



Misleading and Deceptive Conduct and Economic Torts

LAWS203 EXAM NOTES



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NO INDEMNIFICATION OF OFFICERS

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OVERVIEW OF AUSTRALIAN CONSUMER LAW

Why is consumer & competition law necessary?

s51 of the *CONSTITUTION OF AUSTRALIA ACT*

COMPETITION & CONSUMER ACT 2010 (Cth)

AUSTRALIAN CONSUMER LAW (ACL) is SCHEDULE 2, CCA

REPLACES *TRADE PRACTICES ACT 1974* (Cth)

APPLIES TO PERSONS + CORPORATIONS

NOT FOR FINANCIAL PRODUCTS & SERVICES (ASIC)

FAIR TRADING AMENDMENT (AUSTRALIAN CONSUMER LAW) ACT 2010 (Vic)

Competition and Consumer Act

CHAPTER TWO - DISHONOURABLE CONDUCT eg

MISLEADING & DECEPTIVE & UNCONSCIONABLE CONDUCT, UNFAIR CONTRACT TERMS

CHAPTER THREE - UNFAIR PRACTICES eg

FALSE & MISLEADING REPRESENTATIONS, UNSOLICITED SUPPLIES & GOODS, PRICING,
CONSUMER TRANSACTIONS, GUARANTEES, SAFETY OF CONSUMER GOODS & SERVICES, MAKERS' LIABILITY FOR
PRODUCT DEFECTS

CHAPTER FOUR - CONSEQUENCES FOR BREACH

CHAPTER FIVE - ENFORCEMENT POWERS & REMEDIES & DAMAGES FOR CONSUMERS

s 131C - CONCURRENT WITH STATE & TERRITORY LAW

s 5 EXTRATERRITORIAL APPLICATION,

Wells v John R Lewis

Bray v F Hoffman

The Crown

CROWN IMMUNITY and

DERIVATIVE CROWN IMMUNITY

s2A COMMONWEALTH CROWN

ACCC v Baxter Healthcare

s2B STATE CROWN

s2BA LOCAL GOVERNMENT

'Business'

s2 'BUSINESS'

'CARRYING ON BUSINESS'

Fasold v Roberts;

J S MacMillan v Cth p 16

Not carrying on a business

'Consumer'

s 3 - A CONSUMER defined:

'ACQUIRES GOODS OR SERVICES' for

PERSONAL, DOMESTIC or HOUSEHOLD USE (must be a regular practice)

\$40,000 CEILING (currently under review)

Nesbit v Porter (2000) 2 NZLR 465 p38

Jillawarra Grazing Co v John Shearer p39

Something used for a business activity not applicable

Crago v Multiquip Pty Ltd & Dunogan Farm Tech p41

Ostrich egg incubator, because baby ostrichers were being on sold.

Carpet Call Pty Ltd v Chan p 42

Carpet cleaner - domestic rating

NOT FOR RE-SALE or MANUFACTURE;

Laws v GWS p 45

EXCEPTION FOR VEHICLES

APPLIES TO CORPORATIONS;

PT Garuda v ACCC - not necessarily contractual p 47

What are their substantial current activities

Shahid v Australasian... 'substantial current activities' test p 49

s2 'TRADE & COMMERCE',

E v Red Cross - not necessarily for profit; p 51

Concrete v Nelson - includes trade outside Australia

Constitution 'in trade or commerce' s 51.

'GOODS & SERVICES' – 'goods' = computer software;

Adamson v West Perth - work contract rights;

Obeid v ACCC - no restricted meaning of 'services';

ACCC v Jutson - includes IT services (s 6) p 23

Manufacturer s 7

Importer, designs, makes, uses

S18 CCA - Misleading and Deceptive Conduct

S18: PROHIBITS MISLEADING & DECEPTIVE CONDUCT IN TRADE & COMMERCE

DIFFERENCE BETWEEN a TORT action & an ACL action

TO TAKE AN ACTION IN TORT

THE ISSUE DOES NOT HAVE TO BE 'IN TRADE OR COMMERCE'

BUT

TO TAKE AN ACTION UNDER s18 CCA

THE ISSUE MUST BE IN 'TRADE & COMMERCE'

A PERSON must not,

In trade or commerce

Engage in CONDUCT that is misleading or deceptive

OR

Likely to mislead/deceive

'PERSON' includes a COMPANY

s2 *Acts Interpretation Act* 1901 (Cth)

s2(2)(a) ACL & s4(2)(A) CCA

The s 18 CONDUCT must be in relation to a CONTRACT or ARRANGEMENT OR an UNDERSTANDING or a COVENANT

...TO DO or NOT DO SOMETHING

CONVENANT = OBLIGATION in a DEED

ARRANGEMENT = AN UNDERTAKING TO DISCHARGE an OBLIGATION

CCA DOES NOT DEFINE MISLEADING or DECEPTIVE

PARKDALE CUSTOM BUILT FURNITURE v PUXU (1982) 42 ALR 1: p 123

Give 'misleading & deceptive conduct' their:

'PLAIN NATURAL MEANING' ;

Consider the 'OVERALL IMPRESSION' ;
Ask: is it 'CAPABLE OF INDUCING ERROR'?

Not liable, okay to make goods that closely resemble goods from another, if they are correctly labeled. - An ordinary person who reads labels would not be confused.

McWILLIAMS WINE PTY LTD v McDONALD'S SYSTEM OF AUST PTY LTD (1980) 33 ALR 394 p125
(2 'very different' products) so NOT misleading

Named a red wine, Big Mac. Maccas was worried people would be confused. 1st Fed court, found confusion
HCA found that potential consumers would not be confused because different products.

TACO CO OF AUST v TACO BELL PTY LTD (1982) 42 ALR 177 (2 similar products): so MISLEADING
Set this test:

identify WHO might be misled;
consider EVERYONE in that GROUP,
apply an OBJECTIVE TEST and
decide WHY the misconception has occurred

Examples of Misleading and Deceptive

REPEATED WORDS:

FRASER v NRMA HOLDINGS LTD (1995) 127 ALR 543 p 137

Increases likelihood of being believe, and therefore increases likelihood of being deceptive.

Repeated use of the word 'free' in a prospectus, led potential customers to believe they would get free shares

'INTENTION' is irrelevant,
Yorke v Lucas (1985) 61 ALR 307 p 137

Dangerous ½ truths,
KANNEGIETER v HAIR TESTING LABORATORY [2004] FCA 639 p142
Hair testing place, selectively chosen words from a veterinary approved of using horse hair to test health of horse,
used words to promote product.

Silence

SILENCE is misleading when OBLIGED to reveal relevant facts, GENERAL NEWSPAPERS v TELSTRA CORP (1993) 117 ALR 629 ;

Printing co expressed interest in printing yellow pages. Usually Telstra advertised and encouraged for tender.
Allowed the printer to be on the list of tender before just reassigning the original contractors.

NOT MERE SILENCE, WINTERTON CONSTRUCTION v HAMBROS AUST (1992) 111 ALR 649 : because

s2 (i) refraining from doing an act or
(ii) making it known that the act will not be done.

Was silence DELIBERATE?

COSTA VRACA v BERRIGAN WEEDS(1998) 155 ALR 714

Future Conduct/Predictions/Opinions

Prediction/opinion is not misleading if the person BELIEVES it is true, AWAD v TWIN CREEKS PROPERTIES (2012) NSWCA 2000

s4 ACL must be 'reasonable grounds' for the statement

ACCC v GARY PEER & ASSOCIATES PTY LTD (2005) FCA 404 - 'price guide of \$600,000 plus' p 153

Real Estate Agent advertised, \$600,000 people should inspect. Vendors instructed not to sell for less than \$800,000.
Found misleading

HENJO INVESTMENTS v COLLINS MARRICKVILLE (1988) 79 ALR 8. 3 – no enquiry is no escape
Court held Henjo liable, despite Collins' outside knowledge.

ACCC v TPG (2013) 304 ALR 186 – ‘correction’ notice & the ‘transitory effect’
Must occur quickly after the mistake was published.

Validly 'Passing on Information'

Similar to gossip - not liable if just passing on., not claiming it as their own.

BUTCHER v LACHLAN ELDER REALTY PTY LTD (2004) 212 ALR 357

OK – because ‘a disclaimer’

Size of property incorrect, had advertised with a recommendation for prospective buyers to check for themselves and that they were merely passing on info.

GOOGLE INC v ACCC (2013) 294 ALR 404

OK – because ‘a conduit’

Appeal found google liable.

Principle of ‘reading down’ EXCLUSION CLAUSES

CLARK EQUIPMENT AUST v COVCAT PTY LTD (1987) 71 ALR 367

BUTCHER v LACHLAN ELDER REALTY PTY LTD (2004) 212 ALR 357

'Without Prejudice' Negotiations

MUST NOT MISLEAD or DECEIVE during ‘without prejudice’ negotiations

QUAD CONSULTING v DAVID BLEAKLEY (1990) 98 ALR 659

S 19 Media Exemption

s19 EXEMPTS the media from misleading and deceptive conduct in some circumstances, eg

BOND v BARRY (2007) 73 IPR 490

BUT

NO EXEMPTION in

ACCC v CHANNEL SEVEN BRISBANE (WILDLY WEALTHY WOMEN CASE) (2009) 255 ALR 1 where the media had a CONTRACT with a supplier of services, & the media PUBLISHED, & thus ADOPTED misleading representations about those services

Does not apply to

Remedies & Penalties for s 18 Breaches p 172

DECLARATIONS s21 FCA (761...)

UNDERTAKINGS s218 ACL

SUBSTANTIATION NOTICES s219 ACL

PUBLIC WARNING NOTICES s223 ACL

INJUNCTIONS s232 ACL(705...708...)

DAMAGES s236 ACL(720...726...)

COMPENSATORY ORDERS s237 ACL(744)

ORDERS FOR NON-PARTY CONSUMERS s239 (747)

NON-PUNITIVE ORDERS s246 ACL

ORDERS TO PRESERVE PROPERTY s137 CCA

POWER TO OBTAIN INFORMATION, DOCS, s155CCA

Does the advertisement cause, or is it likely to cause, or induce, error?

Standard: Ordinary person would understand.

PARKDALE FURNITURE v PUXU (1982) 42 ALR 1

FARQUAR v BOTTOM (1980) 2 NSWLR 380

Lists principles for advertisements.

TELSTRA CORP LTD v CABLE & WIRELESS OPTUS (2001) FCA 1478

Consider:

the target audience &

the reasonable or ordinary consumer

Advertisements (CH 4)

PUFF: 'an exaggerated statement that no reasonable person would believe to be true'

CARLILL v CARBOLIC SMOKE BALL CO (1893) 1 QB 256 co's bank deposit was proof of good faith – not a 'puff'

SMALL PRINT: prominent enough to prevent misleading?

TRADE PRACTICES COMMISSION v QDSV HOLDINGS (1995) ATPR 41-371,

ASTERISK:

MEDICAL BENEFITS v CASSIDY (2003) 205 ALR 402 ;

PRICING:

ACCC v SIGNATURE SECURITY GROUP (2003) FCA 3 'from just \$295'.

DIFFERENT MEDIA HAVE DIFFERENT IMPACTS

MEDICAL BENEFITS v CASSIDY (2003) 205 ALR 402

ACCC v ARNOTT'S BISCUITS (2008) FCA 590: words & pictures must be consistent – fruit pillows

Biscuits that Arnotts had made, depicting fruits not in biscuit filling.

IMPROPER LABELLING

LEVI STRAUSS v WINGATE MARKETING (1993) 116 ALR 298 .

CHARACTER MARKETING

PACIFIC DUNLOP v HOGAN (CROCODILE DUNDEE CASE) (1989) 87 ALR 14

MARK FOYS v TVSN PACIFIC (2000) 181 ALR 90

COMPARATIVE ADVERTISING

Must be accurate

GILLETTE AUSTRALIA v ENERGIZER AUSTRALIA (2002) 193 ALR 629 &

HOOVER AUSTRALIA v EMAIL LTD (1991) 104 ALR 369

DISPARAGING ADVERTISEMENT

May be misleading

MAKITA v BLACK & DECKER (1990) 18 IPR 270 INACCURATE PARODYING

May be misleading

COCA-COLA v ALL-FECT DISTRIBUTORS (1998) 43 IPR 47

Trading & Business Names

s18 does NOT create a monopoly on trading or business names – TWO BUSINESSES MAY USE SIMILAR NAMES without contravening s 18 even though the public may be confused!

Eg

HORNSBY BUILDING INFO CENTRE v SYDNEY BUILDING INFO CENTRE (1978) 18 ALR 639: Court held: the names were only descriptive of the work

Two Price Advertisement

WAS & NOW PRICING

Can be misleading

ACCC v PROUDS, ASCOT FOUR PTY TLD (2009) FCAFC 61

STRIKE THROUGH & NOW PRICING

False advertising if seller often discounts prices,

ACCC v JEWELLERY GROUP (2012) 293 ALR 335 : '

ADVERTISING IS A VERY COMPLEX MATTER

Environmental Claims

Environmental claims must be accurate.

DAIKIN AUSTRALIA PTY LTD (219)an Enforceable Undertaking of 12 October 2004 lasting 5 years

Principles set out in *GREEN MARKETING & THE AUSTRALIAN CONSUMER LAW JOURNAL* 2011 pp8-15 (noted in your textbook pp 218-219).

ACCC v SNOWDALE HOLDINGS (No2) (2017) FCA 834

CONTRAVENTION OF ACL SS18(1); 29(1)(a) etc

EGGS WERE SOLD IN CARTONS & ON A WEBSITE DESCRIBING THE EGGS AS 'FREE RANGE' EGGS – THEY WERE NOT 'FREE RANGE' EGGS

FALSELY REPRESENTED THE EGGS WERE LAID BY HENS FARMED IN CONDITIONS WHERE THEY WERE ABLE TO ACCESS OPEN RANGES MOST DAYS

FCA ORDERS per SIOPSIS, J

DECLARATION VINDICATING THE CLAIMS MADE BY THE ACCC;

INJUNCTION PREVENTING SNOWDALE FROM DESCRIBING THEIR EGGS AS 'FREE RANGE' FOR 3 YEARS

COMPLIANCE ORDER – SNOWDALE TO UNDERTAKE A CONSUMER LAW COMPLIANCE PROGRAM

PECUNIARY PENALTY – SNOWDALE TO PAY \$750,000 PENALTY IN INSTALMENTS

Tort - not need to be trade or commerce

Action under ACL - S 3 ACL - Must be in trade or commerce