



## “FRESHLY BAKED”. WELL, SORT OF...

AUTHOR // FEDA DABBAGH

**A recent decision of the Federal Court of Australia has placed a sharp focus on the use of credence claims (that is, claims which involve a representation of a premium or special characteristic about a product) in marketing in the Food and Beverage industry.**

**In a victory for common sense and consumers, the Australian Federal Court has ruled that Coles breached the Australian Consumer Law by labelling its par-baked bread “fresh” in *ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 634*.**

On 18 June 2014, the Federal Court of Australia ruled that Coles engaged in misleading and deceptive conduct when marketing its par-baked bread. Par-baked bread is prepared for sale by applying heat in an oven to partly baked dough that has been snap frozen and stored for a period of time. The bread was partially baked and frozen off-site and then transported to the Coles supermarkets where the baking process was finished. The par-baked bread was promoted by Coles using the terms “baked today, sold today”, “freshly baked” and in some cases “Freshly Baked in-store”.

### THE FACTS

Coles' in-store bakeries use three methods of baking: preparing bread ‘from scratch’, applying heat in an oven to frozen dough and applying heat in an oven to par-baked bread that has been snap frozen and stored for a period of time. The ACCC took issue with the “fresh” descriptions of bread prepared using the third process.

The ACCC asserted that Coles had represented frozen and par-baked products as being baked from scratch or entirely baked on the day they were offered for sale.

### THE IMPORTANCE OF CONTEXT

The Court placed significant emphasis on the role of context when determining whether conduct is likely to mislead or deceive. In the Coles context, the claim did not convey a message that only **some** baking had taken place that day and initial baking of a substantial kind took place weeks or months before at other locations (including Ireland).

The meaning of the word “fresh” will differ depending on the context in which it is used. It may connote notions of recency and/or notions of being “unprocessed” or not interfered with by man. The danger lies in the multitude of possible meanings, only one of which needs to be potentially misleading in order to fall foul of the Australian Consumer Law.

The FCA considered that to reasonable and ordinary people, the way the phrase “Baked today, sold today” was used would convey that the entire baking process took place that day. The Court found that those representations were misleading.

The Court commented that Coles needed to make clear that “freshly baked” actually means the completion of the baking process of frozen product prepared off site by suppliers as opposed to the entire ‘from scratch’ baking process.

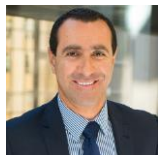
## WHAT DOES THE DECISION MEAN FOR INDUSTRY PARTICIPANTS?

Participants in the food and beverage industry need to make sure that they have adequate substantiation for the credence claims they make about their products and to exercise caution when using broad laudatory words and phrases that are intended to influence the buying decisions of consumers. Common examples of the use

of the word "fresh" in different contexts capable of different meanings include "garden fresh", "fresh from the farm", "freshly squeezed" and "fresh taste"..

It is now not always enough to simply demonstrate the recency of the relevant preparatory process in order to avoid misleading consumers by use of the word "Fresh". Your ingredients must often be fresh too!.

### FOR MORE INFORMATION, PLEASE CONTACT:



**MARK SECIVANOVIC //**  
Partner

**T** 61 2 8235 1256

**E** [m.secivanovic@clarkekann.com.au](mailto:m.secivanovic@clarkekann.com.au)



**FEDA DABBAGH //**  
Associate

**T** 361 2 8235 1256

**E** [f.dabbagh@clarkekann.com.au](mailto:f.dabbagh@clarkekann.com.au)

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at [www.clarkekann.com.au](http://www.clarkekann.com.au). To update your contact details or unsubscribe to any of our publications, email us at [ck@clarkekann.com.au](mailto:ck@clarkekann.com.au).

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation.

[Privacy Policy](#)

**ClarkeKann**  
LAWYERS

CLARKEKANN.COM.AU

#### Queensland

Level 7, 300 Queen Street  
Brisbane QLD 4000  
Australia

T // +61 7 3001 9222  
F // +61 7 3001 9299  
E // [ck@clarkekann.com.au](mailto:ck@clarkekann.com.au)

#### New South Wales

Level 4, 9 Castlereagh Street  
Sydney NSW 2000  
Australia

T // +61 2 8235 1222  
F // +61 2 8235 1299  
E // [ck@clarkekann.com.au](mailto:ck@clarkekann.com.au)