
OBLIGATIONS *exam notes 2021*

7. Misleading or Deceptive Conduct

💡 **RULE:** A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (s 18 **Australian Consumer Law**).

Note ! The predecessor of s 18 was s 52 of the Trade Practices Act 1974 (Cth)

Threshold Issues for MDC

Before we can test for MDC we must ensure certain threshold elements are met.

★ A Person

"Person" is not limited to a single individual; the statute also allows for employers, body corporates, companies (2C(1) of the **Acts Interpretation Act 1901** (Cth))

★ In Trade or Commerce

The courts have debated either a broad interpretation ie. anything an employee does (minority in **Concrete**) but the favoured approach is a narrow construction.

💡 **RULE:** To be caught by s 18, 'trade or commerce' is limited to conduct that is inherently commercial in nature; not merely 'in connection with' or 'in relation to' trade or commerce (**Concrete Constructions**)

→ **NOT T/C** - **Concrete** [not T/C]

- cannot be 'merely incidental' in course of business
- internal communications are not inherently commercial = not T/C
- Toohey J: issue was not whether *in connection* w trade & commerce, must have been *in* trade or commerce --> 'in' suggests conduct directed towards person w whom corp had T/C dealings with

→ **PRIVATE SALES** - **Williams v Pisano** [not T/C]

- Private sales of land by an individual not T/C unless arising in the course of a direct business activities
- Look at nature of how property was treated (here lived in house, reno & sold for profit, but so do most)
- Even if ordinary means of trade or commerce (agent & renovations) were utilised for sale purposes, not enough
- **Note !** If there was a real-estate agent involved and *their* conduct could be MDC, then we could go after the real-estate agent (facilitating the sale is their essence of their T/C, as in *Butcher*)

→ **EMPLOYEES** - **Houghton v Arms** [T/C]

7. Misleading or Deceptive Conduct

- 💡 **SUB-RULE:** An individual acting on behalf of their employer may breach s 18 even though they engaged in the conduct on behalf of their employer
- 💡 **TEST:** (a) in T/C; (b) conduct MDC = find. Focus is on the nature of the conduct, not the identity of actor

Testing for MDC

In any hypothetical, we must test for MDC by (a) **establishing the relevant audience** to be misled (this will give us the standard), before (b) drawing on/distinguishing **analogous cases** based on the **conduct**; and (c) ensuring any **special tests** are applied.

- 💡 **RULE:** Misleading or deceptive conduct is conduct that has the capacity to lead into error those to whom it is directed.

Note ! It is not generally necessary to show **intention** on the part of the perpetrator to mislead or deceive, but:

- May need to show that silence is intentional (ACL s 2(2))
- A person's state of mind may be relevant to representations as to future (s 4- were there reasonable grounds for making representation?)

★ (a) The Relevant Audience

MDC must have the capacity to lead into error *those to whom it is directed*-

(a) Establish the relevant audience, by asking who must be misled. Distinguish bw:

→ **GENERAL PUBLIC** - **ACCC v TPG**

- 💡 **SUB-RULE:** Where the conduct is directed to the public at large (eg. mass advertising), judge by reference to the effect such conduct would have on the reasonable member of that class of persons

Look to dominant message:

- Nature of communication (eg printed chance to read vs TV, radio etc)
- Ad an unbidden intrusion on audience? How blatant/present?
- Background info on broad intended audience --> can't assume all equal

→ **IDENTIFIED INDIVIDUAL** - **Butcher v Lachlan Elder**

- 💡 **SUB-RULE:** Where the conduct is directed to specific individuals, judge by reference to the effect such conduct would have on a reasonable person with the characteristics of the individual(s) to whom the conduct is directed

7. Misleading or Deceptive Conduct

Look to individual:

- Characterise the particulars of transaction as whole --> totality
- Particular conduct of particular agent to particular person (eg. *Butcher*, small business to intelligent buyer)
- Nature of parties (experience in field, socio-economic standing, resources available to them)

★ (b) Particular Forms of Conduct

Proving s 18 involves more than just presenting views about how the conduct could be said to be misleading- the courts apply different tests when dealing with different forms of conduct.

→ **PUFF** - Exaggerated claims made in advertising; apart of ordinary commerce : no legal effect : no MDC

→ **SILENCE** - Refraining (otherwise than inadvertently) from doing an act can be MDC (ACLs 2(2)(c)). Statute supports silence = MDC

? **Does silence needs to be deliberate?** Courts have no definitive answer to this issue...

💡 **REASONABLE EXPECTATION TEST:** Silence amounts to misleading or deceptive conduct when circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed (*Kimberley NZI Finance v Terero* - endorsed in *Miller v BMW*)

💡 **ASK:** Would it be reasonable to expect that, in the circumstances, what was not disclosed should have been?

- In *Miller* the failure to disclose that the policy was not cancellable was not ruled a reasonable expectation from the test
- Showed that there is no general requirement for a party to volunteer all information
- The false assumption of information by a party must be weighed on the contextual facts (length/nature of document; party experience; time frame)

Note! Deliberateness is further explored in Remedies below- first we would analyse if this silence ^^ meets MDC and *then later possibly* speak to whether the MDC was intentional in remedies (ie. no need for intent for primary contravener, but do need intention for other parties)

→ **MAKING A CONTRACT** - Making a contract may constitute misleading or deceptive because of the definition of 'engage in conduct' in s 2. Parties may rely on s 18 ACL if contractual promise is unenforceable due to contract failure (eg. no consideration) or not a party (privity blocks).

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- *Promises about presently existing state of affairs* -

MDC if a clause in a contract affirms an existing state of affairs, and it is false (*Accounting Systems v CCH*)

- *Promises as to the future* -

MDC in a contractual promise to future matters if either:

- Take the implied statements of current fact as deducible from the making of the promise (eg. A promises to do something- ergo implies A has intention; ability) and testing the truth of these (*Futretronics v Gadzhis*)
- Representation about future matters will be taken to be misleading unless the person making the representation has reasonable grounds for doing so (s 4 ACL: note **evidentiary provision** ie. cannot breach, but use to show s 18 breach)

PASSING ON INFO - Passing on information from another party may not be liable even if that information is misleading. This is particularly so where the person passing on the information expressly disclaims any belief in its truth or falsity, acting as conduit (*Butcher v Lachlan Elder Realty*)

💡 **ASK:** Was it clear that the content was produced by someone else? (*Butcher*)

Remedies

s 18 does not create a right to a remedy. Rather, it establishes a norm of conduct.

A breach of s 18 may result in the granting of the following remedies:

- Injunctions (s 232)
- Damages (s 236)
- Orders (s 237) including compensation orders and rescission orders

💡 **RULE:** Damages can be awarded and orders made against the person who breaches the prohibition against MCD and/or a person 'involved' in the contravention (s 236 & 237)

💡 **TEST:** s 2(1) defines the term 'involved'. A person is involved in a contravention if:

- has aided, abetted, counselled or procured the contravention;
- has induced, whether by threats or promises or otherwise, the contravention;
- has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- has conspired with others to effect the contravention

NOTE ! This introduces an element of intention for deliberateness: we don't need to show the primary contravener deliberately breached the act (with the possible exception of silence) BUT if we are seeking