

Misleading and Deceptive Conduct

Accessory s236 CCA, s75B and section 2 ACL

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd

- Must establish
 - There has been conduct in trade or commerce that is or is likely to be misleading or deceptive.
- May not establish
 - The presence of a contractual relationship between parties
 - Defendant has breached the a duty of care that he/she owed
 - Anyone has actually been misled or deceived.
- Three elements to apply section 18
 - A person/corporation should engage in conduct,
 - Conduct must be “in trade or commerce”
 - Conduct must be misleading or deceptive, or is likely to mislead or deceive.

See *AstraZeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd*.

“IN TRADE OR COMMERCE”

- “In trade or commerce” is different from “in connection with trade or commerce”.
- Conduct which, of its nature, bear a trading or commercial character.
- **Relevant cases**
 - *Concrete Construction (NSW) Pty Ltd v Nelson*
 - *Village Building Company Ltd v Canberra International Airport Private Ltd*
- *Taco Co of Australia Inc v Taco Bell Pty Ltd*
 - Identify the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive
 - Matter must be considered with reference to all who come in the identified group
 - Not necessary to prove that some individuals actually formed an erroneous conclusion.
 - Why proven misconception has arisen?

REMEDIES

- Section 236 ACL
- Section 237 ACL
- Section 243 ACL

Unconscionable Conduct

- Sections 20, 21, 22 and 22A CCA
- The concept of “unconscionable conduct” has its base in equity.

Section 20

Unconscionable conduct – definition

- *Competition and Consumer Commissioner v Samton Holdings Pty Ltd*
- Conduct against good conscience
- Conduct that cannot be reconciled with what is right or reasonable in the circumstances of a transaction
- Courts intervene only if conduct falls within the accepted categories of cases.
- The category in *Commercial Bank of Australia v Amadio* is relevant.
- For determining whether conduct is unconscionable:
 - Whether one party has some sort of *special*
 - Whether the stronger party is aware of the special disability
 - Whether it is unconscionable of the stronger party, knowing well the special disability, to enter into the contract.

Section 21 and 22

- Deals with unconscionable conduct in statutory terms
- Overcome limitations of the section 20.
- Wider in scope than section 20
 - The prohibition of unconscionable conduct in section 51AB/Section 21 is expressed in a different fashion than section 51AA/section 20.
 - Section 22 have indicia that guide courts.
- **Section 21**
 - Applies with respect to “business consumers” and “small business suppliers”
 - Identification of special disadvantage is different from section 20
- *ACCC v Lux Distributors Pty Ltd (2013)*
 - ‘unfair or unreasonable’
 - involves a ‘pejorative moral’ element
 - high degree of moral obloquy
 - moral tainting and deliberate wrongdoing

False or Misleading Representations

ACL s 29-38 – Different from s 18

- No requirement of identifying a specific false representation
- Criminal fines as well as civil penalties can be imposed for the breach
- No necessary requirement of proving intentional deception

Unsolicited Supplies

- Scrupulous suppliers send unordered goods or service and then expect the customer to pay
- Three types of Inertia selling
 - Unsolicited debit or credit cards
 - Unordered goods or services
 - Unauthorised entry in a directory or an unauthorised Financial Reform (Consequential)

Pyramid Schemes

- Chapter 3, Division 3 of the *ACL*
- Section 44 – general prohibition on pyramid schemes
- Section 45 defines a pyramid scheme.
- Different from multilevel marketing systems
- Do not involve any commercial activity
- *Australian Communication Network Pty Ltd v ACCC*

Pricing Conduct

- Sections 47 and 48 *ACL*
- Unit pricing – Retail Grocery Industry (Unit Pricing) Code of Conduct prescribed by The trade Practices (Industry Code-Unit Pricing) Regulations 2009

Harassment and Coercion

- Section 50 *ACL*
- Replaces 60 *TPA*
- Extends the scope of the prohibition in section 60 *TPA* to the sale or grant, or the possible sale or grant, or possible sale or grant of an interest in land or the payment for an interest in land.
- *ACCC v McCaskey*
- *ACCC v The Maritime Union of Australia*