

unit summary:

## ACL s 18 - starting point

- a person must, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive
- conduct must bear a trading/commercial (t/c) character
- must be IN - not in *respect or merely connected with or incidental to* t/c
  - **Concrete Constructions (NSW) Pty Ltd v Nelson (1990)** - leading authority
- examples
  - private sale of land - not conduct in t/c
  - sale of business - yes
  - public/political statements, debates, general education - generally not
  - employment contracts - depends
  - internal communications - no
  - conduct to influence others - maybe
  - government activities - maybe

## misleading or deceptive conduct

### 1. intention

- where intention to harm P is required, it is generally sufficient either that harm is D's primary purpose, to that it is deliberate
- ie. one (or secondary) purpose, or means to D's other ends

### 2. injurious falsehood

four elements - **Palmer Bruyn v Parker v Parsons (2001)**

1. false statement concerning P's goods or business
2. publication to 3rd party
3. malice
4. proof of actual damage

### 3. deceit

five elements - **Pasley v Freeman & Magill v Magill**

1. false representation
2. dishonest
3. intention to rely
4. reliance
5. damage

### 4. negligent misrepresentation

- **Hedley Byrne v Heller (1964)** - important - different criteria (salient features) for statements & acts
- see - DoC, special relationship, indeterminacy of liability, request for info, reasonable reliance, vulnerability, disclaimer

### 5. unfair advertising practices

- **s 18 application**
  - what conduct is breaching
  - relevant audience
  - message/impression to ordinary/reasonable representative
- a) opinions & exaggerations - mere puff
- b) predictions - liable if no grounds for making them
- c) silence
- d) scientific claims - shouldn't be misrepresented
- e) comparative advertising - lawful unless misleading
- f) country of origin claims
- g) using celebrities to promote products
- h) sponsorship & ambush marketing

### 6. specific unfair practices

- **s 29** - false or misleading representations about goods or services
  - covers standard, quality, value, price, greed, composition, newness, testimonials, sponsorship, approval, affiliation, place of origin, repairs, existence or exclusion of condition, warranty, guarantee, etc.
- **s 32** - offering rebates, gifts, prizes
- **s 35** - bait advertising
- **s 36** - wrongly accepting payment
- **ss 39, 40, 41** - unsolicited supplies
- **s 44** - pyramid selling
- **s 47** - multiple pricing
- **s 48** - single price to be stated
- **s 49** - referral selling

### 7. passing off

- **Reckitt & Colman Products v Borden (1990)** - three elements
  1. established goodwill/reputation attached to the goods in the public mind
  2. misrepresentation - actual/likely to mislead a reasonable customer
  3. damage - actual/likely
- examples

- use of P's name, trade name, trademark
- imitating the get-up, design, advertising of goods
- misrepresenting one class of P's products as another
- inverse/reverse passing off
- misrepresentation over the internet

### 8. misfeasance in public office

- **Three Rivers DC v Governor & Co of the BoE (No 3)** - four elements:
  1. public officer
  2. acts in excess of authority
  3. has a particular state knowledge about extent of that authority & consequences of actions, or D intended to harm P
  4. damage

## economic torts

### 1. intentionally procuring a breach of contract

- **Lumley v Gye & OBG v Allan** - three elements:
  1. procurement
  2. intention to cause T's breach of contract
  3. damage
- must be a valid contract & third party

### 2. intimidation

- unlawful threat to another person which coerces that person to act to P's financial detriment, with the intention of harming P
- three requirements:
  1. unlawful coercive threat to T or P
  2. intention to cause P economic loss
  3. damages in the form of economic loss

### 3. conspiracy

- two ways of committing the tort:
  - lawful means conspiracy
  - unlawful means conspiracy
- combination of parties who have an agreement
- agreement implemented
- intention to harm - shared by all
- damages in the form of economic loss

### 4. interference with trade or business by unlawful means

- **OBG Ltd v Allan** - three main components
  1. unlawful means applied to T, affecting P's economic interest
  2. intention to use loss to P
  3. economic loss

## product liability & consumer guarantees

- apply the law of negligence, thus duty of care, duty to warn, duty to test
- immediate inspection - meaningful if it can reveal the defect
  - production negligence
  - design negligence
  - development negligence
- **ACL consumer guarantees - ss 51-64**

## remedies

### 1. public & private remedies

- compensation
- non-compensatory damages
  - nominal
  - contemptuous
  - restitutionary
  - exemplary/punitive
  - aggravated
- duty to mitigate loss
- other remedies in the ACL

### 2. vicarious & accessorial liability

- first prove existence or particular relationship
  - employer & employee, master & servant VS independent contractor
  - contract of services VS contract for services
- test for determining worker's status - **Ready Mixed Concrete case** - control
- other tests:
  - organisation
  - independent business
  - multi-factorial approach
- liability of acts of non-employees
  - non-delegable DoC
- liability of advertising agencies, the media & accessories

## MISLEADING CONDUCT

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## ACL SECTION 18

**Competition and Consumer Act 2010 sch 2: The Australian Consumer Law s 18:**  
*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.*

### “conduct”

- must be in trade or commerce
- s 2(2)(a), (b) ACL:
  - 'doing or refusing to do any act'
  - 'making or giving effect to a provisions of a contract or arrangement'
  - 'requiring the giving of a covenant' -
- representation element
  - **Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 at [32]**
  - 'the expression “conduct” in TPA, s 52 extends beyond representations [but] contravening conduct is generally apt to evolve misrepresentations'

### “trading corporation”

- a body corporate who's trading activity is a SUBSTANTIAL ACTIVITY of the corporation
- irrespective of the nature of the corporation
  - **R v Judges of FCA**
  - **Ex party WANFL (1979) 23 ALR 439 per Murphy J [477]**
- substantial current activities test:
  - **Hughes v Western Australian Cricket Assoc Inc (1986) per Toohey J [671-2]**
    - trading alone is not enough
    - incorporation is irrelevant
    - current activities test not sole criterion, company constitutions also matters
    - trade must be a substantial/significant corporate activity
    - a sporting/religious/governmental body can be a trading corporation if its activities meet the required test
    - incorporation under a statute such as the **Associations Incorporation Act** does not prevent a corporate body from being a trading corporation
    - trading denotes 'providing for reward, goods or services'
    - may be a financial corporation
  - **Shahid v Australasian College of Dermatologists (2007)**
    - S applied to be accepted for training at college - was not accepted - wanted refund - also refused - S claimed MDC

- College claimed not to have engaged in trade or commerce - no payment for selection & training of new dermatologists
- however college earned substantial income from annual scientific meeting (principal trading activity) & ongoing training programmes
- HELD: 'current activities' rather than 'essential character' or 'purpose of incorporation' showed that trading WAS a 'SUBSTANTIAL corporate activity'
- **E v Aus Red Cross Society (1991)**
  - ARCS & hospital are trading corporations even if not motivated by private gain, since activities at *RELEVANT time* WERE trading activities (kiosks, street stalls, shops, etc)

### “in trade or commerce”

- conduct must bear a 'trading/commercial character'
- must be IN, NOT in respect of or merely connected with or incidental to T/C
- relevant provisions of ACL with *trade or commerce* requirement:
  - **ss 18 20 21 29 30 32 34 35 36 37 41 42 47 48 49 54 55 56 57 58 59 60 61 62**
- **Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 92 ALR 193** \*leading authority\*
  - N allegedly injured due to misinformation by foreman about safety of some bolts on shafts, which he relied upon
  - ISSUE: whether what foreman said was in *trade or commerce*
  - HELD: conduct constituted of an internal communication by one employee to another in the course of their ordinary activities thus merely 'in *RESPECT* of trade or commerce' not *IN* trade or commerce
  - the words 'in trade or commerce' refer to 'the central conception' of trade or commerce, and NOT the 'immense field of activities' in which corporations may engage (**Dixon J in Bank of NSW v Cth (1948) 76 CLR 1 at 381**)
  - **s 52 is NOT intended to extend to ALL conduct, regardless of its nature, in which a corporation might engage**
- e.g. merely driving a truck without more trade or commerce is not 'in trade or commerce' and giving of a misleading hand signal by driver of one of its trucks is not conduct by a corporation 'in trade or commerce. However driving a truck with competitors name to mislead customer may constitute misleading/deceptive conduct' in trade or commerce' [**Coorey 2.101**]
- **Re Ku-ring-gai Co-Op Building Society (No 12) Ltd (1978)**
  - wide approach to defining 'in trade or commerce' - but now narrowed down
- **Hearn v O'Rourke [2003] FCAFC 78**
  - identify the features which impart a trading/commercial character to an activity which would not, without more, have that character. focus on conduct in question

- the correct approach is to determine whether or not the relevant conduct can, according to ordinary usage, be described as having occurred in the course of dealings... which of their nature, bear a trading or commercial character

## examples

### 1. PRIVATE SALE OF LAND

- generally not conduct in trade or commerce
- **O'Brien v Smolonogov (1983) 53 ALR 107**
  - no business character in misrepresentations given over phone
- **Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 94 ALR 719**
  - A, as an individual was not engaged in trade or commerce
  - but estate agents & lawyers were both acting in trade or commerce = engaged in MDC

### 2. SALE OF BUSINESS

- generally conduct in trade or commerce
- **Lubidineuse v Bevanere Pty Ltd (1984) 55 ALR 273**
  - cosmetic clinic sold - promised Kostic (a nurse) would stay on with business
  - D knew at the time that nurse intended to resign and not stay on
  - held to have committed MDC

### 3. PUBLIC STATEMENTS, DEBATES & GENERAL EDUCATION

- generally not conduct in trade or commerce
- **Plimer v Roberts (Noah's Ark Case) (1997) 150 ALR 235**
  - R (a preacher) gave voluntary lecture about how Noah's Ark was found
  - P claimed R's claims were MDC
  - HELD: claims were misleading, but not in trade or commerce - no liability
  - although students recorded & sold lecture online, making money in trade or commerce - R was not part of group - had not personally engaged
  - however, if R was paid to give lectures - different outcome
- **Orion Pet Products v RSPCA (Vic) (No Bark-Woof Case)**
  - O produced a shock collar to train dogs - RSPCA claimed through numerous ads it was ineffective & a torture device
  - HELD: RSPCA were not in trade or commerce - did not profit from the ads, even though RSPCA offered alternative obedience training & products
- **Tobacco Institute (Aus) v AFCO (1992) 111 ALR 61**
  - TIA released ad campaign with (false) scientific claims that there are no negative health effects of 2nd hand smoking

- "little evidence, and none which proves scientifically, that cigarette smoke causes diseases in non-smokers"
- HELD: ads were made in trade or commerce - had direct benefit to the T/C of tobacco - designed to sell products of organisations represented by TIA
- **Glorie v WA Chip & Pulp (1981)** - pro-deforestation campaign held to be in T/C

### 4. POLITICAL STATEMENTS

- generally not considered in trade or commerce
- **Durant v Greiner (1990)**
  - D promised school would not be closed down but it was
  - HELD: police statement was not in trade or commerce
- **Unilan Holdings v Kerin (1992)**
  - guarantee to keep reserve price - not kept
  - HELD: political statement
- **Robun v CIA (1999) & Village Building v CIA (No 2) 2004**
  - CIA = Canberra Airport - led campaign about noise near airport to discourage development near airport
  - HELD: not statement in trade or commerce - but rather lobbying for political purpose/campaign - even though it effected others trade or commerce

### 5. EMPLOYMENT CONTRACTS - depends on the nature of the contract

### 6. INTERNAL COMMUNICATIONS

- generally not in trade or commerce (**Concrete Constructions**), however, may be
- **Firewatch Aus v FCA 1999**
  - internal bulletins which could be seen by other organisation & influenced trade or commerce

### 7. CONDUCT TO INFLUENCE OTHERS

- may be in trade or commerce
- **Dataflow Computer Services v Goodman (1999)**
  - G was misleading in relation to business dealings - saying that they were going to directly supply products & not use Dataflow (injuring D's brand)
  - HELD: no business connection btwn G & D = not in trade or commerce

### 8. GOVERNMENT ACTIVITIES

- may be in trade or commerce, but not necessarily
- **Skyes v RBA (1998)**
  - conduct in relation to the manufacture of notes held to be in trade or commerce in those specific circumstances