

Consumer Law – Advertising and Sales

Enforced by:	Powers
ACCC – Regulate Corporations	Commonwealth Authority (Civil, criminal proceedings) against businesses/Individuals
NSW Fair Trading – Regulate businesses conducted or registered in the state	Power to enter dwelling or premises Can request info with written notice
ASIC -Financial G & S by Corporations Australian Securities and Investments Commission Act 2001 (Cth) s 12DA – misleading and deceptive conduct for financial services	Commence prosecutions Seek civil penalties from the courts Power to require companies and people to provide documents and info

Misleading or Deceptive Conduct

Most commonly:

- **False Advertising:** Print, TV, radio, digital media [Commissioning Ad included]

Promotion of a g or s in a way that it misrepresents the suitability or other characteristics of the g or s

- **Professional Advice**
- **Financial Services**
- **Food / Drink Labelling**
- **Franchising**
- **Real Estate**
- **Marketing/ Sport Events**

s18 lower threshold for evaluating conduct

Common law “Reasonable Man”

Replaced by “unsuspecting modest member of the community”

Overall conduct of business considered so disclaimer may be inadequate

Parkdale Custom Built Furniture Pty

Ltd v Puxu Pty Ltd (1982) 149 CLR 191

“Would not be right to select some words only and ignore others “

Australian Consumer Law (ACL) 1 Jan 2011 s18 (1) | Trade Practices Act 1974 (Cth) s 52

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

- Person:** [Natural Person/ Artificial Person] – Sole trader/Partnerships/companies/trusts
- Conduct:** Most actions taken by businesses (Act or refraining to act) **s 2 (2) (ACL)**
 - **Pre-K statements:** Misleading/deceptive statement made to induce other party into K
 - **Expressing opinions/Representations about the future:** Business person makes representation about future state/condition knowing its false or have no reasonable basis
E.g. Seller of business make unreasonable assertions about future profitability
 - **Silence / Doing nothing:** Holding back relevant information – if ordinary person expects to be told relevant information/importance for transaction
E.g. Purchaser showed seating of 128 but only licenced to 84 = M & D
- In trade or commerce:** Commercial in character, Buying and Selling of G & S
Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17
Highlight difference between in trade or commerce and in relation to trade and commerce

DOES NOT INCLUDE: Education activity, Political Campaigns, Actions within workplace ≠ s18
Unilan Holdings Pty Ltd v Kerin [1992]

Speech was in relation to trade or commerce but not conduct actually in trade or commerce

- Misleading or Deceptive:** Main target to protect consumers
Leads consumers into error, lead to believe something inaccurate/false, causes confusion but not error
Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd [1984]
Likely to mislead or deceive if there is a real or not remote chance or possibility regardless of whether it is or > than 50%

3 PART TEST

- Relevant class of consumers:** group of persons likely to be exposed to conduct
Who is conduct directed to?
 - Few persons- sale of specific business
 - Particular group of persons – target audience: Luxury car ads
 - Public at large – E.g. TV ad for family restaurants
- What meaning would that conduct convey to that class of consumers?**
 - Consider conduct from perspective of relevant class (Objective Test)
Average member of that group understands the conduct to mean?
 - Hypothetical ‘representative’ member of the class
 - E.g. An ad that would only mislead GPs but not anyone outside this group
- Would the conveyed meaning mislead or deceive the relevant class of consumers?**
(Objective Test) Would Average Member of the class be led into error about G or S
Likely to Mislead or Deceive sufficient for s18
Intention of business irrelevant, only effect of conduct on consumers could prevent contravention of s 18
Annand & Tompson Pty Ltd v IPC [1979] FCA 36 at[26]
Objective test – conduct of appellant was such as to be misleading or deceptive when viewed in light of the type of person who is likely to be exposed to that conduct.
Person in question: less than average intelligence & background knowledge

ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 634

Character of conduct directed at a particular target audience is determined by reference to that class. Not a matter of any particular person was misled or deceived but whether the conduct was misleading or deceptive

REMEDIES -Civil Remedies

- **Injunctions against repetition** **Part 5 – 2 (ACL)**
- **Damages for breach** **s236 (ACL)**
- **Other orders – declaring whole or part of k void, varying a k, require return of money or property, redirecting money, requiring repair, supply services, etc**

Disclaimers: Seek to exclude maker of statement from legal liability

– - Exclusion clause disclaimer contradicts ACL s18 to protect consumers

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

By affixing label to each product to assert the product is the manufacturer's and not the competitors, manufacturer can prevent a finding against s 18

Label placed by plaintiff and removed by third party (retailer) – the label would have alerted customers of separate identity and precluded defendants conduct from being characterised as misleading or deceptive = not breached s 52 of TPA

ACCC Advertising and Selling Guide (2014)

Advertiser must not make terms and conditions of offer unclear or unreadable by:

- Text in obscure location, flashing disclaimer for quick moment, voice over too quiet or quiet

Comparative Advertising: must be accurate and provide consumers with useful info

A business's product or service is compared against a competitor's

++ business sue each other for s18 breach to protect itself against unfair advertising

Hoover (Australia) Pty Ltd v Email Ltd (1991) 104 ALR 369

- Email contravened s18, lead placed in competitor's machine in ad, promo info stating lead weight equalled weight of a few towels

Makita (Australia) Pty Ltd v Black & Decker (Australasia) Pty Ltd(1990) 18 IPR 270

Black and Decker – misleading and deceptive conduct through drill ad. They didn't show specific model they were comparing. Doctored footage. No independent testing done. **Black and Decker ordered to carry out Corrective advertising.** Breach s 52 TPA

HCF Australia Ltd v Switzerland Health Fund Pty Ltd [1988]

Comparative advertising examined "critically" than other forms of advertising because reader less likely to regard it as mere exaggeration

Duracell Australia Ltd v Union Carbide Australia Ltd [1988]

Claim Energiser AA batteries lasts longer on average than Duracell. Based on unconvincing experiments.

Cheap products, consumers not expected to devote time to weigh statements, inaccurate statements can often be found misleading

Ensure Accurate Message conveyed to relevant class of consumers to prevent contravention s18

- **Inaccuracies**
 - **Half-truths /silence**
No obligation to disclose information unless failure renders ad misleading
ACCC Advertising and Selling Guidelines (1997)
E.g. Commission intervened and ceased conduct and offer refunds where promised discounts not realised
Half-truths – guidelines disclose it is misleading if insufficient info leads to erroneous conclusion to be drawn. LEAVING OUT IMPORTANT INFO WORSE THAN HIDING IT IN FINE PRINT
 - **Ambiguities**
 - **Omissions**
- Best to compare similar products
 - Identify the competitor brand name clearly
 - If tests performed, ensure results are accurately presented
 - Specific claims – if external factors impact accuracy, this should be explained

False or Misleading Representations

29 False or misleading representations about goods or services

(1) 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; or
- (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 ...

- Denigrating competitor's product NOT deceptive if info is accurate
- 'Puffery' not misleading or deceptive – not serious claims
Bembridge v Just Spectacles Pty Ltd (2006)
Buy one pair get one free – no asterisk indicating promotion had conditions
They took insufficient measures to clearly bring qualifications to attention of the class of reader who was exposed to the poster
- ACCC Advertising and Selling Guidelines (1991) p16**
OK: Humour, cartoons, slogans, exaggeration for attention
E.g. 'Best coffee in town' = reasonable consumer mere puffery
NO: representations and claims on a factual character, quality, **price terms breach unless substantiated**
- Advertisement considered as a whole – small print + obscure corrections won't correct misleading impression

Defined: statement or communication that is false or misleading

S 29 (ACL) – Representations rather than conduct (Type of conduct) | More specific than s18

Person: Also applies to all business structures

Misleading or Deceptive: how misrepresentation understood by relevant class of consumers
Intention of business irrelevant

False + Misleading ≠ or > Misleading + Deceptive

Nielson v Hempston Holdings Pty Ltd [1986]

Fact that person conduct was directed at did not make further enquiries does not absolve maker of representation from responsibility

False or Misleading representations will violate BOTH s18 and s29 (false representations more serious than general misleading or deceptive)

Breach occurs when representation falls into one of these categories made and it is false or misleading to consumers

S29 breach constitutes criminal offense

Misleading representations about goods and services

Category of false or misleading representation	Example
Standard, quality, value, or grade of goods or services s 29(1)(a),(b)	<ul style="list-style-type: none"> • Standard: compliance with 'official' types of standards, such as Consumer Safety Standards for flammability of children's nightclothes or Standards Association of Australia Standards • Quality: claiming a toothpaste inhibits plaque formation when this is not proven; inaccurate 'green' or 'organic' statements • Value: 'unlimited' download times; 'per minute' charges for overseas calls • Grade: 'restaurant grade' meat
That a particular person has agreed to acquire goods or services s 29(1)(d)	This may involve claiming payment for orders that have not actually been made.
Representations that appear to be testimonials s 29(1)(f)	<ul style="list-style-type: none"> • 'Testimonials' are endorsements or recommendations of a business or product by previous purchasers or other third parties (sometimes celebrities). They create the impression that other people are happy with the product or service, which encourages new customers to buy it. • Fictitious testimonials (i.e. where the business has made the 'testimonials' up itself) or false or misquoted testimonials (where the person's comments have been changed) are prohibited.
Sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services s 29(1)(g)	<ul style="list-style-type: none"> • Sponsorship or approval: this aspect is covered below under 'Character merchandising' • Performance characteristics: effectiveness of an air freshener or a weight loss program; scientific or medical results and (possibly) also the safety of products • Uses: inaccurate claims about what a product can be used for • Benefits: inaccurate claims about benefits the product or service has, eg, healing qualities of ion mats
Sponsorship, approval or affiliation of persons making the relevant representations s 29(1)(h)	<ul style="list-style-type: none"> • Sponsorship or approval: This aspect is covered below under 'Character merchandising' • Affiliation: describing oneself as a CPA ('Certified Practising Accountant') when not a member of that representative body.
Price s 29(1)(i)	<ul style="list-style-type: none"> • Advertising the wrong price for goods or services • Inflating the price before reducing it so the 'saving' looks bigger • Offering goods as 'marked down' although they have never been offered at the higher price • Not including on-road costs in the 'full' price of a car • Not including compulsory delivery charges in the price of a computer
Need for goods or services s 29(1)(l)	<ul style="list-style-type: none"> • Advertisements inaccurately suggesting particular medical conditions are serious and require treatment • Misrepresenting the need to be included in a directory claimed to be affiliated with the government

False or Misleading representations about Goods ONLY

Category of false or misleading representation	Example
Composition, style, model, history or previous use of goods s 29(1)(a)	Composition: type and amount of fruit in fruit juices and cordials; the ingredients in pre-prepared foods (eg, beef pies that contain lamb); the components of fabrics (e.g. 50% wool)

	Style / Model: the type of product e.g. a Subaru Forrester History or previous use: ex-rental cars sold as ex-executive cars (i.e. used by executives of the manufacturer); mileage of cars.
Goods are New s 29(1)(c)	New, as opposed to used or second-hand. A 'new' car may have much older compliance plates (up to 20 months in one case) but still be considered 'new', as opposed to second-hand. However, in some circles new may mean 'recently made'. The particular audience should be kept in mind when making such claims.
Availability of repairs and spare parts s 29(1)(j)	Promoting the availability of facilities for repair and / or of spare parts for goods when none are available. Manufacturers are also required to provide spare parts and repair facilities for reasonable periods after purchase of goods — see Module 10 for more detail.
Origin of goods s 29(1)(k)	Making a false or misleading representation about the origin of any goods is a breach of this section. The issue has particular relevance to foods, with a new Country of Origin Food Labelling ('CoOL') information standard taking effect in Australia from 1 July 2016 that requires food (packaged and fresh) offered for retail sale to have a label stating where the food originated - but also governs the use of labels claiming that food was either 'Produced', 'Grown' or 'Made' in Australia. More information about the CoOL Code and examples of the correct types of labels can be found here .
Existence, exclusion or effect of any condition, warranty, guarantee, right or remedy s 29(1)(m)	'No refunds' signs (consumers have a right to a refund under the ACL if goods are faulty or services are deficient — a sign stating the opposite is therefore false).
Requirement to pay for existing rights s 29(1)(n)	Telling a customer that they must pay for the right to a refund if a good is faulty or a service is deficient (this right already exists under the ACL and consequently, the statement is false).

Twentieth Century Fox Film Corporation v The South Australian Brewing Co Ltd (1996) 66 FCR 451

<ul style="list-style-type: none"> • Australian beer company launched 'Duff Beer' • Fox sued for misleading and deceptive conduct + False or misleading representations • Same Name, Different label & Design • Issue: Did brewers commit wrong against FOX? • Beer would create false impression that it was licensed • 3 Part test: All satisfied: Was misleading 	<ul style="list-style-type: none"> • Brewers intended to exploit association with TV show • Brewers would/have succeeded in misleading consumers • Disclaimers can remove misleading tendencies but in this case, it would not be taken seriously by fans • Promotional use of famous names, images or likeness must be licenced to avoid liability in ACL or 'Passing off'
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When consumers may be approached

Under the ACL, consumers may not be **telephoned** in relation to unsolicited consumer agreements:

Weekdays
before 9.00am or after 8.00pm

Saturdays
before 9.00am or after 5.00 pm

Sundays
at any time.

Consumers may not be **approached in person** (usually in their homes) in relation to unsolicited consumer agreements:

Weekdays
before 9.00am or after 6.00pm

Saturdays
before 9.00 am or after 5.00pm

Sundays or public holidays
at any time.

Unconscionable K: Made taking advantage of another party

Part 2 – 2 (ACL)

Under ACL, **Unequal bargaining power given more weight**

Factors taken into account

- whether conditions in the contract were necessary to protect the legitimate interests of the (larger) business
- whether unfair tactics or pressure were employed
- whether the customer was able understand the documents
- consistency in price, circumstances and conduct between this and other similar transactions
- compliance with any industry codes
- general good faith and willingness to negotiate.

Standard Form K: Pre-prepared K 'take it or leave it' basis. No room to negotiate any term

E.g. Mobile Phone K, Software end service agreements

+ Protects interests of the business + Efficient

Unfair Terms in standard form K: Not enforced, only terms of void not whole K

Under ACL, Unfair terms in a K are VOID **Part 2 – 3 of (ACL)**

To determine if term in standard form is unfair

3 Factors

- whether the term would cause a significant imbalance in the parties' rights and obligations under the contract
- whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term (there is a presumption against this, so the business would usually have to prove it is reasonably necessary to protect their interests)
- whether the term would cause detriment (not just financial) to a party if it were to be enforced.

Actions to re-express unfair terms into fair ones

- **limit price increase in cost of service to external measurable e.g. inflation**
- **onerous terms can be balanced e.g. increase in price term balanced with term allowing customer to cancel subscription if they don't like price hike.**

Unsolicited Consumer agreements

Part 3 -2, Division 2 (ACL)

Defined: consumer agreement that was not invited by the consumer + price to be paid cannot be ascertained at time of agreement OR is > than \$100

ACL impose specific requirements -> Failure = VOID SALE (unenforceable)

ALL unsolicited consumer agreements bound by ACL

Excluding: Genuine opinion polling, Research Calls

☆ If customer approached during acceptable period -> Request to leave / cease negotiations must be respected immediately -> consumer mustn't be approached for 30 days

Making the agreement: consumer who enter into unsolicited agreement must be given copy of agreement **immediately (if signed) within 5 days (over phone)**

*****Agreements negotiated in person must be signed to be valid**

Agreement Document: comply with requirements

- Set out all terms of agreement
- Specify total price (how price calculated)
- Clearly identify supplier of goods – Suppliers name / business address, contact details (postal, phone, fax, email), ABN, Australian Company Number

Termination Period

10 days for consumer to change their mind and cancel agreement.

Consumer must be informed of their rights & how to exercise it through **PROMINENT NOTICE DISPLAYED ON FRONT PAGE OF AGREEMENT**