

Lecture 11: Consumer Protection

Consumer Law –
the statutory
provisions

Unconscionable
conduct
Misleading or
deceptive conduct
False
representations

Consumer Protection:

- Aim = prevent businesses from harming consumers and promote fair competition
- Competition and Consumer Act (CCA)
 - Regulates 'Restrictive Trade' practices to produce greater competition and efficiency
 - Protects against unfair practices
- Prior to 2011 – called *Trade Practices Act 1974*

Australia Consumer Law – Schedule 2 (of Competition and Consumer act 2010)

- Consumer law and unfair practice

Regulator:

- ACCC = to ensure individuals and businesses comply with Commonwealth consumer protection, fair trading and competition/trade practice laws

Question 1: Do we have a consumer?

Who is a consumer:

- Acquire goods/services for up to 40k or more and products are used for personal, domestic or household purposes

Who is not a consumer:

- Purchased for re-supply or for use in the manufacture or repair of items

Question 2: What type of conduct are we using?

Unconscionable conduct: SS20-22

(Drawn from Armadio)

- Especially when small businesses deal with large businesses
- **Section 20: Don't do it**
- **Section 21: Don't do it in relation to the acquisition of g/s**
- **Section 22: Statutory Checklist**
 - Relative bargaining powers
 - Any duress?
 - Literacy – did they understand the document
 - Undue influence
 - Monopoly?

Misleading or deceptive Conduct: s18

Section 18

- A person shall not trade, engage in misleading or deceptive conduct that **IS LIKELY** to mislead or deceive
- Not restrictive in its usage to consumers and can be equally enforced by competitors or suppliers against other competitors or suppliers
- Section 18 was formally section 52 of Trade Practices Act
- In relation to financial services = Australian Securities and Investment Commission Act 2011 – ASIC
- Section 18 is made of the following elements:
 - Conduct by a person
 - ❖ Lead a consumer astray in action or conduct
 - ❖ Lead a consumer into making an error
 - ❖ **Weitmann v Katies Ltd**
 - ❖ **Test: Question of fact to be determined in context of evidence of each case**
 - In the activity of trade or commerce
 - Engaged in misleading or deceptive conduct that is or likely to mislead

What is conduct?

- Statement of opinion = in relation to a professional person
- Broken promises and false predictions
- # Statements that are literally true but which create a false impression
- Pre-contractual statements
- Silence
- Puffery – self evident exaggeration will not be taken to infringe - advertising

Misleading or deceptive conduct tests:

- Would lead one ordinary member of the public
 - Relevant section of the public:
 - Need to identify the class of persons who are perspective purchasers and who are likely to be affected by the conduct
 - ❖ At whom was the conduct directed?
 - ❖ Would those persons have been likely to be led into error by the conduct?
 - Whether conduct is misleading or deceptive is determined by using an objective test of “**whether a reasonable person would be mislead or deceived**”
 - Standard for assessing conduct:
 - Exposed or potentially exposed to the relevant conduct
 - ‘Likely to mislead or deceive’
 - You do not need to prove anyone was mislead
 - Just need real possibility or ‘not remote chance’ that someone might be mislead
- Who is likely to read the statement or be influenced by it
- Into error
- **Taco Company of Australia Inc V Taco Bell Pty Ltd**

Silence:

- May be misleading if failure to communicate fact may cause an untrue representation of another fact to be misleading
- Ask: Is there any reasonable expectation of disclosure?
- Colonial Mutual life v Trade Practices Commission
- Sent people to outback where literacy was not good. Did not tell them that premiums go up :. Engaged in misleading conduct
- Traditional secretiveness of bargaining process is not a licence to deceive
- Poseidon Ltd V Adelaide Petroleum NL

What is not misleading?

- Confusion or uncertainty
- McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd
- Size of letters/demographics targeting
- Pardale Custom built furniture Pty Ltd v Puxu
- Correct labelling will get you out of trouble

False Representation: S29

A breach will result in:

- Prosecution by ACCC for criminal offence
- Injured parties being provided with civil remedies

Prohibits false rep in promotion/supply of goods and services

- a) Standard, degree of quality, value, grade, history
- b) Services
- c) Goods are new
- d) Goods or services have been ordered
- e) Testimonials relating to goods or services
- f) Performance characteristics, accessories, benefits
- g) **Sponsorship**, approval
- h) **Price** (when new taxes are introduced)
- i) Repair facilities or spare parts
- j) **Place of origin**
- k) Need for any g/s
- l) Existence exclusion, guarantee, warranty
- m) **Requirement to pay for a contractual right**

Key Cases and Statue Law

Contract Law

1. **Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (*Smoke Ball*) Offer.** £1,000 deposited into a bank account amounted to intention to create a legal contract with anyone who satisfied the conditions.
2. **Merritt v Merritt [1970] 2 All ER 760 *Intention to Create Legal Relations*.** Although between a husband and wife, the presence of a signed contract between the two rebukes the presumption that there is no intention to create a legally binding contract between them.
3. **Wakeling v Ripley (1951) 51 SR (NSW) 183 *Intention to Create Legal Relations*.** Similar to Merritt, it was proved that they gave up significantly to make the move, and the economic seriousness that would result implied a legally binding contract.
4. **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 QB 401 *Invitation to Treat*.** Displaying stock on shelves in a store is an invitation to treat. The offer is made at the check-out and the acceptance is when the money is paid.
5. **Hyde v Wrench (1840) 49 ER 132 *Counter-Offer Destroys Original Offer*.** No contract was made since he had rejected the initial offer. He could not revive the original offer and accept it after a counter-offer was made.
6. **Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723 *Practical Benefit Constitutes Consideration*.** Rent was reduced but the plaintiff returned later and asked for the original rent to be paid in arrears. This was unsuccessful as the fact that having someone renting out a store in the shopping centre gave them a practical benefit of more customers overall.