

## **PART B – DECEPTIVE TRADE PRACTICES**

**SECTION 1:** The definition/meaning of “in trade and commerce” pursuant to s.18 of the ACL

**SECTION 2:** The definition/meaning of “classes of persons misled pursuant s.18 of the ACL

**SECTION 3:** The point at which a representation as to a ‘future matter’ (including a non-fulfilled promise) amounts to a contravention of s.18 of the ACL

**SECTION 4:** Silence and when it amounts to misleading and deceptive conduct under s.18 of the ACL

**SECTION 5:** When a contravention of s. 18 of the ACL amounts to a cause of loss and damage and the effect of a disclaimer clause under.18 of the ACL

**SECTION 6:** The assessment of damages pursuant to s. 236 of the ACL

**SECTION 7:** The meaning of “a person involved in a contravention” pursuant to s. 2 of the ACL

**SECTION 8:** The effect on a claimant’s claim for damages under s.236 of the *ACL*, in situations where the claimant or their advisor knew or should have known that a statement made to them was misleading or deceptive

**SECTION 9:** The point at which a cause of action first accrues pursuant to s. 236 (2) of the ACL

**SECTION 10:** The use of a remedies, “such as orders the Court thinks appropriate” (s. 237 of the ACL) and how these order can be used by the Court to grant relief to a claimant who is likely to suffer loss or damage from conduct in contravention of s.18 of the ACL

**SECTION 11:** The granting of injunctive relief pursuant to s. 232 of the ACL

**SECTION 1:** The definition/meaning of “in trade and commerce” pursuant to s.18 of the ACL

- *Nelson v Concrete Constructions* (1990) 169 CLR 594
- *O'Brien v Smolonogov* (1983) 53 ALR 107
- *Argy v Blunts* (1990) ATPR 41-015, 26 FCR 112
- *E v Australian Red Cross* (1991) ATPR 41-085
- *Durant v Greiner* (1990) 21 NSWLR 119
- *Plimer v Roberts* (1997) 80 FCR 303
- *Robin v Canberra International Airport* [1999] FCA 1019

**Introduction:**

- s52 of the TPA imposes an ‘in trade or commerce’ limitation on the factual inquiry as to whether or not ‘misleading and/or deceptive conduct’ contravenes the Act
  - o s52: “A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”
    - The same limitation is now found in s18 ACL
  - o ie Conduct **must be** in ‘trade or commerce’ for such conduct to amount to a contravention
- The Federal Court in *Re Ku-ring-gai Corporation Building Society Ltd (No 12)* 1978, stated that “trade” and “commerce” encompass “all the mutual communing’s, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which compromise commercial arrangements.”

**Employment Contracts:**

***Nelson v Concrete Constructions* (1990) 169 CLR 594:**

- In *Nelson v Concrete Constructions*, the Court was concerned with a claim brought by an employee of a concrete construction company. It was argued injury had been suffered as a result of the misleading and deceptive conduct of the his employer.
  - o The employer successfully defended the claim on the basis that any misleading or deceptive conduct through its foreman, was not conduct “in trade or commerce”
- In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990), the High Court stated that the legislation was not intended to encompass all conduct of a corporation in the course of its overall business. Rather, it concerned ‘conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character’.
- The High Court allowed the appeal brought by the employer on the basis that the alleged conduct was not ‘in trade or commerce’ for the purpose of s 52 TPA (now replaced by s 18 of the ACL).
- The majority (Mason CJ, Deane, Dawson and Gaudron) stipulated that the heading for the relevant section (‘consumer protection’) would not ‘impose an unnaturally constricted meaning’, however it was clear ‘that the section was not intended to extend to all conduct, regardless of its nature, in which a corporation

might engage in the course of, or for the purposes of, its overall trading or commercial business.’

- **HELD:** The Court held that the phrase referred to conduct which is itself an aspect of activities which, of their nature, bear a trading or commercial character. The Court distinguished the facts from circumstances such as the construction of a building for another pursuant to a building contract.
- Although Brennan, McHuge and Toohey JJ agreed with the joint judgment’s conclusion that the conduct was **not** in ‘in trade or commerce’, their Honour’s found that the conduct must be directed towards a person in his or her capacity as a consumer, which was not established on the facts.

### **Property Transactions:**

- Purely domestic transactions such as the sale of private dwellings (in which the vendor resided) are not in the course of trade or commerce (*O’Brian v Smolonogov*)
- Nevertheless, in subsequent decisions it has become apparent that conduct would not be classified as private or non-commercial merely because the transaction to which it related is of a certain type.
- Rather, the decisive consideration in this setting is the interest of the impugned agent in the dealing in issue.
- Accordingly, the actions of some parties to a particular dealing may be in trade or commerce, while those of others in relation to the same dealing are not.
  - o Generally an agent is held not to be dealing in “trade and commerce”

### **O’Brian v Smolonogov (1983) 53 ALR 107:**

- In *O’Brian v Smolonogov*, a vendor who had subdivided his land made statements alleged to have been misleading or deceptive in contravention of s 52 TPA by the purchaser, who purported to rescind the contract of sale.
- The trial judge, while accepting that the sale of land by private contract, without more, may not be in trade or commerce, held that the fact that the conduct involved an invitation to treat by way of public advertisements, the ordinary means of trade or commerce were utilised for the purpose of selling the land. The contract was rescinded.
- **HELD:** The Full Court of the Federal Court **held** that the because the appellant’s conduct was not in the course of carrying on a business and lacked a commercial character, the conduct was not in ‘trade or commerce’.
- Fox, Sheppard and Beaumont JJ observed that ‘the mere use, by a person not acting in the course of carrying on a business, of facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce.’
- The court highlighted that the land in question was not acquired to become a trading stock, was not a mere realisation of a capital asset or the carrying on of land development, and was not used for any business activity such as farming or grazing (at 133).

### Argy v Blunts (1990) ATPR 41-015, 26 FCR 112

- **Facts:** The applicant purchaser bought a residential property for \$3,012,000.
- **HELD:** The court held that the vendor had not acted in “trade or commerce”, even though the vendor had engaged an estate agent and incurred significant advertising expenditure.
- **Judgment:** The court refused to distinguish from the ruling in *O’Brien* even though the sale here was by auction, there was an expenditure here of some \$6000 in advertising, the public were invited by advertisement and brochure to inspect the property and an estate agent, which itself acted “in trade or commerce” was engaged by the vendor.

### **Health Related Cases**

#### E v Australian Red Cross (1991) ATPR 41-085:

- In *E v Australian Red Cross*, E had received a blood transfusion, which, unknown to the everyone, was infected with the HIV virus. E sued the Australian Red Cross Society (as well as the NSW Division) and the Royal Prince Alfred Hospital for negligence and for contravention of s 52 of the TPA.
- **HELD:** It was held both at trial and on appeal to the Full Court of the Federal Court that the receipt of payment by the Australian Red Cross for the blood it supplied to hospitals was not ‘in trade or commerce’.
  - o The payment was viewed as being by way of reimbursement for the cost of providing blood.
- The Australian Red Cross Society was **not** regarded as engaging in the trade of blood. Wilcox J (trial judge) held that the Australian Red Cross Society acted ‘gratuitously’ as, whether or not trading corporations, they were not paid for the blood but rather reimbursed for the cost of the operations.
- **HELD:** However, the Royal Prince Alfred Hospital was held to engage in conduct in trade or commerce as it charged the applicant hospital fees “in consideration of the supply” of medical services.
- It was noted that the mere fact that an organisation was established for a non-commercial purpose did not automatically lead to the conclusion that it would never act in trade or commerce.
  - o Wilcox J concluded that ‘there was nothing in the intrinsic nature of The Prince Alfred Hospital’s activity to disqualify it as a trading corporation’ (at [127]). Ultimately however the hospital was not found to have engaged in misleading or deceptive conduct.

### **Politicians**

- The Courts’ view that public commentators **do not** typically make comments in “trade or commerce”. Politicians when providing assurance are **not engaging in** conduct “in trade or commerce” even though it might be misleading or deceptive

#### Durant v Greiner (1990) 21 NSWLR 119

- NSW Premier was sued. Prior he has said that a particular school would not be shut down, however following the election, the school was closed down.
- **HELD:** the statement by the premier was held **not** to be in “trade or commerce”