

# Consumer Law

The [Australian Consumer Law \(ACL\)](#) protects consumers in many ways that businesses must be aware of, particularly those involved in selling goods or services to the public.

The legislation that regulates dealings between businesses and consumers is the [Australian Consumer Law \(ACL\)](#). It commenced operation on [1 January 2011](#) and replaced several Commonwealth, State and Territory consumer laws.

Cases decided by the courts under the old laws may continue to be relevant. An important example is [s 52 of the Trade Practices Act 1974 \(Cth\)](#) which is no longer in operation, having been replaced by [s 18 of the ACL](#). Section 52 of the Trade Practices Act is in the same terms as s 18 of the ACL

The ACL is jointly enforced by several different regulators. These regulators are:

- The [Australian Competition and Consumer Commission \(ACCC\)](#), which regulates corporations
- [State fair trading agencies](#) (such as [New South Wales Fair Trading](#)) which regulate businesses conducted or registered under the laws of the relevant State
- The [Australian Securities and Investments Commission \(ASIC\)](#), which regulates the provision of financial goods and services by corporations. The [ACCC](#) is a Commonwealth statutory authority which has power to bring legal proceedings, both civil and criminal, against businesses or individuals who contravene the provisions of the ACL.

## **Section 18 (Misleading or deceptive conduct)**

This section applies to [misleading or deceptive conduct](#). This has

significance for advertising but also applies more broadly to other types of conduct in business.

**Misleading or deceptive conduct** is business activity that misleads or deceives consumers (or has the tendency to mislead or deceive consumers) about some matter relating to a good or service provided by the business. Example is **false advertising**:

- Promotion of a product or service in a way that misrepresents the suitability or other characteristics of the good or service

Though advertising is the main activity that leads to misleading or deceiving consumers, others include:

- Providing professional advice
- Managing bank accounts and financial services
- Labelling food and drink products
- Franchising
- Selling real estate

- Marketing and conducting sports events

The main purpose of s 18 is the protection of consumers, however Businesses that have been affected by misleading or deceptive conduct may also act under s 18 - Businesses act under s 18 to restrain other businesses from making misleading or deceptive representations about its products or services, usually in the form of an advertisement.

The section states:

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”

Where:

‘**Person**’ includes individuals as well as *artificial* persons — corporations. This means that in effect, the law of misleading or deceptive conduct applies to all businesses, whether they are large or small, incorporated or unincorporated.

‘**Conduct**’ encompasses actions undertaken by the business/individual. As advertising is the main action, any actions taken to arrange the advertising (such as commissioning the advertisement, paying for it and having it publicised) would constitute ‘conduct’ within the meaning of the section. Other behavior that has been held to be ‘conduct’ for the purposes of s 18 includes:

- **Making pre-contractual statements.** A misleading or deceptive statement made to induce another party to enter a contract may constitute conduct under s 18
- **Expressing opinions or representations about the future.** Where a business person makes a representation about some future state or condition knowing that statement to be false or having no reasonable basis for making the statement
- **Staying silent or doing nothing.** Silence (or the holding back of relevant information) will constitute misleading or deceptive conduct if an ordinary person would reasonably expect to be told that information due to its relevance or importance to the transaction being considered

‘**In trade of commerce**’ requires that the conduct be **commercial** in character. ‘**Trade**’ takes its usual meaning of buying and selling goods or services.

It is important to note that the conduct must occur ‘in’ trade and commerce rather than merely being related to it. Consequently, the courts have ruled that activities such as education, political campaigns and actions within the workplace are not subject to s 18. When is conduct ‘misleading or deceptive’

Conduct which affects consumers will be misleading or deceptive if it leads consumers into error or otherwise, causes consumers to believe something about a good or service that is inaccurate or false. Conduct that merely causes confusion to consumers, leading them to confusion or ‘wonderment’ but not error, is not misleading or deceptive for the purposes of s 18.

The **3-step test**, developed by courts, focuses on the role of consumer and is helpful in determining whether conduct is characterised as misleading or deceptive.

1. **What is the relevant class of consumer?** The relevant class of consumers is the group of persons that is likely to be exposed to the conduct in question. Is it targeted at a few specific individuals, a particular target audience, or the public at large?
2. **What meaning would the conduct convey to that class of consumers?** It is necessary to consider the conduct from the point of view of the relevant class: what would an average member of that class understand the conduct to mean? The meaning of the conduct is the meaning that the typical member would be most likely to perceive, not the meaning that the business intended to convey.
3. **Would the conveyed meaning mislead or deceive the relevant class of consumers?** This is an objective, rather than subjective, test: would an average member of the class be led into error

about the product? If so, then the conduct is misleading or deceptive. It is not necessary to prove that an **actual** consumer was misled or deceived since s 18 applies not only to conduct that has misled or deceived but also to conduct which is ‘**likely to mislead or deceive**’. Nor is there any requirement to demonstrate that the business **intended** its conduct to be misleading or deceptive.

## Disclaimers

A **disclaimer** is a statement that seeks to exclude the maker of the statement from legal liability.

Disclaimers in the form of exclusion clauses in contracts, which seek to excuse the business from liability under the ACL, are not usually upheld by the courts since they contradict the public policy reason for s 18 (that is, to protect consumers).

However, a disclaimer may be effective if its effect is to avoid any suggestion of misleading or deceptive conduct from arising in the first place. As seen in the **case: Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982)**.

However, the entirety of the business's conduct is considered so if consumers would still be misled by the business's conduct overall, the disclaimer will not be sufficient to protect the business against liability.

To be effective, a disclaimer must be clearly worded and prominently displayed — it should not be confined to small print that is hard to read, or be placed in an obscure position or in some location separate from the product. The disclaimer must also be available to the consumer before he or she decides to buy the product

## Comparative advertising

Legally, **comparative advertising** (where a business's product or service is compared against a competitor's) is a perfectly acceptable form of advertising. However, as a tactical matter, comparative advertising does have some risks in terms of inviting a legal challenge from the competitor business.

It is quite common for a business to be sued by a competitor under s 18 on the basis that the advertisement made misleading or deceptive comparisons with the goods or services of the competitor

To this extent, s 18 can be thought of as partially '**self-regulating**': as it is in the interests of a business to protect itself from unfair advertising

**Case: Hoover (Australia) Pty Ltd v Email Ltd (1991)** reveals that comparative advertising can be a breach of s 18 if the advertisement uses a misleading or deceptive portrayal of a competitor's product. Therefore, business can use comparative advertising if honest about the differentiation between products. To avoid breaching s 18, business can:

- When comparing products, the safest option is to confine your comparison to similar or equivalent products
- If there are any tests performed as part of the comparison, ensure that the results are accurately presented
- Where specific claims are made and there is a likelihood that external factors may impact on the accuracy of those claims in the future, this should be explained (eg: future return on investments)

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- Simply denigrating, or ‘running down’, a competitor’s product is not misleading or deceptive conduct, provided what is said remains accurate.
- Advertising ‘puffery’ does not constitute misleading or deceptive conduct as consumers are considered aware of trader’s tendencies to exaggerate the good qualities of their own products,
- The advertisement will be considered as a whole — if any aspect could be misleading or deceptive to your consumers consider how you might balance that perception or ‘set it straight’ in the rest of the advertisement

## **Section 29 (False or misleading representation)**

[Section 29](#) of the [ACL](#) prohibits the making of false or misleading representations.

Section 29 states:

“A person must not, in trade or commerce, 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:

- . a) Make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use
  - . b) Make a false or misleading representation that services are of a particular standard, quality, value or grade; or
  - . c) Make a false or misleading representation that goods are new; or
  - . d) Make a false or misleading representation that a particular person has agreed to acquire goods or services ...”
- Section 29 bears several similarities to s 18:
  - Applies to all business structures (‘**person**’ in s 29 carries the meaning discussed earlier)
  - How the courts work out whether the representation is ‘false or misleading’.
    - Finding about what the representation is and then assessing how that representation would be understood by the relevant class of consumers.
    - Intention of the party making the representation is irrelevant.

The main difference of s 29 is that it applies to **representations** rather than conduct and specifically, representations that are **false or misleading**. Therefore, s 29 applies to a more specific type of conduct than that contemplated by s 18.

Nevertheless, a representation is a type of conduct; It follows that a false or misleading representation will breach both s 29 and s 18.

Why 2 sections?... Representations which are false or misleading are

considered more serious than general conduct which is misleading or deceptive. For this reason, a separate section has been introduced to address false or misleading representations.

Breach of s 29 constitutes a **criminal offence** for which a business (and business people) can be prosecuted. The maximum penalties for breach of s 29 are fines of **\$220,000 for individuals** and **\$1.1 million for corporations**.