

## Article Information

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# ACCC v Dateline Imports Pty Ltd: Make sure you have reasonable grounds, even if it is true

**There is increasing focus on manufacturers to show they have reasonable grounds to make representations to consumers about ingredients in their products. Manufacturers must ensure testing of products support any representations made in respect of those ingredients.**

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If manufacturers do not hold reasonable grounds for making certain representations about ingredients in a product, it could constitute misleading and deceptive conduct. This is the case even where those representations turn out to be true. The case of *ACCC v Dateline Imports Pty Ltd* which illustrates the difficulty in making representations about complex chemical products where experts disagree on the existence of harmful ingredients and sophisticated testing methods cannot conclusively rule out the existence of such chemicals.

### Background

In August 2015, the Full Court of the Federal Court partly allowed an appeal by the Australian Competition and Consumer Commission (ACCC) in *ACCC v Dateline Imports Pty Ltd*. The case concerned the hair straightening product Keratin Complex Smoothing Therapy (Keratin Complex). Dateline made various representations between 2009 and 2010 that Keratin Complex did not contain formaldehyde (formaldehyde representations). Amongst other allegations, the ACCC alleged that making the formaldehyde representations constituted misleading or deceptive conduct.

At first instance, the Court held the formaldehyde representations made by Dateline Imports Pty Ltd (Dateline) did not constitute misleading and deceptive conduct. The ACCC appealed on number of grounds, and partly succeeded on the ground that Dateline did not have reasonable grounds to make formaldehyde representations. In this respect, two key issues arose on appeal being:

- whether the Keratin Complex contained formaldehyde, and
- whether Dateline had reasonable grounds to make the formaldehyde representations.

### Were the representations false?

The ACCC appealed the finding that the Keratin Complex did not contain formaldehyde. Whether the Keratin Complex contained formaldehyde was subject to extensive expert testimony at first instance. Dateline's experts interpreted the term 'formaldehyde' to include only free or unreacted formaldehyde. The ACCC's experts described formaldehyde to include a solution consisting of 'methylene glycol' with associated unreacted or free formaldehyde molecules relating to each other in a dynamic equilibrium. Expert evidence confirmed the existence of methylene glycol, but not free formaldehyde. Accordingly, the central issue was whether Keratin Complex could be said to contain formaldehyde, by reason of the presence of methylene glycol. The experts disagreed on this point, and the primary judge held in favour of Dateline's experts that in the circumstances, the detection of methylene glycol does not establish, on the balance of probabilities, the existence of formaldehyde. As such, the ACCC failed to prove the Keratin Complex solution must be said to contain an unknown and undetected quantity of formaldehyde when methylene glycol is detected.

On appeal, the Full Court upheld the finding of the primary judge after examining the expert evidence heard at the trial. There was no error in law, and it was open to the primary judge to accept Dateline's expert evidence over the ACCC's. Accordingly, because the ACCC failed to establish formaldehyde was present in the Keratin Complex to the requisite burden of proof, it failed to prove the formaldehyde representations were, in fact, false. This ground of appeal therefore

failed.

### **Reasonable Grounds**

The Full Court held that, even in circumstances where it was not established the formaldehyde representations were false, it does not follow from that conclusion that at the time of making the formaldehyde representations, Dateline had reasonable grounds to make them.

The Full Court found that Dateline did not have reasonable grounds to make the following representations:

- Keratin Complex did not contain any toxic or dangerous chemical
- Keratin Complex did not contain formaldehyde
- Persons using Keratin Complex could not be exposed to formaldehyde
- Keratin Complex was safe for its recommended use
- Keratin Complex complied with all health and safety regulations in the world (compliance representation).

Reasonable grounds will not exist if ‘the representor did not have facts sufficient to induce, the mind of a reasonable person, a basis for making the representation.’ The Full Court observed the intention of the legislator was to protect consumers from conduct where there are no reasonable grounds known to the representor.

Dateline submitted that the fact the formaldehyde representations were not false was enough to defeat the allegation of misleading or deceptive conduct. The Full Court rejected this submission and said that Dateline had to show whether reasonable grounds existed for making the formaldehyde representations. This involved an examination of what Dateline actually knew, and whether those grounds were objectively reasonable. Accordingly, Dateline submitted it had reasonable grounds because methylene glycol was a different substance to formaldehyde. It relied on a report commissioned by Dateline in September 2010. The report stated ‘free formaldehyde was not detected, but the spectra acquired are consistent with samples containing methylene glycol, the hydrated form of formaldehyde.’ Dateline submitted it therefore had reasonable grounds to believe only methylene glycol was present, a different substance to formaldehyde.

The Full Court concluded this was not enough to find it was reasonable to disregard the presence of methylene glycol in making the formaldehyde representations. Further, the Court held it failed to show reasonable grounds for making the compliance representation as there had been a recall of the Keratin Complex in Ireland, and agreed with the primary judge’s observations that Dateline did not have reasonable grounds for representing that the Keratin Complex was safe for its recommended use nor that it did not contain any toxic or dangerous chemicals.

Consequently, it was held Dateline did not have reasonable grounds to make the formaldehyde representation. Although it could not be shown formaldehyde was present in the Keratin Complex, Dateline was held to have engaged in misleading and deceptive conduct.

### **Conclusion**

In summary, the uncertainty in whether or not formaldehyde was in the Keratin Complex is where Dateline became unstuck. Expert evidence led by both parties could not rule out the existence of formaldehyde in the Keratin Complex, but could not provide that the chemical was not in the product. The lesson for manufacturers to take away is to ensure a concrete basis exists, in the form of expert advice or testing, for making representations about specific ingredients or chemicals to consumers to avoid allegations of misleading and deceptive conduct.

The matter was remitted back to the trial judge for further penalty.