

# Misleading or Deceptive Conduct

## s18 of the ACL

### **18 Misleading or deceptive conduct**

- 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).

- Comprehensive provision of wide impact

### Elements

#### *1) Person*

- Not defined
- s2c Acts Interpretation Act 1901 (Cth) – body politic, corporation or individual

#### *2) In trade or commerce*

- Concrete construction (NSW) Pty Ltd v Nelson (1990)
  - Conduct must be in trade or commerce (not in respect of, or merely connected with, or incidental to)

#### *3) Engaging in conduct*

- To do or refuse to do any act [s2(2)(a)]
- In reference to refusing to do an act
  - Unintentional refraining from acting would not be regarded as ‘conduct’ for the purposes of s2(2)(c)
- The words engaging in conduct become particularly important where there is more than one person who has engaged in the misleading or deceptive conduct
  - Of course, the level of involvement of each person must be assessed individually
  - It will depend on the facts whether each person has engaged in conduct that is misleading or deceptive

#### *4) Misleading or deceptive conduct*

- Not defined in ACL or CCA
- Should be given their plain and natural meaning
  - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
- Words can be used interchangeably
- Threshold test
  - The overall impression of the conduct induces or is capable of misleading someone or inducing error
    - Depends on the facts of the case
      - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
        - Puxu did not mislead or deceive even though the goods closely resembled those of Parkdale, as the goods were properly labeled and an ordinary person who read the labels on the furniture could not possibly be deceived or misled
- Mere confusion or wonderment
  - Generally insufficient
    - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd

- Not enough to establish that the conduct was confusing or caused people to wonder whether two products may have come from the same source
- McWilliam's Wine Pty Ltd v McDonald's System of Australia Pty Ltd (1980)
  - Use of the word 'BIG MAC' might have caused confusion that the businesses were connected, but was not misleading or deceptive
- Taco Co of Australia Inc v Taco Bell Pty Ltd
  - Conduct producing confusion or uncertainty may, but in the ordinary case won't, be misleading
- Doctrine of erroneous assumption
  - Not misleading unless the person labours under some error
  - Ordinary and reasonable members of the public test
  - People whose reactions are extreme or fanciful should be disregarded

#### 5) Likely to mislead or deceive?

- Don't need to prove person was actually misled
- Evidence of someone being misled may be persuasive but not essential
- Must be real and not remote chance to mislead (no need to be more than 50%)
  - Taco Co of Australia Inc v Taco Bell Pty Ltd (1982)
    - Using the name Taco Bell (different company to overseas label) in Australia was likely to mislead

#### Who must be misled?

- 4) Not limited to consumers
- 5) Relevant members of the public must be misled
  - a) 4 step process (Taco Co of Australia Inc v Taco Bell Pty Ltd (1982))
    - 1) Identify the relevant section(s) of the public by reference to whom the question of whether conduct is, or is likely to be misleading
      - Test is objective
    - 2) The matter is to be considered by reference to all who come within it
      - Note: unlikely to protect the extremely stupid or gullible, someone who makes fanciful assumptions or reacts in extreme way
      - Does not protect people who fail to take reasonable care
        - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
          - Eg. person who wanted specific furniture would be expected to read labels

#### General principles of misleading or deceptive conduct

- Who must be misled
  - Not limited to consumers
  - Relevant members of the public must be misled
  - 4 step process (Taco Co of Australia Inc v Taco Bell Pty Ltd (1982))
    - Identify the relevant section(s) of the public by reference to whom the question of whether conduct is, or is likely to be misleading
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- Note: unlikely to protect the extremely stupid or gullible, someone who makes fanciful assumptions or reacts in extreme way
  - Does not protect people who fail to take reasonable care
    - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
      - Eg. person who wanted specific furniture would be expected to read labels
- Conduct must be viewed as a whole
  - Incorrect to select some words or conduct which alone would be misleading, however in their context is not capable of misleading
    - Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd
- Multiple meanings
  - If one meaning conveys a misleading impression, then statement is likely to be misleading
    - ACCC v Coles Supermarkets Australia Pty Ltd
      - Will be misleading if any reasonable interpretation of it would lead a member of the class into error
  - Context and the dominant message will be important
    - Eg. 'Free' can convey a number of different meanings in different contexts
      - Fraser v NRMA Holdings Ltd
        - Reference to 'Free Shares' multiple times likely to mislead person to believe shares could be acquired without significant cost or outgoing
      - ACCC v Commonwealth Bank of Australia
        - The words 'no establishment fee' in different contexts can also be misleading or deceptive for the purposes of s18
- Intent (and honesty)
  - Not relevant under s18
  - However where a person did intend to mislead, a court may more readily find that the conduct was misleading or likely to mislead
    - ACCC v Singtel Optus Pty Ltd (No3)
      - Optus intended its misleading advertising campaign to have a substantial impact in the broadband market
- Spoken words
  - Essential words be proved with degree of precision for court to be reasonably satisfied that they are likely to mislead
  - Watson v Foxman
    - Serious difficulties of proof in the absence of reliable record
- Literal truths
  - A statement that is literally true and accurate may nevertheless carry with it a misleading impression
    - Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd
      - Announce famous opera singer will appear but produce unknown person with the same name
- Half-truths
  - 2 ways – Both may contravene s18
    - Omission of relevant facts

- Kannegieter v Hair Testing Laboratory Pty Ltd
    - Doctors statements taken out of context to create false representation that he approved and endorsed product
  - Mixture of truth or lies
- Silence
  - Treated the same as any other circumstance
  - Necessary to identify clearly and precisely which type of silence is alleged
  - Silence is likely to mislead in two ways
    - Where there is an obligation to reveal relevant facts
      - Eg. customer wants to buy something for a stated purpose and you sell him something that isn't suitable for this purpose without telling him
    - Where the silence is, in isolation of itself, misleading
      - Note not when done inadvertently - s2(2)(c)
- Future conduct (predictions, forecasts or opinions)
  - s4 ACL
    - If a person makes a representation as to future conduct and does not have reasonable grounds for making the representation, the representation is misleading
    - Evidentiary burden on defendant to adduce evidence that there were reasonable grounds for making it
  - If statements predict future outcomes, they need to have reasonable basis for predictions (Bill Acceptance Corp Ltd).
  - Just because they do not eventuate does not make them misleading
    - Global Sportsman Pty Ltd v Mirror Newspapers Ltd
  - The broader and more expansive the representation as to future conduct is made, the wider the responsibility for proof of the representor to show that he or she had reasonable grounds
    - Reasonable grounds include and intention to perform the representation and an ability to perform it
  - As a rule of thumb for determining reasonable grounds, future conduct should be based on balanced information, reliable and/or updated data, relevant time periods, and realistic calculations
  - ACCC v Gary Peer & Associates Pty Ltd [2005]
    - Multiple statements in newspapers stating 'PRICE GUIDE \$600,000 Plus Buyers Should Inspect'
    - Held each statement was misleading as Gary Peer was instructed not to sell below \$780,000
- Failure to make proper inquiries
  - Person still liable for contravention even if subject could have made proper inquiries that would have exposed misleading conduct
  - Henjo investments Pty Ltd v Collins Marrickville Pty Ltd (No1) [1988]
    - Lawyer failed to confirm if bar licensing laws were complied with before purchase. Henjo in contravention
- Failure to accommodate subsequent changes and the transitory effects
  - True statement that has at a later stage become untrue may be misleading if not corrected

- Obligation on behalf of the person making the continual representation to correct or qualify the misleading representation, so it becomes truthful
- Passing on information
  - A person who passes on information may be engaging in misleading conduct, unless it is clear that they are not the source of the information
    - Yorke v Lucas
      - Where it is apparent that a person passing on the information was not the source, it is doubtful that the person is engaging in misleading or deceptive conduct
  - Whether person is passing on information is a question of fact
    - Butcher v Lachlan Elder Realty Pty Ltd
      - Brochure describing property was inaccurate, however disclaimer stating that all information was gained from other sources and they couldn't guarantee accuracy was enough to escape liability
    - Google Inc v ACCC (2013)
      - Advertisers used Adwords (Google program) to trigger link to sponsors website when competitors name was entered. Google did not contravene as google had not made the representations
- Disclaimers
  - Statement designed to limit the liability of a person or negate the effect of misleading conduct
  - Whether a disclaimer limits or negates the effect of a misleading representation is a question of fact
  - The court will examine the disclaimer in light of all the circumstances and consider whether the conduct in question, including any representations and the disclaimer, is likely to mislead or deceive
- Exclusion clauses
  - Cannot contract out using exclusion clauses
    - Clark Equipment Australia Ltd v Covcat Pty Ltd (1987)
      - Remedy will not be lost whatever the parties may provide in their agreement
  - Question of fact whether the exclusion clause has broken the nexus between the misleading conduct and the loss suffered
    - Sutton v A J Thompson Pty Ltd
      - If a person is so determined to enter into a contract that he is not in truth influenced by some false representation made to him, he clearly has no case
- Misleading conduct in relation to professional advice
  - Incorrect professional advice may be misleading
  - s18 capture both errors of fact and errors of law
    - SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission (1990)
      - Provided advice that workers' compensation insurance would extend to employees injured during interstate work. The advice was incorrect. Even though question of fact, misleading
- Misleading conduct in without prejudice negotiations

- The fact that negotiations were conducted on a 'without prejudice' basis is no defense, if in the course of the negotiation, a misleading representation was made and relied on
  - Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd (1990)
- Misleading conduct and legal professional privilege
  - Communications that are protected by legal professional privilege even if relevant to a misleading conduct case, may be excluded from evidence at an interlocutory stage of proceeding, or at a final hearing
- Puffery
  - May contravene s18
  - Note average person test

### Exemptions for information providers

#### s19 ACL

- s18 does not apply to an information provider who made the publication in the course of carrying on a business of providing information
- Includes Television or radio broadcasts
  - Bond v Barry (2007)
    - Freelance journalist was exempted from liability

### Available remedies and enforcement powers

- Person contravening s18 may be subjected to any of the following remedies and enforcement powers
  - Declarations
  - Undertakings
  - Injunctions
  - Damages
  - Compensatory orders
  - Compensation orders arising out of other proceedings
  - Orders for non-party consumers
  - Non-punitive orders
  - Orders for the preservation of property
  - Power to obtain information, documents and evidence

## Differences between ss18 and 29 of the ACL

- s18 is a general provision, whereas s29 is specific and the list of prohibitions is exhaustive
- s18 refers to engaging in conduct, whereas s29 refers only to making representations
- s18 is a civil provision, whereas s29 is both civil and criminal. s18 will only require the standard of proof to be the balance of probabilities, whereas the offence provision in s151 requires proof beyond a reasonable doubt
- s29 has the additional requirement of in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services
- NOTE\* there can be overlap between ss18 and 29