

## 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)
  1. 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.
  2. Impression: the product itself is brand new: TPG case
  3. 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 breached 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