

SVENSON  
BARRISTERS



The state of play:

*Misleading or Deceptive  
Conduct*

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CALUM HENDERSON

*chenderson@vicbar.com.au*

# Outline

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- ❖ Why are we here?
- ❖ Elements of contravention/compliance (Different sources)
- ❖ Jurisdictional reach
- ❖ Common scenarios and issues
- ❖ Recent illustrative case
- ❖ Qualifications Defences

# Why you should be interested

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- Over 40 years of this law – it's ubiquitous
- Essential knowledge for any commercial lawyer
- Continual developments
  - Esp causation of loss
- Modern situations
  - especially ecommerce
  - search engines and algorithms

# Common areas for dispute

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- Advertising
- Sale of Business
- Passing off
- Consumer Products
- Health & Beauty Products
- Professionals

# Elements

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## Australian Consumer Law

### 18 Misleading or Deceptive Conduct

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

Also see

- s.29 – False or misleading representations about goods or services
- s.12DA *ASIC Act* (financial services)
- S.1041H (financial products or services)

# Misleading or deceptive

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- Objective Test: What did the reasonable consumer of the relevant class understand the words used, in their context, to mean? : *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93
- Depending on the class of persons, can expect a certain level of naivety, gullibility, or lower than average intelligence
- Evidence of person actually being led into error is usually probative

# Trade or Commerce

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*'Conduct... towards persons, be they consumers or not with whom it (or those whose interest it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.'* : Concrete Constructions (NSW) P/L v Nelson (1990) 169 CLR 594

Case law re interpretation of TPA (esp s.52) still applies to ACL: *Murphy v Victoria* [2014] VSCA 238

# Without prejudice communications in trade or commerce?

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*A party cannot, with impunity, engage in misleading or deceptive conduct resulting loss to another under the cover of “without prejudice” negotiations.” Quad Consulting Pty Ltd v David R Bleakley and Associates Pty Ltd [1990] FCA 455 per Hill J*

*Kerr J At [212]: “.. The representations at issue were advanced with respect to the commencement of a proceeding that was intended to be brought in this Court. They were also advanced in relation to proceedings already on foot in the FWC...The representations were plainly not “an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.” ... they cannot properly be characterised as having been made in “trade or commerce”: Martin v Norton Rose Fulbright (No 11) [2020] FCA 1641 & [2021] FCAFC 216 (26 Nov 2021)*

BUT – this doesn't mean we can ignore obligation under the Civil Procedure Act

# *Loci* of the conduct

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- ❖ In Australia – ACL
- ❖ Outside Australia – s.5(1)(c)
  - ❖ Corporation incorporated or doing business in Australia
  - ❖ Australian citizens
  - ❖ Persons ordinarily resident in Australia

# Conduct in Australia

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- ❖ Engaging in conduct here yourself (at various levels)
- ❖ Directing communications to counterparts in Australia
- ❖ Targeting or supplying to customers in Australia
- ❖ Focus is generally on the recipient of representations (or where they are to be acted upon?)

*Bray v f Hoffman-La Roche Ltd* [2002] FCA 243

*Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485

*ACCC v Valve Corporation (No 3)* [2016] FCA 196

# Carrying on Business in Australia

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- ❖ Business: “*activities engaged in for the purpose of profit on a continuous and repetitive basis*’: *Hope v Bathurst City Council* (1980) 144 CLR 1
- ❖ Not necessary to have a place of business here.
- ❖ Look at level of activity/control of overseas parent of local subsidiary/agent, control of board, ownership of assets, authority of local co to bind parent, accounting practices: *ACCC v Yazaki Corp (No 2)* [2015] FCA 1304
- ❖ Online businesses – number of local customers, assets in Australia, access to overseas products: *ACCC v Valve*

May not work the other way around: Wholly owned Singaporean subsidiary of Aus Co transacting for land in Dubai not doing business in Australia: *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 at [400]-[408]

# Establishing Loss

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- ❖ Loss must be “by reason of” the proscribed conduct: s.236 ACL
- ❖ Issue is one of causation
- ❖ Not a “but for” test (although that would probably suffice in many cases). Causative chains are more sometimes more complex.
- ❖ Reliance will suffice but is not necessary: *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* [2004] NSWCA 270
  - ❖ But must then show that reliance led to the loss
  - ❖ Finding reliance is a subjective assessment
- ❖ Damaged third party does not need to show reliance. Just loss as a natural and direct result.

Counterfactual: what would P have done if it was aware of the truth: *Caffey v Leatt-Hayter (No 3)* [2013] WASC 348 at [337] per Beech J

# Proving / Measuring Loss

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*Keys Consulting P/L & Scaturchiov Cat Enterprises P/L*[2019] VSCA 136

Sale of business

Projected Turnover / Profit did not materialize

Established misleading or deceptive conduct in pre contractual valuations

Did not lead evidence of actual trading figures

CC found for P and estimated damages “as best it could”.

VSCA said alleging damage requires proof of what the actual trading outcome was to determine the true value of the transaction

# Case Illustration #1

*ACCC v EmploySURE* [2021] FCAFC 142

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Griffiths J considered small business owners were “intelligent” and “shrewd” and would know this was a private business.

Full Court said key search words such as “Fair Work Ombudsman”, “Fair Work Commission”, “Fair Work Australia” represented government affiliation or endorsement.

Audience were generally small businesses and trial judge had erroneously considered these people would be “intelligent or shrewd”. They were generally small businesses and trial judge had erroneously considered these people would be “intelligent or shrewd”.

Also considered context in which the search results would be looked for and read.

# Case Illustration #2

ACCC v Meta (2022)

Allegations:

- false, misleading or deceptive conduct
- aiding, abetting or knowingly concerned

<https://www.carterchapters.com/a-big-moment/?cct1=376441821&cct2=9751356007&cct3=34937417966&cct4=c&cct5=n>

ABC NEWS NEWS MODE PROMS UNTERHALTUNG

## **SPECIAL REPORT: Andrew Forrest's Latest Investment Has Experts in Awe And Big Banks Terrified**

*Australia citizens are already raking in millions of dollars from home using this "wealth loophole" - but is it legitimate?*



“We allege that the technology of Meta enabled these ads to be targeted to users most likely to engage with the ads, that Meta assured its users it would detect and prevent spam and promote safety on Facebook, but it failed to prevent the publication of other similar celebrity endorsement cryptocurrency scam ads on its pages or warn users,” Mr Sims said.

# Conclusion

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1. Proving the conduct is usually straightforward. More difficult is establishing:

- creation of a misconception
- the misconception led to loss
- measurable loss

2. This is an area of law that continues to develop and *needs* to develop as new and innovative business models emerge.

Thank You