

LAWS3308

5th Edition Marketing and the Law – GET THIS BOOK (essential)

READ readings before lectures. Not covered in tutorials = not covered in exam.

Tutorial Presentations- 10-15mins on a topic. Discover new developments or cases and share with class. 10 marks. (new and interesting- nothing taken from textbook, engage audience).

FINAL EXAM- only includes Competition law and Intellectual Property Law!

Competition law = anti trust law

What is Marketing?

“Marketing consists of all activities designed to generate and facilitate any exchange intended to satisfy human needs and wants”

What is Marketing Law?

Marketing Law is not a discrete body of law. Rather it is a collection of bits and pieces of the law, drawn from many areas, all of which relate to stages in the marketing process, and to the ‘activities designed to generate and facilitate any exchange intended to satisfy human needs and wants’ to which Stanton et al referred in their definition of marketing.

THE POLICY OBJECTIVES OF MARKETING LAW:

- Consumer Protection
- Preservation of ‘Workably Competitive’ markets for goods and services
- Encouragement of Innovation & the Prevention of ‘Free Riding’

Balancing act between competition and the creation of monopolies. Competition is the antithesis (opposite) of regulation. Does the law strike the right balance between protecting consumer’s interests and ensuring innovation is encouraged?

READ CHAPTER 1 OF TEXTBOOK

GO TO ACCC WEBSITE → student resources → introductory slides.

Australian Patents and Designs Office

Competition and Consumer Act (main focus)

Schedule 2 – consumer law of whole country (for individuals, partnerships, companies etc)

An Overview of Australian Consumer Law

Why do we have ACL?

- To protect consumers, who deal at a disadvantage, have less negotiating power, lack of info or don’t know about the law.

Implementation

- In 2010, the *Competition and Consumer Act 2010 (C’th)* was enacted by the Commonwealth (Federal) Parliament. This legislation contains, in Schedule 2, a set of provisions called the Australian Consumer Law (ACL). All Australian State and Territory parliaments have now enacted legislation to adopt this Schedule as a law of

their jurisdiction. Thus the ACL has legal force and effect throughout Australia either as a law of the Commonwealth or as a law of each State and Territory.

- The result of this cooperative legislative effort is a single, uniform consumer protection law that operates, without any constitutional limitations, as law in all jurisdictions throughout Australia, as from January 1, 2011.
- Many Acts that previously regulated aspects of consumer protection have been replaced by this new Law. This has made the application of the Law much simpler than it used to be.
- The ACL deals comprehensively with the following aspects of consumer protection:
 - misleading or deceptive conduct in trade or commerce
 - unconscionable conduct
 - unfair terms in contracts
 - other unfair business practices
 - guarantees in consumer contracts
 - unsolicited consumer agreements
 - protection from defective goods

Definition of 'Consumer' and 'Consumer Contract'

Goods are acquired by a consumer when they are not more than \$40,000, regardless of what the goods are.

If the price of the goods exceed \$40,000 then a person acquires the goods as a consumer if the goods are bought for personal/household use.(s.3)

IF goods are acquired for re-sale, or to be used up in trade or commerce, or in production or manufacture, repair or treatment of other goods or fixtures on land the purchaser is never a consumer.

The ACL is enforced by:

- 1) private action brought against suppliers by consumers
- 2) regulator seeking the imposition, on parties who have breached the ACL, of pecuniary penalties and fines.

7 Aspects of Consumer Protection Under ACL

Aspect 1: the general prohibition of 'misleading or deceptive conduct' in trade or commerce

- ACL s. 18 says: "*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or that is likely to mislead or deceive.*" [This replaces the identical provisions of s 52 of the old Trade Practices Act, 1974 (Cth).]
- The word 'person' includes both natural persons and corporations.
- Conduct is misleading when it leads or is likely to lead the persons at whom it is directed into error: McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd (1980) 33 ALR 394.
- It is not necessary to prove that the conduct was either intentional or negligent. Yorke v Treasury Stores Pty Ltd (1983) ATPR 40-336 FC
- Misleading conduct is prohibited only if it takes place 'in trade or commerce'. Concrete Constructions (NSW) Pty Ltd v Nelson 1990 HCA 17; (1990) 169 CLR 594.
- Misleading 'conduct' can take the form of doing something, or failing to do something.
- It can also be in the form of making, or failing to make, a statement.
- Because the concept is so wide, it applies to a great many different situations.

Aspect 2: ACL ss. 20-22 prohibit 'unconscionable conduct' generally and specifically in connection the supply or acquisition of goods or services.

- Sections 20, 21 and 22 of the ACL prohibit 'unconscionable conduct'. The provisions build on the general law doctrine of unconscionable dealing that we covered in Week 5.
- Section 20 says that: 'A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time'. This means that conduct which constitutes unconscionable dealing in the general law of contract will also constitute a breach s 20 of the ACL. This is significant because a breach of the ACL makes remedies available that are not available in the general law, and makes civil penalties payable.
- Section 21 (1) says: "a person must not, in trade or commerce, in connection with the supply, or possible supply of goods or services of a kind to a person (other than a listed public company) engage in conduct that is, in all the circumstances, unconscionable"

QUERY: How does s. 21 differ from & have scope for independent operation outside s. 20?

(i) Firstly, s. 21 of the ACL makes it clear that that section is not intended to be limited to the equitable or common law doctrines of unconscionable conduct (see s.21(4)(a) ACL). This means that, unlikely unconscionable conduct under the "unwritten law", claimants will not have to establish that they were at a 'special disadvantage' through factors like infirmity, age or a difficulty understanding English, before a court would recognise that unconscionable conduct has occurred.

(ii) Secondly, a new interpretative principle has been included in s. 21 to make it clear that the new statutory unconscionable conduct is not limited to the bargaining practices leading to the formation of a contract and can also be apparent in the way in which a party exercises its rights under a contract, or in the way in which a party behaves once a contract is made. It can also apply to the way in which contracts are renewed, renegotiated or terminated. (see s.21(4)(c) ACL).

(iii) Thirdly, A further interpretative principle in s. 21 provides that the prohibition on unconscionable conduct applies to systemic conduct or patterns of behaviour and that there is no need to identify a person at a disadvantage in order to attract the prohibition (see s.21(4)(b) ACL). Thus it is clear that this new form of statutory unconscionable conduct is not, like its 'unwritten law' predecessor, limited to individual transactions or events. A pattern of systematic conduct or patterns of behaviour occurring over a period of time - which might include an accumulation of minor incidents - can also (taken together) amount to actionable 'unconscionable conduct'.

Unconscionable Conduct: case examples

[Garry Rogers Motors \(Aust\) Pty Ltd v Subaru \(Aust\) Pty Ltd \[1999\] FCA 903](#)

[Australian Competition and Consumer Commission v Lux Pty Ltd \[2004\] FCA](#)

[Australian Competition and Consumer Commission v Keshow \[2005\] FCA 558](#)

Aspect 3: regulation of unfair terms in 'consumer contracts'

LECTURE 2

Misleading or Deceptive Conduct and Unfair or Dishonest Marketing Techniques: truth in advertising.

- Misleading or deceptive conduct (s 18)
- False or misleading representations – civil (s 29) and criminal (s 151) penalties

- Other unfair or dishonest techniques
- Remedies

Misleading or Deceptive Conduct

- Formerly s 52 Trade Practices Act

The Australian Consumer Law

Chapter 2 -- General protections

Part 2-1 -- Misleading or deceptive conduct

S 18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Elements:

1. [Person](#)
2. [In trade or commerce](#)

Definition: ACL s 2:

'Trade or commerce' means:

Trade or commerce within Australia; or

Trade or commerce between Australia and places outside Australia

and includes any business or professional activity (whether or not carried on for profit)

The terms 'trade' and 'commerce' themselves are not defined.

3. [Engage in conduct](#)

Definition: ACL s 2(2):

(a) a reference to engaging in conduct is a reference **to doing or refusing to do any act**, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

(iii) the requiring of the giving of, or the giving of, a covenant; and

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

(iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a **reference to refusing to do an act includes a reference to:**

(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

What is conduct?

Includes:

- representations
- silence
- providing advice

- passing off (taking another business's name or product).

4. That is misleading or deceptive or likely to mislead or deceive.

- Not defined in ACL
- ***Weitman v Katies Ltd*** per Franki J:
 - The most appropriate meaning for the word "deceive" is "to cause to believe what is false; to mislead as to a matter of fact; to lead into error; to impose upon, delude take in". The most appropriate definition in the dictionary for the word "mislead" is: "to lead astray in action or conduct; *to lead into error*; to cause to err".
- Key words
- **(a) "Misleading or deceptive"**
 - Conduct will be "misleading or deceptive" if it induces or is capable of inducing error: ***Parkdale v Puxu***
- **(b) "Likely to mislead or deceive"**
 - It is unnecessary to prove that conduct actually misled or deceived anyone: ***Parkdale v Puxu***
 - Conduct must demonstrate a real, not remote chance or possibility regardless of whether it is less or more than 50%: ***Global Sportsman v Mirror Newspapers***
- **Must a person have intended to mislead or deceive in order to contravene s 18?**
 - Intent is irrelevant, consequence of conduct important: ***Hornsby Building Information Centre***

Establishing MDC

Apply these steps (from Taco Bell):

Step 1: Identify the relevant section of the public

- **To whom was the conduct directed?**
- The approach used by the court will differ, depending upon whether the conduct was directed towards:

A. Specific individuals OR B. The public at large (or a section of the public)?

- Consider relevant factors:
 - Nature of the product or service,
 - Price,
 - Ordinary purchaser, likely viewer,
 - Media used (push/pull?)

Step 2: Test the conduct by reference to those in the class

A. CONDUCT DIRECTED TOWARDS SPECIFIC INDIVIDUALS

- Consider the character and the conduct of the parties: ***Butcher v Lachlan Elder Realty***
- Ie. look at:
 - the nature of the parties
 - their respective relevant knowledge and experience
 - the nature of the transaction and
 - any other relevant matters.
- **The conduct is to be judged by the likely effect on the specific individual or individuals**

B. CONDUCT DIRECTED TOWARDS THE PUBLIC AT LARGE

- In advertising, usually the public at large (or section of public)
- Where conduct directed toward members of public needs to be “approached at a level of abstraction” not present where conduct is directed towards individuals: *Campomar v Nike*

Who is the hypothetical person?

- Must be an ordinary, reasonable member of the class
- Court will disregard ‘assumptions by persons whose reactions are extreme or fanciful’ : *Campomar v Nike*
- Certain qualities may be attributed to the hypothetical person
- The qualities attributed to the hypothetical person may differ across classes of consumers
- It is possible that the conduct will need to be tested across more than one class of consumers
- **EXAMPLE**
- *Apotex Pty Ltd v Les Laboratoires Servier (No 2)*
 - Doctors
 - Pharmacists
 - Patients prescribed or using drug

Step 3: Examine evidence of deception

- **Taco Bell:**
- Once the message or impression has been identified, it's a simple question of whether that message is true or false
- If false, a breach of the ACL must follow.
- [Evidence that some individual has in fact formed an erroneous conclusion is admissible and may be persuasive, but is not essential].
- Note: It must be the case that the misconception has arisen as a result of the conduct complained of and not some other factor.

Exclusion Clauses and Disclaimers

- Can liability for MDC be excluded by use of an exclusion clause? NO
- However an effectively worded disclaimer may preclude MDC from arising (tricky and rare)
- Must be able to be seen and understood by those who would otherwise be misled BEFORE they act in relation to the transaction
 - Clear and appropriate
 - Sufficiently prominent
 - Timely

e.g. Opinions and Exaggerations

- May be mere puff
- Some 'opinions' may more accurately convey facts
- Eg. *Budget Rent A Car System Pty Ltd v Dewhirst*
- The mere fact the opinion is incorrect (can an opinion be incorrect?) will not render it MDC

- However, it will be expected that the opinion is honest, supported by some facts and (in the case of experts) based on rational grounds: **Bateman v Slatyer; Tobacco Institute v AFCO**
- They are not statements which are mere exaggerations or statements incapable of objective proof, rather they are statements of fact and they are wrong.
- Which of the following are likely to be characterised as a puff?
 1. Best coffee in Fremantle
 2. Fremantle's most awarded coffee shop
 3. If you like quality coffee then you'll love our product
 4. It's not Nespresso, but we think it's as good - and it's half the price
 5. The most enjoyable instant coffee on the market

Predictions/future representations

- The mere fact the prediction is incorrect will not render it misleading or deceptive (see s 4 ACL)
- A person who makes a representation about a future matter must have reasonable grounds for making the representation
- The person must bring evidence to demonstrate this
- Eg **ACCC v Danoz Direct Pty Ltd**

Silence

- Silence is 'conduct' within S 2(2)(c)(i) ACL

The Q: does the silence convey a false message?

- **What is silence?**
 - Telling a half truth (ie. partial disclosure) eg. **Henjo Investments v Collins Marrickville**
 - Remaining silent after circumstances have changed (ie changed circumstances render the representation untrue)
 - Non-disclosure where there is a reasonable expectation that information would be disclosed eg. **Demagogue v Ramensky**

Demagogue v Ramensky: "reasonable expectations test": Black CJ @FCR 32

"Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive".

Application of the test:

- The silence must be considered in light of all relevant circumstances, including acts, omissions, statements, even "fraudulence", etc.
- IF given these circumstances, there is a reasonable expectation that the information that was kept silent should have been disclosed, the silence will be regarded as MDC.

Scientific Claim

- Advertisers must not misrepresent scientific claims
- Consumers do not have the knowledge or data to assess scientific claims properly
- Eg. **Colgate Palmolive Pty Ltd v Rexona Pty Ltd**

Comparative Advertising

- **Gillette Australia Pty Ltd v Energizer Australia Pty Ltd** Heerey J:
- "Provided the factual assertions are not untrue, or misleading half-truths, an advertiser can lawfully compare a particular aspect of its product or service favourably with the same aspect of a competitor's product or service".

- *Eg. Makita Australia Pty Ltd v Black and Decker (Australasia) Pty Ltd; Stuart Alexander and Co (Interstate) Pty Ltd v Blenders Pty Ltd*

False Advertising

(s. 18 refers to conduct and doesn't include criminal sanctions, section 29 refers to representations)

Specific false or misleading misrepresentations

- **S29 (formerly s53 of the TPA) – false or misleading representations about goods or services (civil penalties)**
- **S151 creates a criminal offence that replicates s29**
- S.29 False or misleading representations about goods or services
 - (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
 - (a) make a false or misleading representation that
 - (n) ...

Specific Provisions

- (a) & (b) standard, quality, value, grade, composition, style or model, history or previous use of goods and services
- (c) newness of goods
- (d) agreement to acquire goods or services
- (e) & (f) testimonials or about testimonials
- (g) & (h) sponsorship, approval, affiliation, performance characteristics, accessories, use or benefits of goods or services or corporation
- (i) price of goods or services
- (j) availability of facilities and spare parts
- (k) place of origin
- (l) need for goods and services
- (m) & (n) contractual rights and requirement to pay
- **S.151 False or misleading representations about goods or services**
 - (1) A person commits an offence if the person, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
 - (a) makes a false or misleading representation that
 - (n) ...

Further Relevant Provisions (READ)

- S.33/155 – Misleading conduct re goods
- S.34/156 – Misleading conduct re services
- S.47/165 – Multiple Pricing
- S.48/166 – Single Price

Statutory Controls on Other Unfair or Dishonest Selling Techniques

- Offering gifts & prizes: s32
- Bait advertising: s35
- Referral selling: s57
- Accepting payment without intention to supply: s36
- Harassment & Coercion: s50

- Pyramid selling: ss44 & 45
- Inertia selling: s40
- Door to Door selling: *Door to Door Trading Act 1987* (WA)

Remedies

Liability of Advertising Agencies

- Liability as an 'accessory'
 - Person aiding, abetting, procuring, counselling, inducing, attempting to induce, conspiring or knowingly concerned in ...
- Liability provisions
 - S.224 – Breaches of provisions other than ss.18 & 19 ACL – Pecuniary fines
 - S.236 – Breach of ss.18-150 ACL - Damages
- Not strict liability
 - Person must have knowledge or intention: *Yorke v Lucas; Giorgianni v The Queen; MBF v Cassidy; Bevins v Cassidy*

Defences

- Exemptions
 - Information providers – TV, radio, newspapers etc ACL ss19, 38 & 160
 - EXCEPT – misleading or deceptive advertisements or content under an agreement
- Defences
 - Civil penalties
 - S.226 – Acting honestly and reasonably
 - Criminal penalties
 - **S.207** - Reasonable mistake of fact
 - **S.208** - Due diligence and reasonable precautions
 - S.209 - Publishers provided they did not know