

MISLEADING AND DECEPTIVE CONDUCT

S 18 Australian Consumer Law

A person must not, **in trade or commerce, engage in conduct that is misleading and deceptive or likely to mislead or deceive.**

- Conduct is MD when it 'leads into error'.
 - **s 18** refers to conduct not representations.
 - As such it is not necessary to prove the existence of a misrepresentation in order for conduct generally to breach **s 18**.
- In order to establish a breach of **s 18**, a person must establish that a person or corporation has:
 - (a) engaged in conduct;
 - (b) in trade or commerce; and
 - (c) that the conduct was misleading or deceptive or likely to mislead or deceive.
- There is no need to establish a contractual relationship between the parties.

Questions to Ask Whether Conduct is MCD:

1. What is the actual behaviour alleged to have constituted MCD?
2. What is the actual misrepresentation that led to the error made on the part of consumers?
3. How did the court evaluate the relevant class of consumers alleged to have been misled?
4. How did the court evaluate which constituted MC under **s 18**?

What Must be Established?

- The conduct of the representor must be or be likely to be misleading or deceptive.

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd

Case summary provided in purchased notes.

- The words of the statute are clear and unambiguous.
 - But provide little practical guidance.
- What constitutes MDC is therefore a matter of fact and degree (*Specsavers Pty Ltd v Luxottica Retail Pty Ltd*:

- Whether or not conduct is MD is a question of fact to be determined objectively and upon the basis of the impugned conduct being viewed as a whole and in its full context;
- Conduct will be likely to MD if there is a 'real and not remote chance or possibility' of misleading or deceiving regardless of whether it is less or more than 50%.
 - Must be obvious, so class of person can connect with it.
- If conduct is capable of having more than one meaning, question whether it is MD is to be tested against each meaning which is reasonably open.
- Was the hypothetical reasonable person misled?
 - In a potential situation where it is the message itself being evaluated, before anyone has actually been misled (ie. raised by competitor).
- In comparative advertising, facts asserted must be accurate.
- **s 18** is not just for consumers.
 - Can assist competitors. Can bring an action that the product manufacturers are making false claims about the product through advertisements.

Elements of Misleading and Deceptive Conduct Under s18 ACL:

- The perpetrator
 - 1. Engages in conduct
 - 2. In the course of trade and commerce
 - 3. Which is misleading and deceptive
- OR
 - 4. Is likely to mislead or deceive.
- Applies to a person as well as corporate entities (*Houghton v Arms*).
 - But does not apply for private sales (eg. a person selling their house to another person cannot be liable for MDC as not done in the course of a business context.. But their real estate agent may be if there is such conduct in the advertising).
 - *Smolonogov v O'Brien* and *Argy v Blunts*.
- The conduct can be in the course of trade or commerce in Australia or trade and commerce between Australia and places outside Australia.
- There are a number of common threshold issues to be addressed before **s 18** conduct can be established:
 - 1. Whether conduct is 'in trade or commerce';

- 2. The *Taco Bell* methodology for evaluating misleading or deceptive conduct; and
- 3. The methodology employed for evaluating the relevant 'class of consumers' alleged to have been misled.

What is Conduct in Trade and Commerce?

Concrete Constructions (NSW) Pty Ltd v Nelson

Case summary provided in purchased notes.

- There are competing interpretations of the phrase 'in trade or commerce' and the court had to decide whether to follow a wide or narrow interpretation.
- Determined that the narrow approach was preferred:
 - "...In the context of the Act with its heading 'Consumer Protection', it is plain that [s 18] was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage of, or for the purposes of, its overall trading or commercial business".
- Important to remember that the conduct of a corporation is towards persons whether they be consumers or not with whom they have a course of dealings or transactions which have a bearing as a trading or commercial character (*Village Building Co Ltd v Canberra International Airport*).
- Therefore, the term 'in trade or commerce' has been interpreted to mean conduct in the course of transactions which have a trading or commercial character.
- Statements made in the course of a lecture were not made in the course of trade or commerce (*Plumer v Roberts*).

Dataflow v Goodman

Case summary provided in purchased notes.

TCN Channel Nine Pty Ltd v Ilvairy Pty Ltd

Case summary provided in purchased notes.

- As long as it is in the trade of the person to whom the representation is being made it is made in trade and commerce.

Establishing Misleading and Deceptive Conduct

Taco Bell Methodology:

Taco Co of Australia Inc v Taco Bell Pty Ltd

Case summary provided in purchased notes.

- Conduct is misleading or deceptive if 'it leads into error' and so the following must be taken into account:
 - Identifying relevant section of the public allegedly misled;
 - Testing the conduct by reference to all who fall within the class;
 - Examining the evidence of deception; and
 - Carefully examining how the misconception has arisen.

Conduct:

- The HC has found that the ambit of 'conduct' is not limited to positive actions or representation, and that silence can be considered misleading or deceptive in certain circumstances (*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*).
- See also: *Demagogue Pty Ltd v Ramensky*; *Stora Enso Australia Pty Ltd v CPI Group Ltd*; *Hai Quan Global Smash Repairs v Ledabow Pty Ltd*.

Butcher v Lachlan Elder Realty

Case summary provided in purchased notes.

- Must be a nexus between conduct and any actual or apprehended misconception or deception.

A class of consumers have to be identified:

- HC provided some guidance to identifying 'ordinary reasonable member' of the class in *Campomar Sociedad, Limitada v Nike International*.
 - When the alleged misconduct is directed toward identified individuals (eg purchasers of a business), the relevant 'class' is confined to those purchasers.
 - So identify the conduct alleged to be misleading and deceptive, examine whether the misled state of mind of the actual consumer was caused by the conduct in question or by some other cause (*Butcher v Lachlan Elder Realty*).
- However, relevant conduct is often directed to public at large (particularly when advertising through mass media).
- Where persons are not identified individuals, must be able to isolate by some criterion (characteristic or quality) to be imputed to a representative member of that class.
 - Then "an inquiry thus is to be made with respect to this hypothetical individual why the misconception complained of has or is likely to arise" (*Campbell v Backoffice Investments Pty Ltd*).

- Extreme or fanciful views to be disregarded.

Example:

A pharmaceutical company is making superior claims of its products over others. It sends circularised advertising material to medical practitioners across Australia. It also advertises to the public in general. The hypothetical test is whether a 'hypothetical member' of each class would have been misled. So the same conduct may be found to mislead one class of consumers (general public) but not the other (medical practitioners).

10th Cantanae Pty Ltd v Shoshana Pty Ltd

Case summary provided in purchased notes.

- Rejected in:

Apotex Pty Ltd v Les Laboratories Servier (No 2) (2008)

Case summary provided in purchased notes.

- As to causation, as long as the state of mislead mind is brought by the misrepresentation then it is an actionable misrepresentation or deception.

Mc Williams Wines Pty Ltd v McDonalds Systems of Australia Pty Ltd

Case summary provided in purchased notes.

- Compare this to *Taco Bell Inc v Taco Bell Pty Ltd*.