

Intro to s 18 of the ACL (formerly s 52 of the TPA)

Section 18:

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

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).’

- Breach of s 18 gives rise to **civil liability only**
- Section 18 does not of itself provide the cause of action or remedy – see instead specific remedial sections, e.g. s 236 (damages)

Coverage of s. 18

Original objective: to prohibit suppliers making false representations about the nature or characteristics of their goods or services, or about their connection with another person / business (‘passing off’ situations)

Now extended to any false claims made in trade or commerce, e.g. pre-contractual misrepresentations, professionally negligent advice

Not limited to claims that mislead consumers

Concrete Constructions (NSW) v Nelson (1990) 169 CLR 594

Locus standi for breach of s 18 (Who can sue)

Not limited to ‘consumers’

- Re conduct directed to the public (e.g. false claims in advertisements /marketing material), any person can obtain an injunction under s 232 of the ACL (formerly s 80 of the TPA) including:
 - The ACCC;
 - Consumers;
 - Consumer groups;
 - Business competitors

Hornsby Building Information Centre v Sydney Building Information Centre (1978)
140 CLR 216 (Information centre in different suburbs of Sydney) Pg 94

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 Pg 95

But note that to claim *damages* under s 236 of the ACL, the applicant must have suffered loss

The nature of the prohibition in s 18 of the ACL

Section 18 prohibits conduct that leads, or is likely to lead, into error the reasonable member of the target audience

‘Likely’ means ‘has the capacity or tendency to mislead’ – not necessary to show that any person has actually been misled

- Parkdale Custom Built Furniture v Puxu Pty Ltd (1982) per Gibbs CJ (Were found not to be misled in this case)

The test is objective

- Campbell v Backoffice Investments Pty Ltd [2009] HCA 25 (Objective test: conduct vs circumstances; state of knowledge; some subjective circumstances)

Liability is ‘strict’ – D liable even if acting honestly and reasonably (don’t have to show intention)

- Parkdale Custom Built Furniture v Puxu Pty Ltd (1982)

P generally does not need to show an intention to deceive, or negligence:

- S&I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd (1998) 88 FCR 354

But a breach of s 18 is more easily found where D intended to deceive

- Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd

Also, exceptional cases where relevant to enquire whether D acted honestly and / or reasonably; e.g. future statements; silence; opinions; accessorial liability (revisited in Topics 6/9)

s 18 not limited to representations recognised at common law

- State Government Insurance Corp v Government Insurance Office of NSW (1991) 28 FCR 511

(sometimes silence can be a misrepresentation under statute: deliberately withholding information. Must be silence plus the surrounding circumstances)

E.g. 'conduct' encompasses:

- Silence
- Contractual warranties
 - Campbell v Backoffice Investments Pty Ltd [2009] (page 118 facts; page 193 outcome – Misleading statement in contract)

The 'target audience'

The persons to whom conduct is intended to be directed, or reasonably anticipated that it would be directed

Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR45
(Perfume pg 112)

Conduct directed to an identified individual or class judged by the 'ordinary' or 'reasonable' person in that position or class.

- Campbell v Backoffice Investments Pty Ltd [2009]

Though some subjective characteristics can be taken into account

- Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592 (eg. Sophisticated buyer pg 142)