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## Deceptive Trade Practices Topics

### 1. What is conduct in Trade or Commerce in the context of s 18 of the Australian Consumer Law?

#### Introduction

- S 18 of the ACL prohibits certain types of conduct that take place in trade or commerce. Pursuant to the act (ss 18(1)): *A person shall not **in trade or commerce** engage in conduct that is **misleading or deceptive** or is likely to mislead or deceive.*
- As such, it is central to determine what “conduct” is “in trade or commerce” in order to understand the extent of this restriction.
- There have been, primarily, two possible constructions of this limitation
  - The **first**, a broad construction: anything that occurs ‘in connection with’ or ‘in relation to’ trade or commerce.
  - The **second**, a narrower construction: conduct that was engaged in by a person as part of ‘trade or commerce’.

#### Concrete Constructions v Nelson (1990)

- The construction of the limitation was considered in **Concrete Constructions v Nelson**, where an employee claimed that his foreman’s wrong instructions, which lead to his injury, constituted misleading and deceptive conduct.
- The issue before the court, thus, was whether the internal instructions between an employee and his employer constituted conduct ‘in trade or commerce’.
  - If the broad construction (“in connection with”) was to be used, the conduct would fall under the Act; however, if the narrow construction (part of “trade or commerce”) was to be used, the conduct would be outside of the act.
- Mason CJ, Deane, Dawson and Gaudron JJ concluded that the narrow construction, here, was most appropriate (finding that the conduct was not in trade or commerce). They noted:
  - The wording of the act seemed to apply evenly to persons involved in a transaction, or dealing with one another ‘in trade or commerce’, thus, the nature of the transaction was not central.
  - Whereas the ACL is not bound by the same constitutional limitations as the TPA was, the wording used was in direct reflection of s 51(i) of the constitution, as such, the power cited should encompass the whole act: thus a narrow approach is required.
  - Finally, the phrase ‘in trade or commerce’ in s 18 has a restrictive operation. It qualifies the prohibited conduct to only apply to such specified conduct. If the legislature wanted the act to be more broadly construed, it should have been worded as such (Toohey).
- Thus, their honours concluded that the interpretation of ‘in trade or commerce’ includes activities which are undergone in the course of ‘carrying on some overall trading or commercial business’.
  - Their Honours considered the following examples and contrasted they type of conduct which would have constituted ‘in trade and commerce’.
  - For example, driving a truck to make a delivery to a client, rather than just driving a truck

- However, The conduct of some parties in a commercial transaction may be in trade or commerce, while actions of other are not
  - This is limited to the specific act, just because the person acts, generally, in trade or commerce, it does not guarantee that the specific act falls within the scope of the legislation: ***Bank of NSW v The Commonwealth***)

This position, however, is further clarified in certain circumstances.