



LLB323 – EXAM NOTES

Semester 2 2020



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Misleading and Deceptive Conduct

Problem Question

Elements

- Section 18(1) (previously s 52 TPA) simply provides:
 - A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.
- The 3 main elements are therefore:
 - conduct by a person;
 - the activity of trade or commerce; and
 - misleading or deceptive conduct, or conduct likely to mislead or deceive.
- If these three elements are present, any person can bring an action against a corporation involved in conduct that is misleading or deceptive or likely to mislead or deceive.

Conduct by a Person

- A person is not defined in the ACL or the *Competition and Consumer Act 2010* (Cth).
- It is simply given its legislative meaning under 2 C of the *Acts Interpretation Act 1901* (Cth) to include a corporation as well as an individual.
- A corporation includes a trading corporation – s 4(1) CCA
 - A trading corporation is one which engages in trading as a ‘substantial and not merely a peripheral activity’ *R v Federal Court of Australia; Ex parte WA National Football League*
 - Although the substantial current activities test focuses on what the corporation actually does, this does not mean that the purpose for which it was formed is irrelevant *E v Australian Red Cross Society* – in this case it was found a hospital can constitute a trading corporation

In Trade or Commerce

- The consumer protection provisions of the ACL prohibit conduct that takes place ‘in trade or commerce’.
- In broad terms, it requires that the conduct in question must, of itself, be commercial in nature. Consumer transactions involving the acquisition of goods or services from a business will always occur in trade or commerce.
- Section 2(1) of the ACL provides that the phrase ‘includes any business or professional activity (whether or not carried on for profit)’.
- The High Court held that the words ‘in trade or commerce’ are ‘not terms of art but are terms of common knowledge of the widest import’ *Concrete Constructions (NSW) Pty Ltd v Nelson*
- The Court stated in that case that s 52 of the TPA (s 18 ACL) was not intended to encompass all conduct of a corporation in the course of its overall business. Rather s 52 was concerned with ‘the conduct of a corporation towards persons...with whom it has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character’

- In *Concrete Constructions (NSW) v Nelson* a worker was injured when he fell to the bottom of a shaft whilst working for Concrete Constructions on a building site. He alleged the accident occurred as a result of him relying upon the assurance of the foreman that a grate at the entry of the shaft was secured by bolts. The court held that the alleged misleading or deceptive conduct of the company's foreman in the present case consisted of an internal communication by one employee in the course of their ordinary activities in and about the construction of a building. It was not therefore, 'in trade or commerce'.

Misleading or Deceptive Conduct

- There is no definition of the terms 'misleading' or 'deceptive'.
- In summary, it can be said that the conduct will be misleading or deceptive if it induces or is capable of inducing error (the threshold test) *Parkdale Custom Built Furniture v Puxu Pty Ltd*
- It is for the court to determine objectively whether specific conduct is misleading or deceptive or likely to mislead or deceive *Prospero Publishing v Rumcoast Holdings*
- Whether particular conduct is misleading or deceptive is a question of fact to be answered in the context of the evidence as to the alleged conduct and as to relevant surrounding facts and circumstances *Lego Australia Pty Ltd v Paul's (Merchants) Pty Ltd*
- Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility regardless of whether it is less or more than 50% *Global Sportsman Pty Ltd v Mirror Newspapers*
- The words 'or is likely to deceive' means 'may mislead or deceive' or 'may be expected to mislead or deceive' or 'has the capacity or tendency to mislead or deceive' *McWilliams Wines v McDonalds System of Australia*
- For specific examples – see page 192 of TB

The Causal Link

- Conduct has to be a cause, or at least one of the causes of the applicant being misled or deceived if it is to contravene s 18.
- The need for a causal link means that s 18 may not be contravened where the misconception was attributable to an erroneous assumption entertained by anyone rather to the conduct of the respondent *Parkdale Custom Built Furniture v Puxu*
- Where conduct is directed to a specific individual, whether it is misleading or deceptive it is determined by considering its impact on that person only. If it is the cause of their misconception and it was not unreasonable for that misconception to occur, then liability will be established. The approach to be adopted where the conduct is directed to members of the public is more complex.

Overall Context

- In a situation where statements have been made either before or in the course of complex negotiations for a significant transaction for the sale and purchase of property, those statements must not be considered in isolation but in the overall context of the transaction *ACCC v Oceans Commercial Pty Ltd*
- It should be noted that the principle is not restricted to the sale and purchase of property but applies equally to any conduct which has the capacity to mislead or

deceive. That is, the conduct must be considered in its overall context having regard to all the relevant circumstances *ACCC v Gary Peer & Assocs Pty Ltd*

- As regards advertisements, the whole advertisement has to be considered. It would be wrong to select words which alone may mislead but when viewed in their context are not misleading or are otherwise qualified in the rest of the advertisement *ACCC v Woolworths*
- The use of a qualifying statement will not necessarily nullify a misrepresentation that is contained within it. The qualifying statement must be sufficiently prominent to prevent the primary statement being misleading and deceptive *Medical Benefits Fund of Australia v Cassidy*

Requirement of a Misrepresentation

- Conduct cannot be categorised as misleading or deceptive, or likely to be misleading or deceptive under s 18 ACL, unless the conduct contains or conveys a misrepresentation *Taco Co of Australia v Taco Bell*
- Despite the fact that often conduct that gives rise to a claim under s 18 will be brought by a representation, a representation is not essential in order for s 18 to apply *Parkdale Custom Built Furniture v Puxu*
- Where a misrepresentation is relied on in support of a claim under s 18 the relevant time for testing the character of the representation complained of is at the date of the making of the misrepresentation and not with the benefit of hindsight *Cedric Constructions v Elders Finance and Investment Co*
- Where a representation is relied on, it must be clear and unambiguous or at least not so vague as to be illusory *Roberts v Hongkong Bank of Australia*

Negligent Misrepresentations

- Negligent misrepresentations may constitute misleading or deceptive conduct and be actionable under s 18 of the ACL where the trade or commerce requirement is met.
- Where the respondent's conduct contained a factual misrepresentation, an applicant will have little difficulty in establishing that it was misleading or deceptive.
- *Leo v Brambles Holdings* suggests that negligent conduct will not, by itself, constitute misleading or deceptive conduct for the purpose of s 18. Negligent does not always = misleading. However, if some form of misrepresentation is conveyed by the respondent's negligent conduct, s 18 may be contravened.

Defamation

- There are two important limitations placed on the ability to use s 18 to obtain a remedy for defamation.
- The first limitation is that the defamatory matter must have been communicated in trade or commerce.
- The second limitation on the operation of s 18 in respect of defamatory statements is s 19 of the ACL, which curtails the ability to sue media outlets.

Expression of Opinion and Law

- A preliminary question to be addressed in all cases is whether the statement is a statement of fact or a statement of opinion.

- A statement of opinion is a 'judgement or belief of something as probable, though not certain or established' *Hi-Rise Access Pty Ltd v Standards Australia Limited*
- Whether or not a statement is one of fact or opinion depends on all the relevant circumstances known to the representee, including the form in which the statement is made and the personal knowledge or likely personal knowledge of the person making the statement *Middleton v Aon Risk Services Australia*

Intention and Inadvertence Not Relevant

- The intention of the corporation engaging in conduct in trade or commerce is irrelevant to the determination of whether or not that conduct is misleading or deceptive or likely to mislead or deceive, within the meaning of s 18 *Hornsby Building Information Centre v Sydney Building Centre*
- So whether s 18 is contravened does not depend on intention or belief concerning the accuracy of a statement or a representation, but rather whether the statement or representation in fact conveys a meaning which is false *Global Sportsman v Mirror Newspapers*
- The evidence that a person has actually (intentionally) been misled does not conclusively establish that the conduct is misleading or deceptive or likely to mislead or deceive. Nevertheless (although intention is not required) such evidence may be relevant and persuasive and will be admissible *Natural Waters of Viti Ltd v Dayals (Fiji) Artesian Waters*
- A court therefore will more easily find a breach of s 18 where there is clear evidence of an intention to deceive *Nylex Corp v Sabco Ltd*
- It will not assist the corporation or other person if evidence supports the conclusion that the conduct was inadvertently (without knowledge or intention) engaged in, or that the corporation or other person actually believed in reasonable ground that the conduct was not misleading or deceptive.
- The rationale is that s 18 is concerned mainly with the real and potential impact of commercial conduct and not with the state of mind of the person engaging in that conduct.

Mere Confusion is Not Sufficient

- 'Conduct which merely confuses is no conduct which contravenes s 18' *McWilliams Wines Pty Ltd v McDonald's System of Australia Pty Ltd*
- Something which is merely puzzling or confusing is not necessarily an infringement of s 18. This is particularly true where goods have a similar appearance *Parkdale Custom Built Furniture v Puxu Pty Ltd*
- The 'conduct' must lead, or be capable of leading a person into error and the error or misconception must result from conduct of the person and not from other consequences for which the person is not responsible *Equity Access Pty Ltd v Westpac Banking Corp*
- The question is not whether a member of the relevant class or section of the public has been led into any error. Rather, the question is have they been led into the error identified by the applicant? Or have they simply been confused because of what the respondent has done? Confusion or uncertainty would suggest less particularity, and a more amorphous state of mind. Error suggest something much more identifiable and concrete.