

# How far can you take dairy claims?

It is tempting to gain market share by singing your product's praises, but if a claim cannot be entirely substantiated your reputation and bottom line are at risk. Lawyer Sharon Givoni offers some case studies that show how to stay on the right side of the law.

Australia's consumer protection laws appear to be straightforward – you must tell the truth, the whole truth and nothing but the truth. In reality, however, there are plenty of grey areas when it comes to claims and, as the case studies below will show, dairy manufacturers are susceptible to being caught out.



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Keep your target audience in mind when labelling and promoting products.

## Is it really 'natural'?



The word 'natural' can have great appeal for consumers, but it must be used with care.

## When is cheesecake not cheesecake?



Be careful how you describe your product, including its flavour.

A manufacturer found this out the hard way when it marketed its ice-cream product as 'Lemon Cheesecake'. It was taken to court by a dissatisfied competitor who sold cheesecake in a cone. The judge took the view that the words "Lemon Cheesecake"

used to promote the ice-cream on in-store advertising were misleading.

Interestingly, the company's advertisement promoting the product in a trade journal was not found to be misleading, because its intended audience was members of the dairy industry, who would have understood that 'Lemon Cheesecake' was a flavour and not an ingredient.



Describing a dairy product that has undergone processes such as pasteurisation and homogenisation as '100% natural' may not be entirely accurate. This is a grey area, so tread with caution.

## Dairy marketing dilemmas ...



Is milk a 'natural' product? Processes such as homogenisation and pasteurisation push that claim into a 'grey' area when it comes to advertising.



Can cheesecake be a dessert and a flavour? It depends on your audience.



Parmesan and romano might be similar, but they are different. Don't make the mistake of trying to substitute one for the other.

Disclaimer: The contents of this article are of a general nature only and cannot be relied on as a substitute for tailored legal advice suited to your individual circumstances.

## Unintentionally misleading consumers does not make it less of an offence in the eyes of the law

### Colours can make a difference

**TRAP**

Consumers could be misled by packaging elements that give an overall impression of your product.

Something as simple as the colour of the packaging could create problems if it is trade marked by a competitor. For example, many consumers associate silver packaging with Philadelphia Cream Cheese. Kraft Foods has held the trade mark on silver cream cheese packaging since 1996.

There are still instances, however, when a trade-marked colour may be used by a

competitor – for example as an element of packaging or for a product that is significantly different from the one related to the trade mark. For example, the colour red applied to the end of a banana is registered as trade marked by Fada Pty Ltd, but edam cheese can still be coated with red wax without fear of trade mark infringement, as this has been happening for longer.

Colour combinations and motifs could also create a problem if they convey a certain message to consumers. For example, green and gold packaging with a kangaroo image could imply that the product is Australian-

made, which could be legally problematic if the product contains imported ingredients.

**TIP**

Colours and motifs on packaging can land processors in hot water. If in doubt, leave it out.

### A cheese by any other name

**TRAP**

Even though some cheese types are similar, substitutions are not allowed.

In 2008, a dairy processor was found guilty of falsely labelling romano cheese as parmesan, apparently in an effort to



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*If your gut feeling tells you that you are going about it the wrong way, you may well be. If in doubt, leave it out*

reduce a product stockpile. The processor was ordered to send a letter explaining its actions to all of its business customers and to implement a trade practices compliance program.

**TIP** The phrase "it's all in the name" has to become your mantra.

### A picture is worth a thousand words

**TRAP** Images look great on packaging and advertising, but may create a false impression.

In 2000, a food processor used images of bananas and mangos on the labelling for its banana and mango flavoured cordial. The Australian Competition and Consumer Commission (ACCC) was concerned that consumers would assume the cordial contained real fruit extracts and the judge agreed. The company withdrew the cordial from sale, with much negative publicity resulting.

**TIP** Treat images the same as words – if there is a chance consumers may misinterpret it, avoid it.



*A judge found that images of bananas and mangos on a cordial label created the false impression that it contained real fruit extracts. The company was forced to withdraw it from sale.*

### Milk not locally produced

**TRAP** 'Local' milk is not always local in the eyes of the authorities.

In 1999, the ACCC successfully took legal action against a milk processor for misleading conduct relating to its 'local milk' campaign in the Northern Territory. Because the raw milk was trucked in from Queensland, the Federal Court found the processor guilty of misleading consumers with its advertising slogan "the Territory's Own". The fact that the company had one commercial dairy farm operating in the Northern Territory did not save it.

**TIP** Be careful when making origin statements, as they can be interpreted wrongly.

### Final thoughts

Dairy processors need to consider the implications of the wording and representations they use to market products. And remember, unintentionally misleading consumers does not make it less of an offence in the eyes of the law.

There are many ways to promote your products and to capture market share. If your gut feeling tells you that you are going about it the wrong way, you may well be. If you are not sure about a claim or an image, leave it out or seek legal advice. ■

### About the author

Sharon Givoni is an intellectual property lawyer who has registered hundreds of brands for clients across many industries Australia-wide. She can also help protect your brands in New Zealand. Her practice has a strong focus on the food, beverage and packaging industry. Sharon also advises in other areas of intellectual property, such as copyright law and disputes. For more information, visit [www.sharongivoni.com.au](http://www.sharongivoni.com.au) or contact her at [sharon@iplegal.com.au](mailto:sharon@iplegal.com.au)

### Colour me confused



*Cheese manufacturers should steer clear of using silver as the predominant colour of cream cheese packaging, as Kraft Foods has that colour registered as a trade mark. Green and gold, or an image of a kangaroo, may be taken to mean that a product is Australian made, but does it comply with the country of origin tests under the law? Edam cheese is covered in red wax, partly for practical purposes, yet another company has managed to register the look of a red tip applied to a banana as its very own trade mark so that no one else can do the same thing.*