

Country of origin claims and the obligations of businesses under the Australian Consumer Law

The Australian Competition and Consumer Commission (ACCC) recently released its guide, *'Country of origin claims and the Australian Consumer Law'* (ACL), which sets out to help businesses learn about relevant ACL provisions relating to country of origin claims and to understand how these provisions operate.

The release of the guide is timely given that the ACCC remains particularly active in pursuing credence claims regarding products that are false or misleading, with substantial penalties for claims that are found to be in contravention of the ACL.

The golden rule

Generally speaking, each claim or representation made in relation to a product in any type of promotional statement, including what is actually stated in words and also what is implied by the use of words and images, must be correct taking into account content and context.

Added certainty and protection

To provide certainty for businesses, the ACL also provides 'safe harbour' defences for country of origin claims in relation to goods that meet certain criteria, which provides safeguards for businesses against proceedings brought under sections 18, 29(1)(a), 291(1)(k), 151(1)(a) and/or 151(1)(k) of the ACL.

The practical effect of the safe harbour defences is that if you make a country of origin claim for a product, and if it is alleged to be false or misleading, you may have an automatic defence to the allegation if you can satisfy the criteria of one of the following safe harbour defences (that are set out in the ACCC's guide and in section 255 of the ACL):

- (a) *General country of origin safe harbour defence* which, in order to rely upon, requires that a business establish that the goods were (i) substantially transformed in the country of origin being claimed and (ii) 50% or more of the total costs to produce or manufacture the goods must have occurred in that country;

Key issues

- The ACCC is serious as to enforcing credence claims including country of origin;
- Safe harbour defences will only apply to country of origin claims, not region or place of origin claims;
- If a country of origin representation doesn't fall within a safe harbour defence a country of origin representation can still be made, but businesses should exercise additional care to ensure that a representation of this nature is not misleading or deceptive, and that they can properly substantiate any claim that is made;
- In cases where there is no clear country of origin, businesses should consider whether it is necessary or appropriate to make a country of origin claim as part of their marketing strategy.

- (b) *'Produce of safe harbour defence'* which in order to rely upon requires a business to demonstrate that (i) each significant component or ingredient of the goods originated in the specified country, and (ii) virtually all of the production processes took place in that country and so long as the representation did not contain a more specific claim, such as, 'product of' or 'grown in' claim;
- (c) *'Goods grown in' safe harbour defence* which in order to rely upon requires a business to establish that (i) the country referred to as the country in which the goods were grown could also be represented as the country of origin of the goods, or the country of which the goods are the produce, (ii) that each significant ingredient or significant component of the goods was grown in that country, (iii) all, or virtually all, processes involved in the production or manufacture happened in that country;
- (d) *'Ingredient/components grown in' safe harbour defence* which in order to rely upon requires the business to establish that (i) the country referred to is the country that could be represented as the country of origin of the goods, or the country of which the goods are the produce, (ii) each ingredient or component that is claimed to be grown in that country was grown only in that country, (iii) each ingredient or component that

is claimed to be grown in that country was processed only in that country, and (iv) 50% or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country.

- (e) *Use of a prescribed logo safe harbour defence*
Although there are currently no regulations under the ACL that prescribe any logos, the ACL allows for a country of origin logo to be prescribed by regulation if the goods have been substantially transformed in the country represented as the country of origin in the logo and to a certain percentage of the cost of producing or manufacturing the goods occurred in that country.
- (f) Claims that do not fall within the safe harbour defences identified above will not necessarily contravene the ACL, but additional care should be exercised to ensure that the claims are not misleading or deceptive taking into account the content and context of the representation.

country of origin claims as the safe harbour defences do not provide immunity from actions brought under sections 33 and 155 of the ACL.

Businesses should also note that:

- Safe harbour defences only apply to country of origin claims, not region or place of origin claims;
- 'Grown in' safe harbour defences cannot be relied upon if the 'grown in' representation is made in conjunction with a 'made in' or 'produce of' claim;
- Businesses need to ensure the provision of additional information to elaborate on country of origin claims is accurate, does not mislead, is unambiguous, and clear;
- Failing to disclose important information can also amount to misleading or deceptive conduct, particularly if the overall impression of the labelling or packaging conveys a misleading implication;
- Care should be exercised when using pictorial representations and businesses should ensure that attempts to qualify pictorial representations are sufficiently prominent and clear.

Businesses should always exercise care when making country of origin claims

Irrespective of whether a business is able to rely on the immunity offered by a country of origin safe harbour defence, businesses should always exercise care in relation to making

Conclusion

The ACCC's new guidelines provide a detailed insight into relevant considerations for businesses whose marketing strategies involve making country of origin claims to ensure that they comply with their obligations under the ACL.

Businesses should ensure that each representation made in relation to a product's country of origin is accurate. Particular caution should be exercised when country of origin claims do not fall within the safe harbour defences

provided under the ACL. Businesses should have a reasonable basis for making country of origin claims and should be able to readily substantiate any claim that is made. Although the inability to rely on a safe harbour defence in relation to a country of origin claim does not in and of itself cause a contravention of the ACL, particular care should be exercised in those circumstances. In cases where there is no clear country of origin, businesses should consider whether it is necessary or appropriate to make a country of origin claim.

Contacts

Dave Poddar

Partner

T: +612 8922 8033

E: dave.poddar@cliffordchance.com

Danny Simmons

Partner

T: +612 8922 8007

E: danny.simmons@cliffordchance.com

Mark Pistilli

Partner

T: +612 8922 8001

E: mark.pistilli@cliffordchance.com

Mark Grime

Associate

T: +612 8922 8072

E: mark.grime@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

HKG#1048507-v1

www.cliffordchance.com

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia
Clifford Chance, Level 16, No. 1 O'Connell Street, Sydney, NSW 2000, Australia

© Clifford Chance 2014

Clifford Chance is a law firm with liability limited by a scheme approved under Professional Standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.