

Consumer Protection Law

Part 2: The Australian Legal Environment for Business

Unit 8: Week 10 Tutorial

Learning Objectives

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

- Identify misleading or deceptive conduct under section 18 of the Australian Consumer Law (ACL).
- Analyse business practices for potential breaches of section 18 of the ACL.
- Understand consumer guarantees under sections 54 to 57 of the ACL.
- Analyse business practices for potential breaches of sections 54 to 57 of the ACL.
- Apply the IPAC method to resolve a legal problem.
- Develop critical thinking and collaboration skills through group work and presentations.

Before this tutorial, you should have:

- Attended Unit 8 lecture
- Read the assigned Readings
- Completed the Tutorial Questions
- Read the In-Class Collaboration and Presentations questions

During this tutorial, you will:

- Demonstrate an understanding of the topic in the unit
- Participate in tutorial activities by:
 - Contributing to group discussions
 - Asking questions
 - Listening actively
 - Working collaboratively with other students
- Complete the In-Class Collaboration and Presentations activity

After this tutorial, you should:

- Consider attending one of the scheduled consultations and attempt to resolve any questions that you have as soon as possible.



Readings

Consumer Protection Law

The Australian Consumer Law (ACL) is Australia's national consumer law which gives all Australian consumers the same rights. The aim of the ACL is to promote consumer protection. The ACL appears in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA).

Misleading or Deceptive Conduct

Misleading or deceptive conduct is found under section 18 of the **ACL**.

Section 18 has far-reaching consequences, both for individuals and businesses.

Section 18 of the Australian Consumer Law

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

Pre-conditions to liability under section 18

In order to succeed in a case based on s 18, the plaintiff must prove the following elements:

- (1) The defendant must be 'a person' or a corporation.
- (2) The defendant's conduct must have occurred in 'trade or commerce'.
- (3) The defendant's conduct must have amounted to 'engaging in conduct'.
- (4) The defendant's conduct must have been 'misleading or deceptive' or 'likely to mislead or deceive'.

'A person' and 'corporation'

Section 18 targets conduct by all persons, whether they are individuals or corporations. The definition includes financial corporations, trading corporations and foreign corporations.

Corporations are artificial entities created by law (through incorporation) that must act through human agents – for example, directors and employees. Any conduct engaged in on behalf of a corporation would be deemed to have been engaged in by the corporation itself. Section 18 will cover the misleading or deceptive conduct of corporations who act through their directors, officers and employees within the scope of their authority.

In 'trade or commerce'

The 'trade or commerce' requirement operates as a significant limitation on s 18. Unless the transaction has a trading or commercial character, s 18 will not apply. Accordingly, private or non-commercial sales – such as a one-off sale advertised in the local newspaper – will not breach s 18. Similarly, the sale of a private car or property does not constitute conduct in 'trade or commerce'.

'Engaging in conduct'

'Engaging in conduct' includes doing or refusing to do an act. For example, a corporation engages in conduct if it makes a statement, performs an act, makes a claim or refuses to do so. Essentially the phrase covers virtually every act and it may even cover inaction. In some circumstances, remaining silent can constitute 'engaging in conduct'.

'Mislead or deceive' or 'or is likely to mislead or deceive'

'Mislead' essentially means to lead a person into error or to create a false impression. 'Deceive' also means to lead into error, but it has a negative connotation—it denotes some sort of deliberate misconduct. Providing wrong information about a particular product, providing no information or hiding some vital information about a product can all mislead or deceive.

The phrase 'or is likely to mislead or deceive' makes it unnecessary to prove that the conduct in question actually misled or deceived anyone. It is relevant to situations where conduct is capable of misleading or deceiving, or has the potential to mislead or deceive.

Principles on misleading or deceptive conduct in breach of s 18

Case law on 'misleading or deceptive' confirms the following:

- Breach of s 18 may be proved without knowledge or intention on the part of the defendant. The section should be understood as meaning precisely what it says and as involving no questions of intent upon the part of the corporation whose conduct is in question.
- Silence may be misleading or deceptive, and there may be a reasonable expectation of disclosure of relevant facts.
- There is no general duty of disclosure – but conduct may be misleading or deceptive if facts which give rise to a reasonable expectation of disclosure are not disclosed.
- If a person is entitled to believe that a relevant fact would be communicated, failure to communicate the fact may be misleading or deceptive.
- An honest belief in the statement is not a defence if the statement is misleading or deceptive in breach of s 18.
- An honest opinion which cannot be substantiated – or which is not based on fact – can be misleading or deceptive. For example, claims by a clinic that its alternative cancer therapies can, for example, cure cancer and/or prolong the life of a cancer sufferer – even though honestly believed – were misleading or deceptive because these cannot be substantiated.

Consumer Guarantees – Guarantees relating to the supply of goods

The Australian Consumer Law also sets out consumer rights that are called consumer guarantees. These consumer guarantees apply to all supplies of goods to consumers, whether by business or by individuals, and are not limited to supplies in 'trade or commerce'.

Guarantee as to acceptable quality (s 54)

Suppliers (including manufacturers) to consumers must guarantee that the goods are of acceptable quality.

Goods are of acceptable quality if they are as:

- (a) fit for all the purposes for which goods of that kind are commonly supplied; and
- (b) acceptable in appearance and finish; and
- (c) free from defects; and
- (d) safe; and
- (e) durable;

Having regard to:

- (a) the nature of the goods; and
- (b) the price of the goods (if relevant); and
- (c) any statements made about the goods on any packaging or label on the goods; and
- (d) any representation made about the goods by the supplier or manufacturer of the goods; and
- (e) any other relevant circumstances relating to the supply of the goods.

Nature of the good

The nature of the good is relevant to the acceptable quality of the goods. The nature of the good includes:

- the materials used or composition of the components (if any)
 - For example, how long a good can be expected to last will depend upon the quality of the materials used in the good's manufacture. A good made of high quality materials can generally be expected to last longer than an equivalent good made of lower quality materials.
- the type of good and its use
 - For example, goods that are more portable or contain complex components would generally be reasonably expected to last for a shorter time period than goods that are stationary and relatively simple. This is because a reasonable consumer would be likely to expect portable goods to be subject to more wear and tear through normal use of the good.

Price of the good

The price of a good can generally be linked to the quality of the materials and the manufacturing techniques used to produce the good. This means that often goods purchased at a high price can be expected to last longer than goods purchased at a lower price. However, a higher price is not the only

criteria for determining the reasonable durability of a good. Many other factors affect the price of a good, such as a relatively scarce and exotic material.

Statements made about the good

There are often statements about the durability of a good on its packaging or label, in advertising material or made orally by sales staff. These statements affect how long a reasonable consumer would expect a good to last. For example, if the label states that the good will last a certain amount of time, then a reasonable consumer would expect the good to last at least the amount of time stated.

The guarantee does not apply where:

- the reason or reasons why they are not of acceptable quality have been specifically drawn to a consumer's attention
- they are damaged by abnormal use.
- the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and the examination ought reasonably to have revealed that the goods were not of acceptable quality.

Guarantee as to fitness for any disclosed purpose (s 55)

Suppliers must supply goods to consumers which are fit for their disclosed purpose.

Goods are reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit.

A disclosed purpose is a particular purpose (whether or not that purpose is a purpose for which the goods are commonly supplied) for which the goods are being acquired by the consumer and that the consumer makes known, expressly or by implication, to the supplier or salesperson.

The guarantee does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier or salesperson. For example, it would not be reasonable if a consumer tells a checkout operator at a department store that he or she wants goods to achieve a particular purpose.

These are the two main tests for the consumer guarantee of fitness of disclosed purpose to apply – they must both be fulfilled:

- Has the consumer made known to the supplier or manufacturer the disclosed purpose of the goods?
- Has the consumer reasonably relied on the supplier's skill or judgment?

Guarantee relating to the supply of goods by description (s 56)

Suppliers (including manufacturers) to consumers must guarantee that the goods match (comply with, correspond with) their description. Description may include the colour, size or kind of the goods.

Section 56 is concerned with description rather than quality. This means that the focus is on whether the product matches the description, rather than on the overall quality or performance of the product. For example, if you buy a shirt described as “100% cotton,” the primary concern is that the shirt is indeed made of 100% cotton, regardless of whether the fabric is of high or low quality.

If the supply is a sale by demonstration model as well as a sale by description, the goods must correspond with both the demonstration model (under s 57) and the description.

A supply of goods by description includes:

- sales where the consumer has not seen the goods and relies on a description in, for example, a website, a newspaper advertisement or catalogue.
- sales where the consumer relies on a description of goods which do not yet exist.
- sales where the consumer has actually seen the goods (the goods have been described in the label on the goods, or the description is set out in the contract).

Guarantees relating to the supply of goods by sample or demonstration model (s 57)

If goods are sold by reference to a sample or a demonstration model, they must match (correspond with) that sample or that demonstration model in quality, state or condition. If the goods are supplied by reference to a sample, the consumer will have a reasonable opportunity to compare the goods with the sample. The goods must also be of acceptable quality unless the defect could have been discovered by reasonable examination of the sample or demonstration model, whether or not there has been any actual examination.

The sample and the demonstration model speak for themselves, but they can only say so much. Any defects that cannot be disclosed by the sample or demonstration model are not excluded by inspecting the sample or the demonstration model

If goods are supplied by reference to a sample or demonstration model as well as by description, the guarantees in sections 56 and 57 both apply.

‘No refunds’ signs

The consumer guarantees cannot be excluded from consumer contracts with ‘no refund’ signs, etc. Sellers/retailers cannot say ‘no refunds’. A ‘no refund’ policy stops consumers claiming their statutory rights under the ACL (their non-excludable consumer guarantees) and is illegal. The ACCC is a strong regulator of attempts to exclude them.

Any attempt to exclude the consumer guarantees is a ‘false or misleading, and is void (of no effect) under the ACL.

References

Ciro, T, Goldwasser, V & Reeta V 2014, *Law and Business*, Oxford University Press, South Melbourne, Victoria, Australia.

Guidance on the Consumer Guarantee: Acceptable Quality and the Meaning of 'Durability' 2022, *Australian Consumer Law*, 2 November.

Latimer, P 2016, *Australian Business Law 2016*, CCH Australia, Sydney, NSW, Australia.



Tutorial Questions

Students must complete the following questions before coming to class

Misleading or Deceptive Conduct

1. What does s 18 of the Australian Consumer Law (ACL) prohibit?

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2. Explain the elements of s 18.

Elements of s 18	What does the element mean?

Misleading or Deceptive Conduct

- Read the following ACCC Media Release from the Australian Competition and Consumer Commission (ACCC). Use the IPAC method to analyse the case.

Federal Court finds Coles' 'Freshly Baked' and 'Baked Today' marketing claims misleading

18 June 2014

The Federal Court has today found that claims made by Coles Supermarkets Australia Pty Ltd (Coles) that its 'Cuisine Royale' and 'Coles Bakery' bread was 'Baked Today, Sold Today' and in some cases 'Freshly Baked In-Store' were false, misleading and deceptive, in proceedings brought by the Australian Competition and Consumer Commission.

These bread products were partially baked and frozen off site by a supplier (in the case of Cuisine Royale, this baking and freezing took place overseas), transported and 'finished' at in-store bakeries within Coles supermarkets.

These bread products were promoted at Coles' supermarkets with in-house bakeries as 'Baked Today, Sold Today' and in some cases 'Freshly Baked In-Store'. In addition, some of these products were offered for sale at Coles' supermarkets close to prominent signs which stated 'Freshly Baked' or 'Baked Fresh'.

The Court found that the "Baked Today, Sold Today", "Freshly Baked" and "Baked Fresh" claims made by Coles amounted to a misleading representation that the par baked bread products had been baked on the day of sale or baked in a fresh process using fresh not frozen product.

In his judgment, Chief Justice Allsop said "It is not the place of the court to provide an advice ...as to how Coles might sell bread that has been par-baked from frozen product...A start would, however, be to make it tolerably clear to the public that the recent baking was the completion of a baking process that had taken place sometime before, off site, and that "freshly baked" actually meant the completion of the baking process of frozen product prepared and frozen off site by suppliers."

"The ACCC brought these proceedings because it was concerned that Coles' 'Baked Today' and 'Freshly Baked' claims about par baked bread were likely to mislead consumers," ACCC Chairman Rod Sims said.

"These claims also placed independently-owned and franchised bakeries that freshly bake bread from scratch each day at a competitive disadvantage."

"Today's decision confirms that Coles misled consumers about the baking of these bread products. Consumers should be able to rely on the accuracy of credence claims made by businesses like Coles to promote their products, especially where those claims are used to compete with smaller businesses which are genuinely offering a differentiated product," Mr Sims said.

Credence claims are representations of a premium or special characteristic that are difficult for a consumer to test the accuracy for themselves. They are powerful marketing tools that can mislead consumers if improperly used and have the potential to adversely impact the competitive process and small businesses.

In particular, when larger businesses present their products as having a particular feature when they don't, it can undermine the unique selling point that small businesses who do offer that feature depend upon to compete. Claims of this kind are a current enforcement priority area for the ACCC.

A hearing will be held in the Federal Court in Melbourne at a later date to determine the relief that will be ordered. The ACCC is seeking penalties, declarations, injunctions, costs and other orders.

Release number: MR 149/14

[Source](#)

Discuss the reasons why the court concluded that Coles Supermarkets breached s 18 of the Australian Consumer Law (ACL). In your answer, address the four elements of s 18.

Misleading or Deceptive Conduct

4. Read the given sets of facts below. Use the IPAC method to analyse each one.

a)

X recently ran an advertising campaign where it promoted that a watch “was \$2,500, now \$1,500”. The price of the watch, however, has always been \$1,800.

Discuss whether X has breached s 18 of the Australian consumer Law (ACL)?

b)

An advertisement for a new streaming service by Company X claims that the service is “free for the first month.” However, in the fine print, it states that users must pay a \$5 activation fee to start the free trial.

Discuss whether X has breached s 18 of the Australian consumer Law (ACL)?

c)

X, a beverage company, advertises its new energy drink with the slogan, “This drink will make you feel like you can fly!”

Discuss whether X has breached s 18 of the Australian consumer Law (ACL)?

Consumer Guarantees

5. Read the following news article. Use the IPAC method to analyse the case.

'An accident waiting to happen': Video of toddler easily opening \$800 pool fence sparks urgent recall

By Ben Hill for Daily Mail Australia

PUBLISHED: 11:13 AEST, 10 May 2018 | UPDATED: 13:02 AEST, 10 May 2018



A pool fence costing almost \$800 has been recalled after video emerged of a toddler easily reaching through a gap and opening it.



The 'Be-Safe Pool Fence - Portable Pool Fence Starter Kit' made by Clark Rubber has been recalled due to safety concerns.



Queensland Minister for Housing and Public Works, Mick de Brenni, issued the recall after an investigation was carried out by the state's Building and Construction Commission.

[Source](#)

A pool fence sold costing almost \$800 has been recalled after video emerged of a toddler easily reaching through a gap and opening it.

The 'Be-Safe Pool Fence - Portable Pool Fence Starter Kit' made by Clark Rubber and sold across Australia has been recalled due to safety concerns.

Queensland Minister for Housing and Public Works Mick de Brenni issued the recall after an investigation was carried out by the state's Building and Construction Commission.

Mr de Brenni said the fence failed to meet standards for safety, as well as having 'simply failed community standards'.

Footage emerged of Curtis Modrow, four, easily opening the fence, sparking an investigation by the QBCC and consumer group Choice.

Curtis' mother Sandy Behrens was shocked when he opened the gate unassisted and made his way to the above ground pool on Christmas Day.

'He put his hands through the pool gate, undid the latch and pushed through. Then he stepped up onto the ladder,' she said.

'The gate system of the kit failed the pool safety standard on numerous occasions but significantly the area of biggest concern is the latch that is required to be self-latching when it isn't, as well as gaps in the fence allowing prohibited access to the latch,' Mr de Brenni said.

'QBCC tests found that the latch doesn't close and secure itself properly and this completely defeats its safety purpose.'

'In January this year, a consumer contacted the QBCC after a child was able to reach inside the fence and undo the latch and open the gate.'

'This is an accident waiting to happen, and I'm pleased the QBCC acted swiftly to investigate and advise me of the issue.'

'Ensuring the safety of our community is my number one priority.'

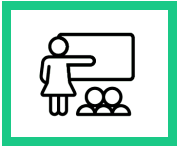
The fence is sold exclusively by Clark Rubber stores for \$799. The company has agreed to recall the product.

Anyone who purchased the fence is urged to return them to a Clark Rubber store, where they will be entitled to a full refund.

Australian safety standards say pool fence latches must reach 1200mm but the Be-Safe gate is barely 870mm high.

Anyone who purchased the fence is urged to return them to a Clark Rubber store, where they will be entitled to a full refund.

Discuss whether Clark Rubber has breached s 54 of the Australian Consumer Law (ACL).



In-Class Collaboration and Presentations

Students must read the following questions before coming to class.

Consumer Guarantees

In this activity, you are required to analyse a given fact scenario using the IPAC method (Issue, Principle, Application, Conclusion) and present your answer to the class in small groups.

Instructions:

1. Form small groups and allocate:

- Your tutor will divide the class into 4 groups of students.
- Each group will be assigned with a set of facts from (a) – (d).

2. Understand the fact scenario:

- Carefully read the provided fact scenario.

3. Use the IPAC method to analyse the assigned scenario:

- **Issue:**
 - What is the main legal question or problem that needs to be resolved?
 - Identify the specific issue in dispute.
 - **Principle:**
 - What are the relevant laws or legal principles that apply to this issue?
 - State the rules or legal principles that govern the issue. This includes relevant statutes and/or case law.
 - **Application:**
 - How do the legal principles apply to the facts of the case?
 - Analyse how the legal principles interact with the specific facts. Clearly explain how each fact relates to the legal principles you have identified.
- Integrating Principles and Applications: Immediately follow the principle with an application. For each new principle, repeat the process.*
- **Conclusion:**
 - What is the outcome based on your analysis?
 - State the final decision. Conclude whether the issue is resolved in favour of one party or another based on the application.

4. Prepare your presentation:

- Assign roles within your group (e.g., who will present each part of the IPAC method).
- Create a clear and concise presentation that covers each part of the IPAC method.

5. Present to the class:

- Each group will have 5 minutes to present their analysis.
- Ensure that each member of the group participates in the presentation.
- Be prepared to answer questions from your classmates and your tutor.

Scenarios

a)

Ella recently bought a washing machine from X, a local appliance retailer. The machine, which was significantly more expensive than other models available in the store, broke down after just 2 months of use.

Advise Ella whether X has breached any consumer guarantees under the Australian Consumer Law (ACL)?

b)

Mark purchased a sofa from a furniture store, X, after seeing a display model that matched the colour and fabric he desired. When the sofa was delivered to his home, it differed in both colour and fabric from the sample he had viewed in the store.

Advise Mark whether X has breached any consumer guarantees under the Australian Consumer Law (ACL)?

c)

Lisa visited X, an appliance store, to buy a vacuum cleaner specifically to cleaning pet hair. She explained her needs to the store assistant, who showed her several vacuum cleaners from their range but explicitly mentioned that they were unsure whether any of them would meet her specific requirements. Lisa chose one of the vacuum cleaners and used it to clean pet hair in her home, but it did not effectively remove pet hair as she had hoped.

Advise Lisa whether X has breached any consumer guarantees under the Australian Consumer Law (ACL)?

d)

Bob purchased a leather jacket from an online clothing retailer. The product description on the website stated that the jacket was made from 100% genuine leather. When the jacket arrived, Bob realised that it was made from synthetic materials.

Advise Bob whether X has breached any consumer guarantees under the Australian Consumer Law (ACL)?