concluding that each of the AMG marks was deceptively similar to each of the AMH marks, principally because of the way in which His Honour took into account the strong brand reputation of AMH when assessing deceptive similarity. The primary judge erred in the way he undertook his trade mark comparisons for the following reasons:

- First, they proceeded from an incorrect starting point – namely, that a strong reputation existed in the AMH acronym (seen in the context of a market in which the participants – most significantly, wholesale buyers of meat products – generally use three-letter acronyms in emails and on price lists, and the like, to refer to suppliers and sources of supply). This led His Honour to conclude that this reputation should be taken into account in considering whether the competing marks were deceptively similar. This analysis was appropriate for a passing off case but was the wrong test to apply to a case of trade mark infringement under section 120(1) of the *Trade Marks Act 1995* (Cth) (the **TMA**).

- Second, His Honour's focus on the reputation in the AMH acronym shifted attention from other features of the AMH device mark and other features of the AMG marks – which are significant and meaningful, and ought to have been accorded due weight when conducting the comparisons for the purpose of s120(1) of the TMA. The consequence was to give the AMH acronym a predominating significance, or influence, it should not have been given as part of the deceptive similarity analysis in the context of trade mark infringement.

When the Full Court itself turned to compare each AMG mark with the AMH device mark, it found them to be quite different, even though they possessed similar elements, such as the map of Australia and the first two letters 'AM'. Allowing for the possibility of imperfect recollection, the Full Court was not persuaded that the AMG device mark was deceptively similar to the AMH device mark. The impression created by each mark was substantially different and likely to be enduring. The Full Court took into account that, on the factual findings made at first instance, the marks are used in a market where the buyers are likely to bring to bear an inquiring mind regarding purchases of some considerable value. The evidence showed that other entities involved in the Australian meat industry have also adopted logos including a stylised map of Australia.

The high point of the case on trade mark infringement was the AMG word mark compared with the AMH word mark. Even here, the Full Court found that the primary judge placed too much significance on the 'AM' components of the marks and discounted the significance to be attached to the distinguishing last letters 'G' or 'H'. It was relevant that the letters 'AM', in the context of the Australian meat industry, are likely to be understood as denoting the words 'Australian meat'.

A.I.A. Agricola Italiana Alimentare S.p.A. v Borgo Developments Pty Ltd

Italian meat producer A.I.A. Agricola Italiana Alimentare S.p.A. (**A.I.A.**) has unsuccessfully opposed² the registration of a trade mark by competitor Borgo Developments Pty Ltd (**Borgo**). While the parties' marks have similar elements, those elements are common shapes dominated by different Italian names, such that the marks are not deceptively similar. The decision serves as a reminder to trade mark owners that:

¹ [2018] FCAFC 207.

² [2018] ATMO 184

- Common shapes, alone, are unlikely to distinguish your marks from others’.
- To oppose the registration of a mark on the basis of reputation, the reputation must be in Australia, rather than another country. It must be proved that the reputation has ‘spilled over’ to Australia.
- To prove reputation in Australia, it is necessary to have clear documentary evidence. This can include sales information, advertising expenditure and promotions. Sales information will not assist if it cannot be established which marks were applied to the sold goods.

The background

Borgo and associated entities sell a range of Italian meats and cheeses in Australia. Borgo applied for registration of the following trade mark, comprising the name ‘Borgo’ diagonally across a five-pointed star atop red, white and green concentric circles.



A.I.A. is an Italian company that sells meat products internationally, including in Australia. It asserts rights in the common law trade mark and Australian-registered trade marks shown below:



Common law mark

Registered marks

A.I.A. opposed the registration of Borgo’s trade mark on the following grounds:

- Borgo’s mark is substantially identical with, or deceptively similar to, A.I.A.’s registered marks;
- owing to the reputation of A.I.A.’s marks in Australia, use of Borgo’s mark would be likely to deceive or cause confusion;
- use of Borgo’s mark would be contrary to law, as it would contravene ss 18 and 29 of the Australian Consumer Law and constitute passing off; and
- Borgo’s trade mark application was made in bad faith.

The hearing officer rejected each of A.I.A.’s grounds of opposition, and held that Borgo’s trade mark should be registered.

The reasoning

The hearing officer found that the marks were not substantially identical or deceptively similar. In relation to deceptive similarity, he said that the shared elements, being the star and concentric circles, are ‘commonplace geometric forms’; and that dominant to those elements are two very different Italian names. The hearing officer

concluded there was no suggestion of association between the marks, and an ordinary person would not confuse them.

A.I.A.’s second ground of opposition hinged on the reputation of its marks. To establish this ground, A.I.A. asserted that its registered marks and variations of them (including the common law mark) had been used in Australia since 2007, and in Italy since at least 1950. A.I.A. argued that the marks had acquired a reputation in Australia, and a more significant reputation in Italy that had ‘spilled over into Australia’.

The hearing officer expressed reservations about A.I.A.’s evidence going to reputation in Australia. This was for a number of reasons, including that:

- The sales information A.I.A. provided failed to identify which marks had been used in Australia.
- Due to restrictive food importation laws, A.I.A. had trouble selling its products in Australia, and sold its products through restaurants, delicatessens and fruit barns. The end purchasers of A.I.A.’s products in Australia may never have seen A.I.A.’s branding, including the relevant marks.
- A.I.A. had, in the past, held an Australian registration for the following device mark. However, there was no evidence of use of that mark without the word NEGRONI. In fact, Borgo succeeded in having the mark removed from the trade marks register in late 2017, on the basis of non-use.



The hearing officer was not persuaded that the reputation of the marks in Italy had ‘spilled over’ into Australia. He found that the word NEGRONI and A.I.A.’s common law mark ‘might have acquired some very modest level of awareness with a small section of the Australian public’.

He found that there was no real likelihood of confusion or deception owing to the reputation of A.I.A.’s marks. He pointed out that the only similarities between Borgo’s mark and A.I.A.’s common law mark are the star and circle elements, and said these similarities must be discounted because:

- stars and circles are common shapes;
- the circles are the colours of the Italian flag; and
- the marks are dominated by very different Italian names.

Because A.I.A. failed to establish its second ground of opposition, its third ground of opposition also failed. Finally, the hearing officer dismissed A.I.A.’s assertion that Borgo’s trade mark application had been made in bad faith. He noted, however, that there was a dearth of evidence establishing how the parties arrived at trade marks with similar star and circle elements.

Troubled waters

It can be troubled waters all round when an offshore giant attempts to take on a longstanding local user of a mark. Lawyer Phoebe St John reports on the latest development in the trade mark battle between the two Tridents.

How does it affect you?

- This case illustrates the difficulties large offshore food and beverage brands may encounter when attempting to enter the Australian market, particularly where there is a longstanding local user of the same or a similar mark.
- It also confirms the strict approach the courts take when determining whether use of a trade mark by a licensee (including within the same corporate group) has been ‘under the control of’ the trade mark owner.
- Owners of food and beverage trade marks should be aware that the use of the mark in respect of an ingredient will not normally amount to use in respect of the ‘product’ the subject of the trade mark.

Which ‘Trident’ is which?

Trident Seafoods Corporation v Trident Foods Pty Limited [2018] FCA 1490 is the third decision in a longstanding trade mark feud between Trident Seafoods Corporation (**TSC**) and Trident Foods Pty Ltd (**Trident Foods**) over the right to use the word mark TRIDENT for seafood products.

TSC is the biggest seafood company in the United States, and one of the largest vertically integrated seafood distributors internationally. Its house brand, TRIDENT SEAFOODS, harvests, processes, markets and distributes fresh, tinned and frozen seafood products. TSC has not to date attempted to sell seafood products in Australia using the Trident Seafoods logo, but has rather sold its products in Australia under the brand BOUNTIFUL.

Australian brand Trident Foods first filed for registration of the word mark TRIDENT in relation to seafood products on 15 March 1973, the year of the company’s founding. The TRIDENT brand is traditionally known for its Asian flavours and ingredients, like sweet chili sauce or coconut milk, but has a high penetration in the Australian market for a variety of different food products. Manassen Foods Australia Pty Ltd (**Manassen**) acquired Trident Foods in 2000, and has sold TRIDENT-branded products since that time. However, it wasn’t until 2017 that Manassen was officially authorised to do so via a formal trade mark licence agreement.

Background

On 7 May 2013, TSC filed a trade mark application for its TSC logo in class 29 in respect of seafood and edible oils (among other things), which was refused by the Registrar of Trade Marks on the basis of three prior trade mark registrations for ‘TRIDENT’ held by Trident Foods.

Consequently, TSC initiated non-use removal actions under section 92(4) of the *Trade Marks Act 1995* (Cth) against those three Trident Foods trade mark registrations for the non-use period of 7 January 2011 to 7 January 2014. Trident Foods opposed the removal actions. One registration was successfully removed for non-use by the Registrar of Trade Marks, while two remained on the Register as per the delegate’s discretion. TSC unsuccessfully appealed this decision.

In July 2014, TSC further opposed an application by Trident Foods for the word mark TRIDENT in class 29 (in respect of coconut oil, food made from fish and tinned fish, among other goods) and class 30 (in respect of fish sauce (condiments)). TSC was unsuccessful in its opposition, both at first instance and on appeal.

The Federal Court decision

On appeal to the Federal Court from the delegate of the Registrar of Trade Marks, Justice Gleeson found that Trident Foods had not used two of the trade marks in relation to ‘fish’ or ‘fish products’ during the relevant non-use period. This was the case even though TRIDENT-branded products had been sold by Manassen with Trident Foods’ express knowledge and permission since 2000.

In particular, Justice Gleeson pointed to the fact that their corporate relationship was not one whereby Trident Foods could exercise quality or financial control over Manassen. Rather, the mere fact Trident Foods owned the trade marks that Manassen placed on products it supplied did not prove use of the trade mark by Trident Foods, even though the parties had formalised their licence arrangement in 2017.

Although TSC was able to establish non-use of Trident Foods’ TRIDENT trade marks during the relevant period, the two registrations were not removed. Crucially, Justice Gleeson exercised the discretion as per s101(3) of the Trade Marks Act to keep the two registrations on the Register.

TSC partially succeeded in opposing registration of Trident Foods’ pending application, with the application allowed to proceed to registration for limited goods only.

Significance for the food industry

This case demonstrates just how careful food companies need to be to ensure that they are using their trade marks as registered. For example, the trade mark should be used in respect of the ‘products’ the subject of the registration, rather than those products only being contained as ingredients. One of the issues in the first appeal before Justice Gleeson was which goods fell within the description of ‘fish’ and ‘fish products’, as per Trident Foods’ trade mark registrations in class 29. Her Honour determined that ‘fish products’ referred to seafoods (including molluscs), crustaceans and foods that were prepared from seafoods. Trident Foods tried to rebut the allegation made under s92(4)(b) by arguing that the application of a trade mark to goods containing an ingredient is a use of the trade mark ‘in relation to’ that ingredient. However, Justice Gleeson clearly stated that the application of a trade mark to a particular food product is use in relation to the goods only, and not to the ingredients from which the goods are made more broadly. That said, a product like fish sauce might still be classified as a seafood product, as the main ingredient is fish.

Justice Gleeson’s decision also illustrates that even establishing non-use of a trade mark does not necessarily mean its registration will be removed. Crucially, Her Honour’s focus on public policy, the parties’ conduct after the relevant non-use period had concluded, and the general perceptions of the consumer, were key in outweighing the non-use removal application.

First, after the non-use period, Trident Foods began to sell new fish products in Australia bearing the TRIDENT trade mark (such as tinned mussels), which did constitute ‘use’ of the trade mark. While clearly a reaction to the ongoing court battles it was facing, Her Honour did not believe Trident Foods’ actions lacked good faith. If anything, Her Honour was content that Trident Foods still had an intention to use the mark on the relevant goods, and that the changing use of the trade marks in relation to seafood products reflected the varied circumstances of the marketplace.

Second, Justice Gleeson stipulated that it was in the public interest to keep the TRIDENT marks on the Register, due to the residual reputation in the trade marks. Indeed, consumers were likely to associate the mark with Trident Foods, fish products and the group of companies of which it is a member. The removal of Trident Foods’ registrations and any use of TSC’s trade mark in the future was likely to confuse consumers, as the reputation of the TRIDENT mark had already been created by Manassen (with Trident Foods’ knowledge and express permission).

The outcome at this stage is that international seafood giant TSC is unable to sell fish products under its desired brand in Australia. The trade mark battle between the two Tridents shows that it can be troubled waters all round when an offshore giant attempts to take on a longstanding local user of a mark.

Measuring ‘spilt milk’

Can food and beverage industry participants be found to have engaged in misleading or deceptive conduct for failure to comply with aspects of relevant regulatory regimes? The Federal Court has confirmed that they can. Lawyer Ammy Singh reports.

How does it affect you?

- *Flogineering Pty Ltd v Blu Logistics SA Pty Ltd* [2018] FCA 147 demonstrates that other participants in your industry or supply chain might reasonably assume you have complied with relevant industry regulations, particularly if you take steps (such as referring to or applying approval numbers) indicating that to be so.
- The case is a useful reminder that conduct can be misleading or deceptive when it misleads other industry participants, and is not directed in any way to the ultimate consumer.
- While the case arose in a dairy industry context, where the measurement of milk is of critical importance, there is no reason to think that the general principles would not apply in relation to other food and beverage regulatory regimes.

The background

Flogineering Pty Ltd (**Flogineering**) is a supplier of components of milk ‘flowmetering systems’ that measure the volume of milk. Flogineering’s customers include Fonterra Limited, Murray Goulburn Cooperative Co Limited and Parmalat Australia Pty Ltd. Blu Logistics SA Pty Ltd and the other respondents (**Blu Logistics**) were former customers of Flogineering. They provide milk bulk haulage services, allowing milk to be moved from dairy farms to tankers, and, in turn, from tankers to milk processors.

Blu Logistics used a milk flowmetering system marked with an approval number for a Certificate of Approval that was, in fact, issued to Flogineering by the Department of Industry, Innovation and Science under the *National Measurement Act 1960* (Cth) and the *National Measurement Regulations 1999* (Cth). Under this Act and Regulations, only the holder of an approval is permitted to mark its milk flowmetering systems and instruments with the approval number. This is in order to ensure a regulatory system where the pricing of traded goods is based on accurate measurements.

Flogineering claimed that Blu Logistics had engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of sections 18 and 29 of the Australian Consumer Law (the **ACL**). The central misrepresentation alleged was that ‘any person within the dairy industry observing the approval number’, and particularly dairy farmers and milk processors, was likely to be misled and deceived into believing that Blu Logistics had regulatory approval to mark its milk measuring instruments with an approval number guaranteeing the integrity and accuracy of these instruments.

The decision

Acting Chief Justice Greenwood found in Flogineering’s favour. His Honour noted that Blu Logistics had marked its measuring instruments with the regulatory approval number without Flogineering’s approval. This was despite the fact that Flogineering had an obligation under the industry regulations to ensure that any measuring instruments purporting to comply with the approval were only marked by persons authorised by Flogineering.

His Honour found that Blu Logistics’ conduct was likely to mislead the dairy farmers and milk processors into believing that the measuring instruments were marked with a regulatory approval by persons who had the right to do so. This conduct was found to be commercially significant because both dairy farmers and milk processors understood that Blu Logistics was required to conduct its business in compliance with all aspects of the regulatory requirements. Accordingly, His Honour held this conduct to be in contravention of ss 18 and 29 of the ACL.

Consumers in the supply chain?

One significant aspect of the decision was that the conduct in issue was found to be misleading towards other participants in the dairy supply chain, rather than any ultimate consumer.

Acting Chief Justice Greenwood noted that dairy farmers and milk processors both have a very particular interest in ensuring the accurate measurement of the volume of milk transferred from farms to milk processors. The accuracy of these measurements is crucial to the calculation of each participant’s revenue from the sale of milk. His Honour found that:

Dairy farmers... would undoubtedly proceed on the basis that the tanker could not pull up at the farm gate and at the farmer’s refrigerated vat and undertake any transfer operation unless all regulatory requirements were satisfied, whatever they may be.

In this context, His Honour held that:

Dairy farmers and milk processors are not simply ‘consumers’ of services or goods in a sense relevant to these proceedings. Rather, they are key participants with a very particular interest in the topic of and matters related to the mechanisms by which milk volumes are transferred and measured in the transfer as between farm, bulk haulage contractor and milk processor. In that sense, they are informed consumers in a key sectoral part of the market.

By finding other industry participants to be ‘informed consumers’ in the supply chain who were nevertheless likely to be misled, His Honour’s decision serves as a reminder to food and beverage companies that there are multiple levels of consumers in their supply chain to whom misleading representations might potentially be made. Provided that the conduct takes place in trade or commerce, ss18 and 29 of the ACL apply to representations made to other industry participants in the same way that they apply to representations made to ultimate consumers.

Although this decision relates to dairy regulations, His Honour’s reasoning could well apply to other food and beverage regulatory regimes, particularly where the subject matter is of real commercial concern to industry participants (such as, in this case, the measurement of milk). Food and beverage companies should be mindful of the representations they make, whether to ultimate consumers or others in the industry; and the need to comply with relevant industry regulations, of course, remains paramount.

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