

OVERVIEW OF THE AUSTRALIAN CONSUMER LAW

- Introduced in 2010
- Equivalent provisions previously in the Trade Practices Act 1974
- s 18 - general prohibition and a number of provisions dealing with specific conduct
- Criminal / Civil remedies generally available under specific provisions: different standards of proof

Misleading or Deceptive Conduct

- Conduct must be in trade or commerce
- Firms generally responsible for acts of employees and agents
- Mislead or deceive = lead into error, conduct normally involves misrepresentation
 - identify relevant audience
 - determine message or impression conveyed to reasonable member of relevant audience
 - determine whether message or impression is true or false
- Case: Hansen Beverage v Bickfords (2008) (Monster drink): misleading conduct
- ACCC v TPG (2013): the extra conditions were not sufficiently displayed to overcome this false representation.

Relevant Audience:

- Depend on the whole circumstances including:
 - nature of product involved
 - price of product
 - type of person normally buying product
 - medium used to convey the relevant message. Eg label, packaging, advertisement
- Case: Décor Corp v Bo-Water Scott (1985) the advertisement should be viewed as a whole and should not be taken too literally.

Impression conveyed to relevant audience

- Advertising will mean whatever an 'ordinary or reasonable' member of relevant section of public thinks it means
 - Interlego v Croner: ordinary or reasonable members of these relevant audiences are unlikely to put the advertiser's conduct under much scrutiny (critical observation).
 - Taco Co v Taco Bell

Impression true or false?

Matter of assessing whether the message or impression conveyed to the relevant section of the public is true or false. If it is false, then there is a breach of s 18.

General principles

- Conduct must be judged as a whole
- No requirement that anyone be actually misled or deceived
- Intention is largely irrelevant
- Distinction between confusion and deception
- Advertisement carrying multiple messages
- Disclaimers eg Newton John: defendant's conduct does not extend to making any suggestions of an association.
- Point of Sale

Examples

- Opinions and exaggerations: a trader is entitled to puff up its own product, provided that it does not mislead or deceive.
- Predictions
- Silence
- Scientific claims: *Colgate*
- Comparative advertising: *Makita v Black & Decker (1990)*; *Gillette v Energizer (2002)*
- Country of origin claims
- Using celebrities to promote products
- Sponsorship and ambush marketing

Ambush marketing: Major Sporting Events Act Victoria

- Prohibits unauthorised advertising on buildings, structures, and vessels;
- Criminal offence to possess “prohibited items”, such as flags or banners > 1 sq m and commercial quantities of items that could reasonably be used for commercial purposes;
- Minister can declare specified logos etc relating to an event to be protected,
 - Prohibits conduct that falsely suggests a sponsorship, approval, or affiliation with an event, organiser, or associated activity; and
 - Prohibits the unauthorised broadcast, telecast, or transmission of sound or images of an event

Penalties

- Financial Penalties
 - Civil Penalties
 - Fines
 - Damages
- Civil provisions Part 3-1
- Criminal provisions Part 4-1
- see chart in text
- Civil proceedings give rise to orders for injunctions, damages and civil penalties. Criminal proceedings give rise to fines. The amount of civil penalty that the court can impose is similar to the fine that can be imposed in a criminal case.

Misrepresentations under sections 29/151

29(1)(a)/(b) – standard, quality, value, grade, composition etc

29(1)(c) – newness of goods

29(1)(d) – agreement to acquire goods or services

29(1)(e)(f) – testimonials

29(1)(g)(h) – sponsorship, approval, performance characteristics, accessories, uses or benefits

29(1)(i) – price of goods or services

29(1)(j) – facilities for repair, spare parts

29(1)(k) – place of origin of goods

29(1)(k) – place of origin of goods

29(1)(l) – need for goods or services

29(1)(m) – contract rights of consumers

29(1)(n) – requirement to pay for contractual right

Specific misconduct

Conduct under sections 33/155 and 34/156

- Misleading conduct in relation to goods: 33/155
- Misleading conduct in relation to services: 34/156

Pricing conduct under sections 47/165 and 48/166

- Multiple pricing
- Single price to be stated in certain circumstances

Liability of Advertising Agencies and Accessories

- Advertising agencies and primary liability
- Liability as an accessory

Defences

- Information providers (media outlets)
- Defence to a civil penalty action
- Special defence for publishers
- Reasonable mistake of fact
- Reasonable precautions, exercising due diligence

The regulator’s powers/remedies

- Undertakings
- Substantiation notices
- Public warning notices
- Infringement notices
- Court Orders
- Fines

- Injunctions
- Corrective advertising
- Compliance and education programs
- Community service order
- Order enforcing undertaking given to ACCC
- Order disqualifying person from managing
- Compensation

Chapter 10 tutorial notes

Question 10.03 Misleading or deceptive

A soap powder manufacturer had marketed a product called 'Sudso' for many years. Its market share had fallen steadily due to increased competition. The manufacturer designed a bright new package for the product, added a scented fragrance and changed its name to 'Sno'. The product was then re-released and advertised as 'a new advance in laundry detergent that washes whiter than white'. Has the soap manufacturer breached any laws?

Answer

Issue Whether the advertisement of the re-released soap powder is misleading or deceptive.

Relevant law and Application

S 18 of the ACL prohibits misleading or deceptive conduct.

- Two preliminary matters: (1) is the conduct in trade or commerce (2) when is a firm liable for the acts of its e'ees and agents (generally liable)
- Test for applying s 18 (3 steps)
 - General public: consider the relevant audience by taking the nature of the product and the types of person who normally buys the product into consideration- audiences are the general public bc everyone may purchase it.
 - Impression: the product itself is brand new: TPG case
 - The impression is false = direct breach of s 18

29 of the ACL provides that a corporation shall 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, make a false or misleading representation about the matters listed in s29(1)(a)-(n).

- **S 29(1)(a) quality, grade, and composition**
- **S. 29(1)(c) newness of goods.** S29(1)(c) prohibits false or misleading representations that goods are new, including representing a product that is new and improved formula when it is in fact a re-launched item.

S. 33 Misleading conduct in relation to goods. S33 of the ACL prohibits misrepresentations with respect to the nature and characteristics of any goods. The product was represented as a new product when it is actually old formula with new package. The conduct of misrepresenting the nature of the product will breach s33 in the civil provision and s155 of the ACL in criminal provision.

Defences for the soap powder manufacturer, it is unlikely that they will be able to rely on reasonable precautions and exercising due diligence.

Conclusion It is likely that the soap manufacturer will be held liable under the ACL because it falsely engaged in misleading and deceptive conduct that are likely to trick the general public into thinking that the product and the formula are new to the market when it is actually not. A court can order fines, injunctions and corrective advertising to the soap manufacturer.

Question 10.06 Travel agency

Mile High Travel ran a series of advertisements in newspapers and magazines promoting an overseas tour it had organised. The advertisement read :

GREATEST EXPERIENCE OF YOUR LIFE OR YOUR MONEY BACK

Exciting action filled 14 day fully escorted tours of the West Coast of America with extended stopovers in Honolulu just \$3000 per person.

The ad was prepared and placed by Jonathan Jetset, the MHT's manager.

Anne called MHT, but was informed that, for private accommodation, her fare would be \$3500, as the advertised price was based on twin share. She was also told some tours may run for 13 days, as MHT had been told by the airline that its schedule was subject to change, which at times might mean returning a day earlier than advertised.

When MHT received this information from the airline, 10 ads had run, with 10 more to come. Jonathan chose not to alter the ad, but instructed staff to tell customers some tours might be reduced to 13 days. Anne went on the tour, but was disappointed. The weather was poor and on 4 days tour were given 'free' days when they were left on their own. Her tour was cut down to 13 days.

Answer

Parties:

MHT: travel agencies- Run the ad even if its false

Ann: customers

Media (Outsourced media/ad agencies)

Facts claim:

14 days trip with extended stopovers for the price of \$3000

Issue Whether the advertisement will mislead or deceive the public

Relevant Law and application

- S 18 Misleading or deceptive conduct: The test for applying s 18
 - Relevant audience: general public
 - Impression conveyed: money back guarantee, tours, 11 days instead of 13 days, and fully escorted- these claimed are untrue
- S 29(1)(b) standard, quality and value of the service
- S 29(1)(i) price
- S 29(1)(g) performance characteristics of services
- S 34 misleading conduct in relation to service
- S 48 single price to be stated in certain circumstances

Case Doherty v Traveland PL: they breach ed s. 34 because the ad would be misled as to the quantity of the services (11 days instead of the advertised 13 days).

Case point of sale St Lukes Health Insurance p.390

Defence

- s. 207 MHT's wrong ad, only prior 10 ad can rely on the defence because it was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person. However, the later 10 ads after the airline had informed the MHT about the reduced length of tour, MHT will not be able to rely on this defence.
- Ann suffered from the increased \$500 of the trip and the additional costs to the tour.
- S. 209 advertising agent and media outlet who publish MHT's ad can rely on this defence
- S. 38 exemption for information provider

Conclusion and Remedies

Ann can bring civil action

Damages: Compensation for the \$500 difference

Chapter 11

Question 11.01a Bait Advertising

Flora Pty Ltd advertises as follows:

'Black Roses, Long a dream. Now a reality Available for the first time. Next Monday at our Richmond store. Limited quantities Hurry. Hurry.'

Unfortunately, a fire at Flora's nursery over the weekend destroys the flowers which were to be sold on the Monday. Flora is most apologetic to its customers and takes the names and addresses of its disappointed clients with a promise that they will be supplied when the roses become available.

Answer

Issue Whether Flora's failure in supplying roses to customers constitute a breach under the ACL

Relevant Law and Application

- Under s 35 and 157 of the ACL, sellers advertise that a product is available which in fact it is not, or that it is available at a low price when in fact there are only a limited number of items available at the price.
- Elements of bait advertising
- To avoid legal responsibilities, Flora need to provide the roses in a reasonable time.

Question 11.01b Bait advertising

ACDC Ltd advertises in a regional newspaper as follows:

'Toshima Notebook Computers — \$1995.

This weekend only. Whilst stocks last.'

ACDC knew it only had 10 of the advertised computers in stock.

Answer

Issue Whether ACDC's conduct constituted a breach under s35 of the ACL

Law and Application

S35 of the ACL in the civil provision states that a conduct is unlawful when the supplier advertising goods or services at a specific price, when there are reasonable grounds for believing that the advertiser will not be able to offer reasonable quantities for a reasonable period of time. There are several elements to consider:

A. Elements of bait advertising: the ad is in trade and commerce. Moreover, the price of the computer had been listed on the ad as well.

B. What is a reasonable period? Need to look at the advertiser's market and the nature of the ad. ACDC is entitled to specify the period of time that the computers will be available. ACDC did specify that the computers will only be available in "this weekend". Therefore, the period of time of sale is reasonable.

C. What is a reasonable quantities?

- Matters to consider:
 - Types of good: computer
 - Method of advertising: regional newspaper
 - Method of distribution: retail?
 - Rate of turnover- price: \$1995

The ad had been listed on a regional newspaper where it is reasonable to expect that there would be more than 10 customers to come into the store during a weekend. Many people would have been brought to ACDC's store by this ad and would have been disappointed. In *Collis v Coles Myer Ltd*, the retailer had not obtained "reasonable quantities" of the coffee when a large demand can be expected.

Defences, Remedies and Conclusion

There is no special defence for a breach of s35 and s157 under the ACL. However, for second offence under s157, there is a special defence for the act of failing to supply advertised goods or services in reasonable quantities in a reasonable period. The special defence can be divided in to two forms, including raincheck or substitution. ACL allows for civil pecuniary penalties be sought by ACCC and victims for any breach.

Moreover, the 'unfair practices' are also designated as criminal offences under ch 4 of the ACL. It was in the public's interest that special price goods are made available in reasonable quantities.

Remedies are also available for consumers.

Question 11.01c Referral selling

Super-Roofs Pty Ltd advertises on television as follows:

'Buy one of our roofs now. Special deal. If you sign up for one of our super aluminium roofs within the next two months, we'll give you a rebate of \$60 off the special price of the roof for every customer you get to sign up with us.

Hurry now! Contact Super-Roofs Pty Ltd.'

Several customers sign up to pay \$1000 for new roofs but are disappointed because they do not receive the rebate when they convince others to sign up.