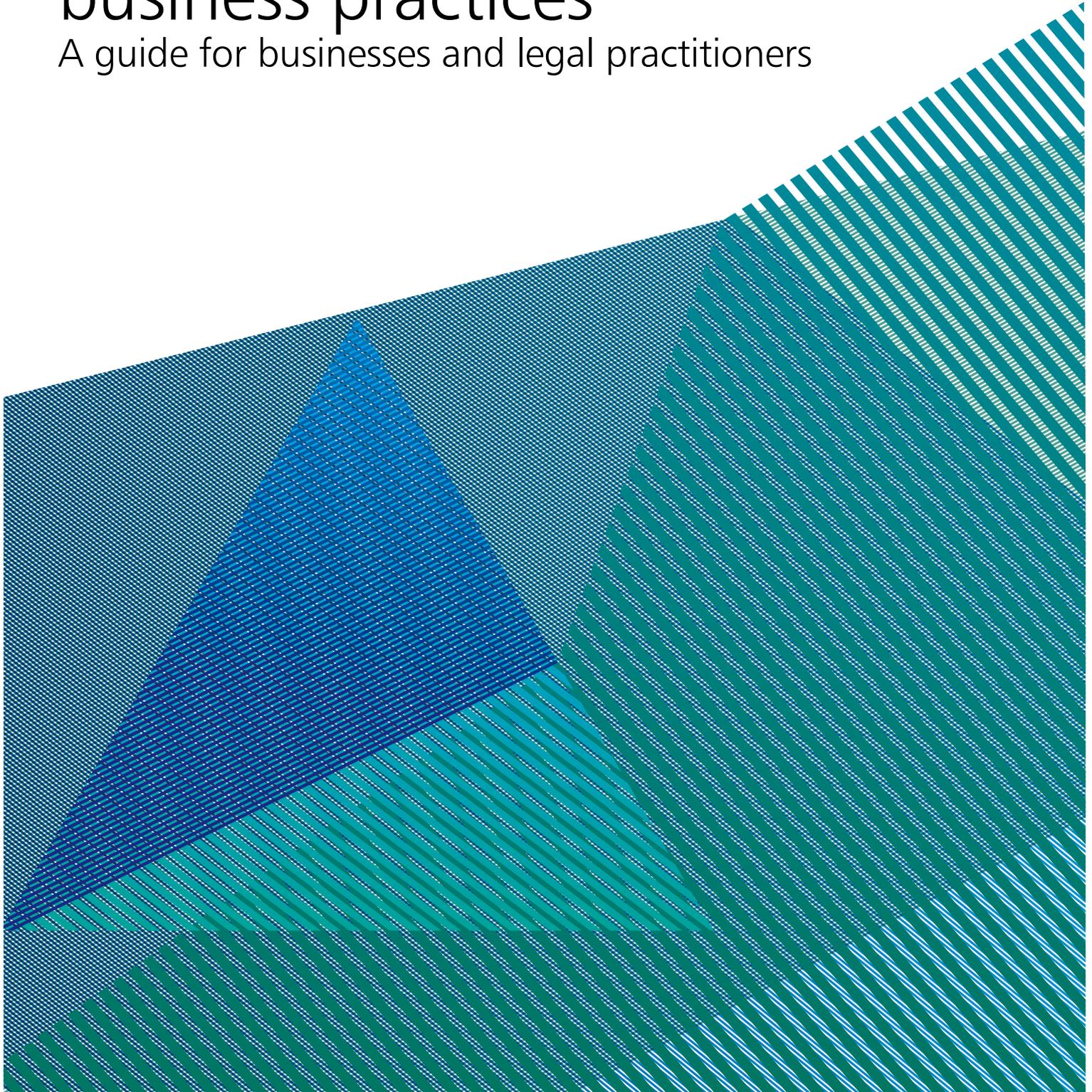


Avoiding unfair business practices

A guide for businesses and legal practitioners



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

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Introduction

This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

These guides:

- > explain the law in simple language but are no substitute for the legislation
- > give general information and examples – not legal advice or a definitive list of situations where the law applies.

About this guide

This guide will help businesses and legal practitioners avoid unfair business practices by understanding relevant sections of the ACL. The guide covers:

- > misleading or deceptive conduct
- > false or misleading representations
- > unconscionable conduct
- > representations about country of origin
- > information standards.

About the other guides

The other guides in this series cover:

- > **consumer guarantees**
explains supplier, manufacturer and importer responsibilities when there is a problem with goods and services; refunds, replacements, repairs and other remedies
- > **product safety**
covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements
- > **sales practices**
covers unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion

- > **unfair contract terms**
outlines what an unfair term is and which contracts are affected by the law.
- > **compliance and enforcement**
outlines how consumer protection agencies will enforce the law.

The Australian Treasury also publishes information about the ACL – see *The Australian Consumer Law – a guide to provisions*, available from the Australian Treasury website at treasury.gov.au or the Australian Consumer Law website at consumerlaw.gov.au.

About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

It is a national, state and territory law from 1 January 2011 and includes unfair contract terms legislation introduced on 1 July 2010.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL. The regulators of this law include:

- > the Australian Competition and Consumer Commission (ACCC)
- > the Australian Securities and Investments Commission (ASIC)
- > each state and territory consumer protection agency.

The ACL replaces previous Commonwealth, state and territory consumer protection legislation. It is contained in the *Competition and Consumer Act 2010 (CCA)*.

Aspects of the ACL are reflected in the *Australian Securities and Investments Commission Act 2001 (Cth)* (ASIC Act), to protect consumers of financial products and services.

01

Misleading or deceptive conduct

Summary

It is unlawful for a business to make statements in trade or commerce that:

- > are misleading or deceptive
- > would be likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive.

Businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

ACL reference: sections 18 and 19

What is misleading or deceptive conduct?

'Conduct' includes actions and statements, such as:

- > advertisements
- > promotions
- > quotations
- > statements
- > any representation made by a person.

Business conduct is likely to break the law if it creates a misleading overall impression among the audience about (for example) the price, value or quality of consumer goods or services.

It is a business's actions and statements that matter – not its intentions. A business can mislead and deceive, without intending to.

For example:

- > A trader's business name suggests an affiliation with a long-established institution. The name may mislead or deceive because of this similarity. The trader's intentions when choosing the name would not matter.

Puffery

'Puffery' is wildly exaggerated, fanciful or vague claims that no reasonable person could possibly treat seriously or find misleading.

For example:

- > a café owner claims to make 'the best coffee in the world'
- > 'all your dreams will come true' if you use a certain product.

Silence

A business can break the law by failing to disclose relevant facts to a customer.

Silence can be misleading or deceptive when:

- > one person fails to alert another to facts known only to them, and the facts are relevant to the decision
- > important details a person should know are not conveyed to them
- > a change in circumstance meant information already provided was incorrect.

Whether silence is misleading or deceptive will depend on the circumstances of each case.

For example, the following could be misleading:

- > A restaurateur is selling her restaurant. When asked the reason for sale, she does not mention that she is selling because a similar restaurant is opening nearby.
Legal reference: Hardy v Your Tabs Pty Ltd (in Liq) [2000] NSW CA 150
- > A consumer who lives in a regional area is buying a mobile phone. The salesman knows where the consumer lives but fails to tell him that coverage in that area is poor and the phone may be of no use.

Disclaimers and small print

Businesses cannot rely on disclaimers buried in small print as an excuse for misleading or deceptive conduct.

For example:

- > A large department store engaged in misleading conduct when it advertised '25 per cent off all clothing' and '15-40 per cent off housewares', but in small print excluded certain clothing and manchester. A court found this to be misleading conduct.

Legal reference: ACCC v Target Australia Pty Ltd [2001] FCA 1326

However, consumers cannot ignore disclaimers that are prominently displayed. Such disclaimers may be enough to protect a business, depending on the circumstances.

For example:

- > A bank advertises low credit card interest rates for the first 12 months. The advertisement clearly and prominently indicates the low rates are only available to new customers who apply within a certain period. This disclaimer is sufficient because it clearly informs consumers about the terms and conditions.

It is recommended that businesses prominently display all disclaimers and any terms and conditions. Even so, businesses must ensure that these

disclaimers, terms and conditions are not unfair. An unfair contract term will be void (treated as if it never existed).

Predictions and opinions

A statement about the future that does not turn out to be true is not necessarily misleading or deceptive.

But promises, opinions and predictions can be misleading or deceptive if the person making the statement:

- > knew it was untrue or incorrect
- > did not care whether it was true or not
- > had no reasonable grounds for making it.

For example:

- > A real estate agency was selling apartments with a view of the sea.

The agency assured prospective buyers that the view was protected because the land between the apartment block and the sea was zoned for low-rise development. This was based on information provided by a council officer.

However, the council officer's information was wrong. The zoning was about to change, allowing high-rise development. The agency had made a false statement about a future matter but had reasonable grounds, so was not liable for misleading consumers.

Journal reference: (2009) 17 TPLJ 25

A court will consider the circumstances and the effect or impact on the consumer when deciding if a prediction or opinion was misleading or deceptive.

Exceptions for information providers

'Information providers' include media organisations such as:

- > radio stations
- > television stations
- > publishers of newspapers or magazines (including online).

Information providers will be liable for publishing an advertisement that is misleading or deceptive.

However, they may not be responsible if:

- > they are in the business of publishing or arranging for the publication of advertisements
- > they received the advertisement in the ordinary course of this business; and
- > they did not know, and had no reason to suspect, that the advertisement was misleading or deceptive.

For example:

- > A tradesman publishes an advertisement in a major newspaper. The advertisement states that he is a registered builder, when he is not. The newspaper staff was unaware of the builder's unregistered status. Although the advertisement may be misleading or deceptive, the newspaper will not be liable because it had no reason to suspect the information was false. However, the tradesman's conduct would be misleading or deceptive.

Penalties

Misleading or deceptive conduct may lead to civil remedies including injunctions, declarations, damages, compensatory orders, orders for non-party consumers and non-punitive orders. The regulator also can accept court-enforceable undertakings, and issue substantiation and public warning notices.

Fines and criminal sanctions do not apply, but penalties may apply if the conduct breaches the ACL in other ways.

02

False or misleading representations

Summary

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services. Whether a representation is false or misleading will depend on the circumstances.

It is unlawful for a business to make a misleading testimonial. A business must produce evidence to show that a testimonial is not misleading.

Making false or misleading representations is an offence. The maximum fine is \$220,000 for an individual and \$1.1 million for a body corporate.

ACL reference: sections 29-38 and sections 151-160

What are false or misleading representations?

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services.

For instance, a business must not make false or misleading representations about:

- > the standard, quality, value or grade of goods or services
- > the composition, style, model or previous history or use of goods
- > whether the goods are new
- > a particular person agreeing to acquire goods or services
- > testimonials by any person relating to goods or services
- > the sponsorship, approval, performance characteristics, accessories, benefits and uses of goods or services
- > the price of goods or services

- > the availability of repair facilities or spare parts
- > the place of origin of a product – for example, where it was made or assembled
- > a buyer's need for the goods or services
- > any guarantee, warranty or condition on the goods or services
- > the requirement to pay for any guarantee, warranty or condition on the goods or services.

Courts have found false and misleading representations in these cases:

- > a manufacturer sold socks, which were not pure cotton, labelled as 'pure cotton'
Legal reference: TPC v Pacific Dunlop Limited (1994) ATPR 41-307
- > a retailer placed a label on garments showing a sale price and a higher, crossed-out price. However, the garments had never sold for the higher price
Legal reference: TPC v Cue Design Pty Ltd (1996) A Crim R 500; ATPR 41-475

- > a business made a series of untrue representations about the therapeutic benefits of negative ion mats it sold
Legal reference: ACCC v Giraffe World Australia Pty Ltd (1999) 95 FCR 302; 166 ALR 74
- > a motor repairer told a customer more repair work was needed on their car than was necessary.
Legal reference: Dawson v Motor Tyre Service Pty Ltd (1981) ATPR 40-223

Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation that misleads one group of consumers may not necessarily mislead another group.

For example:

- > People concerned about their body image may be more vulnerable to products claiming to enhance beauty. Whether a representation about a beauty product was misleading would depend on whether it would mislead a reasonable person within this group.

A representation can be misleading even if it is true or partly true.

For example:

- > On the front of their product packaging, a business claimed their batteries lasted as long as those of two other competitors. The claim was supported by tests, but only against some (not all) of the competitors' batteries. This was explained on the back of the packaging. A court found the message on the front of the packaging had misled consumers, even though there was a clearer message on the back of the packaging.
Legal reference: Energizer Australia Pty Ltd v Remington Products Australia Pty Ltd [2008] FCA 58

Testimonials

It is unlawful to make, or use, false or misleading testimonials.

Testimonials are statements from previous customers about their experience with a product or service.

These can give consumers confidence in a product or service on the basis that another person – particularly a celebrity or well-known person – is satisfied with the goods or services.

Misleading representations can persuade customers to buy something to their detriment, based on belief in the testimonial.

Examples of false and misleading representations about testimonials include:

- > A supplier published a newspaper advertisement about a 'nasal delivery system' to treat impotence or erectile dysfunction. The advertisement quoted an interview with a celebrity that falsely claimed he had suffered from impotence and the nasal delivery system had assisted in dealing with this condition.
Legal reference: ACCC v Advanced Medical Institute Pty Ltd (No 3) (2007) ATPR (Digest) 46-269
- > An advertisement where an actor is portrayed as a real person and falsely claims to have reaped financial benefits from distributing health care products.

In court, a representation about a testimonial is presumed to be misleading but not false. A business accused of making a misleading testimonial has to provide evidence to show it is not misleading.

Make sure testimonials are true and correct when using them to endorse products. You can do this by getting real customers to speak about their actual experience.

Consumer guarantees – guarantees, conditions and warranties

It is unlawful to make false or misleading representations about consumer guarantees. For more information, see another guide in this series – *Consumer guarantees: A guide for businesses and legal practitioners*.

Sale or grant of an interest in land

A business must not make false or misleading representations about the sale or grant of an interest in land.

It must not:

- > represent that it has a sponsorship, approval or affiliation when it does not
- > make false or misleading representations about the:
 - nature of the interest in the land
 - price, location, characteristics or use that can be made of the land
 - availability of facilities associated with the land.

For example, a real estate agent would be misrepresenting the characteristics of a property if advertising 'beachfront lots' that did not front the beach.

Employment and business activities

It is unlawful to make false or misleading representations about the:

- > availability, nature or terms and conditions of employment
- > profitability, risk or other material aspect of any business activity that requires work or investment by a person.

For example:

- > A second-hand truck dealer falsely told buyers they could get employment from certain places if they bought the dealer's trucks. The truck dealer was found guilty of misleading the buyers and fined.
Legal reference: Wilde v Menville Pty Ltd (1981) 50 FLR; 3 ATPR 40-195

Offering rebates, gifts, prizes and other free items

When supplying or promoting goods or services, it is unlawful to offer rebates, gifts, prizes or other free items without intending to provide them. It is also unlawful to fail to provide them as promised.

The rebate, gift, prize or other free item must be provided within the specified time or, if no time was specified, within a reasonable time.

For example:

- > A stereo equipment retailer held a promotion. Customers went into a draw to win prizes when they bought stereo equipment. The retailer felt the promotion had not been a financial success so, among other things, fake names were added to the draw. Those fake names were declared the winners. This meant no prizes were awarded by the retailer. The retailer pleaded guilty and was fined.
Legal reference: TPC v Calderton Corp Pty Ltd (1994) ATPR 41-306

Misleading conduct – nature of goods and services

Businesses must not engage in conduct likely to mislead the public about the nature, manufacturing process, characteristics, suitability for purpose or the quantity of any goods or services.

For example:

- > An importer sells bicycle helmets with labels indicating the helmets met a safety standard, even though the helmets have not been laboratory tested to check whether they meet the standard.
- > When stocks of organic eggs ran out, a supplier packed eggs in a carton labelled as 'organic' even though the eggs were not.
Legal reference: ACCC v G.O. Pty Ltd [2007] FCA 1246

Bait advertising

'Bait advertising' usually happens when a business advertises goods at a certain price but does not have a reasonable supply for customers to buy. What is a 'reasonable supply' will depend on several factors, including the type of goods and what is said in the advertisement.

For example:

- > An electronics retailer runs a major national campaign advertising 42-inch televisions at a low price of \$799 for a week-long sale. The retailer usually sells about 30 televisions of this type every week. The retailer only stocks two televisions at the advertised price and refuses to take customer orders. When customers attempt to buy the television at the advertised price, they are told it is out of stock and offered a more expensive unit for \$999. This is likely to be bait advertising as the retailer does not have a reasonable supply of the advertised television.

Wrongly accepting payments for goods or services

Businesses must not accept payment for goods or services:

- > if they do not intend to supply
- > if they intend to supply materially different goods or services
- > if they know, or should have known, they would not be able to supply the goods or services in a timely manner.

For example, a landscaper contracts to provide yellow paving stones and accepts payment, knowing that only grey paving stones are available at the time of the agreement and that it will be difficult to get yellow paving stones.

This part of the law is not intended to affect businesses who genuinely try to meet supply agreements. A business may avoid prosecution if:

- > the failure to supply was due to something beyond its control, and
- > it exercised due diligence and took reasonable precautions.

Exceptions for information providers

'Information providers' include media organisations such as:

- > radio stations
- > television stations
- > publishers of newspapers or magazines (including online).

Information providers will be liable for publishing an advertisement that is misleading or deceptive.

However, they may not be responsible if:

- > they are in the business of publishing or arranging for the publication of advertisements
- > they received the advertisement in the ordinary course of this business, and
- > they did not know, and had no reason to suspect, that the advertisement was misleading or deceptive.

For example:

- > A tradesman publishes an advertisement in a major newspaper. The advertisement states that he is a registered builder, when he is not. The newspaper staff was unaware of the builder's unregistered status. Although the advertisement may be misleading or deceptive, the newspaper will not be liable because it had no reason to suspect the information was false. However, the tradesman's conduct would be misleading or deceptive.

Penalties

Making false or misleading representations is an offence.

The maximum criminal penalties are \$220,000 for an individual and \$1.1 million for a body corporate. Civil penalties for the same amount apply.

Other civil remedies include:

- > injunctions
- > damages
- > compensation
- > orders for non-party consumers
- > corrective advertising orders
- > adverse publicity orders
- > disqualification orders.

Consumer protection agencies can accept court-enforceable undertakings, issue infringement notices, substantiation notices and public warning notices.

03

Unconscionable conduct

What is unconscionable conduct?

Generally, 'unconscionable conduct' is a statement or action so unreasonable it defies good conscience.

A business must not act unconscionably when:

- > selling or supplying goods and services to a consumer
- > supplying or acquiring goods and services to or from a business.

ACL reference: Part 2-2 (sections 20-22).

Examples of unconscionable conduct by a trader can, depending on the circumstances, include:

- > not properly explaining the conditions of a contract to a person they know does not speak English or has a learning disability
- > not allowing sufficient time to read an agreement, ask questions or get advice
- > using a friend or relative of the customer to influence the customer's decision

- > inducing a person to sign a blank or one-sided contract
- > taking advantage of a low-income consumer by making false statements about the real cost of a loan
- > failing to disclose key contractual terms
- > using high pressure tactics, such as refusing to take 'no' for an answer.

Penalties

The maximum civil penalties are \$220,000 for an individual and \$1.1 million for a body corporate.

A business must not act unconscionably when supplying goods or services to a consumer.

04

Representations about country of origin

Summary

Businesses must not make false or misleading representations about the country of origin of goods.

A representation about country of origin includes words, a picture or both, either:

- > attached to the goods (for instance, on a label)
- > in promotional material linked to the goods.

Claims about country of origin include:

- > 'made in' a specified country
- > 'produce of', 'product of' or 'produced in' a country
- > use of a particular logo
- > claims that goods, or ingredients or components were 'grown in' a country.

The ACL sets out criteria for businesses to follow when making claims about the country of origin of goods.

ACL reference: sections 254-258

What is a 'country of origin' representation?

Businesses must not make false or misleading representations about the country of origin of goods.

A representation about country of origin can include words, a picture or both, indicating that goods were made, produced or grown in a particular country.

The representation can be either:

- > attached to the goods
– for instance, on a label
- > in promotional material linked to the goods.

Words or pictures that are an essential part of the goods are not necessarily a representation about country of origin.

For example:

- > A t-shirt with a 'Made in Australia' label makes a representation about country of origin. A t-shirt emblazoned with the word 'Australia' as part of its design, does not.

A business must ensure absence of a country of origin representation does not imply one, because of other statements or signs associated with a good.

For example, it is unlawful to sell a 'genuine Turkish rug' when it is actually made in China, as a consumer may believe it was made in Turkey.

04 Representations about country of origin

Representations about country of origin include:

- > 'made in' or 'manufactured in' a specified country
- > 'produce of', 'product of' or 'produced in' a specified country
- > use of a prescribed logo
- > claims that goods, or ingredients or components, were 'grown in' a specified country.

The ACL provides certain legal protections for businesses that make country of origin representations, provided they meet criteria set out in the law.

Criteria for country of origin claims

The ACL sets out certain criteria for claims about the country of origin of goods.

The criteria apply to claims about *country*, not *region* – for example, they do not apply to 'made in Tasmania' or 'made in California'.

If a business is accused of making a false or misleading claim about country of origin, it must point to evidence that the claim meets the criteria set out in the ACL.

'Made in' claims

For a business to claim goods are 'made in' or 'manufactured in' a specified country:

- > the goods must be *substantially transformed* in that country, and
- > 50 per cent or more of the total *cost of producing or manufacturing* the goods must be incurred in that country.

Substantial transformation

This means the product undergoes a fundamental change in the country represented. The changes can be to the product's appearance, operation or purpose.

Processes that lead to substantial transformation include:

- > processing ingredients from the claimed country of origin and another country into a finished food product, such as the production of a cake using sugar from the claimed country of origin with spices, fruit and flour and sugar from another country
- > production of a newspaper using imported ink
- > moulding sheet metal into a car panel
- > milling flour from wheat.

It does not include:

- > reconstituting imported fruit juice concentrate into fruit juice for sale – whether or not water, sugar, preservatives and packaging from the claimed country of origin were used
- > assembling imported components into household or other items - for example: white goods, furniture or electronic goods.

Costs of producing or manufacturing goods

The total cost of producing and manufacturing goods includes the producer or manufacturer's expenditure on:

- > materials to produce or manufacture the goods.
This includes:
 - purchase price
 - overseas freight and insurance
 - port and clearance charges
 - inward transport to store.

It does not include:

- customs and excise duty
- sales tax
- goods and services tax

- > labour related to and reasonably allocated to the production or manufacture of the goods.
This includes:
 - manufacturing wages and employee benefits
 - supervision and training
 - quality control
 - packing goods into inner containers
 - handling and storing the goods
- > overheads related to and reasonably allocated to the production or manufacture of the goods.
This includes:
 - inspection and testing of goods and materials
 - insurance and leasing of equipment
 - vehicle expenses
 - storage of goods at the factory.

For example:

- > To use the Made in Australia label, more than half of the total cost of making the product must be incurred in Australia.

A manufacturer wants a product, which has a total production cost of \$85, to carry this label. The product has material costs of \$45, labour costs of \$25 and overheads of \$15. The labour and overhead costs were incurred in Australia. Of the material costs, \$40 were imported and \$5 were Australian materials.

The total Australian component is \$45 (\$25 labour, \$15 overheads, \$5 materials) and the imported component is \$40. As the total Australian production costs are greater than 50 per cent, the product could be labelled 'Made in Australia'.

However, if all the materials were imported, the product could not carry the 'Made in Australia' label. The total imported components cost \$45 – more than 50 per cent of the total production costs. See *'Made in' claims*, page 14.

Substantial transformation means the product undergoes a fundamental change in the country represented.

'Product of' claims

For a business to claim goods are 'produced in', 'produce of' or 'product of' a specified country:

- > all or virtually all of the production or manufacturing processes must happen in that country (see *Costs of producing or manufacturing goods*, page 15), and
- > all of the significant ingredients or components must come from that country. An ingredient or component does not have to be a certain percentage to be 'significant'.

For example:

- > An apple and cranberry juice bottle can carry a 'produce of Australia' label only if both juices are from Australia.

Even though the cranberry juice is about five per cent of the total volume, it is 'significant' to the product and the label would be misleading if the cranberry juice was imported.

The final product may contain an imported preservative and still be 'produce of Australia'; the cranberry juice is 'significant', the preservative is not.

Claims of origin based on use of a prescribed logo

If a business labels a product with a prescribed logo, the goods must:

- > meet the requirements for substantial transformation (see page 14), and
- > meet the prescribed percentage of production or manufacturing costs that apply for that logo. See *Costs of producing or manufacturing goods* on page 15.

No logos were prescribed in the ACL at the time of publication.

'Grown in' claims

A business can lawfully claim goods are 'grown in' a particular country when:

- > at least 50 per cent of the total weight comprises ingredients or components grown and processed in that country
- > virtually all production or manufacturing processes happened in that country, and
- > each significant ingredient or significant component was grown and processed only in that country. An ingredient or component does not have to be a certain percentage to be 'significant' – see the example under *'Product of' claims*, on this page.