

HOW TO AVOID MISLEADING AND DECEPTIVE CONDUCT IN ADVERTISING

Advantage Partnership Lawyers

The Australian Consumer law prohibits businesses from engaging in misleading or deceptive conduct in trade or conduct.

What is misleading or deceptive conduct?

- Conduct that induces error, or is capable of inducing error, in an ordinary person.
- It is the overall impression that counts – the dominant message, not the “fine print”.
- The conduct can consist of spoken or written words or any other conduct such as gestures, body language or even silence or lack of response.
- A company can engage in such conduct by reason of the actions of its officers, employees or agents.

Businesses can be liable for misleading and deceptive conduct even if:

- Nobody is actually misled. All that is necessary is that the conduct is likely to mislead or deceive people.
- The person making the representation acted honestly and reasonably. All that is necessary for liability to arise is that the conduct did mislead or deceive.
- The affected person did not make proper inquiries, or could have discovered the conduct was misleading or deceptive had they investigated the matter.

So – what SHOULDN'T you do?

- ☑ Make statements that are incorrect or likely to create a false impression, for example about the quality, value, price, age or benefits of goods or services, or any associated guarantee or warranty. Using false testimonials is also illegal.
(See Event Promoters case example below)
- ☑ Rely on small print and disclaimers as an excuse for a misleading overall message.
(See Harvey Fresh case example below)
- ☑ Use bait advertising – that is, advertise specific prices on goods that are not available or are available in only very limited quantities (where this limit is not clearly and specifically disclosed).
(See Harvey Norman case example below)
- ☑ Make false or misleading claims that a product (or part of a product) was made, produced, manufactured or grown in a particular country.
(See Australian Bush Hat Co case example below)
- ☑ Make false or misleading claims that give the impression that a product, or one of its attributes, has some kind of added benefit or premium when compared to similar products and services.
(See Pepe's Ducks case example below)
- ☑ Mislead consumers about items on offer in a promotional activity, or the chances of receiving these items. If there is a catch, you must let people know at the outset.
(See Star Promotions Club case example below)
- ☑ Do not:
 - Guess the facts;
 - Omit relevant information;
 - Make ambiguous or contradictory statements or use unnecessary jargon;
 - Make promises you cannot keep, or make predictions without reasonable basis; and
 - Offer goods or services without a reasonable basis for believing you can deliver them.



Suite 2, Level 9, Dymocks Building
428 George Street, Sydney NSW 2000

P (02) 9221 7555

E legal.one@advantagepartnership.net

www.advantagepartnership.net

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Penalties



Misleading and deceptive conduct may lead to civil remedies including:

- Injunctions;
- Damages;
- Compensatory orders;
- Orders for non-party consumers;
- Non-punitive orders;
- Adverse publicity; and
- Disqualification orders.

Fines and criminal sanctions do not apply, but further penalties may apply if the conduct breaches the Australian Consumer Law in other ways.

And what SHOULD you do?

- ☑ Make sure small print and disclaimers are clear and prominent so that consumers know what the real offer is.
- ☑ Use comparative advertising so long as it is accurate.
- ☑ Only offer goods or services at a 'special price' if they are available in reasonable quantities for a reasonable period, unless you state clearly that the good is in short supply or on sale for a limited time.
- ☑ Contact your local consumer protection agency to check if there are any legal requirements for prize giveaways and competitions under state/territory laws.
- ☑ It's ok to use wildly exaggerated or vague claims about a product or service that no one could possibly treat seriously – for example 'the best steaks on earth'.
- ☑ Be sure to:
 - Give current and correct information;
 - Use simple language;
 - Check that the overall impression is accurate;
 - Back up claims with facts and documented evidence where appropriate;
 - Note important limitations or exemptions;
 - Correct any misunderstandings; and
 - Be prepared to substantiate.

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Case Examples:

Incorrect Statements: Event Promoters Mr G. J. Millar and Mr J. R. Webb

The Federal Court in Perth found that event promoters, Mr Gregory John Millar and Mr John Raymond Webb, engaged in misleading or deceptive conduct when promoting various industry exhibitions. The court found misleading conduct in relation to critical aspects of the exhibitions such as the number of other exhibitors which would participate, visitor numbers, and that the exhibitions were endorsed or supported by leading political figures.

The conduct included representations that:

- The then Prime Minister of Australia, Mr Howard, had provided a message of support or consented to the publication of a message of support in regards to the Sydney International Mining & Engineering Expo (SIMEX 06) when he had not;
- The then Premier of Western Australia, Dr Gallop, had provided a message of support or consented to the publication of a message of support in regards to the Australian Industry Expo 2005 (Aus Industry 05) and the Minebox Expo 2006 when he had not;
- 30,000 visitors would attend Aus Industry 05 and at least 20,000 people were expected to attend MineBox 06 without reasonable grounds for making those representations;
- More than 2,500 exhibitors were scheduled for Aus Industry 05 which was not the case and there would be approximately 1,500 exhibitors at SIMEX 06 without reasonable grounds for making that representation, and
- At various times prior to SIMEX 06 only 24 stands or less remained available when at those times more than 24 stands were available.

Small Print: Harvey Fresh (1994) Ltd

In 2008, Harvey Fresh Ltd acknowledged that the '100% juice' claim on the label of its 250ml Apple & Blackcurrant fruit juice product was wrong and may have misled consumers. The small print ingredients list on the reverse side of the label indicated the product consisted of apple concentrate, blackcurrant flavour, grape skin extract and colour 466. The ACCC accepted court-enforceable undertaking from Harvey Fresh including that it would not claim a fruit juice product is 100 per cent juice when the product does not contain 100 per cent juice. The ACCC Chairman said that consumers are entitled to expect that the actual contents of a product match the overall impression given by the packaging.

Bait Advertising: Harvey Norman

In 2011 six West Australian Harvey Norman franchises each paid an infringement notice of \$6,600 for advertising the Kodak 'Playsport' pocket video camera when they did not stock the camera. The ACCC issued the infringement notices because it had reasonable grounds to believe the franchisees had engaged in bait advertising by advertising the camera in a catalogue when they were unable to supply the product to the customers. ACCC chairman said that "promotional material must be accurate and there must be adequate stock of the advertised product to meet reasonable demand, otherwise businesses risk bait advertising which is illegal".

Country of Origin: Australian Bush Hat Co Pty Ltd

Between 2006 and 2009 the Australian Bush Hat Co (ABHC) represented that its *Premium Selection* and *Statesman hats* were manufactured in Australia when that was not the case. The hats were in fact substantially manufactured in India and imported into Australia by ABHC where they were subsequently trimmed and finished. Tags and labels attached to the hats included the statement *Manufactured in Australia from Quality and Imported Local Products*, ABHC's name and a map of Australia which created the overall impression that the hats were manufactured in Australia.

ABHC accepted that it engaged in misleading or deceptive conduct and made false representations about the place of origin of the hats. The ACCC accepted court enforceable undertaking from the AHBC including an undertaking to refrain from representing that its hats are manufactured in Australia unless they meet the country of origin test as outlines in the legislation.

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Premium Claims:

Pepe's Ducks Ltd

The Federal Court ordered that Pepe's Ducks Ltd, a leading supplier of duck meat products, pay \$375,000 in civil pecuniary penalties and \$25,000 in costs arising from statements made that its ducks were 'open range' and 'grown nature's way' when in fact the ducks grown by Pepe's Ducks were raised in barns and were not allowed to spend any of their time outdoors.

Promotions:

Star Promotions Club Pty Ltd

In 2010, the Federal Court declared the Star Promotions Club Pty Ltd scratch card promotion misleading and deceptive.

At various times between September 2008 and August 2009, Star had distributed promotional scratch cards for its mobile premium service as inserts in popular magazines and newspapers across Australia, as well as letterbox drops. The ACCC chairman said "Anyone scratching the cards found that they were a lucky winner, that is, until they sent in their text message to check what prize they had won. Most consumers found that they were simply signed up to a mobile premium subscription service costing \$6.60 per week, rather than the winner of a car or a substantial cash prize. Advertising that is used to lure consumers into costly services is unacceptable. Service providers need to make sure that all important terms and conditions are up front and easily understood.

Amongst the courts orders was the requirement that Star send the following text message to current subscribers within three months:

*FreeMsg Star Promotions Club scratch card promotion found misleading
Court action taken by ACCC
Complaints? Call 1300xxxxxx or your telco provider*



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