Instructor’s Manual for Module 7
False or misleading advertising practices

Dear Educator,

The content of this educational module is available to your students to learn online at: www.accc.gov.au/ccaeducation
The online module is a free resource and includes the first five quiz questions contained in this Instructor’s Manual.

You are invited to request your students to complete this module and the multiple choice quiz online or you may choose to teach this content in a classroom. The ACCC has developed this Instructor’s Manual to provide you with additional quiz questions and answers and a discussion question and answer that are not available on the online program. You can also receive the content of this module in a PowerPoint presentation if you subscribe to the free ACCC Tertiary Information Network, available under the ‘For Educators’ section at www.accc.gov.au/ccaeducation

We wish you success in teaching this module. The ACCC Small Business and Consumer Strategies Branch.

Learning objectives

At the end of this module, you should be able to:

- Explain the concept of misleading or deceptive conduct and the possible consequences of not complying with this law
- List the general principles in determining whether conduct is misleading or deceptive
- Provide examples of misleading or deceptive conduct
- Describe the difference between misleading or deceptive conduct and false and misleading representations
- Provide examples of false and misleading representations.
Introduction

Effective marketing and advertising is crucial to the success of most businesses. It is the means by which firms engage with their customers and differentiate themselves from their competitors. Firms usually make promises, statements or claims to try and win their customers. But is there a limit on what you can say or advertise?

This module deals with the provisions of the Australian Consumer Law (ACL) which is Schedule 2 to the Competition and Consumer Act 2010 (the CCA), that relate to honesty, accuracy and fair dealing in the market place.

To promote honesty and fair dealing in the market place, the ACL bans businesses from:

- engaging in any form of conduct that is misleading or deceptive, or behaviour that is likely to mislead or deceive
- making false or misleading representations about goods, services, land, employment opportunities, or certain business activities.

Breaking this law can have very significant consequences for the business and individuals who represent the business. Therefore, it is important that when you are working in business you ensure any communication or promotional materials you make, and any dealings you have with other businesses, are not misleading, deceptive or false.
What is misleading or deceptive conduct?

In promoting and marketing your business you are likely to make promises or statements about your business, your products or services. These statements might be made to:

- your customers directly (either orally or in writing), or
- to the public at large, such as through newspaper advertisements, television or radio broadcasts, labels on your products, advertisements on billboards or via social media
- other businesses

Statements that you make can contain direct or implied representations or claims. For example, a label on a wine bottle containing the words “Made in Victoria from local ingredients” might well suggest to most customers that the grapes that form the wine are grown in Victoria and that the wine is processed in Victoria.

Another example of an inferred or implied representation is an advertisement that contains a picture of a recognisable celebrity with the product that you are promoting. The insinuation in this example is that the celebrity pictured endorses the product.

The general rule is that when a business makes any representation (directly or impliedly), the business must ensure that the representation is not untrue or false and it is not likely to mislead the type of consumers at which the advertisement is targeted.

More specifically, section 18(1) of the ACL states "a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

To whom does this law apply?

The law against misleading or deceptive conduct applies to any individual or business engaging in ‘trade or commerce’.

In other words, it embraces any form of business activity, including:

- making claims about goods or services
- advertising and other forms of promotion
- making representations during business negotiations
- using social media for commercial purposes
- expressing opinions or statements about the future.
To whom does this law not apply?

Activities that are not considered to be in ‘trade or commerce’ and therefore are not subject to the law against misleading or deceptive conduct include:

- political statements
- private sales (such as at a garage sale)
- private statements not in connection with any business activity, for example personal comments on your face-book page

Section 18 of the ACL also does not apply to conduct relating to the **provision of financial services** (for example, representations made by financial advisors, banks or insurance companies). Representations made by financial service providers are covered in identical terms by section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

There is also a limited exception for the **media**, created by section 19 of the ACL, in relation to the publication and broadcasting of news items.

Who can complain about misleading or deceptive conduct?

Anyone can complain about misleading or deceptive conduct – consumers who are affected by the behaviour, general members of the public, or competitor firms.
General principles in determining whether conduct is misleading or deceptive:

In considering whether conduct contravenes section 18 of the ACL, the overall impression created by the representation is considered to determine whether it is likely to lead a significant number of people into error or has the tendency to deceive such persons. Other general principles apply when considering whether conduct is misleading or deceptive, including:

- **no-one need actually be misled.** The prohibition applies to conduct that is *likely* to mislead or deceive, as well as conduct that *actually* is misleading or deceptive.

- **it applies to private as well as public conduct.** The prohibition is not restricted to conduct only directed towards consumers (for example in representations made on a product), or the public at large (for example in representations contained on a billboard or television advertisement); it applies equally to private communications undertaken in the course of business (for example, by a waiter on behalf of a restaurant to a customer).

- **fault or intent is not necessary.** The law is not restricted to cases where there is some moral or conscious fault on the part of the business. The law can be breached by accident, even when the business acted honestly and had no intention of misleading or deceiving anyone. This is because the effect of the conduct (usually a misrepresentation) is considered rather than its purpose i.e. is the advertisement likely to have been misleading?

- **conduct is not limited to words or positive representations.** Any form of conduct on the part of a business can breach the ACL if it causes its customers, or suppliers, to be misled. For example, the publication of images or pictures that exaggerate the quality or features of an advertiser’s products could be misleading or deceptive. Silence can amount to misleading conduct, where that silence causes its customers or suppliers to be misled.

**Example – Silence can be misleading**

A supplier of wood shavings (to be used for the export of live crayfish) was guilty of misleading conduct because the supplier failed to inform the buyer that a toxic chemical had been used to treat the wood.

See: *Forwood Products Pty Ltd v Gibbett* (2002) ATPR 41-870

- **repeating information can amount to misleading conduct.** A business that passes on incorrect information provided by someone else will break the law about
misleading or deceptive conduct if the business gives the impression that the information is its own. However, if the business makes clear that it was merely passing on the information and did not give any assurance about the accuracy of that information, it will not be legally responsible.

Example – Repeating information can be misleading

A real estate agency innocently relayed to a prospective buyer, incorrect information provided by the vendor as if it was the source of that information. The agency was subsequently found to have engaged in misleading or deceptive conduct.

See: Argy v Blunts and Lane Cove Real Estate Pty Ltd (1990)26 FCR 112.

• statements about the future can be misleading or deceptive. A business will be liable for engaging in misleading or deceptive conduct if it makes a statement about the future that later proves to be incorrect, unless the business had reasonable grounds for making the statement.

Examples - statements about the future can be misleading or deceptive

The court ruled that the following statements about the future (that later proved to be incorrect) were misleading or deceptive:

• “All the shops in the shopping centre will be let when the centre opens”. See: Lyons v Kern Konstructions (Townsville) Pty Ltd (1983) 47 ALR 114

• “Investors could expect capital growth of around eight per cent per annum”. See: ACCC v Oceana Commercial Pty Ltd (2004) ATPR (Digest) 46-244.

When deciding whether an advertisement is misleading or deceptive, the court will consider the:

• audience to whom the advertisement is directed. For example, an advertisement that does not mislead adults may mislead children. Conversely, an advertisement that would mislead the general public may not be misleading if it was directed only at people with a special knowledge and understanding of the subject matter.
• **whole advertisement.** For example, words that are read in isolation may be misleading or deceptive, however they may not have this effect when read with the rest of the advertisement.

• **transaction and the product advertised.** For example, advertisements about inexpensive transactions, or directed at impulse buyers, are unlikely to be scrutinised carefully and consequently have a greater potential to mislead their audience. Conversely, advertisements relating to expensive items are likely to be scrutinised more closely and are less likely to mislead.

Examples of misleading or deceptive conduct:

The law against misleading or deceptive conduct applies to all forms of advertising.

**Examples:**

The following advertisements were held to contravene section 18 of the ACL:

- an advertisement represented that a mobile telephone could be bought for $0 – when the telephone could only be purchased if bundled with a telephone service for which there was a substantial charge.
  See: *ACCC v Telstra Corporation Ltd* (2004) ATPR 42-017

- an advertisement represented that a new ingredient in a brand of toothpaste reduced tooth decay - when there was no scientific evidence to prove that this was true

**Advertisements using an existing name or design:** advertisements may be misleading or deceptive if, without permission, they feature the name, logo or design of another business or person. It may also be misleading or deceptive for a business to copy an existing product and then advertise it under its own name.

Legal responsibility will arise in such cases when a reasonable member of the target audience is misled, or is likely to be misled, into thinking there is some kind of connection between the businesses, or the products, when there is not.
### Examples - advertisements using an existing name or design:

- Adopting the same promotional designs and images as a rival firm may cause consumers to be misled into thinking that the businesses are cooperating, or that one has endorsed the other, or that their products are now the same.  
  See: *The Kettle Chip Co Pty Ltd v Apand Pty Ltd* (1993) 46 FCR 152.

- Using the name or imagery associated with a well-known personality without permission may mislead consumers into thinking that the personality has endorsed the product, or that there is some form of cooperation between them and the business.  

- Promoting a new product using a television presenter and slogan previously associated with a well-established rival product may cause consumers to be misled into thinking that the two products are connected in some way, or that the original business has introduced a new product line.  

### Comparative advertising:

Comparative advertising: although advertising that compares, likens or differentiates is not of itself unlawful, it will contravene section 18 of the ACL if it is misleading or deceptive. Comparative advertising occurs when businesses seek to promote their products by:

- favourably comparing them, or their price, with those of a rival business
- by denigrating rival products
- by showing the positive benefits of their product using a ‘before’ and ‘after’ comparison.

### Examples - Comparative advertising:

- An advertisement saying that a product would last as long as those of a rival was misleading because the statement was correct only in relation to one of the rival’s range of products, but not others  

- An advertisement favourably comparing the price of the advertiser’s products with those of a rival was misleading because it did not disclose that the rival’s customers were entitled to a rebate which reduced the amount they would actually pay  

- An advertisement showing a contest between rival products in which one completely devastated the other and caused it to emit smoke was misleading because in five of the six takes of the advertisement both products emitted smoke and the advertiser’s product was just as badly affected by the contest as the other
Advertisements and fine print: fine or small print qualifying statements made in an advertisement will only protect the advertiser from liability if they prevent the advertisement from misleading its audience. For example, if a product is advertised at a cheap price, but the fine print says that this price is available only if the consumer buys another product, the advertisement will contravene section 18 unless that requirement to buy another product is so clear and prominent that it prevents the dominant message (the cheap price in this example) from being misleading. See: ACCC v TPG Internet Pty Ltd [2010] VID1099/2010

Advertisements and sales puffery: it is not misleading or deceptive to use grandiose or exaggerated claims where the audience could not reasonably be misled, this is commonly referred to as ‘puffery’. For example, many cafés advertise that they have ‘the best coffee in town’; however a reasonable consumer is likely to recognise this as advertising puffery and is unlikely to rely on that statement or find it misleading.

Advertisements and price claims: as price is an important factor in consumer decision making, special care should be taken to ensure that statements about price are not misleading. For example, consumers may be misled if products are offered ‘free’ but on closer examination ‘conditions apply’, or if price is specified however GST is not included. See: ACCC v Nationwide News Pty Ltd (1996) ATPR 41-519 and ACCC v Signature Security Group Pty Ltd (2003) ATPR 41-908.

It is also important that a firm doesn’t mislead its customers about the potential savings that may be available for its products or services. For example, businesses often advertise a sale by using statements such as “$99 $49.50” or “WAS $275 NOW $149”.

Great care should be taken when making representations like this as they imply to consumers that they will save an amount (being the difference between the higher and lower price). If the products or services advertised on sale in the manner demonstrated above have not been sold at the higher price, or if only a very limited quantity was sold at
the higher price prior to the sale commencing, these advertised savings are likely to be misleading or deceptive.

**False or misleading representations**

In addition to the general prohibition of misleading or deceptive conduct, the ACL prohibits a large number of specific false or misleading representations. Like section 18, they apply to all businesses and to all forms of business activity (other than conduct relating to financial services and news items published by media outlets). However, unlike section 18, breaching these laws can attract civil penalties. They also have mirror provisions that constitute criminal offences that can result in criminal penalties (see Chapter 4 of the ACL).

**Representations about products or services**

The ACL prohibits businesses from making a number of specific false or misleading representations about products or services. Section 29(1) states that:

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 goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

<table>
<thead>
<tr>
<th>Example – False or misleading representations about the composition, style or model of goods</th>
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<td>Aldi admitted that it had made false or misleading representations with respect to the standard or quality of certain vehicles when it pictorially advertised them with seven seats even though these vehicles only contained five seats.</td>
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b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
Example – False or misleading representations about the standard or quality of goods

The respondent was found to have made false and misleading representations by claiming in its advertising that it had a government affiliation when this was not true and therefore represented a standard or quality it did not possess.

See ACCC v Optell Pty Ltd (1998) 41 IPR 49; ATPR 41-640

c) make a false or misleading representation that goods are new; or

d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or

e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or

f) make a false or misleading representation concerning:
   i. a testimonial by any person; or
   ii. a representation that purports to be such a testimonial; relating to goods or services; or

g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

Example – False or misleading representations about the performance characteristics, uses or benefits

The respondent made false or misleading representations about the performance characteristics, uses or benefits of its mobile network services by promoting and selling the service in remote areas where the mobile coverage was not available.

See: ACCC v EDirect Pty Ltd (in liq) [2012] FCA 976
h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

i) make a false or misleading representation with respect to the price of goods or services; or

Example – False or misleading representations about the price of goods or services

The respondent was a builder who pictorially represented the homes it could build in brochures. The respondent admitted to making false or misleading representations about the price of goods by showing pictures of features of the homes that were only available at a higher price than what was advertised.

See ACCC v Metricom Homes Qld Pty Ltd [2012] FCA 797

j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or

k) make a false or misleading representation concerning the place of origin of goods;

or

Example – False or misleading representations about the place of origin of goods

The respondent made false or misleading representations about the place of origin of goods by advertising that its footwear was ‘made in Australia’ when the footwear was made in China.

See ACCC v Marksun Aust Pty Ltd [2011] FCA 695

l) make a false or misleading representation concerning the need for any goods or services; or

m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

The consequences of engaging in prohibited conduct

Engaging in any of the forms of conduct outlined in this module can have very serious consequences for your employer and for you personally.

- civil pecuniary penalties:

  A person who is found to have breached certain provisions of the ACL, such as the prohibition against false or misleading representations, may be liable to pay a civil
pecuniary penalty of up to $1.1 million for companies and $220,000 for individuals. A civil penalty is a financial penalty and is designed to deter the person and others from breaching the law. A penalty may only be imposed by the court once it has found that the person has breached the ACL at the civil standard of proof. This means that the person must be proved to have breached the ACL on the balance of probabilities that is that the conduct was more likely to have occurred than not.

Section 18 of the ACL which deals with misleading or deceptive conduct is not the subject of civil pecuniary penalties.

- **criminal penalties:**

  The ACL also prohibits numerous business practices that are false or misleading, and gives rise to both criminal and civil liabilities.

  Criminal law is the body of law that deals with crime and the legal punishment of criminal offences. The legislation, such as the CCA, specifies what a criminal or civil contravention is. If the ACCC refers a criminal matter to the Commonwealth Director of Public Prosecutions (CDPP), the CDPP may take legal action against a firm that is suspected to have contravened a criminal prohibition. The CDPP must prove that the law was contravened beyond a reasonable doubt. This is a higher standard of proof than the standard of proof for civil contraventions. In most cases, the penalty is also a fine of up to $1.1 million (for companies) and $220,000 (for individuals). Section 18 (misleading or deceptive conduct) is also not the subject of criminal sanctions.

- Other civil remedies include:
  
  - **an injunction (a court order)** requiring the business to stop the conduct that is breaching the law
  
  - **an award of damages (compensation)** provided to those suffering loss or damage as a result of the contravening conduct
  
  - orders requiring the liable business to establish a compliance or training program for staff to reduce the risk of further contraventions, publish corrective advertising or disclose specified information
  
  - **disqualification orders** made by a court prohibiting a person from managing a business for a specified period
  
  - **infringement notices (penalty notice):** if the ACCC has reasonable grounds to believe that a business has made a false or misleading representation (other than misleading or deceptive conduct under s.18), it may issue an infringement notice, which in effect is a fine.

  The infringement notice must explain the area of law that the business is alleged to have breached and state the penalty amount that the business must pay. If the
business does not pay the specified penalty amount, court proceedings can then be taken against it.

Summary

It is unlawful for a business to make promises, statements or representations in trade or commerce that are misleading or deceptive or would be likely to mislead or deceive. Statements about the future, including opinions and predictions, can be misleading or deceptive if the person making the statement did not have reasonable grounds for making it. Failing to disclose relevant information can also be misleading or deceptive.

Businesses cannot rely on small print and disclaimers as an excuse or contract out of their obligations under the ACL.

It is also unlawful for a business to make false or misleading representations about specific things about products or services, the sale of land, employment or business transactions. False or misleading representations about these particular things can attract civil and criminal penalties.

Further reading


- Website:
  - www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-claims
Quiz questions

Question 7.1:
Bob is a shop owner who purchased products from a manufacturer after being told that only Australian raw materials were used in the products. Relying on this, Bob advertised the products for sale as ‘wholly Australian’. It has since been established that 50 per cent of the material used to make the products was imported from England.

Which of the following statements is true?

A. The shop owner has not contravened the ACL as it relied on the manufacturer and believed what it was told.
B. Only the manufacturer is responsible in this situation as it made a false representation to the shop owner.
C. No one is at fault unless it can be shown that consumers have suffered loss or damage as a result of the goods not being made entirely from Australian raw materials.
D. The shop owner has contravened the ACL.

The correct answer is option D: The shop owner has contravened the ACL. Because the shop owner’s advertisement was false, it has (a) engaged in misleading or deceptive conduct and (b) made a false representation. It is no defence to show that it was relaying information provided by the manufacturer unless the shop owner made it very clear that the information came from the manufacturer and that it did not endorse the information.

Question 7.2:
Best Flowers Pty Ltd, a small retail flower business signed a lease for a store in a new shopping centre complex because the developer advised that all 100 shops in the centre would be occupied in six months.

However, when the centre opened six months later, only half the shops were occupied and the shopping centre complex failed to attract the consumer patronage anticipated. As a result, Best Flowers’ revenue was only half what its business plan had projected. Is Best Flowers able to seek a remedy?

A. Best Flowers has no remedy because, being a business and not a consumer, it cannot rely upon the ACL.
B. Best Flowers may be able to rely upon the ACL’s prohibition of misleading or deceptive conduct in an action for damages brought against the developer.
C. Best Flowers has no remedy because the developer’s statement was about a future matter and as such was not false at the time it was made.
D. Best Flowers has no remedy because its business plan should have provided for the contingency of the centre not being fully occupied.

The correct answer is option B: The developer’s representation was a prediction about a future matter. As it proved to be incorrect, it will be misleading or deceptive unless there were reasonable grounds for it being made.

Question 7.3:
Sally purchased a new tractor from a large dealership after being told by a sales representative that it had features making it the most powerful tractor on the Australian market selling for under $100,000.

Unfortunately, the sales representative had made an honest mistake about the capabilities of various tractors and what he told Sally was incorrect. When Sally complained about this, the dealership pointed out that the contract of sale she had signed contained a clause, which said that it gave no guarantee about the accuracy of any statements made by its representatives. Although Sally agreed that she had signed this contract, she said that she had not read this clause. Which of the following statements is correct?

A. The dealership is protected by the contract that Sally signed and therefore it cannot be responsible for what the representative said about the tractor.
B. Sally has a claim against the sales representative, but not the dealership, as it was the representative that made the incorrect statement.
C. Sally has no claim against the representative or the dealership as the mistake was an honest one.
D. The dealership has engaged in misleading or deceptive conduct and made a false representation for which it is liable to Sally.

The correct answer is option D: In situations such as this one, an employer is responsible for any misleading conduct or false representation made by an employee. It is not a defence that the incorrect statement was a mistake, nor can the dealership exclude its obligation for contravening provisions of the ACL by relying on a clause in its contract of sale. Therefore the court is likely to find the dealership liable for misleading or deceptive conduct and making a false representation.

Question 7.4:
A business operator used Twitter to make inaccurate criticisms of the products sold by a rival business. Does the business have a remedy?

A. The business criticised has no remedy under the ACL as Twitter is only social media.
B. The business may have a remedy under the ACL if the business operator was using Twitter as part of its commercial operation.
C. Only consumers can complain under the ACL as they are the ones purchasing the goods being referred to.
D. The ACL is not concerned with the use of social media.

The correct answer is option B: Conduct in the form of representations made using social media will come within the scope of the ACL if those representations are made in connection with a business’s commercial activity, or that of a rival business. If the representations contravene a prohibition in the ACL, liability will arise so the business may have a remedy.

Question 7.5:
An advertisement was published with a paparazzi photograph showing a famous film star drinking a well-known soft drink. Which of the following statements is correct?

A. This advertisement won’t contravene the ACL if the film star was actually drinking this beverage.
B. The advertisement could amount to misleading or deceptive conduct even if the film star was drinking the beverage.
C. The advertisement won’t contravene the ACL if it is published only on Facebook.
D. The advertisement won’t contravene the ACL if it can be shown that the film star drinks the beverage more than any other brand.

The correct answer is option B. The advertisement will contravene the ACL if it is published in the course of business and it misleads consumers into thinking that the film star has endorsed the product when this is not true. It does not matter if the film star did drink the beverage, or even if it was their favourite drink.

Question 7.6:
Misleading or deceptive conduct is a criminal offence under the ACL:

A. in all circumstances.
B. only if it occurs as part of a business.
C. only if directed towards a consumer.
D. only if it falls within one of the specific false or misleading representations the ACL prohibits.

The correct answer is option D: Misleading or deceptive conduct in section 18 of the ACL is not the subject of criminal sanctions. This conduct will be a criminal offence only if it occurs in trade or commerce and amounts to one of the forms of false or misleading representations about goods, services, employment or land prohibited by other provisions of the ACL.
Question 7.7:
The criminal penalty for a company engaging in false or misleading representations about goods or services is a fine of up to:

A. $500,000
B. $220,000
C. $100,000
D. $1.1 million.

The correct answer is option D: The fine is up to $1.1 million for companies.

Question 7.8:
A business began an advertising campaign saying that its products have certain qualities that they actually do not possess. Can a rival business take action under the ACL to stop this advertising?

A. No, because the rival business is not a consumer.
B. No, because the rival business has not been misled as it has known the truth about the products all along.
C. No, this is a job for the ACCC; private interests should not interfere for their own commercial gain.
D. Yes it can.

The correct answer is option D: A business can take action under the ACL against a rival business that has engaged in misleading or deceptive conduct – in this case, in the form of false advertising. This is possible even though it was not misled by the advertisements and is motivated only out of concern to protect its competitive position. Its most likely remedy is an injunction to stop the other business from publishing the false advertisements.

Question 7.9:
A sporting goods store sells a cricket bat that has been 'used by Michael Clarke'. The Michael Clarke they are referring to is a local school boy and not the captain of the Australian cricket team. Is this misleading?

A. No - the statement is accurate. The bat has been used by a person named Michael Clarke
B. Yes - even though the statement is literally true, consumers are likely to be misled.

The correct answer is option B: Even statements that are literally correct can be misleading.
Question 7.10:
The Prime Minister of Australia stands up in parliament in front of a large audience. He places his hand on his heart and says that he is going to reimburse all the families who suffered loss and damage during the Queensland floods in 2011 by providing a $3,000 cheque. Later that week it becomes apparent that there is no budget for such a compensation scheme and the Prime Minister takes back his promise. Was the Prime Minister’s statement false or misleading?

A. Yes. The Prime Minister is accountable to the Australian public and cannot make false or misleading statements.
B. No. It is not reasonable for the general public to believe any political statements and therefore it is unlikely that people will be misled by a Prime Minister’s promises.
C. No. The statement was not made in trade or commerce and therefore does not attract the false or misleading conduct prohibitions.

The correct answer is option C: Political statements are not subject to the law against misleading or deceptive conduct because they are activities that are not considered to be in ‘trade or commerce’.

Discussion questions

Question 1

New Teeth Ltd has recently entered the toothpaste market with a paste called ‘Brilliant’. As part of New Teeth Ltd’s campaign to launch ‘Brilliant’ it has prepared the following advertisement:

‘Introducing the “Rolls Royce” of tooth paste - Brilliant! Tests show that brushing with Australian made Brilliant will fight tooth decay and eradicate gum disease. A recent poll of ordinary Australians elicited these responses about Brilliant: ‘Brushing with Brilliant is so much better than brushing with other brands’; and ‘Other brands are history now I have Brilliant’. Brilliant is environmentally friendly, exceeds Australian Government health standards and may soon be endorsed by the Australian Dentists Association. You also save money by brushing with Brilliant. Now isn’t that Brilliant?’

Before going to press New Teeth Ltd asks you to check whether the advertisement is problematic in any way. What is the possibility that this advertisement would expose New Teeth Ltd to liability under the ACL? What parts of the advertisements may be problematic and why?
Answer
You are required to consider how the advertisement may contravene the ACL. Issues to explore include:

- Does the advertisement in any way bear a misleading resemblance to another product, or its get-up, or its advertisements? If it does, section 18 may be contravened.

- Is any of the content of the advertisement false or misleading? Or is it mere puffery? It is unlikely that a court would deem the statement “Tests show that brushing with Australian made Brilliant will fight tooth decay and eradicate gum disease” as mere puffery. If tests were not performed on the product and the results did not show that the product can fight tooth decay and eradicate gum disease this statement is likely to be considered false, misleading and deceptive - exposing the company to civil and criminal penalties.

- Did the Australian Dentists Association give the endorsement quoted? If not, liability can arise under sections 18 and 29(1).

- What impression are consumers likely to form about the product being ‘environmentally friendly’? Are consumers likely to understand that the packaging is bio-degradable? Or that the product uses chemicals that do not harm the environment? If these impressions are likely to be formed they ought to be correct otherwise they risk misleading the consumer.

- Does the product exceed all Australian Government health standards? If it does not, it is false and likely to mislead consumers.

- Does the consumer save money using the product and if so, how? Is the representation “You also save money by brushing with Brilliant” due to the product now being on discount? Or perhaps is it comparing it to other more expensive products? It may be misleading to state that consumers are saving money when there is no evidence to support this.

Question 2
Betty has retired and has decided to sell her big house and move into a home unit in Docklands. She has asked Burwood Estate Agency (BEA) to sell her home. During their negotiations Betty told BEA that her house is made from a steel frame (as this was what she had been told when she purchased the house ten years earlier).
BEA provided Betty an attractive glossy brochure picturing new units that were currently being built in Docklands by Dock Units Ltd (DU). Betty was very impressed with what she saw and read in the brochure, especially a description of the swimming pool that would be attached to the units. BEA also told Betty that the land on which the units were being constructed could be accessed by boat. BEA knew this to be true because DU had provided this exciting information to BEA.

Betty entered into a contract to purchase one of the units in Docklands for $400,000. Betty also sold the house on the same day to a gentleman called Peter for $350,000.

When the DU units were finished, Betty discovered that there was no swimming pool (it had been removed from the development as a cost cutting measure) and that the site could not be accessed by boat.

To make matters worse for Betty, Peter is very upset because he has discovered that the house he has bought from Betty has a wooden frame and not a steel one as he had been told by BEA.

Please advise Betty, DU, BEA and Peter of their legal position under the ACL arising out of these transactions.

Answer

Betty and the swimming pool

Does Betty have a case against DU because her unit now doesn’t have a swimming pool? Does she have a remedy? Section 18 of the ACL will help her if the conduct was:

- *made in trade or commerce*. In this example, Betty agreed to buy the unit based on representations that there would be a swimming pool and this was made in a business transaction and therefore in trade or commerce.
- *misleading*. As the statement about the swimming pool has proved to be incorrect, DU is responsible to show that there were reasonable grounds for it to make that statement. If it cannot do this, it will contravene section 18 of the ACL.

If a contravention of section 18 is established, Betty could seek to end the contract and recover damages for any loss she has suffered.

Betty and boat access to her new unit site

Does Betty have a case against BEA because BEA told her that her new unit will be on land that will be accessible by boat?
Assuming the issues above have been satisfied, the question is whether BEA’s conduct towards Betty was misleading given that BEA was merely relaying information provided to it by DU. In this regard the following should be noted:

- BEA can be liable even though it was just relaying information gained from others.
- If BEA made it clear that it was only passing on information and had no knowledge about the matter itself, liability may be avoided. This is because BEA’s conduct would not then have been misleading. On the facts, this is not clear, although it seems as though BEA did not make clear that it was merely relaying information.

*Peter and his house made from a wooden frame*

*Does Peter have a case against BEA and/or Betty for misleading him about the material used for the frame of his house?*

As BEA was acting in the course of its business when it communicated information about Betty’s house to Peter, it could be liable to him if its conduct contravened section 18 of the ACL. As BEA was relaying information provided by Betty, it will be legally responsible *unless* BEA made it clear to Peter that this information was being relayed from Betty and that it was not confirming the accuracy of that information. It is no defence that BEA was given incorrect information by Betty and honestly believed what she had said.

Although she was the source of the false information, Betty cannot be liable under the ACL as her conduct in providing the false information did not occur in the course of a business she conducted.
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