

All sections discussed refer to the Australian Consumer Law (sch2 CCA) unless expressly stated otherwise.

Cannot contract out of ACL

[Contract term] purports to/has the effect of excluding / restricting / modifying:

- the application of all or any of the provisions of Part 3-5 (s150(1)(a)).
- the exercise of a right conferred by any of those provisions (s150(1)(b)).
- any liability under any of those provisions (s150(1)(b)),

it is therefore void pursuant to sX.

Extraterritorial applications

Whether the conduct occurred in Australia?

As per *Gill* [3129], the relevant conduct was provided to, and received by [Australian consumers] in Australia; thus, the conduct occurred occur in Australia rather than [another country].

Gill v Ethico Sarl – Supply of the Ethicon devices took place in Australia because the devices were received in Australia by JJM, an Australian company. The allegedly misleading conduct occurred in Australia because it is based on the information provided to, and received by, Australian consumers in Australia.

(1) By persons with a connection with Australia

S5(1) CCA extends the application of the ACL to include conduct outside Australia engaged in by bodies corporate incorporated or carrying on business within Australia, Australian citizens, or persons ordinarily resident within Australia.

- Business denotes ‘activities undertaken as a commercial enterprise in the nature of a going concern, that is activities engaged in for the purpose of profit on a continuous and repetitive basis’ (*Hope v Bathurst*).

Carrying on business

Valve – Valve did not have a physical presence or place of business in Australia. It supplied computer games to Australian consumers via the internet and granted licences of its computer games to Australian consumers. The supply to consumers in Australian was sufficient to bring its conduct within the scope of the ACL.

- Had many Australian consumers and earned significant revenue.
- Had content servers in Australia to ensure that consumers could download content as soon as possible.
- Had significant personal property and servers located in Australia and paid invoices to Australian companies for equipment involving servers.
- Paid for rack space and power to its servers in Australia.
- Relied on relationships with TP content delivery providers in Australia,

- Entered into contracts with TP service providers outside Australia who provided content around the world, including Australia.

(2) To trade or commerce between Australian and places outside Australia

Misleading or deceptive conduct (Pt 2-1)

[Defendant – a person*] must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (s18). S19 is not applicable because [Defendant] is an information provider.

- Fault is not an element of liability (but if [Defendant] have that intention, court will more likely make out s18 (*TPG*)).
- Person includes corporations and individuals

Engaging in conduct

S139B allows the conduct of [director / employee / agent / other person] to be imputed to [corporation] provided they were acting ‘on behalf of’ [corporation] and:

- (1) Acting within the actual or apparent scope authority of the [director / employee / agent] (s139B(2)(a));
- (2) Acting at the direction of a [director / employee / agent] (s139B(2)(b)(i)); or
- (3) Acting with consent or agreement of a [director / employee / agent] (s139B(2)(b)(ii)).

Conduct is wider than a representation (*Google Inc*). ‘Engaging in conduct’ is broadly defined in s2 including

- Doing or refusing to do an act.
 - The relevant refusing or refraining must be engaged in deliberately (s2(2)(c)(i); *Rhone-Poulenc*).
- Making or giving effect to a provision of a CAU.

Inaction and silence

Red flag: failure to disclose

Deliberate silence may amount to refusing to do an act, and therefore to ‘engaging in conduct’ (s2(2)(c)(i)). The state of mind can be established if the [director / employee / agent] possessed the relevant mental state of mind as per s139B(1).

Silence including other acts or omissions

When combined with [Defendant]’s failure to disclose, the presence of additional acts or omissions may collectively render their conduct misleading or deceptive under s18.

Example

- Providing a document or report (*Citrus Qld*).
- Giving of warranties (*Accounting Systems*; s2(2)(a)).
- Relaying information supplied by another.

OTF, the conduct in question is X.

In trade/commerce

Non-contentious

It is uncontentious that [Defendant]'s conduct was done in trade/commerce because it occurred within Australia (s 2(1)) and was carried out as part of their business activities which bears a trading or commercial nature (*Concrete Constructions*).

Trade or commerce includes any professional or business activity (s2(1)) even if it is not trading or commercial in nature (*Shahid*).

Exclusion

Trade or commerce excludes

- conduct involving private transactions (eg *Walker v Sell*).
 - *Walker v Sell* – the private sale of the car by Sell was not ‘in trade or commerce’ because it was done in the course of a business activity or arising in a business context.
- government contracts (except to the extent that government is carrying on a business).
- conduct that is merely incidental to [Defendant]'s business (*Concrete Constructions*).
 - *Concrete Constructions* – internal communication by one employee during their ordinary activities in and about the construction was not in trade or commerce.

Misleading/deceptive/likely to mislead or deceive

(a) Target audience

In determining whether the conduct has contravened s18, consideration must be given to the nature of the audience (*Butcher*).

Specific individuals

In this case, the relevant audience is [individual], it is therefore necessary to consider the nature of the parties, the character of the transaction and what the parties knew about each other (*Butcher*). The conduct will contravene s18 if a reasonable person who possessed [Plaintiff]'s knowledge of the surrounding circumstance would have been or likely to be misled or deceived by the conduct.

(1) Nature of the parties

The current case may be distinguished from *Butcher*, where the individual purchasers had a background in business, demonstrating substantial intelligence and shrewdness. [Plaintiff] lacks the same level of intelligence, shrewdness, or knowledge in relation to business matters, rendering them more susceptible to being misled or deceived by [Defendant]'s conduct.

[Defendant] may draw an analogy to *Butcher*, where the purchasers had a background in business, with substantial intelligence and shrewdness, as a reason, thereby suggesting that [Plaintiff] is less likely to be misled or deceived. This is because they are more capable of judging their best interests and the limitations of the transaction.

(2) Size of business

[Defendant] will analogise with *Butcher*, where the real estate agent was a small business lacking substantial resources to perform tasks such as independently verifying property title details. Therefore, perhaps lowering the expectation for details to not be misleading or likely to mislead.

[Plaintiff] may distinguish from *Butcher*, where the defendant was a small business lacking resources to complete a complex matter such as verifying property details. [Plaintiff] would argue that [Defendant] is actually a large business and has the resources to complete tasks, therefore there is a greater expectation for details to not be misleading or likely to mislead.

(3) Character of transaction

[Defendant] may analogise with *Butcher*, where the transaction involved a very expensive property, as is the case here with [expensive property/product]. [Defendant] would point out that a transaction of such magnitude would likely necessitate [Plaintiff] to exercise greater care in conducting the transaction, [which they did not do/which they did do, as evidenced by assistance from professional advisors], suggesting that they should be less susceptible to being misled or deceived.

Butcher – ‘all information contained herein is gathered from sources we deem to be reliable. However, we cannot guarantee its accuracy and interested persons should rely on their own enquiries’. After the sale, the applicants found that the pool was not within the property’s boundaries. No MDC.

- *Nature of parties* – The purchasers were intelligent and self-reliant businesspeople, while the real estate agent was a small business without the capability to independently verify property title details.
- *Character of transaction* – The purchase of very expensive property and the purchasers assisted by professional advisers.
- *Disclaimer* – The disclaimer was clear and legible, with only individuals with very poor eyesight having difficulty reading it. A reasonable purchaser would understand that the agent was not the source of the allegedly misleading information but merely acted as a conduit for information provided by another party.

Kirby J (dissent) - The characteristics of purchasers would not have made them alert to the nuances of land law. The agent’s conduct such as including an inaccurate diagram in the marketing brochure and failing to address the reliability of the information during the inspection, were misleading.

General class (public at large / sub-set of the public)

Ads were not directed to the public at large, but a class of public with internet access and some experience in online booking (Foster J in *Jetstar*) - rare to be general public.

Since the conduct was targeted at the public, it is necessary to identify the key characteristics of a representative of that audience (*Campomar*). The conduct will contravene s18 if an ordinary, reasonable member of the class would have been or likely to be misled or deceived by the conduct.

Members are expected to take reasonable care of their own interests by paying a reasonable level of attention to information provided and not react to the conduct in an extreme or fanciful way (*Campomar*).

- *Campomar v Nike* – HC held that the placing of the Nike Sports fragrance in the same area of pharmacies with other sports fragrance was likely to mislead or deceive ordinary or reasonable members of the public into thinking that the fragrance was promoted/distributed by Nike.

Hypothetical members may be treated as having some special knowledge of the subject matter (*TPG*).

- *ACCC v TPG* – the \$29.99 price for broadband services (prominent) was only available when bundled with land line rental at an additional cost of \$30 per month (less prominent) - MDC. Consumers might know that the internet services are commonly offered as a bundle was not apt to defuse the tendency of the advertisements to mislead, especially where the target audience is left only with the general thrust or dominant message after the evanescence of the advertisement. The Q is not if ads would induce

consumers to contract with TPG, the conduct was nevertheless misleading because it enticed the target audience into TPC's marketing web.

- *Parkdale* – held that a reasonable member of the audience (members of the public who were in the market for an expensive make of furniture) would not be misled into buying a similarly designed 'look alike' product because they would check the label to confirm.

(b) Analysis – general case

Determining whether the conduct is misleading/deceptive/likely to mislead/deceive is an objective question of fact (*Butcher*). There must be a sufficient causal link between the conduct and the error on the part of [Plaintiff] (TPG). The Court must consider all the relevant circumstances (*Demagogue*).

Misleading conduct

[Plaintiff] will contend that [Defendant]'s conduct is misleading because it has tendency to lead a person into error (*Campbell*), wherein [Plaintiff] is led to believe [things that are not true]. [Defendant] will contend that the alleged conduct simply tends to create confusion, uncertainty, or wonderment, which does not necessarily establish that the conduct is misleading, deceptive, or likely to mislead or deceive (*Campomar*).

Deceptive conduct

For conduct to be deemed deceptive, it requires an element of moral turpitude, which typically involves some trickery, craft, or guile (*Henjo*).

Likely to mislead or deceive

Red flag: Conduct may have a capacity to mislead, notwithstanding that it has not yet misled anyone.

Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility that it will have that effect (*Global Sportsman*).

Conduit / pass on information

[Intermediary] simply passes on the information without endorsing it or vouching for its accuracy, explicitly states they are not the source of the information, and disclaims belief in its truth or falsity, they would not be considered to have engaged in misleading or deceptive conduct (eg *Butcher*).

Since [Intermediary] adopts or endorses the representation provided by [TP] in the disclaimer, they will be equally held culpable for the misrepresentation (eg *Downey*).

In determining whether a disclaimer is effective to protect [intermediary], the court may consider:

- *Nature of parties* – whether [intermediary] held itself as an expert and would be expected to know the accuracy of the information.
- *Nature of information* – whether it is information that [intermediary] would be expected to possess.
- *Character of transaction* – the more valuation the transaction, the more likely [purchaser] will make independent inquiries, engage other professionals and not rely on the information provided by [intermediary].
- *Content of disclaimers* – the size, clarity, prominence and specificity of the disclaimer, whether it was brought to the attention of [purchaser] prior to entry into the transaction.

Dalton – the purchaser of a vineyard failed to hold an agent liable for representations regarding the area of the planted vine and the output of a bore on the property. The Court noted that disclaimers in the promotional material, clearly stating that the agent was not accept any responsibility for information provided by another party.

Google – Search engines – Google did not engage in misleading conduct by displaying internet search results. While the advertisement was misleading, ordinary and reasonable users would have understood that the information was created by the advertiser, and would not have concluded that Google adopted or endorsed the information. Google had simply ‘passed on’ the information.

Downey – Investment analysis: ‘whilst information inside this publication is believed to be true and correct, the figures and advice supplied are given as a guide only and no responsibility will be taken for any errors and omissions’ - a reasonable purchaser in Downey's position would likely interpret the brochure as endorsing the information prepared by the third party rather than just passing it along.

Mere puff

In response, [Defendant] would argue that the statement was merely puffery, and since a certain degree of puffery is expected in advertisements, it cannot constitute MDC (*General Newspapers*). Citing *Downey*, [Plaintiff] would argue that because the correctness of the statement can be objectively tested – X – the inaccuracy of this statement constitutes MDC. Furthermore, [Plaintiff] would cite *Forrest* to argue that the statement by [Defendant] is MDC because it cannot be genuinely held given that X. This would similarly lead to a finding of MDC.

(b) Analysis – silence

Inadvertent silence: S2(2) suggests that silence must be deliberate, but the matter is unresolved. Gummow J's judgment in *Demagogue* has been used to support the position that silence needs to be deliberate and also the position that silence can be inadvertent.

Silence will be misleading if in all circumstances there was a reasonable expectation that fact will be disclosed (*Demagogue*).

Demagogue – it was misleading for vendor to not disclose information about unusual vehicular access to the property. Ramenskys had a reasonable expectation that any potential problems with access would be disclosed, especially in light of their query.

Henjo – it was misleading for a seller of a restaurant to not disclose that some of the tables were not allowed under liquor-licensing laws.

Miller v BMW – it was not misleading for an insurance broker to not disclose that an insurance policy was not cancellable (a reasonable expectation of disclosure will be less likely in a commercial context between arm's length parties) - *two commercial parties with roughly equal bargaining strength*

- The legislation does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision making of another party.
- Miller had supplied BMW (an experienced premium lender) with a copy of the policy – their failure to draw BMW's attention to a circumstance disclosed by the policy document was not misleading.

(b) Analysis – representation as to future matters/promises/opinions/belief/law

The failure of a promise, opinion, or belief to eventuate does not necessarily constitute a breach of s18. Ultimately, it depends on all the facts to determine what the statements conveyed to their audience at the time they were made (*Forrest*).

The [promise / statement of opinion / belief / law] may be MDC if:

- In all circumstances there is a representation of existing fact that is misleading:
 - That it was genuine
 - That there is a reasonable for it.

[Plaintiff] must prove that [Defendant] have not genuinely and reasonably hold that [promise / statement of opinion / belief / law] (*Forrest*).

Forrest – ASIC alleged that Fortescue engaged in MDC by making false statements of fact regarding the existence of binding agreements, with an implicit false representation that there was a genuine and reasonable basis for making those statements – No MDC.

- The intended audience was investors and possibly a broad section of the business community.
- The references to binding contracts would not have been understood by the reasonable reader to mean that if the matter was litigated, the agreement would not be open to challenge.
- The representation accurately conveyed that the parties had made agreements that they intended to be legally binding.

Future matter

S4 provides that a representation as to future matter is misleading if

- no evidence of reasonable grounds is adduced (s4(2)).
- evidence is adduced but there are no reasonable grounds (ss 4(1)(b), 4(3)).
- There are reasonable grounds, but the representation is misleading (s4(4)).

The evidentiary burden lies with [Defendant].

Futuretronics – The purchaser, in bidding at the auction, made representations of both existing facts (that his bid was genuine) and future matters (that he intended to sign the contract if the property was knocked down to him). However, Gadzhis engaged in MDC by representing that he intended to sign the contract, as he failed to tender evidence demonstrating that he had reasonable grounds for making such a representation.

Disclaimer or exclusion clauses

Statutory liability under s18 cannot be excluded per se.

Disclaimer

If the disclaimer at the bottom of the email negates any MDC in the given circumstances, then no liability would be found (*Butcher*). The courts will consider the wording, timing, and prominence of the disclaimer when making this determination. [Defendant] may draw an analogy with *Butcher*, where it was held that, despite the disclaimer being in small type, it was still readable, and only individuals with very poor eyesight would find it illegible. In this case, there is no evidence suggesting that [Plaintiff] had any issues with their eyesight that would prevent them from reading the disclaimer.

TPG – viewers can't realistically be expected to absorb and digest small print if there is a bold headline which states statement an attractive price. TPG intended to emphasise the most attractive component of its offer and

downplay less attractive component, rather than give equal prominence. Where a person wilfully turns a blind eye / deliberately abstain from asking questions or making enquiries, they may be held to have actual knowledge sufficient to attract accessory liability.

Option 1: Total exclusion clause

[Plaintiff] will point out that as per *byers v Dorothea*, [exclusion clause] is effective to exclude liability for misleading or deceptive conduct under s18.

Option 2: Entire agreement clause

Not effective to defeat an MDC claim

Option 3: Clauses imposing time / money limits on s18 claims

Unsettled as to whether effective – awaiting HC determination.

There is NSW trial authority that parties can impose temporal limitations on Trade Practices claims. For example, Sackar J in *Firstmac* allowed a time limit for claims that was significantly less than the six-year limitation period provided for in the Act, justifying the modification as ‘procedural’ in nature. In obiter, his Honour suggested that a cap on damages might also be permitted. Nevertheless, Ball J in *Omega Air* cast doubt on that line of authority.

In Victoria, the better view is that provisions of a contract that purport to limit the time in which an action based on breach of s18 can be brought are ineffective as they are an ‘unacceptable interference with the public policy underpinning’ the prohibition of MDC (*Brighton v Multiplex*).

Therefore, it remains unsettled whether contractual clauses imposing time or monetary limitations on s18 actions are effective until determined by the High Court.

Remedies

Limitation of action – An action for MDC must be taken within 6 years of the action accruing (ss 236(2), 237(2))

[Plaintiff] would be entitled to damages as of right to compensate actual loss or damage suffered because of a contravention of s18 (s236), with the court being able to make further orders under s237 if appropriate. This means that [Plaintiff] would need to establish that loss or damages have been, or are likely to be suffered, and that there is a connection between the loss and the breach.

S236 – damages

S236 damages are not limited to compensation for economic loss.

Kuzmanovski – words ‘BATHE’ and ‘SWIM’ on a lottery ticket were synonymous and the picture depicted a person swimming or bathing. The ticket misled consumers. Damages of \$20,000 awarded for disappointment, anger and frustration.

Shahid – the College made misleading representations about its appeal process in its training handbook. Shahid was awarded \$2,500 for anxiety and distress.

S237 – compensation orders

S243 sets out the list of orders could be made under s237

(a) Declaring a contract wholly or partly void

- Declaring a contract void is effective rescission – court is not bound by common law bars to rescission, however, is guided by these when exercising discretion (*Henjo*).

(b) Varying a contract

(c) Refusal to enforce a provision of a contract

(d) Order to refund money or return property

(e) Order to compensate loss or damage

(f) Order to repair, or provide parts for, goods

(g) Order to provide specified services

(h) Order to vary or terminate an instrument creating or transferring an interest in land

Calculating damages under s236 & s237

In contract law, [Plaintiff] may argue that they should be awarded damages to put them in the position they would have been in had the contract been properly performed. As such, they will be entitled to X (ie the value if representation is true).

In tort law, [Plaintiff] will be awarded damages to put them in the position they would have been in had the tort not been committed.

- It appears that [Plaintiff] would still have contracted; damages are the difference between the price paid the value of what was obtained at the time of contract (plus damages for any consequential loss) - amount of overpayment.
- It appears that [Plaintiff] would not have contracted and therefore they will be put in the position as if they had not entered into the contract.

As per *Gates v CmL* and *Marks v Gio*, total measures of damages is usually appropriate.

Causation

Red flag: disclaim and acknowledge clause

- Acknowledge clause (re non reliance) may be effective in some limited circumstances if it has the effect that [Plaintiff] did not rely on the statement and so has not suffered any loss – no causation.
- Disclaim may have the effect that the conduct is not misleading, or that [Plaintiff] did not rely on the statement so has not suffered any loss – no causation.

Compensation under ss236 and 237 requires the breach caused (or likely to cause) the loss or damage – Courts use, by analogy, common law principles of causation (*Henville v Walker*). [Plaintiff] must have relied on the alleged conduct.

There is no issue of causation regarding the remedies, as it is evident they would not have entered into the contract but for the MDC (*Cambridge Credit*). The most likely remedy sought would be a discretionary order under s237 to declare the contract void and rescind it. By rescinding the contract, [Plaintiff] would be entitled to a refund of \$X and would have to return the [product]. There are likely no issues with this remedy as [Plaintiff] has not yet used the [product].

Contributory negligence

S137B allows the court to reduce damages to be awarded under s236 for a contravention of s18 where the claimant has failed to take reasonable care of their interest and this failure has contributed to their loss.

There must be a causal link between the claimant's failure to take reasonable care and the claimant's loss or damage.

- Failure to verify representations did not constitute contributory fault where there was nothing to put claimant on notice of their falsity (*Jainrain v Boyana*).

S137B does not apply because [Defendant] intended to cause the loss or damage or cause loss or damage intentionally or fraudulently (*Wieland*).

Contributory negligence is not available under the ACL applied as law of Victoria by the Australian Consumer and Fair Trading Act 2012 (Vic), making the choice of forum crucial.