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<p><b>Misleading and Deceptive Conduct Under the ACL (Statute)</b></p>	<p>Ch 15 M2 2.1.4 p6</p>
<p><b>Australian Consumer Law (ACL) prohibitions:</b></p> <ol style="list-style-type: none"> <li>1. Misleading or deceptive conduct: ACL Chapter 2 (s18) - prohibits general forms of conduct with wide range of civil remedies available</li> <li>2. False or misleading representations: ACL Chapter 3 (s29) - prohibits specific forms of conduct with both civil and criminal penalties.</li> </ol> <p>No significance between the definitions of either (1) or (2).</p>	<p>S18 S29</p>
<p><b>Misleading &amp; Deceptive Conduct under the ACL</b></p> <p>Most case law relates to TPA s52 (original prohibition section), which is now prohibited under ACL s18.</p> <p><b>Section 18(1):</b> a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.</p> <p><b>18 Misleading or deceptive conduct</b></p> <p>(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.</p> <p>(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).</p> <p>Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.</p> <p>→ The provision has wider application than conduct covered by CL misrepresentation.</p> <p>→ <b>Person</b> includes Corporation</p> <p>→ ACL s 2 means - trade and commerce within Australia OR between Australia and places outside of Australia.</p>	<p><i>Trade Practices Act 1974 (Cth) (TPA) s52 now ACL s18.</i></p> <p><i>Sch 2 Competition and Consumer Law Act 2010 (Cth)</i></p> <p>ACL s 2.</p> <p><b>Butler Q25 (p132)</b></p> <p>★ <b>See Parkdale case</b> p 27 below: <b>Meaning of mislead</b> (15.22, B 4.14 p134, B 4.17 p139) <b>Use in theory Qs</b></p>
<p><b>Contravention of s18:</b></p> <ul style="list-style-type: none"> <li>→ Contractual relationship between parties does not need to be established (fraudulent or innocent misrepresentation)</li> <li>→ No duty of care (CL negligence).</li> <li>→ Do not need to establish that someone was mislead.</li> <li>→ Demonstrate a loss due to misleading conduct.</li> </ul>	
<p><b>ACL18 Elements</b></p> <p>→ A person (Individual or corporation)</p>	<p>Butler 3.11, 4.1, 4.5, 4.6, 4.10, 4.11, 4.14: Good wording misrep under statute.</p>

	4.15, 4.17
<p style="text-align: center;"><b>RULE: Must establish:</b></p> <p>1. Engaged in <i>conduct</i> → broader than CL misrep. → Includes cases of <b>Silence, statements of opinions, puffs, statements concerning future matters, including promises. (See examples (pg 7))</b></p> <p>a. → includes spoken and written words, acts &amp; omissions.</p> <p>b. ACL s2(2): includes doing or refusing to do any act, or making it known that an act will not be done.</p>	15.13 - 15.15: silence ACL s2(2) = acts and/or omissions
<p style="text-align: center;"><b><i>Orion Pet Products PL v RSPCA (Vic) (2002)</i></b></p> <p>❑ Held RSPCA was a trading corp and engaged in conduct of a trading corp - Shock Dog Collar case</p> <ul style="list-style-type: none"> <li>★ What is the meaning of ‘in trade and commerce’?</li> <li>★ Statements made in the course of public debate.</li> </ul>	
<p style="text-align: center;"><b><i>Tobacco Institute of Australia Ltd v The Australian Federation of Consumer Organisations Inc</i></b></p> <p>❑ The court held at [43] that the appellant and its servants and agents be restrained from publishing or causing to be published, in trade or commerce, the advertisement</p> <p>❑ Tobacco Case: Passive Smoking in Workplace</p> <ul style="list-style-type: none"> <li>★ The <i>conduct</i> occurred in ‘trade or commerce’.</li> <li>★ Statements made in the course of public debate</li> </ul>	
2. The <i>conduct</i> was misleading or deceptive or likely to mislead or deceive.	
<p style="text-align: center;"><b><i>Taco Co of Australia Inc v Taco Bell PL (1982)</i></b></p> <p>❑ Taco Bell Aust sued Tac Australia for deceptive use of name. Sought injunction.</p> <ul style="list-style-type: none"> <li>★ Resolution is Question of Fact to be answered in context of evidence as to the conduct and as to relevant surrounding facts. (15.25) <ul style="list-style-type: none"> <li>★ Circumstances directed at public or sample of the public.</li> </ul> </li> <li>★ Known as the Taco Bell steps for establishing misleading &amp; deceptive conduct to the public (see Quote from 15.31) <ul style="list-style-type: none"> <li>★ <b>Authority: 2-step Test - see below</b></li> </ul> </li> </ul>	15.25, 15.31 CB 15.1, <b>15.3 (CS)</b>
<p style="text-align: center;"><b><i>Campbell v Backoffice Investments PL (2009)</i></b></p> <ul style="list-style-type: none"> <li>★ Determining Conduct is misleading or deceptive is question of Fact, Objective Test (15.35) <ul style="list-style-type: none"> <li>★ Conduct includes making or giving effect to a provision of a contract. (15.8)</li> </ul> </li> <li>★ Id target audience, conduct directed to specific or identified individuals (15.25), the conduct is to be characterised by reference to the circumstances and context of the questioned conduct. <ul style="list-style-type: none"> <li>★ Evidence of caution is needed. (15.37-38)</li> </ul> </li> </ul>	15.8, 15.25, 15.35, 15.37, 15.38  See Taco case above see 15.26 <i>Butcher v Lachlan Elder RE.</i>

<p><b><u>6. Right to Sue</u></b></p> <ul style="list-style-type: none"> <li>➤ Has the IP lost the right to sue for breach of contract?</li> <li>➤ Statute of Limitations apply.</li> <li>➤ 6 years for contracts, 12 years for deeds.</li> </ul>	
<p><b><u>Actions For a Fixed Sum and Debt</u></b></p> <p>→ Eg; Where P is taking action for recovery of sums of money fixed by the contract, such as:</p> <ul style="list-style-type: none"> <li>◆ Liquidated damages - fixed sum which parties have agreed upon in the contract as being due on breach.</li> <li>◆ Debts - where contract imposes an obligation to pay a sum of money and the right to payment of that sum has accrued to the Plaintiff.</li> </ul>	
<p><b><u>Remedies for Non-Performance of a Contract - Restitution</u></b></p> <p>→ Restitution is 'restoring' a benefit.</p>	ACL - s232 & s236
<p style="text-align: center;"><b><i>Pavey &amp; Matthews P/L v Paul (1987)</i></b></p> <ul style="list-style-type: none"> <li>❑ High court authority, leading Australian case.</li> <li>❑ Offer to be made to the world at large.</li> <li>❑ In NSW, at the time, building contracts had to be in writing, otherwise they were not enforceable.</li> <li>❑ Were doing work for Mrs Paul, did the work and gave her the bill - she then refused to pay because the building contract was not in writing (as required by the Legislation) therefore they couldn't bring an action. <ul style="list-style-type: none"> <li>❑ Then considered coming in by way of restitution and went to the High Court.</li> <li>❑ HELD: The work was done for Mrs Paul and she willingly accepted this, was unjustly enriched and had to pay.</li> </ul> </li> <li>❑ NOTE: If there was a valid contract, would have to go through contract law, would not be able to go through restitution.</li> </ul>	38.3, 38.5, 38.16, 38.22, 38.31, 39.78
<p><b><i>Basis of Restitution</i></b></p> <p>→ The basis of restitution is “<b>unjust enrichment</b>” - this element <b>MUST</b> be present.</p> <p>→ The remedy of restitution requires D to restore to P:</p> <ul style="list-style-type: none"> <li>◆ Money equal to the amount received from P; or</li> <li>◆ Payment for goods or services received from P.</li> </ul> <p>→ Restitution is to prevent D from being unjustly enriched by P.</p>	
<p><b><i>Restitution</i></b></p> <p>→ The <b>four tests</b> to establish if the remedy of restitution is available:</p> <ul style="list-style-type: none"> <li>◆ Was there a benefit which enriched D (this can be positive or negative enrichment)?</li> <li>◆ Was D's enrichment at the expense of P?</li> <li>◆ Would it be unjust to permit D to retain the benefit/enrichment?</li> </ul>	

<ul style="list-style-type: none"> <li>◆ Are there any Defences?</li> <li>→ It is not sufficient for P just to allege that the retention of the benefit by D is unfair or unconscientious. <ul style="list-style-type: none"> <li>➢ P must establish the “specific ground or unjust factor” entitling them to the remedy of restitution.</li> </ul> </li> <li>→ Specific grounds/unjust factors identified by the Australian courts include eg. mistake and total failure of consideration -required.</li> <li>→ Usually sought after because either: <ul style="list-style-type: none"> <li>◆ There is no contract between the parties; or</li> <li>◆ The contract is void, unenforceable, etc. <ul style="list-style-type: none"> <li>● An action for restitution is generally not possible while an enforceable contract exists between the parties.</li> </ul> </li> </ul> </li> </ul> <p><b><u>Differences Between the Remedies of Restitution and Damages</u></b></p> <ul style="list-style-type: none"> <li>→ To obtain <b>damages</b> - P must prove that a loss has been suffered (using the 6 elements of calculating damages) - reversing a P’s loss.</li> <li>→ To obtain <b>restitution</b> - the 4 part test of restitution must be applied - reversing a D’s gain.</li> </ul> <p>→ Situations in which restitution might be an appropriate remedy:</p> <ol style="list-style-type: none"> <li>A. Claims to recover monies paid under a mistake or to recover monies due to a total failure of consideration;</li> <li>B. Claims for reasonable remuneration for work done under void, unenforceable or ineffective contract or contract that did not eventuate.</li> </ol>	
<p><b><i>Recovery Of ‘Reasonable Remuneration’ (Quantum Meruit)</i></b></p> <ul style="list-style-type: none"> <li>→ Where the P does work for, supplies goods to or renders services at request of D but ends up with no contractual entitlement to be paid for it, reasonable remuneration might be able to be covered through <i>Quantum meruit</i>.</li> <li>→ <i>Quantum meruit</i> will usually be awarded where one party has conferred a benefit on another in circumstances where it cannot be remunerated or compensated for that benefit in any other manner.</li> <li>→ <i>Quantum meruit</i> is designed to restore the actual benefit, or the value of the benefit, that one party has conferred on the other.</li> <li>→ <i>Quantum meruit</i> can be awarded in both contract and restitution situations.</li> </ul>	
<p style="text-align: center;"><b><i>Planche v Colburn (1831) 131 ER 305</i></b></p> <ul style="list-style-type: none"> <li>□ Planche was a writer who was engaged by a publisher to write a book.</li> <li>□ Half way through the publisher said that they wouldn’t have the market and cancelled the contract. <ul style="list-style-type: none"> <li>□ Planche was still ready, willing and able to continue writing the book - had written half.</li> </ul> </li> <li>□ HELD: There was prevention of performance - Planche was entitled to payment for the work done. <ul style="list-style-type: none"> <li>□ AKA - <i>Quantum Meruit</i> - where you are paid for the work you have done.</li> </ul> </li> </ul>	<b>Butler p179 &amp;183</b>
<ul style="list-style-type: none"> <li>→ In a <b>contract</b> situations - <i>Quantum meruit</i> can be awarded where, for example, parties have agreed on a supply of goods or services or even on work to be done without actually specifying a price.</li> <li>→ In these situations, if D refuses to pay at all or if the parties cannot agree on appropriate remuneration, the court can award a quantum meruit on the basis of what is deserved.</li> </ul>	

- Was the statement directed at and intended to induce Mr G.
  - Rely/induce
2. Fraudulent/ innocent/ negligent misrepresentation
    - → materiality.
  3. Statement:
    - At the time the statement was made was it true? Explore issues.
    - Duty to disclose
    - → cases
    - Untrue when made or became untrue.
  4. One of Fact
    - “No other dentists in this centre” - statement of fact
    - “Good to add one” - not a statement of fact however this opinion reinforces the comment being relied on that there is no other dentist.
  5. Reliance
    - Peek v Gurney
      - Intended to induce Mr G
      - The representation was made to the brother in law however he could act as Mr G’s agent.
      - If not accepted that he is agent → no course of action.
      - Assuming it was accepted than the statement must have been relied on.
  6. Inducement
    - Mr G relied which is assumed by he entered the contract.
    - Case law - doesn’t have to be the ONLY reason.
    - Then look at fraudulent, innocent or negligent.
  7. Fraud
    - Knowing that the statment was false or reckless as to its truth. This is a subjective test
    - Derry and Peek
    - Manager of a shopping centre, it could be assumed that it would have been aomething he would know → rescission/ damages.
    - If he knew and failed to advise → fraudulent.
    - Mode of making that statement is not relevant.
    - The accusation of fraud is very serious and difficult to prove (lots of factors)
  8. Negligent Misrepresentation
    - Could use negligent misrepresentation instead. Would need to establish:
    - D of C
    - Special relationship
    - Breach
    - Loss/causation → reliance
    - Loss not too remote
    - CASE: Shaddock v Parra CC
    - = give rise to damages
  9. Innocent:
    - Materiality

## Mistake Template

### Mistake - See Butler - Question 26 (p136), Chapter 4.

1. Common mistake - clear of fundamental mistake
  - a. Void or rescinded - basis would be complete difference between contemplated and supplied was different.
  - b. Look at *GPS* elements:
    - i. common assumption to state of affairs.
    - ii. No warranty that state of affairs exists. *McRae* case - court thought did exist.
    - iii. Non-existence must not be attributed to any fault of either party.
      1. Evidences to support claims to rebut any argument of fault.
    - iv. State of Existence for performance: *Bell and Lever* -

- v. Argue on fundamental mistake therefore contract void.

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**EXAMPLE:**

Mr Barker - Houseboat

1. Common mistake - clear of fundamental mistake
  - a. Void or rescinded - basis would be complete difference between contemplated and supplied was different.
2. Look the elements from *Great Peace Shipping*:
  - i. Must be common assumption as to the existence of a state of affairs.
    - (both assumed that Mr B was the owner)
  - ii. Must be no warranty by either party that the state of affairs exists.
    - (unlike in *McRae* case - Mr B never promised that he was the owner)
  - iii. Non-existence of the state of affairs must not be attributable to the fault of either party.
    - (warn Mr B that Mrs R might blame him and might try to prove that Mr B was aware that he was not the owner. Mr B would prove that he believed he was the owner by showing bills paid, etc.)
  - iv. Non-existence of the state of affairs must render performance of the contract impossible.
    - (doesn't own so cant perform contract)
  - v. The State of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contract is to be possible
    - (don't really need to look at this as it is obviously a case of fundamental as in *Bell v Lever Bros*)
    - Can't transfer title
    - NOTE: As it is a fundamental mistake, the contract is **VOID**.

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## Improper Pressure - Duress and Undue Influence

**Duress and Undue Influence - See Butler - Chapter 4 - Question 28 (parts including: Undue Influence, *non est factum* and Fraudulent Misrepresentation) AND Question 30 (Economic Duress). Unconscionable Conduct and Unfair Contract Terms - See Butler - Question 27 (p141), Chapter 4.**

**EXAMPLE - DURESS**

Best Deal Office Supplies

Best Deal Office Supplies (BD) may be able to avoid the new contract and then seek to rely on the original contract under which the higher rental is payable. The new contract may be avoided if BD can establish it was entered into under duress or as the result of unconscionable conduct on the part of Credible Couriers (CC).

Both grounds will give rise to a right to rescind the contract. Here the relevant contract is the new agreement for 12 months at a hire rate that is 20% less than the original contract. The facts do not suggest the right to rescind has been lost.

This advice will consider the elements necessary to establish the grounds of duress and unconscionability in turn.

Duress

On the facts available, BD could argue the contract was entered into as a result of economic duress.

BD would need to establish:

- Pressure which compelled it to enter into the contract
- Illegitimacy of the pressure
- A causal connection between the pressure and the decision to contract.

Economic duress has been described as the use of illegitimate business pressure to induce someone to enter into a contract: *Crescendo Management v Westpac*. However, the terms 'economic duress' and 'illegitimate pressure' have been criticised for being too vague by the New South Wales Court of Appeal in *ANZ v Karam*. In that case it was suggested it would be better if duress was limited to actual or threatened unlawful conduct directed at the legitimate commercial and financial interests of the plaintiff. While not binding in Queensland, the decision of the NSW Court of Appeal likely would be considered persuasive.

In this problem, BD could argue that CC threatened to breach the contract, which would be unlawful conduct.

In *North Ocean Shipping v Hyundai* it was thought that a threat to breach a contract could amount to economic duress. The Court in that case noted it would not have been considered reasonable to expect the plaintiffs to have claimed damages in arbitration, such that prima facie, they had entered into the new arrangement under economic duress. Relevantly, BD did not attempt to reserve its rights (compared with *Hyundai* which did purport to reserve its rights when agreeing to the variation to the price payable in that case).