

Part B: Misleading and Deceptive Conduct

Meaning of “in trade or commerce”	3
“Trade and Commerce”	3
<i>Concrete Constructions v Nelson (HCA)</i>	3
<i>O'Brien v Smolonogov</i>	4
<i>Argy v Blunts</i>	4
<i>E v Aus Red Cross</i>	5
<i>Plimer v Roberts (FC)</i>	5
<i>Robin v Canberra International Airport (1999)</i>	6
<i>Durant v Greiner (1990)</i>	6
“Misleading or Deceptive Conduct” – Classes of Persons	7
Cases Against a Competitor or Rival → Misleading the Public	7
<i>Taco Company v Taco Bell (1977) (FC)</i>	7
<i>Parkdale v PUXU (HC)</i>	8
<i>Campomar v Nike</i>	9
<i>Fraser v NRMA</i>	9
<i>Google Inc. v ACCC</i>	9
Representations as to a Future Matter	10
<i>Bill Acceptance v G WA</i>	10
<i>James v ANZ Bank</i>	10
<i>ASIC v Forest</i>	11
<i>Wheeler Grace v Wright</i>	12
Silence as Misleading or Deceptive Conduct	12
<i>Henjo Investments v Collins</i>	12
<i>Demagogue v Ramensky</i>	14
<i>Miller v BMW</i>	15
Lease Cases	16
<i>Leda Holdings v Oraka</i>	16
<i>Murphy v Overton</i>	16
Reliance/Causation	17
<i>Gould v Vaggelas</i>	17
<i>Lam v Ausintel Investments</i>	17
<i>Rumpe v Camrol</i>	18
Disclaimer Clauses	18
<i>Henjo Investments</i>	18
<i>Campbell v Backoffice Investments</i>	20
Damages for Misleading and Deceptive Conduct	20
<i>Gates v City Mutual Life Ass</i>	20
<i>Sellars v Adelaide Petroleum</i>	21
<i>Kizbeau v WG & B</i>	22
<i>Marks v GIO</i>	22
<i>Henville v Walker</i>	23
<i>Murphy v Overton (damages issue only)</i>	24
<i>HTW Valuers v Astonland</i>	25

Any Person Involved in a Contravention	26
<i>Yorke v Lucas (s75B TPA)</i>	26
Contribution	27
s137B Competition and Consumer Act	27
<i>Henjo Investments</i>	27
<i>Argy v Blunts</i>	27
<i>Burke v LFOT</i>	27
<i>I & L Securities v HTW Valuers</i>	28
<i>Neilsen v Hempstead Holdings</i>	28
Limitations.....	28
<i>Magmam v Westpac</i>	28
<i>Wardley v WA</i>	29
<i>Murphy v Overton</i>	29
<i>Karedis v Antoniou</i>	29
Such Orders as the Court sees fit (s237)	30
<i>Akron Pacific v Illife</i>	30
<i>Henjo Investments</i>	31
Foreign Currency Loan Cases	31
<i>Chiarabaglio v Westpac</i>	31
<i>Westpac v Spice</i>	32
Injunctive Relief (s232).....	32
<i>World Series Cricket v Parish</i>	32

Deceptive Trade Practices

History

- Originally s52 of TPA= misleading and deceptive conduct section
- Cth intro'd nation-wide misleading and deceptive conduct section 18 of the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act)
- Remedies for s18 are more extensive than any common law actions → effect is that litigants will sue for m/d conduct rather than any other claim
- Also easier to prove than any common law action
- Since the claim is under statute, remedies are statutory

S18(1) "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"

Meaning of "in trade or commerce"

"Trade and Commerce"

Employer/Employee

Concrete Constructions v Nelson (HCA)

- **Facts:** Nelson= employee of CC → N injured falling through screen mesh at work as he was relying on his employer's false statement that the bolts were secure
- Workers Compensation changes occurred → less generous than previously → decided to claim under s52 TPA
- Argued CC engaged in misleading and deceptive conduct because they communicated and employed N on the basis that there was a safe system of work
- **Question for the HC: Was CC "in trade or commerce"?**
 - Broad construction of the term trade and commerce (rejected)= applies to corporations
 - Held: CC= commercial company BUT CC's conduct was as an employer directing an employee → not in "trade or commerce" because this was an employer/employee relationship NOT a commercial transaction
 - Emphasis of "trade and commerce" on conduct not the person because of the word "in"

- However conduct will still be in trade and commerce if it is **incidental** to engaging in trade and commerce

Real Property Cases

O'Brien v Smolonogov

- **Facts:** vendor subdivided and sold part of his land, vendor misrepresents the access to the land, purchaser buys land without seeing property
- Vendor had engaged in misleading and deceptive conduct, however issue was “trade and commerce” since he owned part of the land he lived on
 - Vendor was not a developer/subdivider
 - Relying on American authority, FC **held** that **selling part of your own land is not “in trade or commerce”**
 - If vendor was a developer, this may have been “in trade or commerce”
- Also held “the mere use by a person of facilities commonly employed in commercial transactions (advertising) cannot transform a dealing which lacks any business character into something done in trade or commerce”

Argy v Blunts

- **Facts:** A bought private residence, interested in extending house to be closer to the harbour/water and encouraged by real estate brochures stating “unlimited redevelopment potential”
 - Zoning cert said that you could not build within 30m of water BUT this was missing from contract for sale → discovered this after exchange but before settlement
 - A sued his solicitor, real estate agent and vendor (owner occupier)
- **Held:** Agent’s non-disclosure/brochure= misleading and deceptive conduct AND in trade and commerce
- Solicitor attached deficient zoning cert= trade and commerce AND misleading and deceptive conduct because they were holding out that the zoning cert was complete and accurate when it was not
- Vendor= not in trade or commerce (despite great expense of advertising and engaging a real estate agent)

Sale of Business

E v Aus Red Cross

- **Facts:** E received AIDS from blood transfusion (context: at that time, medical profession believed that there was no need to check blood of blood donors for HIV)
- E was patient of private wing of RPA, blood was supplied by Red Cross for a fee to cover reasonable costs
- **Held:**
 - Private wing of RPA i.e. charged hospital fees=trade or commerce BUT RPA had no ability to check the blood before transfusion (it was bagged at Red Cross)
 - Red Cross had ability to check the blood before bagging and therefore had engaged in misleading/deceptive conduct BUT were not in trade or commerce despite the fee as they were acting 'gratuitously'
- Negligence claim also rejected

Religious Organisation

Plimer v Roberts (FC)

- **Facts:** R=creation scientist/Noah's arc, P=retired professor of geology who believed in evolution and opposed to creation science
- P sued R for misleading and deceptive conduct for giving seminars/selling books on creation science
- **Sackville J held** that R's seminars/selling books/lamingtons/coffee= no trade and commerce b/c no commercial rel b/w R and audience i.e. not paid for lectures only funding for trip to Noah's arc site
 - Will be in trade and commerce where public presentation is designed to protect the commercial interests of the presenter
 - Altruistic presentations will not be in trade or commerce

Public Commentators

Glory v WA Chip n pulp

- **Facts:** G=concerned environmentalist opposed to woodchip, G sued woodchip company for misleading/deceptive conduct in their documentary
- **Morley J held** G had standing to sue and that it was in trade or commerce
 - Reason for showing the film was to protect their commercial interests