# The California Transparency in Supply Chains Act 2010 - No Longer a *Safe Harbour* under California Consumer Protection Laws

*Abstract: California was the first jurisdiction to introduce transparency compliance requirements to global supply chains. Businesses have sought and succeeded in using their compliance with the California Transparency in Supply Chains Act 2010 to defeat claims under the California Unfair Competition Law, California Consumers Legal Remedies Act and False Advertising Law, on the basis of the safe harbour doctrine. However, the utilisation of the safe harbour doctrine in this manner, appears to be changing. This article explores key case law from 2015-2016, detailing the changing approach by the California judiciary.*

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## The California Transparency in Supply Chains Act 2010

The *California Transparency in Supply Chains Act 2010* (**Act**) came into effect on 1 January 2012.[[3]](#footnote-3) The Act requires certain business to disclose what actions they are taking, if any, to proactively address slavery and human trafficking in their supply chains.[[4]](#footnote-4)

The Act applies to retail sellers and manufacturers of goods, doing business in California, with worldwide gross receipts of USD $100 million or more.[[5]](#footnote-5) The Act applies to any business that satisfies these threshold requirements, irrespective of domicile. Accordingly, the Act can apply to Australian businesses. Currently, it is estimated that the Act applies to 2,126 businesses.

Under the Act, qualifying businesses are required to publicly disclose to what extent, if any, they undertake actions in five specific areas: (1)whether they or a third party conducts verifications to evaluate and to address risks of slavery and human trafficking;[[6]](#footnote-6) (2) whether they or an independent agency conduct audits of suppliers to evaluate supplier compliance with the organisation's standards for slavery and human trafficking;[[7]](#footnote-7) (3) whether they require direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;[[8]](#footnote-8) (4) whether they maintain internal accountability standards and procedures for employees and contractors that fail to meet internal standards regarding slavery and human trafficking;[[9]](#footnote-9) and (5) whether they provide employee training to key personnel on mitigating the risks of slavery and human trafficking in the supply chain.[[10]](#footnote-10)

The exclusive remedy for non-compliance with the disclosure requirement is an action brought by the Attorney General of California for an injunction compelling disclosure.[[11]](#footnote-11) Businesses do not face a monetary penalty for non-disclosure. The Act does not limit remedies for a violation of any other state or federal law.[[12]](#footnote-12)

## Consumer Protection Laws in California, the Safe Harbour Doctrine, and the Act

California has three consumer protection instruments: the Unfair Competition Law (**UCL**),[[13]](#footnote-13) Consumers Legal Remedies Act (**CLRA**),[[14]](#footnote-14) and False Advertising Law (**FAL**).[[15]](#footnote-15) Generally, claims under the UCL comprise three contentions on the basis of a failure to disclose labour abuses on product packaging: (1) omission violates the CLRA; (2) omission is unfair as it not only prevents informed decision making by consumers but also impairs competition; (3) omission is fraudulent on the basis that the true facts would be material to a reasonable consumer and as such the omission is likely to deceive such a consumer.[[16]](#footnote-16) In relation to the CLRA, generally claims allege misrepresentation concerning source, characteristics and standard of products as a result of the failure to disclose.[[17]](#footnote-17) The FAL claim is generally based on contending that qualifying businesses under the Act have superior knowledge of their supply chains as opposed to consumers, such that this level of knowledge necessitates a duty to disclose labour abuses.[[18]](#footnote-18)

The safe harbour doctrine, in essence, is a provision of a statute that specifies that certain conduct will be deemed not to violate a given rule. The California Supreme Court has held that "safe harbours" arise in two situations: where the legislature has permitted certain conduct; or where the legislature has considered a situation and concluded no action should lie.[[19]](#footnote-19) If either of these conditions exists, the UCL,[[20]](#footnote-20) CLRA,[[21]](#footnote-21) or FAL[[22]](#footnote-22) cannot be utilised.

It is in this way that California law recognises compliance with the Act as the a safe harbour to claims under the UCL, CLRA and FLA. However, as we shall see, whilst this may have been the judiciary's initial viewpoint, there now appears to be renewed scepticism, as to whether this view is indeed correct.

## Survey of the case law

### *Barber v Nestle (9 December 2015)*

In *Barber v Nestle*,[[23]](#footnote-23) the Plaintiff's claimed that Nestle was obliged to inform consumers on its product packaging that some proportion of its cat food products may include seafood which was sourced from forced labour.[[24]](#footnote-24) This omission, it was contended, violated the UCL, CLRA, and FAL.[[25]](#footnote-25)

Nestle sought to dismiss the action, inter alia, on the basis that the Act creates a safe harbour, thereby barring the Plaintiff's claims.[[26]](#footnote-26) The proposition is: first, the California legislature considered and determined the nature of disclosure, that is, the five categories set out above; and second, given this restricted disclosure, this inhibits utilisation of the UCL, CLRA and FAL to compel further, additional disclosure, including on packaging of products.

Judge Carney referred to the legislative history of the Act and its actual text, and in doing so, formed the view that the safe harbour doctrine applied. The Act, in Judge Carney's view, not only set the disclosure level, but also, codified it.[[27]](#footnote-27)

In relation to the legislative history of the Act, Judge Carney stated:

the "Bill Analysis" states that the measure "does not…require the relative[ly] narrow number of designated large companies to do anything other than post specified information on their web sites and also make such information available to interested consumers." It continues to explain that 1714.43 "merely requires the specified large business entities voluntary efforts are…The bill leaves it to consumers to decided whether and how, if at all, they wish to use such information in their purchasing decisions." This mechanism is consistent with how the Bill Analysis describes the purpose of the law: to "ensure [that] interested California consumers have reasonable access to basic information to aid their purchasing decisions." Under 1714.43, companies are "still completely free to do anything they want about their efforts to fight human trafficking and slavery," including nothing at all, so long as they make then required disclosures. This language is impossible to square with Plaintiffs' current contention that California consumer protection law requires companies to make disclosures beyond what 1714.43 requires in order to adequately inform California consumers.[[28]](#footnote-28)

In relation to the text of the Act, Judge Carney determined that the Act did not extend to additional disclosures.[[29]](#footnote-29) In other words, the Act only required limited disclosure regarding steps taken, if any, in each of the five categories.[[30]](#footnote-30)

It is clear from this conclusion, that Judge Carney was of the view that the nature and extent of disclosure begins and ends with the Act:

California has spoken directly to the issue of what disclosures companies must make to customers about potential forced labour in their supply chains…courts may not override the legislature's determination and simply impose their own notions of the day as to what is fair or unfair.[[31]](#footnote-31)

Whilst the safe harbour doctrine ultimately barred the Plaintiff's claims, a notable contention against the applicability of the safe harbour doctrine was presented. That is, conduct will not find safe harbour under the UCL, CLRA or FAL, unless a statute or regulation specifically permits or requires conduct.[[32]](#footnote-32) In other words, the Act does not specifically permit non-disclosure on packaging, and as such, such non-disclosure falls outside the purview of the safe harbour doctrine. As we shall see, this contention, gained traction in later cases and appears to have formed the genesis of a judicial re-think.

### *Wirth v Mars (5 February 2016)*

Shortly after *Barber v Nestle,* a putative class action was filed in *Wirth v Mars* along similar grounds. That is, Mars failed to disclose on its cat food product packaging, the likelihood that forced labour was used in relation to sourcing of seafood that comprised this product. This omission, it was contended, violated the UCL, CLRA and FAL.[[33]](#footnote-33)

In this case, Judge Carter, agreed with the approach and reasoning of Judge Carney in *Barber v Nestle.* Judge Carter observed that courts may not override a state or federal law that permitted certain conduct or considered a situation and concluded no action should lie.[[34]](#footnote-34) Further, that the safe harbour doctrine applied to each of California's consumer protection legislative instruments.[[35]](#footnote-35) In doing so, Judge Carter shared the same view as Judge Carney on the interpretation of the Act's legislative history and text,[[36]](#footnote-36) concluding:

the Court agrees the California legislature considered the exact issue in this case.: what information companies are required to disclose to consumers about forced labour in their supply chains. By prescribing "who must disclose information about forced labour in their supply chains, what they must disclose, and how they must disclose it," the California Legislature created a safe harbour that bars the Plaintiff's claims.[[37]](#footnote-37)

Accordingly, as California legislature had considered the disclosure level, overriding that determination was not within the mandate of a court.[[38]](#footnote-38)

Like the Plaintiff's in *Barber v Nestle*, the Plaintiff's in *Wirth v Mars*, also contended that the Act does not provide for a safe harbour as there is no clear or express provisions enabling manufacturers or retailers to omit information from their product labels regarding forced labour.[[39]](#footnote-39)

### *Hodsdon v Mars (17 February 2016)*

It is at this point that the legal landscape begins to change. *Hodsdon v Mars* followed its predecessors, contending that the failure to inform consumers at the point of sale that, in this case, Mars chocolate products likely contain cocoa beans sourced using forced labour, amounted to a breach of the UCL, CLRA and FAL.[[40]](#footnote-40)

In relation to the safe harbour doctrine, Judge Seeborg agreed with the previous decisions, in that, safe harbours come into existence when the legislature has permitted certain conduct or considered a situation and concluded no action should lie.[[41]](#footnote-41) However, Judge Seeborg, also stated:

No safe harbour exists, [h]owever, if the legislature did not consider that activity in those circumstances. Thus, in the absence of "a specific provision," courts may find business practices unfair under the UCL.[[42]](#footnote-42)

Judge Seeborg went on to question the earlier decisions and their interpretation of the safe harbour doctrine:

Ambiguity remains regarding how to determine whether the legislature "considered a situation and concluded no action should lie." Here, for example, although there is evidence suggesting the legislature considered how to provide consumers with "reasonable access to basic information to aid their purchasing decisions," the legislative history is silent about whether the legislature contemplated disclosures on labels.[[43]](#footnote-43)

Whilst the safe harbour issue did not ultimately necessitate adjudication, Judge Seeborg, expressed scepticism as to whether the safe harbour doctrine is as broad as the earlier cases found.[[44]](#footnote-44) Less than a month later, this scepticism was reiterated by Judge Spero in *McCoy v Nestle.*

### *McCoy v Nestle (29 March 2016)*

*McCoy v Nestle* concerned whether California law required Nestle to inform consumers that some cocoa used in its chocolate products originated at farms in the Ivory Coast that use slave labour and the worst forms of child labour. Again, like the previous cases, it was contended that the failure to disclose this information on its chocolate product packaging violated the UCL, CLRA, and FAL.[[45]](#footnote-45)

Like *Hodsdon v Mars*, determination of the safe harbour issue was not required,[[46]](#footnote-46) however, Judge Spero did address the issue, albeit briefly. Judge Spero, began by setting out the scope of the doctrine as described by the California Supreme Court:

A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct.[[47]](#footnote-47)

In this context, Judge Spero, remarked:

the Act does not actually "bar" any action. Nor does it "clearly permit" any conduct except disclosure of efforts in relation to the eradication of slavery and human trafficking.[[48]](#footnote-48)

Judge Spero went on to refer to *Hodsdon v Mars,* citing that the legislative history is silent in relation to whether the legislature contemplated disclosure on labels. Notably, in this regard, Judge Spero stated that Nestle had not "identified any law expressly permitting the omission of disclosures on product labels in relation to slavery or human trafficking in a product's supply chain."[[49]](#footnote-49)

Whilst Judge Spero did not need to decide whether *Barber v Nestle* or *Wirth v Mars* were correct, Judge Spero did endorse Judge Seeborg's scepticism in relation to the broadness of the safe harbour doctrine:

moreover, there is a difference between, on one hand, advertising the steps a company has taken to reduce slavery in its supply chain (as the statute requires), and on the other, disclosing that such slavery persists (as McCoy seeks here). That the legislature mandated the former in certain instances does not necessarily indicate a conclusion that the latter could never be required under existing consumer protection laws.[[50]](#footnote-50)

## Conclusion

It appears that the broad interpretation given to the safe harbour doctrine in the context of the Act and California's consumer protection laws, is at the very least, in doubt. All cases are currently on appeal.[[51]](#footnote-51) Accordingly, it is a space to monitor closely, as the impacts for businesses may be significant, both in terms of defending potential consumer law actions and/or having to label products, should the safe harbour doctrine lose its broad application.

1. Partner, Baker & McKenzie [↑](#footnote-ref-1)
2. Special Counsel, Baker & McKenzie [↑](#footnote-ref-2)
3. The Act amended the *Civil Code of the State of California 1872* (California) s1714.43 [↑](#footnote-ref-3)
4. *Civil Code of the State of California 1872* (California) s1714.43(a)(1) [↑](#footnote-ref-4)
5. Civil Code of the State of California s1714.43(a)(1). Note: the terms "retail seller", "manufacturer", "doing business in California" and "gross receipts" are defined in the *Revenue and Taxation Code 1939* (California). [↑](#footnote-ref-5)
6. Civil Code of the State of California s1714.43(c)(1) [↑](#footnote-ref-6)
7. Civil Code of the State of California s1714.43(c)(2) [↑](#footnote-ref-7)
8. Civil Code of the State of California s1714.43(c)(3) [↑](#footnote-ref-8)
9. Civil Code of the State of California s1714.43(c)(4) [↑](#footnote-ref-9)
10. Civil Code of the State of California s1714.43(c)(5) [↑](#footnote-ref-10)
11. Civil Code of the State of California s1714.43(d) [↑](#footnote-ref-11)
12. Civil Code of the State of California s1714.43(d) [↑](#footnote-ref-12)
13. *California Business & Professions Code 1937* (California) s17200-17210 [↑](#footnote-ref-13)
14. *Civil Code of the State of California 1872* (California) s1750-1784 [↑](#footnote-ref-14)
15. *California Business & Professions Code 1937* (California) s17500-17509 [↑](#footnote-ref-15)
16. See for example, *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 3 [↑](#footnote-ref-16)
17. See for example, *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 3 [↑](#footnote-ref-17)
18. See for example, *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 3 [↑](#footnote-ref-18)
19. *Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co.,* 20 Cal. 4th 163, 182 (Cal. 1999) [↑](#footnote-ref-19)
20. *Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co.,* 20 Cal. 4th 163, 182 (Cal. 1999) [↑](#footnote-ref-20)
21. *Alvarez v, Chevron Corp.,* 656 F.3d 925, 933-34 (9th Cir. 2011). This case applied the safe harbour doctrine to UCL and CLRA claims; *Cruz v. Anheuser-Busch, LLC,* No. CV14-09670 AB (ASx), 2015 WL 3561536, at 3 (C.D. Cal. 3 June 2015). This case applied the safe harbour doctrine to UCL, CLRA and FAL claims . [↑](#footnote-ref-21)
22. *Pom Wonderful LLC v. Coca Cola Co.,* No. CV08-06237 SJO (FMOx), 2013 WL 543361 at 5 (C.D. Cal. Apr. 16, 2013). This case applied the safe harbour doctrine to UCL and FAL claims; *Cruz v. Anheuser-Busch, LLC,* No. CV14-09670 AB (ASx), 2015 WL 3561536, at 3 (C.D. Cal. 3 June 2015). This case applied the safe harbour doctrine to UCL, CLRA and FAL claims . [↑](#footnote-ref-22)
23. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) [↑](#footnote-ref-23)
24. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 2 [↑](#footnote-ref-24)
25. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 2-3 [↑](#footnote-ref-25)
26. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 4 [↑](#footnote-ref-26)
27. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 11 [↑](#footnote-ref-27)
28. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 10-11 [↑](#footnote-ref-28)
29. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 10. [↑](#footnote-ref-29)
30. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 10. [↑](#footnote-ref-30)
31. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 9-10 [↑](#footnote-ref-31)
32. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. SACV 15-01364-CJC (AGRx) (Dec. 9, 2015) 8 [↑](#footnote-ref-32)
33. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 2-3 [↑](#footnote-ref-33)
34. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 10, 13 [↑](#footnote-ref-34)
35. That is, the UCL, CLRA, FAL: *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 10, 13 [↑](#footnote-ref-35)
36. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 11-12, 13 [↑](#footnote-ref-36)
37. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 13 [↑](#footnote-ref-37)
38. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 13 [↑](#footnote-ref-38)
39. *Wirth, et al, v Mars Inc., et al.,* Case No. SACV 15-1470-DOC (KESx) (Feb. 5, 2016) 11-12 [↑](#footnote-ref-39)
40. *Hodsdon v Mars Inc., et al.,* Case No. 15-cv-04450-RS (Feb. 17, 2016) 1 [↑](#footnote-ref-40)
41. *Hodsdon v Mars Inc., et al.,* Case No. 15-cv-04450-RS (Feb. 17, 2016) 14 [↑](#footnote-ref-41)
42. *Hodsdon v Mars Inc., et al.,* Case No. 15-cv-04450-RS (Feb. 17, 2016) 14 [↑](#footnote-ref-42)
43. *Hodsdon v Mars Inc., et al.,* Case No. 15-cv-04450-RS (Feb. 17, 2016) 15 [↑](#footnote-ref-43)
44. Dismissed on basis of no duty to disclose under UCL and CLRA. [↑](#footnote-ref-44)
45. *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 1. *Dana v The Hershey Company,* No. 15-cv-4453 was also heard. This case involved similar arguments. and a separate concurrent order was issued. [↑](#footnote-ref-45)
46. Dismissed on basis of no duty to disclose under CLRA, FAL and UCL - double check this. [↑](#footnote-ref-46)
47. *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 21 [↑](#footnote-ref-47)
48. *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 22 [↑](#footnote-ref-48)
49. *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 22 [↑](#footnote-ref-49)
50. *McCoy v Nestle United States Inc.,* Case No. 15-cv-04451-JCS (N.D. Cal. Mar. 29, 2016) 22, 23 [↑](#footnote-ref-50)
51. *Barber v Nestle Inc., a Delaware Corporation; and Nestle Purina Petcare Co., a Missouri Corporation,* Case No. 16-55041, US Circuit Court of Appeals, 9th Circuit, filed 7 January 2016; *Wirth, et al, v Mars Inc., et al.,* Case No. 16-55280, US Circuit Court of Appeals, 9th Circuit, filed 25 February 2016; *Hodsdon v Mars Inc., et al.,* Case No. 16-15444, US Circuit Court of Appeals, 9th Circuit, filed 16 March 2016; *McCoy v Nestle United States Inc.,* Case No. 16-15794, US Circuit Court of Appeals, 9th Circuit, filed 29 April 2016 [↑](#footnote-ref-51)