

Avoiding unfair business practices

A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS

This guide was developed by:

- Access Canberra, Australian Capital Territory
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs Victoria
- Consumer and Business Services South Australia
- Consumer, Building and Occupational Services, Tasmania
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

Copyright

© Commonwealth of Australia 2016

March 2016

Ownership of intellectual property rights in this publication

Unless otherwise noted, copyright (and any other intellectual property rights, if any) in this publication is owned by the Commonwealth of Australia (referred to below as the Commonwealth).

Creative Commons licence

With the exception of the Australian Consumer Law logo, photographs and images, this publication is licensed under a Creative Commons Attribution 3.0 Australia Licence.



Creative Commons Attribution 3.0 Australia Licence is a standard form license agreement that allows you to copy, distribute, transmit and adapt this publication provided that you attribute the work. A summary of the licence terms is available from www.creativecommons.org/licenses/by/3.0/au/deed.en. The full licence terms are available from www.creativecommons.org/licenses/by/3.0/au/legalcode

The Commonwealth's preference is that you attribute this publication (and any material sourced from it) using the following wording: *Source: Licensed from the Commonwealth of Australia under a Creative Commons Attribution 3.0 Australia Licence. The Commonwealth of Australia does not necessarily endorse the content of this publication.*

Inquiries regarding this licence and any other use of this document are welcome at:

Manager
Communications
The Treasury
Langton Crescent Parkes ACT 2600
Email: medialiaison@treasury.gov.au

Contents

Introduction	5
About this guide	5
About the other guides	5
About the Australian Consumer Law	5
Misleading or deceptive conduct	6
Summary	6
What is misleading or deceptive conduct?	6
Puffery	7
Silence	7
Disclaimers and small print	8
Predictions and opinions	8
Exceptions for information providers and advertisers	8
Remedies	9
False or misleading representations	10
Summary	10
What are false or misleading representations?	10
Testimonials	11
Consumer guarantees—guarantees, conditions and warranties	12
Sale or grant of an interest in land	13
Employment and business activities	13
Offering rebates, gifts, prizes and other free items	13
Misleading conduct—nature of goods and services	14
Bait advertising	14
Wrongly accepting payments for goods or services	15
Penalties	15
Unconscionable conduct	16
What is unconscionable conduct?	16
Penalties	17
Representations about country or place of origin	18
Country or place of origin representations	18
Country of origin ‘safe harbours’ and relevant criteria	19
Glossary and abbreviations	22
Contacts	24



Introduction

About this guide

This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

This guide will help businesses and legal practitioners avoid unfair business practices by understanding relevant sections of the ACL.

It covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations.

These guides:

- explain the law in simple language, but are no substitute for the legislation
- give general information and examples—not legal advice or a definitive list of situations where the law applies
- include examples of the ACL's application by Australian Consumer Protection regulators and by Australian courts.

About the other guides

The other guides in this series cover:

- **Consumer guarantees**
Covers supplier, manufacturer and importer responsibilities when there is a problem with goods and services; refunds, replacements, repairs and other remedies.
- **Sales practices**
Covers unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion.
- **Unfair contract terms**
Covers what an unfair term is and which contracts are affected by the law.
- **Compliance and enforcement**
Covers how regulators enforce the ACL.

- **Consumer product safety**

Covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements.

Further information and copies of these and other publications are available from the Australian Consumer Law website www.consumerlaw.gov.au

About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

The ACL came into force on 1 January 2011 and replaced the *Trade Practices Act 1974* and previous Commonwealth, state and territory consumer protection legislation. It is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CCA) and is applied as a law of each state and territory by state or territory legislation.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL.

The regulators of the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services; and
- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory.

Some of the consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

Misleading or deceptive conduct

Summary

It is unlawful for a business to make statements in trade or commerce that:

- are misleading or deceptive; or
- are likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive.

In most cases, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

A limited exemption applies to businesses (mostly media outlets) who make representations in certain circumstances in the course of carrying on a business of providing information.

ACL reference: sections 18–19

What is misleading or deceptive conduct?

‘Conduct’ includes but is not limited to actions and statements, such as:

- advertisements
- promotions
- quotations
- statements
- any representation made by a person.

It is important to look at how the behaviour of the business affects the consumer’s impression of a good or service. When deciding if conduct is misleading or deceptive, or likely to mislead or deceive, the most important question to ask is whether the overall impression created by the conduct is false or inaccurate. Even if a consumer discovers the true position before the conclusion of the transaction, the business will have contravened the ACL if the consumer has been enticed into ‘the marketing web’ by the misleading conduct.

Business conduct is likely to breach the law if it creates a misleading overall impression among the audience about (for example) the price, value or quality of consumer goods or services.

CASE STUDIES

Following action by the ACCC, the Federal Court found that Coles misled consumers with representations about the bread sold in Coles’ in-house bakeries. The packaging of the bread stated that it was ‘Baked Today, Sold Today’ and in some cases ‘Freshly Baked In-Store’. The bread was also offered for sale near signs which stated ‘Freshly Baked’ or ‘Baked Fresh’. In fact, these products were ‘par-baked’—that is, they were partially baked and frozen off-site by a supplier (in some cases this baking and freezing took place overseas) and transported and ‘finished’ at in-store bakeries. The Court found that Coles engaged in misleading or deceptive conduct and made false or misleading representations by promoting its bread in this way. The Court made declarations, ordered injunctions, corrective advertising and imposed a penalty of \$2.5 million.

Legal reference: Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330

Following action taken by Consumer Affairs Victoria, the Victorian Court of Appeal found that Mr Rodney Campbell and his associated entities had engaged in misleading and deceptive conduct by representing that the ‘The Hope Clinic’ methods could slow, stop or reverse the progress of cancer, and that the treatments offered at the Clinic had scientific support.

Legal reference: Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors [2012] VSCA 91

Whether conduct is misleading or deceptive will depend on the particular circumstances of the case. This means that all relevant circumstances will be taken into consideration, such as the entire advertisement, the medium in which the advertisement appeared (for example TV, radio, internet), product packaging, and any statements (or silence) made by a sales representative relating to the product. Fine print, contradictory statements and images that obscure or alter written statements are also taken into account.

Further, whether or not conduct is misleading or deceptive must be considered within the context of the class of consumers who are likely to be affected by the conduct. The effect of the conduct will be assessed against an 'ordinary' or 'reasonable' member of the relevant class. It is a business's actions and statements that matter—not its intentions. A business can mislead and deceive, without intending to.

EXAMPLE

- A trader uses a business name that is similar to that of a long-established institution. The use of the similar name may suggest an affiliation between the trader and the institution. Therefore the name may mislead or deceive because of this similarity. The trader's intentions when choosing the name would not matter.

Puffery

'Puffery' is wildly exaggerated, fanciful or vague claims that no reasonable person could possibly treat seriously or find misleading.

EXAMPLES

- A café owner claims to make 'the best coffee in the world'.
- 'All your dreams will come true' if you use a certain product.

Silence

Silence can also be misleading if a business fails to disclose relevant facts to a customer.

Silence can be misleading or deceptive when:

- one person fails to alert another to facts known only to them, and the facts are relevant to the decision
- important details a person should know are not conveyed to them
- a change in circumstance meant information already provided was incorrect.

Whether silence is misleading or deceptive will depend on the circumstances of each case.

EXAMPLES

The following conduct could be misleading:

- A restaurateur is selling her restaurant. When asked the reason for sale, she does not mention that she is selling because a similar restaurant is opening nearby.

Legal reference: *Hardy v Your Tabs Pty Ltd* [2000] NSW CA 150

- A consumer who lives in a regional area is buying a mobile phone. The salesman knows where the consumer lives but fails to tell him that coverage in that area is poor and the phone may be of no use.

Disclaimers and small print

In most cases, businesses cannot rely on disclaimers, disclosures or clarifications buried in small print as an excuse for engaging in misleading or deceptive conduct.

CASE STUDY

In 2013, following action by the ACCC, the Federal Court found that TPG misled consumers about the price of its ADSL2+ broadband. TPG prominently advertised unlimited ADSL2+ for \$29.99 a month and then disclosed in the small print that this service was only available when bundled with home line rental of \$30 per month. The High Court upheld the trial judge's finding that the advertisements were misleading because they conveyed the impression that TPG's Unlimited ADSL2+ broadband internet service could be acquired at a cost of \$29.99 per month, when in fact this service could only be acquired with a 'bundled' home telephone line for an additional \$30 per month plus startup costs.

Legal reference: Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54

However, a prominent disclaimer may sometimes be sufficient to overcome what would otherwise amount to misleading or deceptive conduct.

EXAMPLE

- A bank advertises low credit card interest rates for the first 12 months. The advertisement clearly and prominently indicates the low rates are only available to new customers who apply within a certain period. This disclaimer is sufficient because it clearly informs consumers about the terms and conditions.

It is recommended that businesses prominently display all disclaimers, and any terms and conditions that apply to an offer, in close proximity to the headline statement to reduce the risk of the conduct being misleading.

Predictions and opinions

A statement about the future that does not turn out to be true is not necessarily misleading or deceptive.

But promises, opinions and predictions can be misleading or deceptive if the person making the statement:

- knew it was untrue or incorrect
- did not care whether it was true or not
- had no reasonable grounds for making it.

CASE STUDY

In 2010, following action by the ACCC, the Federal Court found that an individual had made claims about a cancer treatment with no reasonable basis. The individual offered a treatment program that he represented was effective in treating and curing cancer and was proven to bring cancer under control. He charged patients \$2,900 for the first three months and \$1,500 for each succeeding three month period. His claims were made on his website and in an e-book. The Federal Court found that these claims were untrue, that the individual had no reasonable basis for making the representations and possessed no reliable current scientific evidence or expert medical opinion to support them.

Legal reference: Australian Competition and Consumer Commission v Jones [2010] FCA 205

A court will consider the circumstances and the effect or impact on the consumer when deciding if a prediction or opinion was misleading or deceptive.

Exceptions for information providers and advertisers

Information providers are exempt from certain ACL provisions if they publish a matter in the course of carrying on a business of providing information. Information providers include media organisations such as:

- radio stations
- television stations
- publishers of newspapers or magazines (including online).

Advertisers are also exempt from certain provisions if:

- they are in the business of publishing or arranging for the publication of advertisements
- they received the advertisement in the ordinary course of this business; and
- they did not know, and had no reason to suspect, that the advertisement was misleading or deceptive.

However, advertisers must take particular care in relation to the products and services they advertise for their clients. They should know their clients' business and be aware of the requirements under the ACL, otherwise they risk breaching the law.

If media operators are only the vehicle or platform for someone else's misleading message, they may not be liable for breaches of the ACL. But if a media outlet actually adopts or endorses the misleading message, it may also be liable for the contravention.

CASE STUDY

In 2009, the High Court found that Channel Seven had adopted representations made by an investment company in a story aired by the station. Channel Seven was approached by an investment company that claimed to have a successful investment model to share with the public. Channel Seven decided to air the story to promote the investment model and to encourage viewers to invest. Channel Seven made a number of claims on its program about the investment model and its founders which turned out to be false.

Both Channel Seven and the investment company were found to have engaged in misleading and deceptive conduct.

Legal reference: Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Limited [2009] HCA 19

Remedies

Misleading or deceptive conduct may result in court-ordered civil remedies, including the imposition of pecuniary penalties, injunctions, declarations, damages, compensation orders, disqualification orders, orders for non-party consumer redress and non-punitive orders.

As an alternative to issuing legal proceedings, the ACCC and state and territory regulators may also accept court-enforceable undertakings, issue infringement notices, and issue public warning notices.

CASE STUDY

Telecommunications company Optus published newspaper and television advertisements claiming that consumers could obtain 'unlimited broadband'.

In fact, the plans contained a condition that once consumers reached a specified data allowance, their service would slow down to a speed not suitable for popular online activities such as downloading movies, streaming video and making video calls. This condition was disclosed only in very small print in the advertisements, and its effect on the user experience was not explained.

The Federal Court found the advertisements were misleading and deceptive. On appeal, the full Federal Court ordered that Optus pay a total penalty of \$3.61 million for 11 contraventions of section 55A of the *Trade Practices Act 1974*.

Legal reference: Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20

False or misleading representations

Summary

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services. Whether a representation is false or misleading will depend on the circumstances of the particular case.

Making false or misleading representations is an offence. The maximum fine is \$220,000 for an individual and \$1.1 million for a body corporate.

ACL reference: sections 29–34, 151–160

What are false or misleading representations?

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services.

For instance, a business must not make false or misleading representations about:

- the standard, quality, value or grade of goods or services
- the composition, style, model or previous history or use of goods
- whether the goods are new
- a particular person agreeing to acquire goods or services
- testimonials by any person relating to goods or services
- the sponsorship, approval, performance characteristics, accessories, benefits and uses of goods or services
- the price of goods or services
- the availability of repair facilities or spare parts
- the place of origin of a product—for example, where it was made or assembled
- a buyer's need for the goods or services
- any guarantee, warranty or condition on the goods or services
- the requirement to pay for any guarantee, warranty or condition on the goods or services.

CASE STUDIES

Pirovic Enterprises was found to have produced eggs and supplied them in cartons labelled 'free range'. Pirovic also promoted the eggs as being laid by hens that lived in large barns and could roam and forage freely in an outdoor area. Pirovic admitted that it made misleading representations, because most of its hens did not move about freely on an open range on most days.

Legal reference: Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd (No 2) [2014] FCA 1028

The Federal Court found that Zamels had misled consumers through its use of was/now pricing. Zamels advertised a sale with prices described as 'Was \$275 Now \$149' or '\$99 \$49', when it had not sold the advertised products at or near the 'was' or 'strike through' price, or had sold them in limited numbers in the four months prior to the sale period (or a shorter period in circumstances where an item appeared in a previous sale and the period between the ending of a previous sale and the beginning of the next was less than four months).

Legal reference: Australian Competition and Consumer Commission v Jewellery Group Pty Limited (No 2) [2013] FCA 14

An advertising agency operated an advertising account with Google on behalf of a classified advertising business. For that account, the agency included a 'keyword' that was the name of a magazine that was a competitor to its client. As a result, a Google search for the competitor magazine generated a sponsored link that listed the name of the competitor magazine with the website address of the classified ads business below it. The Federal Court found that the classified ads business made false or misleading claims and engaged in misleading or deceptive conduct.

Legal reference: Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd (2011) FCA 1086

CASE STUDIES

Pepe's Ducks was found to be misleading consumer by using certain words and images on its product packaging, website, delivery trucks, signage and merchandise, representing that its ducks were raised in an open range environment, when in fact the ducks were raised solely in indoor sheds.

Legal reference: Australian Competition and Consumer Commission v Pepe's Ducks Ltd [2013] FCA 570

Audi represented that the vehicle had seven seats as a standard feature, when in fact five seats was the standard configuration. The manufacturer also represented that the 'drive away' price for the vehicle was \$79,990, when in fact a purchaser would have to pay additional fees or charges for dealer delivery, statutory charges and two additional seats.

Legal reference: Australian Competition and Consumer Commission v Audi Australia Pty Ltd [2007] FCA 1990

Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation can be misleading even if it is true or partly true.

CASE STUDY

On the front of their product packaging, Energizer claimed their batteries lasted as long as those of two other competitors. The claim was supported by tests, but only against some (not all) of the competitors' batteries, which was explained on the back of the packaging. A court found the message on the front of the packaging had misled consumers, even though there was a clearer message on the back of the packaging.

Legal reference: Energizer Australia Pty Ltd v Remington Products Australia Pty Ltd [2008] FCA 58

Testimonials

Testimonials are statements from previous customers about their experience with a product or service.

These can give consumers confidence in a product or service on the basis that another person—particularly a celebrity or well-known person—is satisfied with the goods or services.

It is unlawful to make a false or misleading representation that:

- purports to be a testimonial by any person; or
- concerns a testimonial by any person

in relation to goods or services.

False or misleading representations concerning testimonials can persuade customers to buy something to their detriment, based on belief in the testimonial. They may also result in competitive detriment to other suppliers of similar goods and services.

CASE STUDIES

Advanced Medical Institute published a newspaper advertisement about a 'nasal delivery system' to treat impotence or erectile dysfunction. The advertisement quoted an interview with a celebrity that falsely claimed he had suffered from impotence and the nasal delivery system had assisted in dealing with this condition.

Legal reference: Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd (No 3) (2006) FCA 1066

Removalist company Citymove Pty Ltd made false or misleading representations concerning testimonials about its furniture removal services that were published on social network website Google+ and on YouTube. The ACCC issued infringement notices relating to allegations that the company used fabricated consumer identities to post the testimonials. The company paid three infringement notices totalling \$30,600.

CASE STUDY

One solar panel company published written testimonials on its website and another published video testimonials on YouTube that were not made by genuine customers of the companies. The Federal Court ordered payment of penalties of \$125,000 across both companies for publishing fake testimonials and also for making false or misleading representations about the country of origin of the solar panels they supplied.

Legal reference: Australian Competition and Consumer Commission v P & N Pty Ltd [2014] FCA 6

Businesses must ensure testimonials are true and correct when using them to endorse products. This can be achieved by getting real customers to speak about their actual experience.

Consumer guarantees—guarantees, conditions and warranties

It is unlawful to make false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee right or remedy, including consumer guarantees.

CASE STUDY

The Federal Court found that an individual who operated an online electronics store had made false or misleading representations to consumers about the availability of refunds and the extent of its liability for faulty goods. The representations included that consumers were not entitled to a refund, repair, or replacement for goods in various circumstances, such as where the goods were no longer under an express warranty, where the goods had been used or were not in their original packaging, or unless a claim was made within a specified time period. He was ordered to pay penalties totalling \$60,000 for the misleading representations about consumers' guarantee rights.

Legal reference: Australian Competition and Consumer Commission v Chopra [2015] FCA 539

For more information, see another guide in this series—*Consumer guarantees: A guide for businesses and legal practitioners*, available from www.consumerlaw.gov.au

Making false or misleading representations is an offence.

Sale or grant of an interest in land

A business must not make false or misleading representations about the sale or grant of an interest in land.

It must not:

- represent that it has a sponsorship, approval or affiliation when it does not
- make false or misleading representations about the:
 - nature of the interest in the land
 - price, location, characteristics or use that can be made of the land
 - availability of facilities associated with the land.

EXAMPLE

- A real estate agent would be misrepresenting the characteristics of a property if advertising ‘beachfront lots’ that did not front the beach.
-

Employment and business activities

It is unlawful to make false or misleading representations about the:

- availability, nature or terms and conditions of employment
- profitability, risk or other material aspect of any business activity that requires work or investment by a person.

CASE STUDY

A Melbourne training company, Keat Enterprises, posted online advertisements for accounting internships or employment. However, the advertisements were a means of attracting people to enrol in its training courses that were generally priced from \$2,000 to \$3,000, with no employment offered to applicants. The company was found to have contravened the law and was fined \$165,000 for misleading conduct.

Legal reference: Director of Consumer Affairs Victoria v Keat Enterprises Pty Ltd (Criminal) [2015] VMC (2 April 2015) (Unreported)

Offering rebates, gifts, prizes and other free items

When supplying or promoting goods or services, it is unlawful to offer rebates, gifts, prizes or other free items without intending to provide them. It is also unlawful to fail to provide them as promised.

The rebate, gift, prize or other free item must be provided within the specified time or, if no time was specified, within a reasonable time.

CASE STUDY

A stereo equipment retailer held a promotion. Customers went into a draw to win prizes when they bought stereo equipment. The retailer felt the promotion had not been a financial success so, among other things, fake names were added to the draw. Those fake names were declared the winners. This meant no prizes were awarded by the retailer. The retailer pleaded guilty and was fined.

Legal reference: Trade Practices Commission v Calderton Corp Pty Ltd (1994) ATPR 41–306

Misleading conduct—nature of goods and services

Businesses must not engage in conduct that is likely to mislead the public about the nature, manufacturing process, characteristics, suitability for purpose or the quantity of any goods or services.

CASE STUDIES

Apple promoted an ‘iPad with WiFi + 4G’ package in Australia, at a time when this product could not connect to any networks which were promoted as 4G networks. The Federal Court declared that this conduct was liable to mislead the public as to the characteristics of the device.

Legal reference: Australian Competition and Consumer Commission v Apple Pty Ltd [2012] FCA 646

Allergy Pathway, an allergy treatment provider, claimed that it could identify and cure or eliminate a person’s allergies or allergic reactions. However, the company could not do this. The Federal Court found that the company had engaged in false, misleading or deceptive conduct in relation to the services it was offering.

Legal reference: Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd [2009] FCA 960

Bait advertising

‘Bait advertising’ occurs when a person advertises goods or services in trade or commerce at a specified price, and there are reasonable grounds for believing that they will not be able to supply the advertised goods at the advertised price for a reasonable period or in reasonable quantities. What is a ‘reasonable supply’ will depend on several factors, including the type of goods and what is said in the advertisement.

CASE STUDY

Six Harvey Norman franchisees in Perth each paid an infringement notice for advertising the Kodak ‘Playsport’ pocket video camera in a catalogue distributed across Perth when they did not stock the camera.

EXAMPLE

- An electronics retailer runs a major national campaign advertising 42-inch televisions at a price of \$799 for a week-long sale. The retailer usually sells about 30 televisions of this type every week. The retailer only stocks two televisions at the advertised price and refuses to take customer orders. When customers attempt to buy the television at the advertised price, they are told it is out of stock and offered a more expensive unit for \$999. This is likely to be bait advertising as the retailer does not have a reasonable supply of the advertised television.
-

Businesses must not engage in conduct that is likely to mislead the public.

Wrongly accepting payments for goods or services

Businesses must not accept payment for goods or services:

- if they do not intend to supply them
- if they intend to supply materially different goods or services
- if they knew, or should have known, they would not be able to supply the goods or services in a timely manner.

CASE STUDIES

The Federal Court declared that on four separate occasions, an individual who operated an online electronics store accepted payment for goods, but failed to supply those goods to consumers within a reasonable timeframe. The Court ordered a penalty of \$10,000 for each of the four contraventions, being a total of \$40,000.

Legal reference: Australian Competition and Consumer Commission v Chopra
[2015] FCA 539

A telecommunications company signed up and charged customers for its mobile phone services, even though those customers lived in remote areas without mobile phone coverage.

Legal reference: Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)
[2012] FCA 976

This part of the law is not intended to affect businesses who genuinely try to meet supply agreements. A business may avoid prosecution if:

- the failure to supply was due to something beyond its control; and
- it exercised due diligence and took reasonable precautions.

Penalties

Making false or misleading representations is an offence.

The maximum pecuniary penalties are \$220,000 for an individual and \$1.1 million for a body corporate.

Other civil remedies include:

- injunctions
- damages
- compensation orders
- orders for non-party consumer redress
- corrective advertising orders
- adverse publicity orders
- orders disqualifying a person from managing corporations.

Consumer protection agencies can also accept court-enforceable undertakings, issue infringement notices and issue public warning notices as an alternative to instituting legal proceedings.

Unconscionable conduct

What is unconscionable conduct?

Generally, ‘unconscionable conduct’ is conduct that defies good conscience, within the context of society’s norms and expectations. For conduct to be unconscionable, it needs to be more than merely unfair or unreasonable.

A business must not act unconscionably when:

- supplying goods or services to a consumer or business
- acquiring goods or services from a consumer or business.

ACL reference: Part 2–2

The prohibition against unconscionable conduct under section 21 of the ACL extends to a broader range of conduct than what the ‘unwritten law’ has traditionally considered to be unconscionable. The ACL sets out a number of matters the court may consider in determining whether conduct in connection with the supply of goods or services is unconscionable. These factors include:

- the relative strengths of the bargaining positions of the supplier and customer
- whether the customer was required to comply with conditions that were not reasonably necessary for the protections of the legitimate interests of the supplier
- whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services
- whether any undue influence, pressure or unfair tactics were used
- the amount for which, and the circumstances under which, identical or equivalent goods or services could have been acquired from someone else
- the extent to which the supplier’s conduct with the customer was consistent with the supplier’s conduct in similar transactions between the supplier and similar customers
- the extent to which the supplier and the customer acted in good faith.

Examples of unconscionable conduct by a business may, depending on the circumstances, include:

- not properly explaining the conditions of a contract to a person they know does not speak English or has a learning disability
- signing a person up for a training course they know has no means of completing as the person does not speak English or has a disability
- not allowing a person sufficient time to read an agreement, ask questions or get advice
- using a friend or relative of the customer to influence the customer’s decision
- inducing a person to sign a blank or one-sided contract
- taking advantage of a low-income consumer by making false statements about the real cost of a loan
- failing to disclose key contractual terms
- using high pressure tactics, such as refusing to take ‘no’ for an answer, sustaining a sales pitch for a long period of time, or refusing to leave a consumer’s home.

Whether particular conduct will be unconscionable will depend on the particular circumstances involved.

CASE STUDIES

Sales representatives for the vacuum cleaner company Lux called upon three elderly women in their homes under the deceptive ruse of offering a free maintenance check for their vacuum cleaners. Once the sales representatives gained entry to consumers' homes, they subjected them to unfair and pressuring sales tactics to induce them into purchasing a vacuum cleaner for a price of up to \$2,280.

In some instances, the sales people also failed to comply with the 'unsolicited consumer agreement' provisions in the ACL that required them to disclose the purpose of their visit before entering a consumer's home, obtain a consumer's consent for staying longer than a specified period, and to inform the consumers of their cooling-off rights. On appeal, the Full Federal Court found that Lux Distributors had engaged in unconscionable conduct.

Legal reference: Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCA 47

A mobile phone company, Excite Mobile, was found to have engaged in unconscionable conduct in relation to its sales methods used to induce customers to enter into contracts, the terms of the contracts and the company's enforcement of the contractual terms. The company relied upon and enforced a 'day cap' clause in its mobile contract, which in some cases only allowed a customer to make a two minute call per day before being charged fees in excess of the monthly contract charge.

The structure of the contracts meant that customers were very likely to incur high excess usage charges as the operation of this term was not adequately disclosed. The company also imposed a \$75 cooling-off fee that customers were required to pay, as well as a \$195 charge imposed for returning a damaged phone, even if only the box was damaged.

Legal reference: Australian Competition and Consumer Commission v Excite Mobile Pty Ltd [2013] FCA 350

A marketer sold educational materials to Indigenous consumers in the Northern Territory. He failed to offer consumers a written record of the contracts they entered into, which involved automatic and indefinite bank account deductions and other conditions that were not reasonably necessary to protect his legitimate business interests. The marketer was also aware of his consumers' relative poverty, cultural differences and differing ability to communicate in English. He did not notify them about the excessive payments or that he would hold on to those payments until the educational materials had been delivered. He also failed to tell consumers how to stop the automatic payments. A court found that the marketer was unconscionable in his dealings with eight consumers and in relation to Indigenous consumers in the Northern Territory generally.

Legal reference: Australian Competition and Consumer Commission v Keshow [2005] FCA 558

Penalties

The maximum civil penalties are \$220,000 for an individual and \$1.1 million for a body corporate.

Representations about country or place of origin

Country or place of origin representations

A country of origin claim is a statement about where a product has been made or grown. Common claims are 'Made in Australia', 'Grown in Australia' and 'Product of Australia'.

The ACL does not require businesses to put country of origin details on its products, unless not doing so would be misleading or deceptive because of other statements or images associated with the product or on its packaging.

However, other laws (including the Australia New Zealand Food Standards Code, the *Commerce (Trade Descriptions) Act 1905* and the *Imported Food Control Act 1992*) impose labelling requirements for food products, imported food products, and all imported goods.

If a business chooses to make a country of origin claim, or is required to do so under other legislation, the representation about the country or place of origin must not be false or misleading.

Representations about country of origin can be conveyed in words, pictures or both and can be:

- attached to the goods (for instance, on a label)
- in promotional material linked to the goods.

Claims about country of origin include:

- 'made in' a specified country
- 'produce of', 'product of' or 'produced in' a country
- use of a particular logo or image (such as a map of Australia)
- claims that goods, or ingredients or components were 'grown in' a country.

Whether the use of a particular name, phrase or symbol will be misleading will depend on the particular circumstances and what message is conveyed. Words or pictures that are an essential part of the goods are not necessarily a representation about a place or country of origin.

EXAMPLE

- A t-shirt with a 'Made in Australia' label makes a representation about its country of origin. A t-shirt emblazoned with the word 'Australia' or a map of Australia as part of its design, does not. However, a jar of imported honey with a map of Australia may convey a representation that the honey was produced in Australia.

CASE STUDY

A Queensland retailer was ordered by the Federal Court to pay \$55,000 in penalties after it admitted it made false or misleading claims that sheepskin and wool bedding products:

- » were made in Australia when they were not made in Australia
- » contained 100 per cent sheep wool when the products were made of a blend of wool and polyester
- » contained 100 per cent alpaca wool when the products only contained up to 20 per cent alpaca wool.

Legal reference: Australian Competition and Consumer Commission v UNJ Millenium Pty Ltd [2012] FCA 1123

A place of origin claim is that a good originates from a particular region rather than a country, for example 'Made in Melbourne' or 'Product of Tasmania'. Legitimate claims could also be made in relation to other places of origin, such as South America, the Americas or the European Union. Consumers can be misled when a seller falsely associates itself with the reputation of a region. All false or misleading claims about the place of origin are prohibited by the ACL.

CASE STUDY

A butcher in Melbourne had used a logo that contained the name of a particular region of Tasmania, used an internet domain name containing the same place name, referred to the place name on its website, displayed signs outside its shop and ran newspaper ads referring to the place name. The court found that the company had represented that the meat being offered for sale through its butchery, or at least a significant proportion of it, was grown in or raised or was otherwise from that region of Tasmania, when this was not the case.

Legal reference: Australian Competition and Consumer Commission v KingIsland Meatworks and Cellars Pty Ltd [2012] FCA 859.

EXAMPLE

- It is unlawful to sell a ‘genuine Turkish rug’ when it is actually made in China, as a consumer may believe it was made in Turkey.
-

Country of origin ‘safe harbours’ and relevant criteria

To help businesses that choose to make a country of origin claim, or that are required to do so under other legislation, the ACL provides defences (‘safe harbours’) for certain claims. If the claim meets the criteria for one of these defences, the claim is deemed not to be misleading or deceptive.

The defences apply to claims about country, not region—for example, they do not apply to ‘made in Tasmania’ or ‘made in California’. If a business is accused of making a false or misleading claim about country of origin, it must point to evidence that the claim meets the criteria for the ‘safe harbour’ defence upon which it seeks to rely.

ACL reference: sections 254–258

It is important to note that the ‘safe harbour’ defences are not available for alleged contraventions of sections 33 and 155 of the ACL. These sections relate to misleading the public about the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods.

While a country of origin claim that meets the criteria for a ‘safe harbour’ will prove that a business has not breached the relevant sections of the ACL, a country of origin claim that does not fall within one of the ‘safe harbours’ may still be made. Such claims will be assessed as to whether they are false or misleading from the point of view of ordinary and reasonable consumers.

‘Made in’ claims

For a business to claim goods are ‘made in’ or ‘manufactured in’ a specified country:

- the goods must be substantially transformed in that country; and
- 50 per cent or more of the total cost of producing or manufacturing the goods must be incurred in that country.

Substantial transformation

This means the product undergoes a fundamental change in the country represented. The changes can be to the product's form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

Processes that lead to substantial transformation may include:

- processing ingredients from the claimed country of origin and another country into a finished food product, such as baking a cake using sugar and flour from the claimed country of origin with added spices from another country
- production of a newspaper using imported ink
- milling flour from wheat.

Processes that do not lead to a substantial transformation include packing, mixing, grading, addition or removal of water, and assembly of imported components into household items.

EXAMPLES

- reconstituting imported fruit juice concentrate into fruit juice for sale—whether or not water, sugar, preservatives and packaging from the claimed country of origin were used
 - assembling imported components into household or other items—such as white goods, furniture or electronic goods.
-

Costs of producing or manufacturing goods

The total cost of producing and manufacturing goods includes the producer or manufacturer's expenditure on:

- materials to produce or manufacture the goods, including:
 - purchase price
 - overseas freight and insurance
 - port and clearance charges
 - inward transport to store.

It may not include:

- customs and excise duty
 - sales tax
 - goods and services tax.
- labour related and reasonably allocated to the production or manufacture of the goods, including:
 - manufacturing wages and employee benefits
 - supervision and training of manufacturing workers
 - quality control
 - packing goods into inner containers
 - handling and storing the goods.
 - overheads related to and reasonably allocated to the production or manufacture of the goods, including:
 - inspection and testing of goods and materials
 - insurance and leasing of equipment
 - vehicle expenses
 - storage of goods at the factory.

EXAMPLE

- A good has a total production cost of \$100. This includes imported material costs of \$45, costs of Australian labour of \$30 and overheads of \$25. The labour and overheads were incurred in Australia, amounting to \$55. Assuming the materials were also substantially transformed in Australia, from their base form into a new product, the manufacturer of the good could utilise the general country of origin defence against any allegation of misleading and deceptive conduct.
-

‘Product of’ and ‘Produce of’ claims

Businesses who claim that their product is all, or almost all, the ‘Product of’ or ‘Produce of’ a country can establish a ‘safe harbour’ defence by demonstrating that:

- each significant component or ingredient of the goods originated in that country; and
- all, or virtually all, of the production processes take place in the country.

Because the term ‘product of’ implies a stronger meaning than ‘made in’ or other general country of origin claims, the ‘safe harbour’ defence for ‘product of’ claims is more onerous.

What constitutes a ‘significant ingredient’ or a ‘significant component’ is not necessarily related to the percentage of that ingredient or component in the product.

EXAMPLE

- An apple and cranberry juice bottle can carry a ‘produce of Australia’ label only if both juices are sourced from Australia.

Even though the cranberry juice is about five per cent of the total volume, it is ‘significant’ to the product and the label would be misleading if the cranberry juice was imported.

The final product may contain an imported preservative and still be classed as ‘produce of Australia’ if the cranberry juice and apple juice are both sourced from Australia. This is because the juices are ‘significant’ to the product and the preservative is not.

However, ‘Product of Australia’ claims will be difficult to sustain for any product with a significant imported component or ingredient. This is particularly relevant for complex products such as processed foods and beverages.

Claims of origin based on use of a prescribed logo

If a business labels a product with a prescribed logo, the goods must:

- meet the requirements for substantial transformation in the country represented by the logo; and
- meet the prescribed percentage of the costs of producing or manufacturing the goods in the country represented by the logo.

No logos were prescribed in the Competition and Consumer Regulations 2010 (Cth) at the time of publication of this guide.

‘Grown in’ claims

A business can lawfully claim goods are ‘grown in’ a particular country when:

- the country referred to as the country in which the goods were grown could also be represented as the country of origin of the goods, or the country of which the goods are the produce. This must be in accordance with the ‘safe harbour’ defence criteria for such claims; and
- each significant ingredient or significant component of the goods was grown in that country; and
- all, or virtually all, processes involved in the production or manufacture of the goods happened in that country.

Certification trade marks

A number of schemes exist to give customers confidence in claims made about goods. Many products carry a logo or other trademark to show they are certified by a particular scheme or have a recognised standard of quality or performance.

Credible schemes will provide detailed information about the basis on which they make claims, such as recognised standards.

A business can’t continue to use a cancelled or expired certification.

More information

See the ACCC’s guide, *Country of origin claims and the Australian Consumer Law*, April 2014, available from www.accc.gov.au/publications

Glossary and abbreviations

TERM	DEFINITION
acquire	to take possession of something by hiring, leasing or buying it, or by exchange or gift.
body corporate	includes a company registered under the <i>Corporations Act 2001</i> (Cth), an incorporated association, a co-operative or an owners corporation.
buy	see 'acquire'
consumer	<p>a person who buys:</p> <ul style="list-style-type: none">• any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations)• goods or services costing more than \$40,000 which would normally be for personal, domestic or household use; or• goods which consist of a vehicle or trailer used mainly to transport goods on public roads. <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none">• an air seeder—<i>Jillawarra Grazing Co v John Shearer Ltd</i> [1984] FCA 30• a large tractor—<i>Atkinson v Hastings Deering (Queensland) Pty Ltd</i> [1985] 6 FCR 331• an industrial photocopier—<i>Four Square Stores (QLD) Ltd v ABE Copiers</i> [1981] ATPR 40-232 at 43,115.
goods	<p>include, among other things:</p> <ul style="list-style-type: none">• animals, including fish• gas and electricity• computer software• second-hand goods• ships, aircraft and other vehicles• minerals, trees and crops, whether on or attached to land• any component part of, or accessory to, goods.
liability	an obligation to put right a problem—for example, fixing a defective product, providing compensation or taking other action.

TERM	DEFINITION
manufacturer	<p>includes a person who:</p> <ul style="list-style-type: none"> • grows, extracts, produces, processes or assembles goods • holds him/herself out to the public as the manufacturer of goods • causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies • permits him/herself to be held out as the manufacturer by another person; or • imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.
product-related services	<p>means a service for or relating to:</p> <ul style="list-style-type: none"> • the installation • the maintenance, repair or cleaning • the assembly • the delivery <p>of consumer goods of a particular kind.</p> <p>Without limiting any of the above, the definition also includes any other service that relates to the supply of consumer goods of that kind.</p>
regulator	the Australian Competition and Consumer Commission or state/territory consumer protection agencies.
services	<p>include duties, work, facilities, rights or benefits provided in the course of business, for example:</p> <ul style="list-style-type: none"> • dry cleaning • installing or repairing consumer goods • providing swimming lessons • lawyers' services.
supplier	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'.
supply	<p>includes:</p> <ul style="list-style-type: none"> • in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase • in relation to services—provide, grant or confer.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
ATPR	Australian Trade Practices Reporter
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
FCAFC	Federal Court of Australia—Full Court
HCA	High Court of Australia
NSWCA	Supreme Court of New South Wales—Court of Appeal
VMC	Magistrates Court of Victoria

Contacts



Australian Competition and Consumer Commission

GPO Box 3131
Canberra ACT 2601
T. 1300 302 502
www.accc.gov.au



Australian Capital Territory Access Canberra

GPO Box 158
Canberra ACT 2601
T. 13 22 81
www.act.gov.au/accessCBR



New South Wales NSW Fair Trading

PO Box 972
Parramatta NSW 2124
T. 13 32 20
www.fairtrading.nsw.gov.au

NORTHERN TERRITORY



Northern Territory Northern Territory Consumer Affairs

PO Box 40946
Casuarina NT 0811
T. 1800 019 319
www.consumeraffairs.nt.gov.au



**Queensland
Government**

Queensland Office of Fair Trading

GPO Box 3111
Brisbane QLD 4001
T. 13 QGOV (13 74 68)
www.qld.gov.au/fairtrading



**Government
of South Australia**

Attorney-General's
Department

South Australia Consumer and Business Services

GPO Box 1719
Adelaide SA 5001
T. 131 882
www.cbs.sa.gov.au



**Tasmanian
Government**

Tasmania Consumer Building and Occupational Services

PO Box 56
Rosny Park TAS 7018
T. 1300 654 499
www.consumer.tas.gov.au



Victoria Consumer Affairs Victoria

GPO Box 123
Melbourne 3001
T. 1300 55 81 81
www.consumer.vic.gov.au



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Western Australia Department of Commerce

Locked Bag 14
Cloisters Square WA 6850
T. 1300 30 40 54
www.commerce.wa.gov.au



ASIC

Australian Securities & Investments Commission

Australian Securities and Investments Commission

PO Box 9827 (in your capital city)
T. 1300 300 630
www.asic.gov.au

