“Misleading or Deceptive Conduct in Employment”

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Misleading or deceptive conduct in employment

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4.1  Sections 18 and 31 of the Australian Consumer Law (ACL) impose on most of Australian employers obligations not to engage in misleading or deceptive conduct about various aspects of employment. The ACL is contained in Schedule 2 of the Consumer Credit Act 2010 (Cth) (CCA). The ACL has a similar scope to the Fair Work Act: see 1.xx. It principally applies to conduct of constitutional corporations. Under s 6 of the CCA it has some extended application to non-corporations. Complementary legislation has been enacted at State and Territory level to ensure that ss 18 and 31 apply to the conduct of almost all employers who are outside the scope of the ACL. Subsection 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.

Subsection 31 (1) states

A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to ... the availability, nature, terms or conditions of the employment... or any other matter relating to the employment.

4.2  Sections 18 and 31 establish norms of conduct, like their nearly identical predecessors ss 52 and 53B of the Trade Practices Act 1975 (Cth) (TPA). Loss or damage caused by a contravention of those norms is recoverable under s 236 of the ACL: see 4.xx. Section 18 applies to conduct in trade or commerce: see 4.xx. It has been applied to a broad range of conduct by employers, including representations relating to the longevity of employment, remuneration and the terms of the engagement, the prospect of future engagement or promotion, and the nature and success of the employer’s business.

4.3  An action seeking damages under s 236 has at least three significant advantages over a claim for breach of contract. First, an action in contract requires a breach of a contractually enforceable promise. An action based on s 236 is not limited to such

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2 See also s 20 of the ACL which largely replicates in a statutory form the equitable doctrine of unconscionable dealing and is discussed in [4.xx]


4 Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1988) 19 FCR 469; 84 ALR 337 at 342-3, Marks v GIO Australia Holdings Limited (1998) 196 CLR 494; 158 ALR 333 at [76].


7 Macdonald v Australian Wool Innovation Ltd [2005] FCA 105 at [277] (representation that a project would proceed).

8 Moss v Lowe Hunt and Partners Pty Ltd [2010] FCA 1181 at [36]–[64] (representation that the employer was financially successful) and ACCC (ACCC) v Zanok Technologies Pty Ltd [2009] FCA 1124 (representation that the employer was part of a global company).
promises. Second, the measure of damages under the ACL is not limited to the notice period. Employees can recover significant damages under the ACL far in excess of ordinary damages under notice provisions. The third advantage arises from the common law approach to representations made about the proposed future conduct of a party. Under the common law a distinction is drawn between a promise to do something in the future (such as to employ for 5 years) and a misleading representation about an existing or past fact. Such a promise is contractually enforceable. A misleading representation is not actionable, unless it concerns an existing or past fact. On this basis, at common law a non-contractual representation that something is to be done in the future (such as a statement, not recorded in the executed contract, that employee would have the job in the long term) was not actionable unless it contains a representation of an existing or past fact – such as an implicit statement that the employer has a current intention to engage the employee in the long term. One of the effects of ss 4, 18 and 31 of the ACL is to abolish, for the purposes of the statute, the distinction between promises and representations about future matter. It enables representations about future matters to be actionable, even if they do not amount to promises. Notwithstanding these advantages, claims based on ss 18 and 31 almost all fail for one of four reasons: the employee fails to prove the representation was made; in cases based on s 18 the representation was not made in trade or commerce (see 4.xx); the employee fails to prove he or she relied on the representation and so cannot prove loss was suffered because of the representation (see 4.xx); or the representation was about a future matter and, though it turns out to be misleading, the employer had a reasonable basis for making the representation (see 4.xx).

4.4 Section 31 of the ACL is limited to conduct that occurred prior to the commencement of the employment. To recover damages for a contravention of s 31 an employee must prove the employer’s conduct was liable to mislead, the employee relied on the misleading conduct and the employee suffered loss or damage because of the misleading conduct. The prospective employer’s conduct need not be in trade or commerce. It is unnecessary for the conduct to lead to employment. The section has regularly applied to employers and employment agencies who induce prospective employees with misleading job advertisements or descriptions. It is an offence to contravene s 31.


16. Section 153 of the ACL. Sections 207 and 208 contain some defences to that offence that are not applicable to a civil contravention of s 31.
4.5 Section 345 of the Fair Work Act provides that a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person, or the exercise, or the effect of the exercise of a workplace right by another person.\textsuperscript{17} This includes statements about the rights of an employee under an enterprise agreement or a modern award. Section 345 is a civil penalty provision. Pursuant to s 545 of the Fair Work Act an employee may recover compensation for proved loss that he or she has suffered because of the contravention.\textsuperscript{18}

**Conduct ‘in trade or commerce’**

4.6 Section 18 of the ACL provides that an employer shall not ‘in trade or commerce’ engage in misleading or deceptive conduct. The leading authority on the meaning of that phrase is *Concrete Constructions v Nelson*.\textsuperscript{19} The facts were simple: Mr Nelson was employed on a building site. His duties included moving grates. His supervisor incorrectly told him the grates were secured by bolts. Relying on what he was told, while removing a grate it gave way and Mr Nelson fell and suffered serious injuries.\textsuperscript{20} The majority of the High Court determined that the then s 52 of the TPA was not limited to conduct that is misleading to a person in the capacity of a consumer.\textsuperscript{21} The court also rejected the employee’s argument that telling Mr Nelson the grate was secured was conduct ‘in trade or commerce’, holding that phrase in s 18 refers:

\begin{quote}
... only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed ... the words ‘in trade or commerce’ refer to ‘the central conception’ of trade or commerce and not to the ‘immense field of activities\textsuperscript{22} in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business ... What the section is concerned with is the conduct of a corporation towards persons, with whom it has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character ... In some areas the dividing line between what is and what is not conduct ‘in trade or commerce’ is less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.\textsuperscript{23}
\end{quote}

\textsuperscript{17} See also Fair Work Act s 349 discussed in *Hadjkiss v CFMEU (No 3)* (2007) 160 IR 263; [2007] FCA 87 at [288].

\textsuperscript{18} See generally *Shop Distributive & Allied Employees’ Association v Karellas Investments Pty Ltd* (2008) 166 FCR 562; 247 ALR 537; 171 IR 439. See \textbf{14.32} on remedies for the contravention.

\textsuperscript{19} *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193.

\textsuperscript{20} *Nelson v Concrete Constructions (NSW) Pty Ltd* (1989) 86 ALR 88 at 89. The facts were agreed. The whole matter from inception resembled a moot. If the employee’s argument was accepted it would have opened a new avenue for injured workers to sue their employers and thereby avoid the limitations on that right imposed by state laws. The Solicitors General for NSW and Victoria intervened to support the employer’s argument. See *Barto v GPR Management Services* (1991) 33 FCR 389 at 393; 105 ALR 339 at 343.

\textsuperscript{21} *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 601-2; 92 ALR 193 at 196.

\textsuperscript{22} Referring here to *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 381.

\textsuperscript{23} *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR at 603-4, 613; ALR at 195–6, 205 per Mason CJ, Deane, Dawson and Gaudron JJ.
4.7 Subsequent decisions have acknowledged the difficulty in discerning the location of the dividing line. The balance of authority supports the view that an employer’s representations are ‘in trade or commerce’ when they were made in negotiations about the formation, variation, or (perhaps) the termination of employment contracts, although some adopt a narrower approach. Conduct of the employer in the course of performing the contract is unlikely to be in trade or commerce. In relation to termination of employment, it has been held that making allegations of misconduct is not in trade or commerce; nor is prosecuting those allegations in civil and criminal forums.

There are three further points to note about conduct in trade or commerce and employment. First, after the decision in Concrete Construction the definition of ‘trade and commerce’ in the ACL was amended to include ‘any business or professional activity’. This amendment extends the provision to include activities that are ‘unequivocally and distinctly characteristic of the carrying on of a profession’. However, s 18 of the ACL will only apply to such activities if they bear a trading or commercial character. Second, some conduct by employees may be in trade or commerce. Third, if an employer engages in conduct that would be trade of commerce vis a vis a stranger (such as selling an old fleet car) then it appears that engaging in the same conduct with an employee would also be in trade or commerce.

29. Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; 92 ALR 193; see also Curtin v University of New South Wales (No 2) [2008] NSWSC 1236 (representation that outsourcing was in the interest of the employer was not in trade or commerce); Hebbard v Bell Potter Securities Ltd (2005) 216 ALR 779, at [5] and [32]; Moss v Lowe Hunt and Partners Pty Ltd [2010] FCA 1181 at [84] and [101] and Westfarmers Dalgety Ltd v Williams [2005] WASC 287.
30. Duncan v Lipscombe Child Care Services Inc (2006) 150 IR 471 at [30]–[34].
33. Prestia v Aknar (1996) 40 NSWLR 165 at 182; Fasold v Roberts (1997) 70 FCR 489 at 528; 145 ALR 548 at 591; Houghton v Arms (2006) 225 CLR 553; 231 ALR 534 at [32], Curtin v University of New South Wales (No 2) [2008] NSWSC 1236 at [37]–[39]; Moss v Lowe Hunt and Partners Pty Ltd [2010] FCA 1181 at [84] appears to have been decided per incurium, on this issue.
34. Dataflow Computer Services Pty Ltd v Goodman (1999) 168 ALR 169; [1999] FCA 1625 at [11]–[21] (a misleading circular sent out by an employee to the employer’s customers falsely informing them of the employer’s future plans to undermine the customers’ business) and Advanced Hair Studio Pty Ltd v TWT Ltd (1987) 18 FCR 1 at 14; 77 ALR 615 at 627.
Misleading or deceptive conduct

4.7 Section 18 applies to conduct that is ‘misleading or deceptive or is likely to mislead or deceive’. Conduct is misleading or deceptive if it has a tendency to lead into error: there ‘must be a sufficient causal link between the conduct and error on the part of persons exposed to it’. 36 Section 18 of the ACL focuses on the likely consequences of the conduct and it is not necessary to prove the employer had an intention to mislead or deceive. 37 However, the employer’s state of mind is not completely irrelevant. As noted in [4.xx], some promises, predications and opinions encompass a representation about the state of mind of the employer at the time the statements are made. Further, intent may be relevant in proving conduct was deliberate and thereby deceptive. 38

4.8 Under s 18 to prove the conduct was misleading it is enough to show that there existed a real (or not remote) chance that the employee might be misled. 39 Whether the employee relied on that conduct is irrelevant to that inquiry. Some untrue statements do not tend to mislead as they are too uncertain, or are understood by reasonable people to be hyperbole. 40 A statement may be literally true but nevertheless misleading as it omits to reveal a crucial qualification. 41 Section 31 refers to conduct that is ‘liable to mislead’. This is a narrower notion than conduct ‘likely to mislead’ referred to in s 18. 42 An employer’s misleading conduct may be addressed to a class, such as the publication of misleading job advertisements. In employment law litigation it is more common for the conduct to be statements made by the employer to the particular employee. Whether such conduct is misleading depends on analysing the conduct in relation to that employee:

... it is necessary to consider the character of the particular conduct of the particular [employer] in relation to the particular [employee], bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.43

40  See eg Re Roberts v Hong Kong Bank of Australia Ltd [1993] FCA 195 at [23].
41  Moss v Lowe Hunt and Partners Pty Ltd [2010] FCA 1181 at [46] and [52]; see also Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216 at 227; 18 ALR 639 at 647.
43  Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; 212 ALR 357 at [36]-[39].
Sections 18 and 31 apply to conduct, not just representations. Omissions and silence can be conduct. To ascertain if the employer’s silence is conduct under the ACL does not depend proving the breach of a common law or equitable duty to disclose or rectify a misleading impression. Rather, silence is to be assessed as a circumstance like any other. Silence is unlikely to mislead ‘unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed.’

Representations about future matters

4.9 Section 4 of the ACL partly regulates when representations ‘with respect to any future matter’ are misleading. A future matter means anything that is to occur in the future, such as a prediction or projection. Many actions by employees based on ss 18 or 31 of the ACL fail because of the application of s 4. The mere fact that a representation as to future conduct does not come to pass does not make it misleading, notwithstanding that the employee has relied on it. An employer’s liability for a representation about a future matter under the ACL can arise on two grounds.

4.10 First, statements about the future commonly consist of a statement about the current state of mind of the maker. A promise by an employer to do X in the future may be misleading if it falsely conveys that, at the time the statement was made, the employer intends to do X or falsely states that the employer has the power to do X. For example, a representation that employment will be for the long term is both a representation of what may occur in the future and a representation of present fact: namely that the employer presently believes that the employment will be for the long term. It will be misleading for the employer to make a representation that it knows is untrue, However, the making of a promise that is not performed or a prediction that is not fulfilled is not in itself misleading or deceptive conduct. In *Patrick v Steel Mains Pty Ltd*, the employer represented that it would continue to employ the employees at a new plant. The employees relocated to the new plant relying on the representation, but the

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45 Demagouge Pty Ltd v Ramensky (1992) 39 FCR 31 at 40; 110 ALR 608 at 610.


47 See *Ting v Blanche* (1993) 118 ALR 543 at 552–3.


new plant did not go well. The employer changed its plans and closed the new plant. Though the representation turned out to be false, it was not misleading as it was true when made.\(^{51}\)

4.11 Second, s 4 of the ACL facilitates proof in cases involving representations about future matters.\(^{52}\) Subsection 4(1) provides that a representation is ‘taken... to be misleading’ where an employer makes a representation with respect to any future matter and it ‘does not have reasonable grounds for making the representation.’ Under ss 4(2) the employer is taken not to have had reasonable grounds for making the representation unless it adduces evidence to the contrary.\(^{53}\) Section 4 of the ACL does not of itself create a cause of action or define a norm of conduct.\(^{54}\) In a practical sense s 4 casts the evidentiary burden of proof on an employer who has made a representation about a future matter to adduce some evidence to show that it had reasonable grounds for making that representation.\(^{55}\) In the absence of any evidence on the matter ss 4(2) will be operative.\(^{56}\) Adducing evidence about the reasonableness of the grounds is not a complete defence for the employer.\(^{57}\) Where some evidence of reasonableness is adduced, ultimately the issue is whether the employer had reasonable grounds for making the representation as to future matters, and the legal or persuasive burden on that issue rests with the employee.\(^{58}\) Section 4 now also applies to accessories.\(^{59}\) Where the representation is as to future matters:

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\begin{align*}
\text{... the causal connection between the [employer’s] conduct [in a case based on statements of future fact] and the loss or damage claimed is not the breaking of the promise or the failure of the prediction. The causal connection which must be shown to exist is a causal connection between the loss or damage claimed and the making of the promise or prediction without reasonable grounds.}^{60}\end{align*}
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51. Patrick v Steel Mains Pty Ltd (1987) 77 ALR 133 at 137–9 (a decision made prior to the enactment of s 51A of the TPA, the predecessor to s 4 of the ACL); Hatt v Magro (2007) 34 WAR 256; [2007] WASCA 124 at [32]–[35] and Sheldrick v WT Partnership (Australia) Pty Ltd v (1998) 89 IR 206, IR at 236–7 (representation that employment was to be for the long term was not misleading when made).

52. Cummings v Lewis (1993) 113 ALR 285 at 294 and Hatt & Ors v Magro (2007) 34 WAR 256 at [38]. These provisions were previously contained in s 51A of the TPA other than ss 4(3).

53. Ting v Blanche (1993) 118 ALR 543 at 552–3; and Robertson v Knott Investments Pty Ltd (No 3) [2010] FCA 1074 at [16].


4.12 These principles are illustrated in Walker v Salomon Smith Barney Securities. Mr Walker was a senior employee with ABN AMRO. A rival company, Natwest, made an offer, accepted in January 1998, to employ Mr Walker on certain terms commencing March 1998. By a sale agreement dated 8 February 1998 another company, Salomon Smith Barney Securities, acquired a controlling interest in Natwest. Mr Walker was told on 13 February 1998 by Natwest that he would be employed after the sale on the same terms and conditions as had previously been agreed. Mr Walker relied on this representation, resigning from his employment with ABN AMRO. Natwest later refused to proceed with the engagement. Mr Walker alleged that Natwest made two relevant representations. The first, made in January 1998, was that he could commence employment on certain terms in March 1998. That representation as to a future matter was made on reasonable grounds. When it was made Natwest proposed to proceed with the employment and Mr Walker’s claim on that representation failed. The second representation, made on 13 February, was that notwithstanding the sale to Salomon Smith Barney Securities Mr Walker would be employed by Natwest on the same terms and conditions as had previously been agreed. Natwest had no reasonable grounds to make that representation. In fact, it became apparent within days that the agreed terms and conditions were completely unacceptable to the new owners. The court concluded that the second representation was misleading and Mr Walker succeeded in his claim. 61

Remedies for breach of ss 18 or 31

4.13 Damages can be awarded under s236 of the ACL when the employer has contravened ss 18 or 31. Proof of loss or damage is an element in an action under s 236. 62 The employee must prove there is a causal link between the loss or damage claimed and the contravening conduct. 63 The test applied to determine the amount of damage recoverable is informed by, but not limited by, analogies to actions in tort and contract. 64 Calculating the loss or damage requires a comparison between the position the employee is in, with the position the employee would have been in but for the contravening conduct. 65 In short, damages under s 236 compensate those who are worse off due to the contravention and do not ensure the employee receives the benefit of the unfulfilled representation. Unlike relief under ss 237, 238 and 243, the right of action conferred by s 236 is not a discretionary remedy. 66 The misleading conduct need not be the sole or principal cause of the loss or damage: ‘It is sufficient if the conduct is a

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63. Marks v GIO Australia Holdings Limited (1998) 196 CLR 494 at [38]–[42]. Under the former s 82 of the TPA the loss or damage had to be caused ‘by’ the contravention” see also Wardley Australia Ltd v Western Australia (1992) 175 CLR 514 at 525.

64. Marks v GIO Australia Holdings Limited (1998) 196 CLR 494 at [17], [24], [38]–[41], [100] and [103].


cause of the alleged loss or made a material contribution to it, no matter that the contribution is a minor one. Reliance by the employee on the representation will prove the necessary causative link where the misleading conduct consists of a misleading representation. In *Wesfarmers Dalgety Ltd v Williams* the employee was worried about whether he was covered by professional indemnity insurance. He asked his employer and was told he was amply covered. His continued employment was reliance for the purpose of an action based on the predecessor of s 18 of the ACL. The fact that an employee, who is promised long-term employment later signs a contract permitting termination on short notice is relevant to, but not determinative of, reliance on the antecedent representation.

The method of calculating damages under s 236 is discussed in 14.32 and 14.63.

**Case list**

- ACCC v Zanok Technologies Pty Ltd [2009] FCA 1124
- ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640; (2013) 304 ALR 186
- Barto v GPR Management Services (1991) 33 FCR 389 at 393; 105 ALR 339
- Butler v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; 212 ALR 357
- CFMEU v BHP Coal Pty Ltd [2015] FCAFC 25
- Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; 92 ALR 193
- Curtin v University of New South Wales (No 2) [2008] NSWSC 1236
- Dataflow Computer Services Pty Ltd v Goodman (1999) 168 ALR 169
- Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 at 40; 110 ALR 608
- Digi-Tech (Australia) Ltd v Brand (2004) 62 IPR 184
- Duncan v Lipscombe Child Care Services Inc (2006) 150 IR 471
- Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82 at 88; 55 ALR 25
- Hatt & Ors v Magro (2007) 34 WAR 256
- Hearn v O’Rourke (2003) 129 FCR 264
- Hebbard v Bell Potter Securities Ltd (2005) 216 ALR 779
- Holloway v Gilport Pty Ltd (1995) 59 IR 305
- Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216 at 228; 18 ALR 639


Macdonald v Australian Wool Innovation Ltd [2005] FCA 105
Marks v GIO Australia Holdings Limited (1998) 196 CLR 494
Martin v Tasmania Development and Resources (1999) 163 ALR 79
McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited (2010) 241 CLR 357
Moss v Lowe Hunt and Partners Pty Ltd [2010] FCA 1181 at [36]–[64]
O’Neill v Medical Benefits Fund of Australia (2002) 122 FCR 455
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 at 197; 42 ALR 1
Patrick v Steel Mains Pty Ltd (1987) 77 ALR 133
Re Roberts v Hong Kong Bank of Australia Ltd [1993] FCA 195
Robertson v Knott Investments Pty Ltd (No 3) [2010] FCA 1074
San Sebastian Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979 (1986) 162 CLR 340 at 366; 68 ALR 161
Sayed v CFMEU [2015] FCA 27
Shahid v Australasian College of Dermatologists (2008) 168 FCR 46
Sheldrick v WT Partnership (Australia) Pty Ltd (1998) 89 IR 206
SPAR Licensing Pty Ltd v MIS Qld Pty Ltd (2014) 314 ALR 35; [2014] FCAFC 50
Stoelwinder v Southern Health Care Network (2000) 177 ALR 501; 97 IR 76
Swindells v State of Victoria [2015] VSC 19
Village Building Co Ltd v Canberra International Airport Pty Ltd (2004) 139 FCR 330; 210 ALR 114
Walker v Salomon Smith Barney Securities Pty Limited (2003) 140 IR 433
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514
Wesfarmers Dalgety Ltd v Williams [2005] WASC 287
Wesoky v Village Cinemas International Pty Ltd [2001] FCA 32
Wright v TNT Management Pty Ltd (1989) 15 NSWLR 679 at 688 and 690

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