

# NTCA Submission: Definitions of Meat and Other Products

SUBMISSION TO JOINT STANDING COMMITTEE ON RURAL AND REGIONAL  
AFFAIRS AND TRANSPORT



Senator McDonald  
Chair  
Rural and Regional Affairs and Transport Committee



*Submission to Senate Inquiry into Definitions of Meat and other Animal products*

The NTCA would like to thank you for the opportunity to provide a submission to the inquiry.

The beef industry in the Northern Territory has existed for longer than the Territory itself. The first pastoral lease over area now within the Northern Territory, was granted in 1876 by the South Australian Government under the then *Waste Lands Act*. Pastoral Lease No 1 (PL1) and Pastoral Lease 2 (PL2) were granted over 500 square miles of land in the region around what is now Alice Springs. Though Alice Springs did not exist at the time, a 5 square mile exclusion area was included in these leases upon which the Alice Springs Telegraph Station would later be built.

In the 145 years since, the cattle industry has grown to 220 pastoral leases encompassing more than 600,000 square kilometres of some of the most remote regions of Northern Australia. Producing more than 500,000 cattle per year for domestic and international consumption, the NT's cattle industry is a vital contributor to the Territory economy.

At the NTCA, we are proud of our industry and our history. This inquiry concerns an issue that strikes at the heart who we are. It raises valid questions about what is acceptable to the community regarding the usage of terms like 'beef' and 'meat' on products that denigrate and diminish the beef industries contribution to our country today and in years past, while seeking to profit off of our integrity.

While NTCA is a pro-business organisation that supports the rights of individual enterprises to participate freely in the market, integrity in product and practice must underpin this. Where companies, such as those who are producing these plant-based 'beef' products, act cynically and perpetuate falsehoods and misrepresentations, the case for government intervention is warranted.

The NTCA supports appropriate government regulation to the extent that it provides for an evenly balanced market that performs in line with the requirements of the law and expectations of the community.

The integrity of our industry underpins strong domestic and international demand for Australian beef. This integrity must not be undermined by those who seek to diminish us and our contributions – all while profiting off our reputation. To do so, quite simply, is wrong.

We would like to commend you Senator, and those participating in the inquiry, for coming together to discuss what is an important issue to the future of the industry.

Regards,

David Connolly  
President

## Contents

<b>NTCA Submission: Recommendations Summary .....</b>	<b>3</b>
<b>NTCA Submission: Principals Summary .....</b>	<b>4</b>
1. Executive Summary.....	6
2. What is the value of labelling to the consumer and government? .....	7
3. The Value of Beef: The Greatest Meat .....	7
3.1 The Value of the Beef Industry .....	8
3.2 The Value of 'Beef' Labelling.....	8
4. Premium Marketing Claims and New Market Entrant Policies.....	9
5. Guidance of Current Consumer Protection Legislation and Caselaw .....	10
5.1 Legislation and Enforcement Approach.....	10
5.2 Caselaw .....	11
6 Case Study: Alternative Meat Co .....	13
6.1 Applying the Law.....	15
7. The Extent of the Issue .....	16
8. A Level Playing Field: Comparing Like for Like .....	18
9. The Case for Government Action.....	18
APPENDIX 1: <i>Australian Consumer Act (2010)</i> (Relevant Sections) .....	0

## NTCA Submission: Recommendations Summary

### Recommendation 1

That the Inquiry ascertain what engagement the ACCC has had to date with producers of plant-based 'meat' products regarding the utilisation of 'beef' and 'meat' in their marketing and what instructions have been provided by the ACCC.

### Recommendation 2

That the Inquiry request the ACCC treat producers of plant-based 'meat' and new and emerging market issues in line with their *Compliance and Enforcement Policy Statement 2021*

### Recommendation 3

That the Inquiry request the ACCC consider all consumer information provided by producers of plant-based 'meat' and consider, where relevant, whether claims regarding *higher ethical standards* of production amount to a premium market claim.

### Recommendation 4

That the Inquiry consider the importance of ensuring that credence claims made by producers of plant-based 'meat' in regard to these *higher ethical standards* of production are reflective of the effect and impact of the Australian beef industry.

### Recommendation 5

That the Inquiry consider whether legislative amendments are required in order to ensure the ACCC's enforcement of the truthful marketing of plant-based 'meat' products.

## NTCA Submission: Principals Summary

### Principal 1

Due to power asymmetries in the consumer-producer relationship, claims on packaging are both highly regarded by consumers and accordingly have been a focus of Government enforcement.

### Principal 2

Australian Companies place a premium on marketing products as 'beef' and 'Australian beef'.

### Principal 3

The plant-based production sector derives benefit from the utilisation of 'beef' and 'meat' marketing claims in their products and relies on these premium branding claims to derive consumer recognition.

### Principal 4

That Premium Marketing claims are those that provide consumers with information regarding the superiority of a product over competing products include claims of higher production or ethical production standards.

### Principal 5

That alternative 'meat' and 'beef' products should be considered as a 'new or emerging market issue' and be prioritised for action by the ACCC – though to date this has not occurred.

### Principal 6

The ACCC has previously stated the importance of regulating food packaging and marketing claims regarding ss18, 29 and 33 of the *Competition and Consumer Act* and pursued in excess of 20 cases against food manufacturing companies in pursuing this cause.

### Principal 7

To date the ACCC has taken no regulatory action against alternative meat companies under the ACL nor believes that consumers are being misled by labelling.

### Principal 8

That the ACCC's submission to this inquiry does not recognise the broader information provided to the consumer by some plant-based 'meat' companies and accordingly is short sighted in its application of the ACL.

### Principal 9

That in considering whether conduct is false or misleading, a broad view of the materials provided in the alleged breach of the act should be considered, not solely that information provided on packaging.

**Principal 10**

That actual deception is not necessary for a party to be in breach of the act and guilty of false and misleading conduct.

**Principal 11**

That whether the conduct is said to have misled or deceived a 'reasonable' consumer or an 'ordinary' consumer is not a prerequisite to determining the likely outcome of a case.

**Principal 12**

Breaches of Australian Consumer Law (ACL) are found to be most egregious where companies deliberately mislead consumers for financial reward and have corporate structures in place that should have prohibited this conduct.

**Principal 13**

That claiming higher *ethical production standards* amounts to a premium marketing claim for which companies are individually responsible to prove to the consumer.

## 1. Executive Summary

Broadly speaking, the question posed by the inquiry is to ascertain the benefits and/or costs of government action to prevent companies who market themselves as being 'alternative meat' or plant-based 'meat' producers utilising animal production sector product descriptors in the marketing of their products. To justify the case for Government intervention the inquiry must determine what if any, negative distortive effects the continued allowance of existing practices could have on the market and broader economy.

At its core, the answer to this question is obvious. Complicating matters is the selective and deliberate manner in which existing laws regulating false and misleading statements in Australian Consumer Law (ACL), have been applied to date. It can be argued that the current legislative system is adequate and that amendment to such is not required. Rather a more diligent approach to ensuring that information provided both to the community and to the consumer is accurate. However, the extent of the current issue indicates that this is unlikely to happen without government directive.

One of the only aspects upon which almost all parties to this inquiry can agree, is that the products that sit of the crux of the issue here are intentionally designed to be misleading. It is inherent to their nature that they are derivative and false. And yet, the position of the consumer and competition regulator is that there is no issue with this.

More egregiously, the ACCC feels it appropriate that these companies should be allowed to leverage the reputation of the products they imitate. It must be determined why the existing law has not been applied and whether there is a case for legislative or regulatory change that binds regulators to enforce laws that, to date, they have avoided applying.

This issue has merit given the current political and social environment. Increasingly, 'science' is being propagated by Australian entities, as well as their global counterparts, that animal production is an 'evil'. Due to the ongoing ineffectiveness of Government regulators to enforce the law and adequately referee these statements, there is a growing myth that the Australian beef industry is a leading cause of damage to Australia's biomass and ecosystems.

Emerging from this zeitgeist, we arrive at the current issue. While much of the discussion of this inquiry will likely concern trade descriptors and the effectiveness of consumer laws, there is a broader point to be made; that these companies, in marketing themselves as alternatives to beef products whilst simultaneously decrying the 'evils' of the beef industry, are denigrating the livelihoods and legacy of the thousands of Australian families who dedicate themselves to the cattle they raise and the land they raise them on.

To be allowed to dismiss the contributions of these people so flippantly, all the while profiting of the reputation they have created, without fear of repercussions, is morally and ethically reprehensible. Government attention to the growing boldness with which these companies undertake these sorts of activities is not only warranted but reasonable and fair.

## 2. What is the value of labelling to the consumer and government?

To the consumer, the value of labelling is premium. Research indicates that 60-70% of consumer decisions are made while the consumer is in the store<sup>1</sup>. Accordingly, product positioning and information operate as the key interface between consumer and producer.

There are two recognised aspects of consumer information provided by packaging (1) being the verbal component of packaging (which includes, brand, product name, producer or country of origin labelling, general information regarding usage instructions) and (2) the visual components of the packaging (font, colour etc).<sup>2</sup>

This verbal component exists as the second most important indicator of consumer purchase decisions.<sup>3</sup> Further, the information provided on labelling has been found to serve as a quasi-discussion between industry, the consumer and Government.

[Packaging acts] as a surrogate for personal interactions with industry and government participants. Judgements about the trustworthiness of these actors and the broader food system were formed through interaction with food labelling and were based on expectations of both competence and goodwill.<sup>4</sup>

The Australian Government similarly recognises the inherent and underlying value of food labelling. The Australian Consumer and Competition Commission (ACCC) has stipulated that the claims made on food labelling can have distortive effects on the market where they are made in breach of consumer law.

There is a competition side to credence claims as well - businesses should be able to compete on their merits. Misleading credence claims tilt the playing field away from suppliers who are doing the right thing. In other words, a supplier may lose its competitive advantage or unique selling point if others are making misleading claims.<sup>5</sup>

The ACCC has a stated focus on misleading and deceptive information provided on food packaging due to power asymmetries between the producer and consumer being heavily weighted towards the producer.

We know that consumers are increasingly placing weight on premium claims – and willing to pay a premium for such goods... But consumers are not in a position to fact check every claim and are in the hands of the producer who makes claims about their goods or services.<sup>6</sup>

### **Principal 1**

**Due to power asymmetries in the consumer-producer relationship, claims on packaging are both highly regarded by consumers and accordingly have been a focus of Government enforcement.**

## 3. The Value of Beef: The Greatest Meat

Given the importance of product marketing claims due to the (1) value consumers place on product information due to (2) a desire to understand premium labelling provenance claims and (3) the power imbalances between the consumer and producer, the question emerges as to what value consumers have regarding existing product labelling regarding beef.

<sup>1</sup> Sener, Kenaci and Dogan (2015), [here](#)

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Tonkin et al (2016), [here](#).

<sup>5</sup> Speech by ACCC Commissioner Sarah Court (2013), [here](#).

<sup>6</sup> Ibid



### 3.1 The Value of the Beef Industry

Beef is big business for Australia, even though per unit outputs are small when compared to other countries, the quality of Australian beef is highly prized. The industry is valued at more than \$10 billion annually and supports the employment of more than 430,000 jobs nationally. This being said, Australia is a comparatively small *producer* of beef.<sup>7</sup> The largest producers of beef globally are the United States (12.6m), Brazil (10.4m) and the EU (7.7m), who collectively produce 30.3 million metric tonnes of beef and veal a year.<sup>8</sup>

While Australia only produces ~2 million tonnes annually, the industry's reputation for 'clean and green' product has led to Australia being one of the largest *exporters* of beef and cattle globally.<sup>9 10</sup>

These credentials have been hard earned and continue to evolve. The Australian beef industry has stated an ambitious goal of being Carbon Neutral by 2030.<sup>11</sup> To date, the beef production sector has halved its GHG Emissions since 2005 – the largest of any sector in the country.<sup>12</sup> In the Territory, pastoral stations have been strong participants in the Emissions Reductions Fund's carbon sequestration and abatement programs and see this as a key market diversification tool moving forward.

Domestic consumers recognise the value of these credentials and have strong and positive associations with Australian beef.

Overall awareness of beef is high among Australians. Beef is the largest animal protein type ranked by value and has also grown on year-ago levels. Beef's strengths are around its perception of being a 'trusted quality' product and as 'the greatest meat'.<sup>13</sup>

### 3.2 The Value of 'Beef' Labelling

A look at how large retailers promote beef provides further background on the value consumers place on 'beef' marketing. Coles<sup>14</sup>, Woolworths<sup>15</sup>, and McDonalds<sup>16</sup>, collectively the largest retailers of Australian beef domestically, all consider that this labelling does have value. All three promote beef on sale as being '100% Aussie Beef' or words to the same effect.

Considering that the vast majority of beef sold in Australia is Australian beef<sup>17</sup>, beyond 99.9%, it must be concluded that there is a value to be derived in communicating to consumers that the product they are purchasing is Australian beef.

#### Principal 2

**Australian Companies place a premium on marketing products as 'beef' and 'Australian beef'.**

<sup>7</sup> IBIS World and ABS cited in MLA, [here](#)

<sup>8</sup> <https://www.statista.com/statistics/263990/leading-beef-producers-around-the-world-since-2007/>

<sup>9</sup> Ibid

<sup>10</sup> Australian Beef Sustainability Framework (2019) [here](#).

<sup>11</sup> Clean Energy Regulator (2016) [here](#).

<sup>12</sup> Australian Beef Sustainability Framework (2021) [here](#)

<sup>13</sup> MLA 2020 [here](#)

<sup>14</sup> Coles 2021 [here](#)

<sup>15</sup> Woolworths 2013 [here](#)

<sup>16</sup> McDonalds 2018 [here](#)

<sup>17</sup> Japan and New Zealand export a small quantity of beef to Australia each year, beyond which no other country currently participates in the domestic market. To date there have been 530,000 kgs of beef imported in Calendar year 2021. In 2020 the Australian domestic beef consumption was 584,000 tonnes. Info [here](#).

Producers of plant based ‘meat’ and ‘beef’ products equally recognise this value. The reason for this is obvious – with their products designed as meat replacements, the comparison is vital to competing for consumer demand. The removal of these terms would damage this ability to compete in the market.

Omitting words that are traditionally associated with animal products from names of plant-based products actually causes consumers to be significantly more confused about the taste and use of the products.<sup>18</sup>

With the growing alternative proteins industry projected to reach \$3b in domestic sales by 2030, how much the industry requires the leveraging of ‘beef’ and similar terminology to reach this claimed target is unclear. However, the prevention of the utilisation of these terms in plant-based products marketing claims is something the sector strongly opposes.<sup>19</sup> It can therefore be assumed that they place value in it and wish it to continue, in order to receive the financial benefit of it.

N.B. It is also noteworthy that for some of these businesses, the practice of utilising ‘beef’ terminology in their marketing is relatively new, and that when some of these products first appeared on the market, they made more an effort to differentiate themselves from ‘meat’ and ‘beef’ but appear to have now changed this practice.

### Principal 3

**The plant-based production sector derives benefit from the utilisation of ‘beef’ and ‘meat’ marketing claims in their products and relies on these premium branding claims to derive consumer recognition.**

## 4. Premium Marketing Claims and New Market Entrant Policies

In the food sector, the integrity in marketing has been rigidly enforced. Premium marketing claims have attracted the attention of the ACCC, especially in relation to claims regarding ‘ethical’ or higher production standards. The ACCC provides the following in regarding to what is included in ‘premium’ claims.

‘Premium claims’ is a broad term used to describe a claim that gives the impression that a product, or one of its attributes, has some kind of added benefit when compared to similar products and services... Premium claims may influence consumers’ purchasing decisions if they give the impression that the products are a better choice than those without the claimed added benefit.<sup>20</sup>

The ACCC has stated this as an area of focus in that consumers are attracted to these products because of their claims as being of a superior quality to other competing products.

A credence claim is a claim made about a product designed to attract consumers to purchase the product – in the food area, which we are currently focussing on, a credence claim might be something like ‘organic’, ‘free range’, ‘made in Australia’ and the like.<sup>21</sup>

<sup>18</sup> Gleckel (2020) [here](#).

<sup>19</sup> Food Frontier 2021, [here](#).

<sup>20</sup> ACCC, [here](#).

<sup>21</sup> Above at no. 5.

The application of these measures is discussed more below in section 6.1. What is important to note here is that penalties for breaching these provisions can be severe and have been extensively pursued in regard to food production systems.

#### Principal 4

**That Premium Marketing claims are those that provide consumers with information regarding the superiority of a product over competing products include claims of higher production or ethical production standards.**

How attention to these sorts of credence claims is made for new market entries, and the correlation between these policies and the ACCC's stated focus on new and emerging market issues, is unknown.

Given the relatively newness of these 'meat' and 'beef' alternative products, and the issues that have emerged from their utilisation of industry terminology, the ACCC appears to not have approached this issue in line with their existing policy. Under, 'Priority Factors' for the ACCC's 2021 *Compliance and Enforcement Policy and Priorities Statement*, they provide the following as being a category in which they would consider acting, or prioritising action,

conduct involving a significant new or emerging market issue or where our action is likely to have an educative or deterrent effect.<sup>22</sup>

From conduct to date, it appears the ACCC feel that these emerging products don't fit into this policy. The Inquiry seeking clarity as to why this is the case would appear reasonable.

#### Principal 5

**That alternative 'meat' and 'beef' products should be considered as a 'new or emerging market issue' and be prioritised for action by the ACCC – though to date this has not occurred.**

## 5. Guidance of Current Consumer Protection Legislation and Caselaw

Here, a summary of what the relevant legislation says, what enforcement has been taken to date and how the courts have applied statute to these circumstances has been made. While the likelihood of a successful outcome at trial remains uncertain, there is a strong case that this conduct should be tested by the courts.

Impinging on this has been the decision of the Regulator to date to pre-empt the decision of the courts by making their own limited determination on complaints made by the public, and in their refusal to apply the same standards that have been applied to traditional food manufacturing businesses to plant-based protein companies.

### 5.1 Legislation and Enforcement Approach

Sections 18, 29, 33 of the *Competition and Consumer Act (2010)* (CCA Act) provide the parameters under which, false, misleading, or deceptive conduct are governed by the ACCC (Appendix 1).<sup>23</sup> There is often overlap between in the application of these sections as they relate to the prosecution of food companies making false or misleading claims.<sup>24</sup>

Between 2010 and 2016 the ACCC undertook 19 cases that resulted in Court-Enforceable Undertakings being agreed between the competition regulator and food production and manufacturing companies to resolve alleged breaches of the act. A further 12 of these companies were taken to the Federal

<sup>22</sup> ACCC (2021) [here](#).

<sup>23</sup> *Competition and Consumer Act 2010 (Cth)*, [here](#).

<sup>24</sup> Hobill and Sanderson (2017), [here](#).

Court regarding false or misleading statements regarding food credence claims on packaging or in the marketing of products.<sup>25</sup>

**Principal 6**

**The ACCC has previously stated the importance of regulating food packaging and marketing claims regarding ss18, 29 and 33 of the *Competition and Consumer Act* and pursued in excess of 20 cases against food manufacturing companies in pursuing this cause.**

In the ACCC's submission to this inquiry, they determined that to date there is no issue with plant-based marketing claims, stating,

The ACCC has reviewed the reports received about labelling of plant-based substitute products using animal related descriptors or animal images. In each case we considered that a court would view the overall impression conveyed by the labelling of these products as unlikely to mislead an ordinary consumer.

However, the ACCC also acknowledges that, "it is important to highlight the fact that only a court, not the ACCC, can determine whether the ACL has been contravened". The complaints received by the ACCC to date have not been tested in court.

**Principal 7**

**To date the ACCC has taken no regulatory action against alternative meat companies under the ACL nor believes that consumers are being misled by labelling.**

This submission makes the assertion that to limit the interpretation of ACL to whether consumers are unable to understand what the nature of the product they are buying actually is, is a narrow reading of the ACL and does not consider broader provisions of information made by these companies.

While the ACCC's position may be that the extent to which consumers are being misled by the current offerings to the market is minimal, their interpretation of this conduct is limited. What has not been considered is the conduct in which these companies engage and the information they provide to the consumer, in order to engender demand for their product, as well as the implications of these claims regarding the superiority of their product.

**Principal 8**

**That the ACCC's submission to this inquiry does not recognise the broader information provided to the consumer by some plant-based 'meat' companies and accordingly is short sighted in its application of the ACL.**

## 5.2 Caselaw

Caselaw regarding the *Trade Practices Act 1974 (Cth)* (herein TPA Act) and subsequent analogous provisions in the CCA Act, increases the case for the legislation in under question here should be tested before the courts.

Historically, breaches of the TPA Act have established a broad scope of inquiry in relation to conduct determined to be false and misleading. Guidance from the Federal Court to date has been that in determining the nature of the conduct, attention must be given to "...considering what is said and done against the background of surrounding circumstances".<sup>26</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> *Taco Company Australian v Taco Bell Pty Ltd* (1982) FCA 136 at Deane and Fitzgerald JJ  
Northern Territory Cattlemen's Association: Submission to Senate Inquiry Definitions of Meat and Other Products (RRAT August 2021)

In *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]*<sup>27</sup> the Court considered not just claims made on the packaging of the product but had consideration to what information was provided by the respondents on their website. Again, in *Australian Competition and Consumer Commission v Pepe's Ducks Ltd* the court took a broad approach in evaluating the extent to which these claims had been made.<sup>28</sup>

**Principal 9**

**That in considering whether conduct is false or misleading, a broad view of the materials provided in the alleged breach of the act should be considered, not solely that information provided on packaging.**

The courts have also provided direction as to whether actual deception needs to be shown, as well as to the quantum of consumers required to have been deceived in order to make a finding. In *Parkdale Custom Build Furniture Pty Ltd v Puxu Pty Ltd*<sup>29</sup>, Justice Gibbs upheld the finding in *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd*<sup>30</sup> that,

the court must decide objectively whether the conduct is misleading or deceptive or likely to mislead or deceive, and that evidence that members of the public have actually been misled is not conclusive.

In *Puxu* it was further elaborated on the relevant question as being, “the effect of the impugned conduct on reasonable or ordinary members of the class of persons to whom the conduct was directed”.<sup>31</sup>

**Principal 10**

**That actual deception is not necessary for a party to be in breach of the act and guilty of false and misleading conduct.**

While there is considerable debate as to the correct application of these categorisations, being a ‘reasonable’ vs a ‘ordinary’ member of the relevant class, the test has been broadly applied at the discretion of the courts.

Current interpretations sit somewhere between the ‘ordinary consumer’, which may include a number of different classes of people including educated, non-educated and those men and women of various vocations who have taken or not taken reasonable steps to inform themselves in decision making, and the ‘reasonable’ consumer who takes care and time in decision making.<sup>32</sup> As noted by in *Siddons Pty Ltd v Stanley Works Pty Ltd (1991)*<sup>33</sup>, people “who have failed to take reasonable care of their own interests have frequently succeeded in s 52 claims”.<sup>34</sup>

**Principal 11**

**That whether the conduct is said to have misled or deceived a ‘reasonable’ consumer or an ‘ordinary’ consumer is not a prerequisite to determining the likely outcome of a case.**

<sup>27</sup> (2014) ATPR

<sup>28</sup> (2013) FCA 570

<sup>29</sup> (1982) HCA 44

<sup>30</sup> (1980) 49 FLR

<sup>31</sup> *Australian Consumer and Competition Commission v TPG Internet Pty Ltd (2020) FCAFC 130*

<sup>32</sup> Kapnoullas and Clarke (2008) [here](#).

<sup>33</sup> 29 FCR 14

<sup>34</sup> Kapnoullas and Clarke (2008).

Rather than considering the quantum of actual consumers deceived, the court favours the approach of how likely it is that the conduct was intended to be misleading and whether a hypothetical consumer could have been deceived as a result.

In the eventuality the respondent is found to be in breach of the Act, the scope of the court in determining what penalty to impose is revealing as to what preconditions are required for breaches to be of higher concern from the perspective of the judiciary.

In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*<sup>35</sup> the court found that in determining what pecuniary penalty to impose, the following was relevant.

- the size of the contravening company;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;
- whether the contravener has a corporate culture conducive to compliance with (Australian Consumer Law) as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention;
- whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of (the ACL) in relation to the contravention;
- whether the contravener has engaged in similar conduct in the past;
- the financial position of the contravener; and
- whether the contravening conduct was systematic, deliberate or covert.

The principals laid out here offer some insight into the views of the court in regard to the seriousness of misconduct – with precedent cases indicating that the court takes a dim view of companies who willingly engage in misleading conduct at the direction of senior management for financial reward as opposed to those who, by way of example, may have fallen victim to the actions of staff not in line with the overall intentions of the company.

#### **Principal 12**

**Breaches of Australian Consumer Law (ACL) are found to be most egregious where companies deliberately mislead consumers for financial reward and have corporate structures in place that should have prohibited this conduct.**

## **6 Case Study: Alternative Meat Co**

Take for example one of the manufactures of plant-based proteins that utilise terminology like ‘beef’ in their marketing – Alternative Meat Co.<sup>36</sup> While on their packaging the company provides clear indications that their product is plant-based, including statements like ‘100% Plant-Based’ and ‘the Alternative Mince’ – they still utilise the term ‘beef’ in their labelling.

<sup>35</sup> 2012 FCAFC 20

<sup>36</sup> Alternative Meat Co (2020) [here](#).





information provided about the production systems from which the Alternative Meat Co products are generated – only that they are *ethically* superior to beef.

While the company should be responsible for these claims, they cannot be blamed for making them in the first place. The reality of the law in this regard is that it has not been applied appropriately and that a large number of companies have made similar claims, leading to acceptance of these actions.

The culpability of the ACCC here though is of a greater concern. Recommendation 1 is made to this end.

### 6.1 Applying the Law

Below is an example of how the courts could interpret the conduct of the Alternative Meat Co. However, it is broadly analogous and serves only as an outline of the questions of law that could be asked and answered. Importantly, it is not reflected of boarder practices in the market, rather here the analogy is representative of how the law could be applied, especially in relation to premium market claims.

- Key legal precedents:
  - o A broad scope of inquiry is required: *Taco*
  - o Companies are liable for statements beyond those on their packaging: *Pirovic*
  - o Actual Deception not the legal quantum, merely the likelihood of deceptive and misleading consequences: *Parkdale*
  - o Consideration is to the effect of the impugned conduct on reasonable or ordinary members of the class of persons to whom the conduct was directed: *Puxu*
  - o Premium marketing claims must be substantiated: *Pepe's Ducks*
  - o That awareness of misleading and deceptive conduct is a mitigating factor: *Singtel*

Applying the principal of *Taco*, the broader context of the activity should be considered in the overall determination of conduct. In this example, there is a clear indication that the products are plant-based, and that the nature of the product is not in and of itself misleading to the consumer. However, the assertions that accompany the product in supporting material provided by the company (website) make it clear that the product is produced to a *higher ethical standard* than beef.

In the context of the broader information provided, (1) being that livestock grazing occurs over 57% of Australia's landmass, (2) that a burger made of beef requires 2,500 litres of water to be produced<sup>\*38</sup> and (3) that livestock emissions make up 51% of global greenhouse gas emissions (which includes an infographic of a cow), the connotation is that eating beef is bad for the animal, bad for the environment and that the companies plant-based product is superior, for which the ACCC has stated a regulatory focus. Again, Alternative Meat Co's is claiming their products are produced to an *ethically higher standard* than the product they are replacing.

Following the rationale set out in *Pirovic* and *Pepe's Ducks* the company is accountable for these claims made on their website and in their marketing materials, especially in relation to making a premium marketing claim regarding the superior provenance of their products.

Applying the principals of *Parkdale* and *Puxu*, whether actual deception has occurred is not a prerequisite for determining the character of the conduct, rather the effect the conduct is likely to have on the intended class of consumer. It would be up to the court to determine where on the

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<sup>38</sup> A claim that is extensively debunked here: <https://www.beefcentral.com/news/does-it-really-take-20000l-of-water-to-produce-1kg-of-beef/>



spectrum of the ‘ordinary’ to ‘reasonable’ consumer this issue would fall but there is an argument to be made that where a person to pick up the product, see the linkage to the beef industry, and question the linkage between the two products.

This consumer could then reasonably be expected to seek out additional information on the product on the company’s website where it would encounter information regarding the ills of animal production, under the spectre of the beef industry, and the higher *ethical* standards to which this product is supposedly produced.

Importantly, some of these claims are either not substantiated, are inflated or have been debunked by the scientific community. Without information as to what production systems the Alternative Meat Co’s inputs are sourced, it could be alleged they are, at the very least misleading and in the worst case deceptive. Regardless, it should not be left to the consumer to verify these claims themselves.

In considering the seriousness of this conduct, caselaw is analogous. In *Pepe’s Ducks Pty Ltd* Justice Bromberg noted the following, in determining a penalty to be imposed, that the respondent

would also have been aware that many consumers prefer products that are sustainably produced with reasonable concern for animal welfare and that many consumers are prepared to pay a premium for such products.

This awareness was considered to be a mitigating factor in determining the extent to which the company was culpable.

*Pepe’s Ducks* is also related here in regard to premium marketing claims. In that case, underpinning the respondent’s culpability in the matter was that their production system was not reflective of being ‘free range’ – in that their animals were raised in barns. The utilisation of this terminology was designed to preferentially place their product in a superior position, from the perspective of the consumer, to competing protein offerings that could not make similar claims.

The court found that the overall impression created by the marketing, including pictures/graphics, was that the product was produced in a certain manner that, in actuality it was not. Similarly, the Alternative Meat Co claims an ethically superior supply chain. This could be interpreted as a ‘premium marketing claim’ for which they are required to supply supporting evidence.

#### Principal 11

**That claiming higher *ethical production standards* amounts to a premium marketing claim for which companies are individually responsible to prove to the consumer.**

### 7. The Extent of the Issue

A key determinant of the success and failure of some of these plant-based meat replacements products in the market is the propagation of the belief that the Australian beef industry is unsustainable and has negative impacts on the environment, the future and the community.

Designed as replacements to beef and meat products, demand is contingent on the desire for individuals to want to seek out the replacements in the first place. The question then emerges why seek out these alternatives?

There is growing sentiment to increase ‘social marketing’ interventions to increase awareness of the environmental harms of global livestock production. This is seen as a key avenue through which to decrease beef consumption,

the share of people worried about its impact on the natural environment was similarly high at 69%. This indicates a gap between participants' concerns in theory and their actual real meat consumption behaviour. Social marketing interventions could be used to close this gap and create an appetite for change towards more environmentally friendly and more sustainable dietary choices.<sup>39</sup>

As seen in *Figure 2* above, the utilisation of 'social marketing' to propagate information with no verifiable source attached is a practice used by entities in Australia to perpetuate myths regarding animal production.

This movement is reflected in a common claim across a large number of plant-based meat companies – who proclaim the superiority of their products in regard to reducing environmental harms.

Company	'Statement	Source
Unreal Co	Unreal Co strives to inspire customers to make the right changes for a healthier life, while contributing to making our environment a healthier place for us to share.	<a href="#">Here</a>
Made with Plants	In fact, everyone can make a difference by simply reducing the number of meat and dairy-based meals we eat each week. This has enormous benefits for our health, our planet and our animal friends.	<a href="#">Here</a>
Eaty	Who say's you can't save the planet one snag or burger at a time? Hint: you can. We're about treading lightly upon the planet while still giving you something amazingly close to actual meat.	<a href="#">Here</a>
Fable Foods	...tasty way to eat healthier with a side of saving the planet.	<a href="#">Here</a>
Farm Foods	Our delicious range of plant-based mince and burgers provide that alternative whilst replicating the taste and texture of meat products whilst being more environmentally sustainable.	<a href="#">Here</a>

*Figure 3: Examples of Environmental Claims*

The vast majority of these statements are not referenced or supported by evidence. They are simply implied to the consumer as being fact. As with credence claims regarding 'free range' livestock production, these environmental credentials should be supported by some evidence. Merely stating that plant production is more sustainable than meat does not make it true. It should not be up to the consumer to verify these claims personally especially as there is a growing body of evidence to suggest that 'vegan' and ethical production systems face their own challenges regarding animal welfare and environmental degradation – with some suggestions that 'billions' of animals are killed in the production of fruit and vegetables.<sup>40</sup>

Could the average consumer truly be expected to know whether crop production or cattle production is a greater contributor to environmental harm? Or is it up to these companies to be honest about the manner in which these claims are made and the ACCC to require these companies to substantiate this with evidence?

What is clear, is that this practice is endemic globally, as many of the companies in figure 3 are internationally based and not Australian, and have emerged in environment where they have not been the subject of regulatory action in Australia.

<sup>39</sup> Bogueva, Marinova and Raphaely (2017) [here](#).

<sup>40</sup> Matthew Evans, in ABC (2019) [here](#).

## 8. A Level Playing Field: Comparing Like for Like

There must be a focus on these claims in regard to the products they are competing against. Comparisons between plant and livestock production in the context of the Australian consumer market should include comparisons between domestic production systems.

Credence claims decrying the negative attributes of the *global* livestock production sector, create comparison between Australian beef for conduct over which they have no control. While there are large amounts of resources on the internet that provide support to *global* livestock production being negative to the environment, as nebulous as some of these claims are, much of this information does not consider the realities of Australian beef production.

As recognised above in section 3.1, the Australian beef industry has taken significant steps in responding public concern regarding the climactic effects of beef production, have implemented measures for identifying sustainable industry indicators and has certification standards for a variety of the claims made on their products (i.e. grass-fed, grain-fed etc.). These standards and practices have been set by the Australian industry for the benefit of Australian consumers and community.

Allegations against the industry should be analogous to the standards to which Australian producers hold themselves – not those of the practices of other countries. It is a reasonable expectation that products competing against another in the Australian domestic market, which compares themselves to another product in the Australian domestic market, could reasonably be expected to provide proof of claims of being superior in the context of the Australian domestic production systems.

Recommendation 4 is made to this affect.

## 9. The Case for Government Action

From the Government's then the case for intervention in the market would, in the form of regulatory change, should be considered through this lens.

While it can, and in the majority of circumstances should, be left to the market to determine what product is most desirable, there have been noted deficiencies in the allowance of the market in determining what is appropriate for consumer labelling and marketing practices in the food manufacturing sector.<sup>41</sup> Given this sentiment already exists, allowing further degradation of consumer understanding and ability to openly participate in the market seems to be perverse when considered in the spectre of the intentions of the law.

Perhaps the strongest argument in support of Government action is this. The Australian beef industry, and especially the Northern Territory beef industry, is investing time, energy and resources into becoming more sustainable and is moving towards carbon neutrality. The industry is actively endeavouring to respond to the concerns of the Australian public. If it is then ethically justifiable to allow companies to ignore this effort, while seeking to displace beef products in the market with an imitation of them, what incentive is being provided for the industry to continue in its endeavours?

If it becomes the position of Government that 'truth' in labelling and marketing is not required here, that these companies should be allowed to continue to misrepresent the Australian beef industry to the domestic consumer, then what incentive does a company have to invest in improving their practices. If the proliferation of these claims continues to go unchecked, and negative consumer sentiment is caused because of it, the Government is in effect allowing the emergence of an inverse incentive for companies to respond to community concerns. If mistruths and dishonesty are allowed

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<sup>41</sup> Timoshanko (2015) [here](#)

Northern Territory Cattlemen's Association: Submission to Senate Inquiry Definitions of Meat and Other Products (RRAT August 2021)

to go unchecked, what value does genuine effort and truthful endeavour have for those who attempt it?

What is called for is a focused effort of enforcement by the ACCC to level the playing field. What is required by the Senate Inquiry is to ensure that the machinery of Government that governs this process operates fairly and reasonably on behalf of Australia's beef industry, to the benefit of the Australian public.

## APPENDIX 1: *Australian Consumer Act (2010) (Relevant Sections)*

### 18 Misleading or deceptive conduct

- (1) A [person](#) must not, in [trade or commerce](#), engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

### 29 False or misleading representations about [goods](#) or [services](#)

- (1) A [person](#) must not, in [trade or commerce](#), in connection with the [supply](#) or possible [supply](#) of [goods](#) or [services](#) or in connection with the promotion by any means of the [supply](#) or use of [goods](#) or [services](#):
- (a) make a false or misleading representation that [goods](#) are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
  - (b) make a false or misleading representation that [services](#) are of a particular standard, quality, value or grade; or
  - (c) make a false or misleading representation that [goods](#) are new; or
  - (d) make a false or misleading representation that a particular [person](#) has agreed to [acquire goods](#) or [services](#); or
  - (e) make a false or misleading representation that purports to be a testimonial by any [person](#) relating to [goods](#) or [services](#); or
  - (f) make a false or misleading representation concerning:
    - (i) a testimonial by any [person](#); or
    - (ii) a representation that purports to be such a testimonial; relating to [goods](#) or [services](#); or
  - (g) make a false or misleading representation that [goods](#) or [services](#) have sponsorship, approval, performance characteristics, [accessories](#), uses or benefits; or
  - (h) make a false or misleading representation that the [person](#) making the representation has a sponsorship, approval or affiliation; or
    - (i) make a false or misleading representation with respect to the [price](#) of [goods](#) or [services](#); or
  - (j) make a false or misleading representation concerning the availability of facilities for the repair of [goods](#) or of spare parts for [goods](#); or
  - (k) make a false or misleading representation concerning the place of origin of [goods](#); or
  - (l) make a false or misleading representation concerning the need for any [goods](#) or [services](#); or
  - (m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or
  - (n) make a false or misleading representation concerning a [requirement](#) to pay for a [contractual](#) right that:
    - (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
    - (ii) a [person](#) has under a law of the Commonwealth, a State or a [Territory](#) (other than an unwritten law).

33 Misleading conduct as to the nature etc. of [goods](#)

A [person](#) must not, in [trade or commerce](#), engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any [goods](#).