

Misleading or Deceptive Conduct:

WHEN IS CONDUCT MISLEADING OR DECEPTIVE?

- The prohibition contained in s18(1) of ACL does not substantively change compared to s52(1) of TPA, and the State and Territory equivalents in their Fair Trading Acts.
- *The only difference is that s18 is directed at the conduct of persons generally rather than corporations.
 - If the conduct concerns that of a corporation, reliance will generally be placed on the ACL (Cth).
 - If the conduct concerns that of natural persons, reliance will generally be placed on the ACL (Application Acts) i.e. Fair Trading Act 2010 (WA).
- S 18 has been applied in range of situations, including advice by professional advisers, advertising, passing off, private contracts, real estate sales and leasing and sales of businesses.

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PROVISION

The Australian Consumer Law Chapter 2 -- General protections Part 2-1 -- Misleading or deceptive conduct

S.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).

Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

ELEMENTS

1. Person;
 2. In trade or commerce;
 3. Engage in conduct;
 4. That is misleading or deceptive or likely to mislead or deceive.
- **Butcher v Lachlan Elder Realty*: the question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s52 has occurred, the task of the court is to examine the relevant course of conduct as a whole.
 - It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances.
 - It is an objective question that the court must determine for itself.

***1. Person**

ACL as a law of the Cth: applies to corporations as defined in s4(1) of CCA -

- Applies to the conduct by corporations (as defined s 4(1) CCA)
 - *Hughes v Western Australian Cricket Association*: the mere fact that a corporation trades does not mean that it is a trading corporation. To determine whether a corporation is a trading corporation, the court will consider the current activities of the corporation and the corporation's constitution.
 - The trading activities must form a sufficiently significant proportion of the corporation's overall activities.
- Applies to some individuals – see ss5(1),6(2),6(3) CCA
 - S.5(1): “extends to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia; Australian citizens or persons ordinarily resident in Australia”.
 - S.6(2): “a reference in this Act to a corporation, except a reference in sections 4, 48, 49, 50, 50A, 77A, 81, 151AE or 151AJ of CCA or s229 of ACL, includes a reference to a person not being a corporation.”
 - S.6(3): “a reference in the provisions of Part XI to a corporation include a reference to person not being a corporation.”
- ACL binds the Crown in right of the Commonwealth to the extent that it is carrying on a business, either directly or by an authority of the Commonwealth, as if the Crown were a corporation.

***Definition s 4(1) CCA - "corporation" means a body corporate that:**

- (a) is a foreign corporation;
 - (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
 - (c) is incorporated in a Territory; or
 - (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).
- Foreign corporation is one incorporated outside continental Australia; in another country or in an external territory.
 - Trading corporation is one which engages in trading (which in this context means the activity of acquiring or supplying goods or services in a commercial or business context) as a substantial and not merely a peripheral activity.
 - Financial corporation: *Re Ku-ring-gai Co-operative Building Society* – the essence of a financial corporation is that it deals in finance, such as lending or borrowing money, as distinct from transactions which merely involve the use of money.
 - In determining whether financial corporation, the substantial current activities test applies.
 - It is not essential for a corporation's financial activities to be its principal activities, so long as they form a significant part of its operations.

What is a trading corporation?

- **Hughes v Western Australian Cricket Association* – substantial current activities test
 - The mere fact that a corporation trades does not mean that it is a trading corporation.
 - Cited *Adamson* – Barwick CJ and Mason J.
 - The test is current activities of the corporation.
 - Where a corporation has not begun to trade, its character may be found in its constitution.
- **Adamson* – trading corporation – extent of trading?
 - It must be a *substantial corporate activity* (Barwick)
 - The trading activities must form a *sufficiently significant proportion of the corporation's overall activities* (Mason)
 - The trading activities *should not be insubstantial* (Murphy J)
 - The corporation must carry on trading activities on a significant scale.

The purpose for which the corporation was formed is not irrelevant. *Hughes*: a corporation's constitution will be especially important where the corporation has not yet started to trade.

- *Fencott v Muller*: a shelf company which has remained dormant since its incorporation can still be a trading corporation for the purposes of the CCA if its constitution authorises it to engage in trading activity.

ACL as law of States and Territories:

- Persons carrying on business within the State or Territory
- Bodies corporate incorporated or registered under the law of the State or Territory
- Persons ordinarily resident in or otherwise connected to the State or Territory regardless of whether the conduct occurs inside or outside the State or Territory (including outside Australia).
- ACL binds the Crown in right of each State or Territory to the extent that it is carrying on business, either directly or by an authority of the State or Territory.

***2. IN Trade or Commerce**

- *Definition s 2 ACL: “‘*Trade or commerce*’ means:
 - a) Trade or commerce within Australia; or
 - b) Trade or commerce between Australia and places outside Australia and includes any business or professional activity (whether or not carried on for profit).
- *General protection against misleading conduct only applies if the conduct occurs in trade or commerce.
- The terms ‘trade’ and ‘commerce’ themselves are not defined.
- **Early definition - *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978):** “the terms “trade” and “commerce” are not terms of art... [They] are clearly of the widest import... [and] are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within open markets or between strangers or have a dominant objective of profit making”

- ***Concrete Constructions:** “in trade or commerce” must have a trading or commercial character”, and it is not sufficient for it to be merely connected with, or incidental, to trade or commerce. Looking for conduct which inherently bears a trading or commercial character.
- It is also necessary to establish that it constitutes trading or commercial activities within Australia or between Australia and places outside of Australia.
- ***Concrete Constructions** Mason CJ and Deane, Dawson and Gaudron JJ: “*what the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.*”

Examples of in trade or commerce:

- Private sale of property NOT in T or C: ***O’Brien v Smolonogov + Williams v Pisano***: the sale by the vendor of his home, even if the vendor had renovated the property with a view to resale at a profit, is not an act done in trade or commerce because it was a private residence.
- Statements by a real estate agent in connection with a sale ARE in T or C: ***Argy v Blunts***
- Statements relating to the sale of a business by the owner or an agent ARE in T or C: ***Bevanere***
- Internal communications within a company are incidental to T or C NOT ‘IN’ T or C: ***Concrete Constructions***
- Government announcements and policy statements NOT ‘IN’ T or C

Summary:

- In T or C
 - External transactions and communications by BUSINESSES to further their commercial interests (*Re Ku-ring-gai Co-operative Building Society*); (*Bevanere Pty Ltd*)
 - External transactions and communications by PROFESSIONALS for which remunerated (*Argy v Blunts & Lane*).
- NOT in T or C
 - Internal communications within a company are incidental to T or C i.e. between one employee to another in the course of their ordinary activities (*Concrete Constructions*).
 - Conduct of a purely private or personal nature
 - Government announcements and policy statements (*Unilan Holdings v Kerrin*).

3. *Engage in conduct

***What is conduct?**

Includes:

- representations
- silence
- providing advice
- passing off.

- *"Engaging in conduct" is defined in Section 2(2) ACL
 - S2(2)(a) includes doing or refusing to do any act...
 - S2(2)(c) a reference to refusing to do an act includes a reference to:
 - (i) *refraining (otherwise than inadvertently) from doing that act* ie. SILENCE is conduct.
- *The concept of "engaging in conduct" in s2(2) of ACL divides conduct into 2 broad categories: "doing any act" or "refusing to do any act".
 - *Google Inc v ACCC*: the focus must be on the statutory text, which focuses on conduct rather than representations.
 - Where the relevant conduct consists of doing an act, the act will generally involve the making of some express or implied representation.
 - *For the doing of an act to constitute a contravention of s.18, it is only necessary to prove that the representation leads into error or is likely to lead into error (*Parkdale Custom Built Furniture*).
 - Determining whether the representation was made is a question of fact.
 - *The ultimate question is whether the representation leads or is likely to lead into error.
- *Limitation on engaging in conduct: Passing On*
 - Generally, conveying information where it is clear it is being passed on "for what it is worth" by someone who makes it clear they are not the authors and have no expertise will not amount to MDC.

Types of Conduct:

***(1) Refusing to do any act: i.e. SILENCE**

- S.2(2)(c) provides "a reference to refusing to do any act includes a reference to (i) refraining (otherwise than inadvertently) from doing that act or; (ii) making it known that the act will not be done."
- "Otherwise than inadvertently" held to mean that an unintentional non-disclosure is not regarded as conduct for the purposes of s.2(2)(c).
- *In determining whether silence constitutes misleading or deceptive conduct, it is first necessary to consider whether the silence amounts to conduct as defined in s.2(2) of ACL. **Silence is conduct within ACL – s.2(2)(c)(i).**

****What is silence?***

- *Mere silence: where silence occurs in isolation, it is not always misleading. *Rhone-Pulenc Agrochimie*: Bowen CJ held "the words 'refuse' and 'refrain' clearly connote that the omission do an act must be deliberate."
 - Unless there is a deliberate decision to withhold information, the silence will not be actionable.
 - If the silence is attributable to carelessness, or ignorance of the significance of the information involved, it will not be actionable – *Costa Vraca v Berrigan Weed*.