
By Ven. Alex Bruce*

Introduction

This article is the second of two exploring whether, and to what extent an existing regulatory regime in the form of the Australian Consumer Law (‘the ACL’) and the economic forces of consumer demand that it protects, can be employed to advance food animal welfare initiatives and to address practices associated with the religious slaughter of animals.

The first article suggested that it was at least theoretically possible to indirectly regulate consumer values issues associated with food animal products through consumer demand. In preferring this regulatory approach, the Commonwealth government’s Labelling Logic Report assigns significant responsibility to the market in signalling consumer preferences for welfare friendly food animal products to suppliers. The discussion in the first article explained how the dynamics of a competitive market, underpinned by competition and consumer policy supports the primacy of the consumer as the driver of this process.

Evidence from the European Union, the United States, the United Kingdom and Australia also suggests that consumers would be willing to pay a price premium for welfare friendly food animal products. Informal, industry and formal surveys and studies suggest that consumer experiences of cognitive dissonance or purchasing inconsistency are mitigated by the availability of accurate information about food animal products, including antecedent animal welfare practices.

However, theoretical possibility must be translated into workable legal reality if the intended market-based regulatory approach to consumer values issues associated with food animal welfare is to be effective.

This is especially so if consumer demands are intended not just to generate informed and honest labelling information, but then to actually signal suppliers of consumers’ preferences for welfare friendly food animal products.

Does the legal structure of the ACL enable it to be applied consistently across all Australian jurisdictions to achieve this end? How does the law work in enabling the ACL to prevent suppliers making misleading or deceptive animal welfare claims in the sale or their food animal products? Does the case law support an interpretation of the ACL that would require suppliers to disclose the fact that animals may have been slaughtered according to religious practices?

This second article answers these questions by exploring how current case law might resolve hypothetical litigation instituted by the Australian Competition and Consumer Commission (‘the ACCC’) against a national retailer of food animal products. This hypothetical litigation involves allegations that the retailer has breached the misleading or deceptive conduct prohibition in ACL s18 by engaging in both ‘positive’ conduct in labelling food animal products and ‘negative’ conduct in failing to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual.

Part I briefly introduces the ACL before Part II introduces the facts of hypothetical litigation instituted by the ACCC against a national retailer alleging that the retailer breached ACL s18 in making certain animal welfare claims associated with its food animal products.

The basic legal framework by which ACL s18 prohibits misleading or deceptive conduct is explained in Part III that analyses the case law relevant to evaluating the first set of allegations against the national retailer. That is, allegations of ‘positive’ conduct; where it is alleged that the national retailer has breached ACL s18 in making misleading or deceptive animal welfare claims associated with its food products.

Part III demonstrates how recent decisions of the Federal Court of Australia in Australian Competition and Consumer Commission v C.I. & Co Pty Ltd2 and Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)3 permit an interpretation of the ACL.

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enabling it to prevent misleading or deceptive welfare claims associated with food animal products.

However, those decisions are not directly relevant to the task of evaluating the second set of allegations. That is, where it is alleged that a failure by the retailer to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual constitutes misleading or deceptive conduct. Part IV therefore explores the difficult legal question of whether and to what extent the ACL can be interpreted to address claims of alleged misleading or deceptive conduct associated with a failure to inform.

Do consumers have a right to be informed whether the meat products they are buying have come from animals that have not been stunned prior to slaughter? Does the failure to inform consumers of this lack of stunning constitute misleading or deceptive conduct by omission in breach of ACL s18?

In exploring these questions, Part IV explains the methodology established by the decision of the High Court in *Campomar Sociedad Ltd v Nike International Ltd* ("Campomar"). As a decision of the High Court, Campomar is the principal authority followed by Australian Courts across all jurisdictions in evaluating conduct directed toward the public at large.

This methodology requires identifying the qualities of a hypothetical consumer against whom allegedly misleading or deceptive conduct is evaluated. Part IV also explores the case law that requires the existence of a reasonable expectation of disclosure, (in the present case, that meat has originated from animals slaughtered according to religious ritual) before a failure to disclose can be characterised as misleading or deceptive.  

By exploring the arguments for and against the issue, Part IV demonstrates how the current state of legal uncertainty associated with characterising silence as misleading or deceptive conduct ultimately dooms the ACCC’s case and compromises the larger ability of the ACL to address allegations of misleading conduct by silence or omission.

The article concludes in Part V that the ACL can be successfully interpreted and enforced against suppliers of food animal products who engage in misleading or deceptive conduct in relation to positive statements made on food labels. However, claims that a failure to provide consumers with information relating to the slaughter of food animals breaches the ACL are likely to fail.

The article also concludes that the Commonwealth government’s intended policy in regulating consumer values matters, including animal welfare and religious slaughter issues set out in the Labelling Logic Report is limited. The limitations associated with the case law in interpreting the ACL highlight the importance of the sort of legislative initiatives intended by the European Union and United Kingdom and discussed in the first article.

Although not without controversy, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL with more specific forms of consumer protection initiatives such as food-specific labelling legislation or Codes of Conduct requiring halal and kosher meat products to be labelled as such.  

**Part I - Australia’s New Consumer Protection Regime**

Until 2011, consumer protection and product liability in Australia was regulated by an often confusing patchwork of Commonwealth, State and Territory legislation, regulations and subordinate legislation. At the Commonwealth (Commonwealth) level and since 1974, the *Trade Practices Act 1974* (Cth) ("the TPA") provided Australia’s principal source of consumer protection legislation. Complementing and in many places duplicating the TPA were individual State and Territory Fair Trading legislation.

On 1 January 2011, this relatively fragmented landscape of consumer

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protection and product liability law in Australia fundamentally changed. The Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (‘the ACL Act’) completed a process of reform that had been gaining momentum since the early 2000’s and that culminated in the creation of a single, nation-wide consumer protection and product liability regime in the form of the Australian Consumer Law.

A National and Consistent Regulatory Regime

In the process, the Australian Consumer Law replaced 17 generic consumer protection laws that existed across States and Territories with a single national Consumer Law found in Schedule 2 to the CCA and implemented as a law of the Commonwealth in Part XI of the CCA and as an ‘applied law’ of the States and Territories in Part XIA of CCA and for the most part, embedded in Fair Trading legislation.

It is the largest reform of Australian consumer protection laws ever undertaken. I have explained in more detail elsewhere the policy and constitutional background to, and the mechanics of the national implementation of the ACL. 7

Part II – Creating a Hypothetical Scenario

This article and the one before it is investigating whether and to what extent the ACL can advance the welfare of food animals. Consistent with its Labelling Logic Report, the Commonwealth government is proposing to facilitate consumers’ preferences for welfare-friendly food animal products by prohibiting misleading or deceptive animal welfare representations made by suppliers of those products.

For the purposes of evaluating whether and to what extent the ACL can function in this way, a hypothetical scenario is posited. This approach follows the suggestion of Justice Kirby in ‘conceptualising the case’ for the purposes of evaluating the merits of an argument where the conceptual bases of arguments for and against a position are expressed at their highest level. 8

Factual Context

Accordingly, we assume that a national grocery retailer, Hestia Pty Ltd (‘Hestia’) owns grocery retail stores in all States and Territories of Australia. It retail in all manner of groceries including food animal products, to consumers. It obtains chicken, beef, pork, lamb and seafood products in bulk from national primary producers. Hestia’s own in-house butchers re-package meat products in styrofoam trays covered in plastic wrap. Labels attached to the plastic covering disclose the relevant cut of meat, its weight, country of origin and ingredients. Consumers simply pick up their desired meat product from the meat section of any Hestia supermarket.

From April 2011, Hestia began selling home-brand generic eggs in all of its stores. The eggs are packaged in Hestia cartons. Labels on the egg cartons depict an image of a smiling chickens roaming about green fields against a backdrop of a large red barn.

On the label are two lines of words; the first line states: ‘Hestia Healthy Choice Eggs’ in bold and capitalised font. A smaller second line of words states ‘Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice.’

Since September 2011, Hestia also began to sell a significant amount of halal and kosher chicken and beef meat in order to satisfy demand by an increasingly multicultural Australian society.

In some stores, located in predominantly Muslim suburbs such as Marrickville and Lakemba in Sydney, Hestia places halal meat products in a separate chiller display that specifically advertises halal meat products. However, in the majority of its stores, there is no distinction between halal and general meat products and consumers do not know whether they are buying halal or non-halal meat products.

After an investigation in January 2012 by a national current affairs program, it is revealed that approximately 80% of the ‘Hestia Healthy Choice Eggs’ have been sourced from battery hen farms. The program also includes interviews with consumers who are shocked to learn that the meat products they have been purchasing have originated from

7 Alex Bruce, Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011) Chapters 1 & 2, 1 – 50.

9 In Greek mythology, Hestia is the goddess of the hearth, family and animal sacrifice; E.M. Berens, Myths and Legends of Ancient Greece and Rome, (Cassell’s Press Publishers, United States, 2011) 37.
animals slaughtered according to Muslim religious ritual that does not permit stunning prior to slaughter.

Predictably, in the weeks following the program, the ACCC receives many complaints about Hestia's practices from all Australian States and Territories. The ACCC notes that the complaints involve fundamental consumer concerns that fit within its Enduring Perspectives and 2012 Objectives, and are consistent with its Compliance and Enforcement Priorities. 10

In these circumstances, and in June 2012, the ACCC institutes proceedings against Hestia in the Federal Court of Australia alleging that advertising associated with its eggs as well as the failure to inform consumers about the religious preparation of meat products constitutes misleading or deceptive conduct in breach of ACL s18.

Pleading the ACCC's Causes of Action

It is in these factual circumstances that the central question posed by these articles can be investigated. However, transposing this theoretical factual scenario into the procedural framework of pleading a cause of action under ACL s18 in the Federal Court of Australia requires a certain amount of precision. The new Federal Court Rules, issued in 2011, require pleadings to very clearly identify the issues to be resolved by the Court and the facts relied upon in order that the other party is aware of the case that must be met. 11

As a general rule, therefore, an applicant is required to plead a cause of action with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity, and to do so at an early stage in the litigation. In Banque Commerciale S.A en Liquidation v Akhil Holdings Ltd, Chief Justice Mason and Justice Gaudron confirmed:

"the functions of pleadings is to state with sufficient clarity the case that must be met ... In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her, and incidentally, to define the issues for decision. 12"

Because ACL s18 is so very broad, a cause of action pleading misleading or deceptive conduct is vulnerable to imprecision and incoherence. Accordingly, it is necessary to plead exactly the nature of the behaviour said to represent the failure to observe that 'norm of conduct'. In Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd, the Court underscored the importance of a precise identification of the factual basis of an action based on misleading or deceptive conduct:

"It necessarily follows that when the section is sought to be used in litigation as the foundation of a cause of action or claim for some specific form of relief, it is imperative that the factual basis upon which the Section is alleged to be brought into play must be stated with appropriate clarity in a statement of claim."

"Experience is showing that the Court must be astute in the prevention of this type of situation by requiring, in the early stages of litigation, that claims based on [s18] be pleaded with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity. 13"

What is the basis of the ACCC's cause of action? The ACCC alleges that Australian consumers are increasingly aware of animal welfare issues, concern that is reflected in their purchasing patterns. It also notes the Commonwealth government's intention, expressed in its Labelling Logic Report, to regulate consumer values issues associated with food products through the misleading or deceptive conduct provisions of the ACL.

In these circumstances, the ACCC's statement of claim 14 pleads that the respondent, Hestia, has, in trade or commerce:

* in connection with the supply and promotion of the supply of eggs produced in Australia for consumption and branded

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11 Rule 16.02 (1) Federal Court Rules 2011.
14 Rule 8.05 Federal Court Rules 2011.
'Hestia Healthy Choice Eggs' engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s18 of the Australian Consumer Law consisting of Schedule 2 to the Competition and Consumer Act 2010 (Cth); and

* in connection with the supply of meat products sourced in Australia and offered for supply, has engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s18 of the Australian Consumer Law consisting of Schedule 2 to the Competition and Consumer Act 2010 (Cth);

In particularising its case, the ACCC alleges that the misleading conduct consisted:

* in the period from April 2011 until January 2012, producing or causing to be produced, egg cartons in its ‘Hestia Healthy Choice Range’ displaying images of chickens roaming on green pastures, accompanied by labels stating ‘Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice’. In doing so, Hestia represented that eggs from the ‘Hestia Health Choice Range’ were obtained from chickens raised in free-range green outdoor pastures in circumstances where the chickens had at all times, substantial space in an outdoor environment permitting them to roam freely; and;
* in the period from September 2011 until January 2012, causing to be sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals.

The ACCC’s originating application\(^{15}\) seeks a number of orders including injunctive relief, corrective advertising and orders requiring that future sales of meat products will be labelled as ‘Halal’, ‘Kosher’ or ‘Slaughtered According to Religious Ritual’.

Not surprisingly, Hestia intends to vigorously defend the ACCC’s action.

Part III – ‘Free Range Eggs’ – Positive Conduct

The ACCC’s first concern relates to the allegedly misleading or deceptive presentation of the ‘Hestia Healthy Choice Range’ eggs. The evidence establishes that some 80% of the eggs retailed by Hestia under this banner were actually obtained from battery hen farms where the hens were kept in cages.

In its statement of claim, the ACCC alleges that Hestia has engaged in misleading or deceptive conduct in breach of ACL s18. The general prohibition against misleading or deceptive conduct is one of the most frequently litigated prohibitions in the ACL. The former s52 of the Trade Practices Act 1974 (Cth) is now s18 of the Australian Consumer Law and very simply provides: ‘person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’.

This very wide-ranging prohibition has ‘been discussed and applied in innumerable authorities’\(^{16}\) and has given rise to an astonishing variety of case-law encompassing almost every aspect of commercial and non-commercial activity. In Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited, the High Court commented on the pervasive nature of litigation involving allegations of misleading and deceptive conduct:

> The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian Courts at all levels.\(^{17}\)

Far from being confined to straightforward transactions between corporate traders and consumers, the prohibition against misleading or deceptive conduct contained in s18 of the Australian Consumer Law extends to inter-corporate commercial activity, governmental activity and into circumstances that other areas of law, such as the law of negligence would have traditionally addressed. Allegations of misleading or deceptive conduct have therefore been pleaded in cases

\(^{15}\) Rule 8.00 Federal Court Rules 2011.

\(^{16}\) Ahl Australia Holdings Pty Limited v Blade Medical Institute (Aust) Pty Ltd (No 2) [2009] FCA 1427, [64] per Fisk J.

involving obvious examples of everyday commercial activity to extremely obscure conduct.

The bewilderingly wide range of circumstances in which misleading or deceptive conduct has been alleged is perhaps explained by the case with which ACL s18 can be pleaded.\(^\text{18}\)

There is no need to establish a contractual relationship between the parties. There is no need to establish that the defendant corporation owed the plaintiff a duty of care that has been breached. In fact, the plaintiff does not even have to establish that anyone has actually been misled or deceived. All that must be established is that there has been conduct in trade or commerce that is, or is likely to be misleading or deceptive.

**ACL s18 - What Must be Established?**

The text of s18 Australian Consumer Law is relatively straightforward. Three elements must be satisfied to establish a contravention:

1. A corporation or person engages in conduct;
2. In trade or commerce; that is
3. Misleading or deceptive or likely to mislead or deceive.

At this point, it should be noted that although s52 of the TPA is now s18 of the *Australian Consumer Law*, the case-law relating to the interpretation of s52 will continue to guide the Courts in evaluating conduct alleged to breach s18. The Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 Cth*, specifically states:

*Section 18 of the ACL replaces the repealed Section 52 of the TP Act. The substance of the drafting of the prohibition has not been changed, other than changing the reference to 'a corporation' to 'a person'. Accordingly, the well-developed jurisprudence relating to s52 of the TP Act is relevant to the interpretation or understanding of the meaning and application of Section 18 of the ACL.* \(^\text{19}\)

Most of the case law discussed in this article involves conduct evaluated under s52. However, for the sake of clarity, I will substitute '[s18]' for 's52' in relevant case-law extracts. There is no material difference in the sections and the substitution is intended for ease of conceptualising the argument as involving ACL s18 rather than TPA s52.

Although the elements of ACL s18 are clear, the interpretation and application of those elements has not been straightforward. The High Court in *Parkdale Custom Built Furniture Proprietary Limited v Pixu Proprietary Limited* admitted:

> The words of [s18] have been said to be clear and unambiguous ... . Nevertheless they are productive of considerable difficulty when it becomes necessary to apply them to the facts of particular cases. Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions. \(^\text{20}\)

These difficulties often arise in satisfying threshold requirements for successfully establishing a contravention of ACL s18. First, the conduct of the person or corporation must be assessable under the *Competition and Consumer Act 2010* (Cth). Second, the conduct must be 'in trade or commerce'; third, there must be an identifiable ‘class of consumers’ who are alleged to have been misled; and fourth, the conduct must have in fact caused the misled state of mind, and to succeed in recovering damages, the loss or damage must have been caused by the allegedly misleading or deceptive conduct.

In working through these requirements the Courts have developed a methodology in relation to s52 that enables conduct to be evaluated. There are certain elements built into that methodology that must be examined in interpreting ACL s18.

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18 The High Court noted ‘In frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the facts of negligence, desert and passing off’ [ibid].

19 Explanatory Memorandum to *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), 37, [311].

A Norm of Conduct Not an Imposition of Liability

Section 18 of the Australian Consumer Law does not actually create a cause of action. It simply establishes a standard of conduct; a person must not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

The Court in Brown v Jam Factory Pty Ltd noted:

Section [18] does not purport to create liability at all; rather it establishes a norm of conduct, failure to observe which has consequences provided for elsewhere in the same statute or under the general law. 21

When the Court mentioned 'consequences provided for elsewhere in the same statute' it was referring to the remedies and orders available under the Trade Practices Act 1974 (Cth) for a contravention of Part V of the TPA that included s52. Likewise, the 'norm of conduct' provided for by ACL s18 does not of itself establish the consequences for a breach. The remedial provisions for a contravention of ACL s18 are found in other parts of the ACL; principally in Chapter 5 and include injunctive relief and damages. 23

Conduct ‘In Trade or Commerce’

For the purposes of this article, and consistent with the authoritative interpretation of that term by the High Court in Concrete Constructions (NSW) Pty Limited v Nelson, 24 the sale for profit of food animal products by Hestia is conduct that is in trade or commerce for the purposes of the ACL. Consistent with the decision in Concrete Constructions, the retail sale of products is an activity that of itself bears a trading or commercial character.

Having established that the relevant conduct of Hestia was ‘in trade or commerce’ the next step is to inquire whether it was in fact misleading or deceptive or likely to mislead or deceive.

22 ACL s 212.
23 ACL s 216.

When is Conduct ‘Misleading or Deceptive’?

Conduct is misleading or deceptive when it ‘leads into error’. The High Court in Parkdale Custom Built Furniture Proprietary Limited v Puxx Proprietary Limited explained:

The words of [s18] require the Court to consider the nature of the conduct of the corporation against which proceedings are brought and to decide whether that conduct was, within the meaning of that section, misleading or deceptive or likely to mislead or deceive ... One meaning which the words 'mislead' and 'deceive' share in common is 'to lead into error'. 25

The Full Federal Court in Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd formulated the requirement as follows:

In order to determine whether there has been any contravention of [s18] of the Act, it is necessary to determine whether or not the conduct complained of amounted to a representation which has or would be likely to lead to a misconception arising in the minds of that section of the public to whom the conduct (which may include refraining from doing an act) has been directed. 26

Whether evaluating the conduct of corporations or of persons, there are three threshold issues that need to be addressed before the prohibition in ACL s18 can be established.

1. Whether conduct is ‘in trade or commerce’;

2. The Taco Bell methodology for evaluating misleading or deceptive conduct; and

3. The Campomar methodology employed for evaluating the relevant 'class of consumers' alleged to have been misled.

These foundational methods or principles influence whether ACL s18 even applies (because the conduct in question might not be 'in trade or

27 Taco Co of America Inc v Taco Bell Pty Ltd (1982) 34 ALR 177.
commerce') and if it does, who might have been misled (identifying the 'class' of consumers through the Campomar methodology) and then whether that conduct is misleading or deceptive in breach of s 18 of the Australian Consumer Law (the Taco Bell methodology).

The Taco Bell Methodology

Conduct is misleading or deceptive if it 'leads into error'. But what is the method by which conduct is considered to have led into error and therefore breached ACL s 18? What processes does the Court undertake in making its assessment? In Apotex Pty Ltd v Les Laboratoires Servier (No 2), the Court stated:

In Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 24 ALR 177 at 102 Deane and Fitzgerald JJ outlined a series of propositions to be considered in assessing whether conduct is misleading or deceptive under [s18] of the Act:

- It is necessary to identify the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive fails to be tested;
- Once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations;
- Evidence that some individual has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Regardless, such evidence does not of itself conclusively establish the conduct to be misleading or deceptive, the test is objective and the Court must determine for itself;
- It is necessary to inquire why any proven misconception has arisen. It is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent.

Application of the Taco Bell Methodology

This process of evaluation, sometimes referred to as the 'Taco Bell Steps' has been adopted and elaborated upon, either explicitly or implicitly by almost all decisions in which the Court is required to evaluate whether conduct is misleading or deceptive or likely to mislead or deceive.

For example, in Domain Names Australia Pty Ltd v .au Domain Administration Ltd, the Full Court stated:

It has long been established that:

- When the question is whether conduct has been likely to mislead or deceive, it is unnecessary to prove anyone was actually misled or deceived;
- Evidence of actual misleading or deception is admissible and may be persuasive but is not essential;
- The test is objective and the Court must determine the question for itself;
- Conduct is likely to mislead or deceive if that is a real or not remote possibility, regardless of whether it is less or more than 50%.

See also AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd.

In other cases, Courts have not explicitly set out the Taco Bell steps, but have implicitly adopted them. For example, in Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd, the Full Court referred to Taco Bell in explaining its approach to the evaluation of the conduct under challenge in that case.

The Full Court stated:

For [s18] of the Act to be enlivened it is sufficient that the conduct complained of, in all the circumstances, answers the

31 AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd (2009) 262 ALR 458, 472.
statutory description, that is to say, that it is misleading or deceptive or likely to mislead or deceive. It is unnecessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception.

That is not to say that evidence of actual misleading or deception and of steps taken in consequence thereof is not likely to be both relevant and important on the question whether the relevant conduct in fact answers the statutory description.32

A similar re-formulation of the Taco Bell steps was adopted by the Court in Johnson & Johnson Pacific Pty Limited v Unilever Australia Limited (No 2).33 The Court in Unilever Australia Limited v Goodman Fielder Consumer Foods Pty Ltd34 also adopted the Taco Bell steps without referring to the case itself.

See also Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd.35

A Consistent Approach to Principles – The Basic Evaluative Framework

The consistent approval of the Taco Bell steps enables a summary of the basic principles employed by the Courts in evaluating whether conduct is misleading or deceptive or likely to mislead or deceive.36

The principles set out below have been extracted from a number of recent decisions of the Federal Court including ACCC v Clarion Marketing Pty Ltd,37 Butcher v Lachlan Elder Realty Pty Limited38 and ACCC v Australian Dreamtime Creations Pty Ltd.39

There are many other cases in which these principles have been stated (in various ways) and elaborated upon, and they form a basic conceptual framework against which allegations of misleading or deceptive conduct may be evaluated. The following ten principles form that basic evaluative framework:

- Whether a representation is likely to mislead or deceive is an objective question of fact, to be determined having regard to all the circumstances of the conduct and not just some isolated aspect of that conduct;
- Conduct is misleading or deceptive if leads into error. It is likely to be misleading or deceptive if there is a real chance that the conduct or representations will mislead or deceive;
- It is necessary to identify some conduct, whether in the form of a representation, an omission or some other form, that led the consumer(s) into error;
- It is necessary to identify the class of consumers toward whom the allegedly misleading conduct was directed;
- Having identified the relevant class of consumers, the test to be applied is objective, that is, whether an ordinary and reasonable person from the class is likely to have been misled or deceived;
- The process involved in identifying the ‘ordinary and reasonable’ person from the class differs depending on whether the allegedly misleading or deceptive conduct was directed toward specific and identified individuals or to a large class;
- Actual intention to mislead or deceive is not necessary to establish a breach of s18 of the ACL, but if intention is present, a Court may be more likely to find that the conduct complained of was misleading;
- Conduct may be misleading or deceptive if it induces error, but it is not sufficient merely to show that it may have led to confusion or caused people to wonder;
- Actual evidence that some people may have been misled is not essential but is admissible and may be persuasive if given;
- A corporation does not avoid liability for breach of s18 because a person who has been the subject of misleading or deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiries.

Application of Relevant Case Law – ‘Positive’ Labelling Representations.

These principles form the basic legal framework for evaluation, in terms of ACL s18, of the ACCC’s allegations against Hestia.
In relation to the first allegation, existing case law demonstrates how the ACL can be successfully employed against Hestia in relation to the first set of the ACCC’s allegations; that Hestia has engaged in misleading or deceptive conduct in falsely representing that its ‘Healthy Choice Range’ eggs are free-range.

Since 2010, the Australian Competition and Consumer Commission has instituted proceedings in the Federal Court of Australia against several Australian suppliers alleging misleading, deceptive or false claims concerning food animal products.

At the time of writing, one of those causes of action remains on foot while fresh proceedings against yet another supplier, Rosie’s Free Range Eggs, were instituted by the ACCC on 8 March 2012.

The unreported decisions in Australian Competition and Consumer Commission v C.J. & Co Pty Ltd and Australian Competition and Consumer Commission v Turi Foods Pty Ltd provide useful guidance about the relationship between product labelling and food animal welfare and how the misleading or deceptive conduct provisions of the ACL can be deployed to ensure food animal products accurately reflect antecedent animal husbandry practices.

In Australian Competition and Consumer Commission v C.J. & Co Pty Ltd, a Western Australian based family owned company, C.J. & Co Pty Ltd (‘CJ’), acquired eggs from egg farms and supplied them to retailers, cafes and restaurants.

Between June 2008 and April 2010, CJ acquired more than a million dozen eggs produced by battery cage hens and 12,000 dozen free-range eggs. However, in that period, CJ supplied its customers with nearly 900,000 dozen eggs that it had labelled ‘free range’, conduct described by the Court as involving ‘a high level of dishonesty’.

In doing so, CJ and its directors earned a significant amount of revenue they would not otherwise have earned if the eggs had been truthfully labelled as ‘cage eggs’. For example, the Court noted that in a two-week representative period between 15 and 30 April 2010, CJ and its directors earned between $5,744 and $9,008 in revenue ‘which they would not have derived had the eggs been labelled clearly as ‘cage eggs’.

Following an ACCC investigation, CJ and its directors admitted the deception and that they had contravened Sections 52, 53(a) and 55 of the Trade Practices Act 1974 (Cth).

Both CJ and the directors consented to certain orders being made against them, including declarations, injunctive relief and corrective advertising.

Because CJ and its directors had admitted the contraventions and consented to orders being made, the Court was not required to establish CJ’s liability through the Taco Bell and Campomar methodologies discussed above. It has become increasingly common for respondents to agree to consent orders and to make joint submissions on penalties with the ACCC, thereby avoiding a substantive trial on the issues.

Nevertheless, the Court cannot simply make orders and impose penalties just because parties consent to them. Before it does so, the Court must be satisfied that the facts before it actually do disclose a breach of the CCA or ACL.

In this case, the Court accepted that the relevant sections of the TPA (now ACL) had been breached ‘following many years of unlawful conduct which must have yielded considerable undeserved profit’.

Significantly, the Court clearly explained the relationship between the misleading labelling and consumer interest in food animal welfare. The misleading labels ‘amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to
advance the cause of animal welfare by so doing.\textsuperscript{50}

This is a simple and direct statement of the intended use of the ACL
anticipated by the Commonwealth Labelling Logic Report.

In an increasingly competitive market for food products, the Labelling
Logic Report anticipates that consumer demand for ethically produced
animal products, what it calls ‘values issues’, will signal producers to
implement food animal welfare practices such as free-range farms.\textsuperscript{51}
Unfortunately the case is also a clear example of the dishonest and
unethical practices warned about by ACCC Commissioner Martin and
discussed earlier.

Growing consumer demand for welfare-friendly animal products is
reflected in the continued willingness of some suppliers to mislead
consumers. For example, on 8 March 2012, the ACCC instituted
proceedings against Ms Rosemary Bruhn, trading as Rosie’s Free Range
Eggs in South Australia. In instituting proceedings, the ACCC ‘alleges
that from March 2007 to October 2010, Ms Bruhn represented that eggs
she supplied to business customers including 117 customers in South
Australia such as retail outlets, bakeries, cafes and restaurants, were free
range eggs when a substantial proportion of the eggs were not free
range but cage eggs’.\textsuperscript{52}

At the time of writing, the matter is before the Federal Court.

Also still before the Court are proceedings commenced in September
2011 by the ACCC against Turi Foods Pty Ltd, Biaïda Poultry Pty Ltd,
Barter Enterprises Pty Limited and the Australian Chicken Meat
Federation Inc (‘the ACMF’). Biaïda Poultry and Barter Enterprises
supply chickens throughout Australia under the well-known ‘Steggles
brand name while Turi Foods supplies ‘La Ionica’ brand chickens in
New South Wales and Victoria.

The ACCC alleged that these corporations engaged in misleading or
deceptive conduct in breach of both the TPA and the ACL in making
certain representations associated with the chicken meat products they

\textsuperscript{53} The ACCC alleged that ‘Biaïda Poultry and Barter
Enterprises made false or misleading claims in print advertising and
product packaging, that Steggles meat chickens are raised in barns with
substantial space available allowing them to roam freely’ when this was
not the case at all’.\textsuperscript{54}

Similar allegations were made against Turi Foods where it was alleged that
‘Turi Foods made false or misleading representations through in-
store displays and advertising on delivery trucks. La Ionica brand meat
chickens were claimed to be able to roam freely in barns with
substantial space and in conditions equivalent to a free range system.’\textsuperscript{55}

While it is on-going, this litigation has been bitterly contested. In
December 2011, the Australian Chicken Meat Federation sought
interlocutory orders dismissing the ACCC’s proceedings either on the
basis that no reasonable cause of action was disclosed\textsuperscript{56} or that the
ACCC had no reasonable prospect of successfully prosecuting its
claims.\textsuperscript{57}

The actual evidence indicated that the average space available to each
chicken was about 500 square centimetres.\textsuperscript{58} To provide some
perspective, an A4 sheet of paper has an area of 625 square centimetres.
A standard laying hen is at least 40-cm high when she stands erect and
is approximately 45-cm long and 18-cm wide, without her wings
extended. Her body space takes therefore takes up an area of about 810
square centimetres.

Despite the mathematical bleakness of the evidence, the ACMF claimed
that there were simply no grounds for alleging that chickens were not
‘free to roam’ as they had represented.\textsuperscript{59} Perhaps not surprisingly,
Tracey J refused to strike out the ACCC’s action, observing that ‘five
hundred centimetres squared is a remarkably small space. In order for
any one chicken to have a larger area of movement, others would have

\textsuperscript{50} Ibid [11].
\textsuperscript{51} Food Labelling Law and Policy Review Panel, Labelling Logic: Review of Food Labelling Law and Policy, 27 January
2011, Commonwealth of Australia, 47, (3.20).
\textsuperscript{52} ACCC Takes Court Action Against SA Egg Supplier, ACCC Media Release 8 March 2012.
\textsuperscript{53} ACCC Takes Action over ‘Free to Roam’ Chicken Claims, ACCC Media Release 7 September 2011.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Rule 26.0(1)(a) Federal Court Rules 2011.
\textsuperscript{57} Rule 26.0(1)(a) Federal Court Rules 2011.
\textsuperscript{58} Australian Competition and Consumer Commission v Turi Foods Pty Ltd [2011] FCA 1382, [14] (Transposed
decision of Tracey J dated 2 December 2011).
\textsuperscript{59} Ibid [10].
to be confined within an even smaller space. 60

By January 2012, Turi Foods Pty Ltd had decided to conclude the proceedings against it by admitting the contraventions and submitting to consent orders. 61 After reviewing the evidence, Tracey J concluded:

the stock densities, which La Jonica has admitted are to be found in the barns in which its chickens are raised, are maintained at such a level that the chickens have severe restrictions placed on their capacity to roam, if, indeed any such capacity exists. 62

These conclusions would later return to haunt Tracey J. The three other respondents continue to fight the ACCC’s allegations and at least two of the respondents have also decided to personally attack the Judge.

In February 2012 Baisha Poultry Pty Ltd and Barter Enterprises attempted to have Tracey J disqualify himself from hearing the case on the grounds of apprehended bias. 64 Both Baisha Poultry and Barter Enterprises owned and operated chicken growing sheds in the same way as Turi Foods, including equivalent stocking densities.

Accordingly, they alleged that Tracey J’s conclusion about stocking densities made in concluding the proceedings against Turi Foods ‘travelled beyond the agreed facts ... and constituted findings independently made by me.’ 65 His Honour rejected the application and, at the date of writing this article, the litigation continues.

60 Ibid (13).
62 Ibid (21).
63 It is usual for food animal suppliers to rigorously litigate against persons who threaten to expose their treatment of animals—see Tailor & Anon v South Australian Telecommunications Ltd (BR) 8710220, Unreported decision of Perry J of the Supreme Court of South Australia, 1997 (involving an application for an injunction to restrain a current ad campaign from using footage of a battery hen egg farm operated by a supplier falsely selling eggs as ‘free range’); ABC v Lenah Game Meats Pty Ltd (2001) 185 ALR 1 in which a supplier of Portland meat sought an injunction to restrain display of footage taken of the plant’s processing practices.
64 Apprehended bias exists where ‘a fair-minded lay observer might reasonably apprehend that the judge might not be impartial and unprejudiced in the overall conduct of the question the judge is required to decide.’ 65 Michael Wilton & Partners v Nicholls (2011) 282 ALR 455, 462.

These decisions demonstrate that the misleading or deceptive conduct provisions in the ACL can be effectively deployed to prevent suppliers of food animal products from deceiving consumers about value issues such as animal welfare conditions. They also reflect an awareness by the Courts of the relationship between consumer concern for food animal welfare and the information provided by suppliers on labels and advertising material.

At least in relation to positive representation such as ‘free-range’ or ‘free-to-roam’, the policy behind the Labelling Logic Report is likely to be well served by the effective enforcement of the ACL.

By preventing suppliers from making misleading or false claims associated with food animal products, consumers will be provided with sufficient and accurate information enabling them to make informed choices about their purchases.

This is especially important when, as North J in Australian Competition and Consumer Commission v C.J & Co Pty Ltd noted, consumers ‘seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.’ 66

Part IV – Silence, Can Nothing Become Something?

The second of the ACCC’s allegations against Hestia are far more difficult for the case law to evaluate. It is alleged that Hestia sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals. The ACCC’s case depends on establishing that ACL s18 is wide enough to encompass a failure to advise or to inform as misleading or deceptive conduct.

In beginning this evaluation, the first step is to identify the relevant class of consumers alleged to have been misled by Hestia’s conduct.

Identifying the Relevant Class of Consumers

In assessing whether consumers have been or might have been misled or deceived by conduct allegedly in breach of s18 of the ACL, the Court must ‘test’ the conduct against the relevant class of consumers.

The Taco Bell methodology involves the Court first identifying the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive falls to be tested; and once the relevant section of the public is established, considering the effect of the conduct by reference to all who come within the identified class, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations.

Accordingly, the very first step involves identifying the class of consumers who are alleged to have been or may have been misled by the conduct. But this begs the further question: 'how is the relevant class identified?'

This question is particularly problematic in the circumstances of the ACCC's case against Hestia. For example, is the relevant class of consumers everyone in Australia who buys groceries at retail stores? Or is the relevant class of consumers smaller, only those who buy groceries at Hestia stores? Or is the relevant class confined by excluding some sub-set or other of a larger group? Or is it necessary to file and serve affidavit evidence from actual consumers polled, for example, on Saturday mornings while they were shopping?

These difficulties were adverted to by Gibbs CJ in Parkdale Custom Built Furniture Proprietary Limited v Puxx Proprietary Limited where His Honour stated:

Section [18] does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumer likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced and the gullible as well as the astute, the section must in my opinion, be regarded as contemplating the effect of the conduct on reasonable members of the class.

The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of consumers who fail to take reasonable care of their own interests.\(^7\)

This view, that the section must be 'regarded as contemplating the effect of the conduct on reasonable members of the class'\(^6\) would seem to further complicate the exercise of identifying the relevant class. Now the High Court is apparently suggesting that however the relevant class of consumers is to be defined for the purposes of testing the allegedly misleading or deceptive conduct, that class only includes 'reasonable members'.

But how does the Court go about identifying a reasonable member of a class that has, itself as yet eluded identification? Fortunately, the High Court in Campomar Sociedad v Nike International\(^6\) provided some guidance in identifying the relevant class of consumers for the purposes of evaluating conduct against ACL s18.

In Campomar, the High Court commenced its discussion of identifying the relevant class of consumers by referring to a passage from the Taco Bell decision where the Full Federal Court stated:

In some cases, such as an express untrue representation made only to identified individuals, the process of deciding that question of fact may be direct and uncomplicated. In other cases, the process will be more complicated and call for the assistance of certain guidelines upon the path to decision.\(^7\)

The High Court in Campomar noted that this passage drew a distinction between conduct that is directed towards identified individuals on the one hand, and to the general public (or larger class) on the other.

When the alleged misleading conduct is directed toward identified individuals, such as the purchasers of a business, the relevant 'class' is confined to those specific, identified purchasers.

However, in many cases, the relevant conduct is directed toward the public at large, especially when it is alleged that a company has breached ACL s18 in its advertising through the mass media or through labelling (or the lack thereof) of food animal products in a supermarket.

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\(^6\) Ibid.
\(^7\) Ibid 84.