



Consumer Protection Law

Reference: CACL Chapter 13
and ACCC Guide to the ACL (see Moodle)

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Introduction to the ACL

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- The gist of this topic (unlike the law of contract where we focused on *agreements*) is that there are **general standards of honesty and fairness** that are imposed by **the law** that **affect all players** in the market **regardless of agreement**.
- The law is the **Australian Consumer Law** (ACL). Its primary focus is to protect consumers
- This is a **big deal**: consumer spending accounts for roughly 60% of Australia's GDP. After 12 November 2016, when unfair contract term protections cover small business contracts, **three-quarters of the final spending in Australia's economy** will be protected in one way or another by the **ACL**.

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- **Dual purpose of consumer protection law:**
 - It protects consumers by:
 - prohibiting **misleading conduct, specific misrepresentations, certain unfair practices, unfair contract terms and unconscionable conduct**
 - providing that **statutory guarantees** apply to each consumer contract
 - ensuring **product safety and manufacturers' liability** for defective goods*
 - It prevents businesses from gaining a competitive edge by not complying with the law
 - If a business does not comply with the ACL its goods will be cheaper than a competitor who does comply

* We do not study this part of the ACL

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The Australian Consumer Law (CACL 13.20 – 13.35 and inc Fig 13.1)

- The **ACL** is in **Schedule 2** of the **Competition and Consumer Act (CCA)**
 - The Act is administered by the Australian Competition and Consumer Commission (ACCC). It applies very broadly to conduct engaged in and outside Australia by Australian citizens or persons ordinarily resident here, to natural persons and to corporations engaged in business, including the internet
- The **ACL** has the following chapters (see Fig 13.1):
 - **Chapter 1 Introduction**
 - Definitions and interpretation
 - **Chapter 2 General Protections**
 - Misleading conduct and unconscionable conduct
 - Unfair contract terms
 - **Chapter 3 Specific Protections**
 - Specific false reps and unfair practices
 - Consumer guarantees
 - *Manufacturers liability for defective goods (not examinable)
 - **Chapter 4 Offences**
 - Criminal offences relating to certain conduct
 - **Chapter 5 Enforcement and Remedies**

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1. Prohibition of 'misleading or deceptive conduct'

- **Section 18(1)** - 'a person shall not in trade or commerce engage in conduct that is misleading or likely to be misleading'
- **Key principles:** *ACCC v Valve* [2016] FCA 196
 - **1. s18 applies to 'conduct'**...broader than 'representations'
 - **2. s18 creates strict liability** – no need to prove fault or fraud or breach of good faith. Only question is whether the conduct occurred and P relied on it – or may rely on it to his/her detriment
 - **3. s18 only applies to conduct occurring in trade or commerce** – must have a commercial flavour – not private sales
 - **4. Remedies for breach of s18 are very broad** and include damages, injunctions, corrective advertising and variation or rescission of contracts

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The elements of s18 (see fig 13.2)

- **A 'person'**
 - both 'natural' and 'legal' persons are included
- **In 'trade or commerce' (CACL 13.50)**
 - s 18 is concerned with "the conduct of a corporation towards persons ... with whom it ... has or may have dealings which...bear a *trading or commercial* character": *Concrete Constructions v Nelson HCA* (CACL 13.50). What doesn't have a 'trading or commercial' character?
 - **Question** – what about *private* sales on eBay or Gumtree? See *O'Brien* (CACL 13.51)
 - **Question** – at a well-known Vic university, a group of law students were unable to be admitted as Australian Lawyers because the university had not taught the required units.
 - They sued for breach of s18 – issue: is a university engaged in 'trade or commerce'?
 - NB Could have sued for breach of contract but more restricted remedies

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- 'Engage in conduct' – what is 'conduct'? (CACL 13.50)
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 - What does 'engage' mean?: *Google v ACCC* (CACL 13.52)
 - Why had Google had not 'engaged'?
 - What is 'conduct'?
 - 1. Puffs?
 - 2. Opinions, statements about the future? – **not** misleading conduct (because they are not facts) but s4(1) (CACL 13.450):
 - Where a person **makes a representation about a future matter** (eg the future profitability of a business or the future trends of the ASX) BUT **does not have reasonable grounds for making it**, the representation may be misleading.

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- 3. Silence – no general duty to disclose. NB:
 - Literal truth may be misleading
 - 'All shops in the market are fully let'. Over ½ have given notice
 - Failure to disclose changed circumstances
 - Permit to develop property not required, then, before contract finalised, law requires permit
 - Failure to disclose where there is a 'reasonable expectation' that disclosure would be made:
 - *Henjo v Collins Marrickville* (CACL 13.171)
 - *Demagogue v Ramensky* (CACL 13.172)

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Three broad categories of misleading conduct:

1. ACCC takes action against Corps for misleading or deceptive conduct when advertising or marketing good or services 9

- **ACCC v TPG** (CACL 13.61)
 - Facts and issue:
 - How to judge if conduct m or d? - "dominant message" to "target audience"
- **ACCC v Turi** (CACL 13.65)
 - Facts and issue:
 - Decision - Why were the advertisements in both cases m or d?
 - NB Also action under s29(1) (specific false rep re history of product), s33 (specific false rep re nature and characteristics) – hence the fine of \$1m ("penalty" not available for breach of s18).
 - How to judge if conduct m or d?: how would a "significant number of hypothetical consumers to whom advertising directed" react?
- **Example: ACCC v Coles** (CACL 13.66) and **ACCC v Reckitt Benckiser**
 - s18 and ss29/33
 - How to judge if conduct m or d? What was "dominant message" to "ordinary and reasonable" members of the "target audience"

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2. Section 18 as a weapon for business - competitor takes action against a competitor

- **McWilliams Wines v McDonald's Systems** (CACL 13.90)
- **Parkdale v Puxu** (CACL 13.100) – similar to McWilliams but compare TPG case (CACL 13.61)
- **Apand v Kettle Chip** (CACL 13.120) – compare Puxu
- **Question:** What are the competing interests in each of these cases? What's the effect of preventing Puxu from manufacturing lounge suites that looked like Parkdale's? Or preventing Apand from copying KC?
 - **Hint:** effective monopoly...

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3. Consumers sue corporations for m or d conduct (often for conduct in pre-contractual negotiations)

- *Bevanere v Lubidineuse* (CACL 13.150)
 - Head employee would continue
- *Byers v Dorotea* (CACL 13.160)
 - Features and quality in relation to home units

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- **Issue of fault and intention** (CACL 13.174)
 - General rule – s18 imposes a form of strict liability
 - need to show a causal link between conduct loss or damage but no need to show intention to mislead
 - Exception - if you are merely *transmitting information*: *Yorke v Lucas* (CACL 13.174)
- **Exclusion clauses and s18** (CACL 13.176)
 - General rule – a party cannot *directly* exclude s18 – eg 'Section 18 does not apply to this contract'.
 - But a contract may have a clause which puts other party on notice that he *should not* rely: read *Butcher v Lachlan Elder Real Estate* (CACL 13.177) – read carefully.

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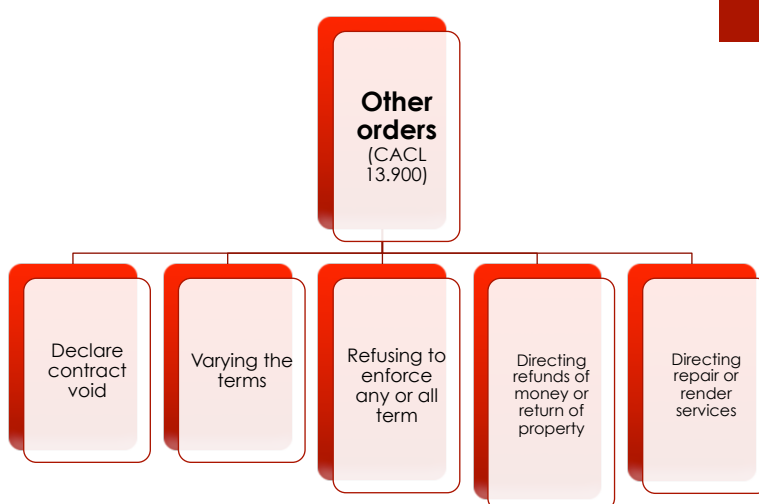
Remedies for breach of s18

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- **Main remedy is damages: s236(1) CACL 13.780**
 - May recover the amount of loss or damage *caused by* the misleading conduct
 - *Wakefield Trucks v Lach Transport* (CACL 13.800)
 - *HTW v Astonland Pty Ltd* (CACL 13.810)
 - *Damages = Difference between contract price and what you've got*
- Individuals involved in the contravention liable for damages (not just corp): s2(1) (CACL 13.830)
 - Aided and abetted
 - Induced
 - *Knowingly* involved in any way in the contravention (ie not strict liability)
 - *See Yorke v Lucas* (CACL 13.840)

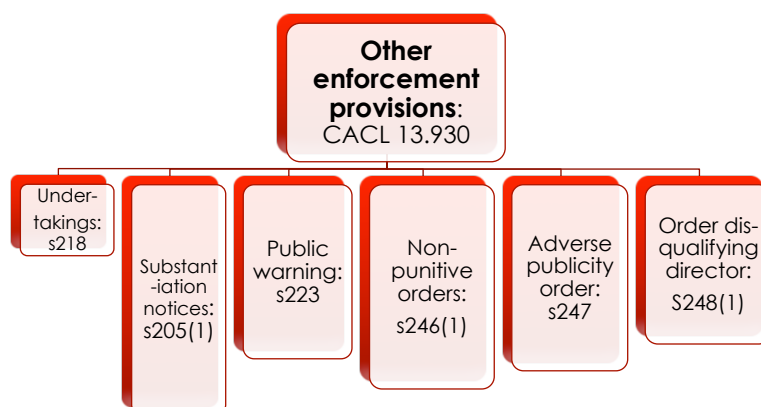
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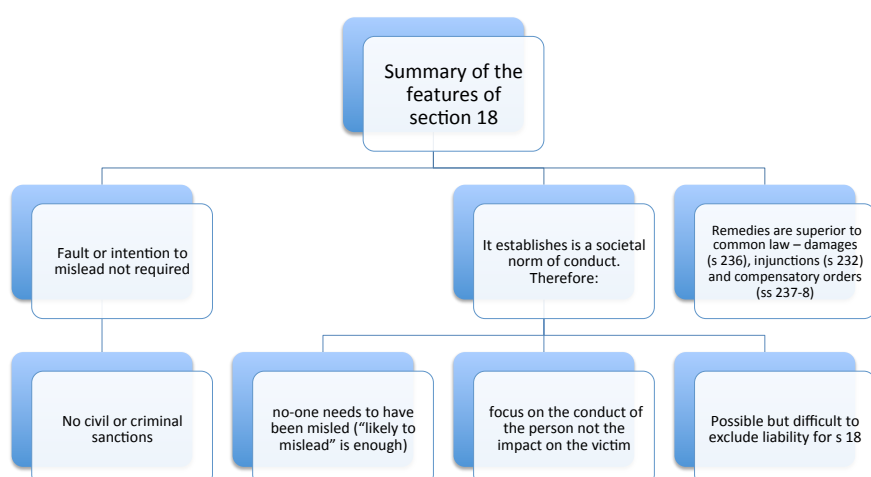
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Figure 13.3 Summary of the features of section 18



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Unconscionable conduct

- **ACL prohibits persons from engaging in unconscionable conduct:** ss20-21

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- **Three categories:**

1. **Under the unwritten law (or common law): s20**

- **CBA v Amadio** (CA 7,890) and **Louth v Diprose** (CA 7,910)
- Compare **ACCC v Berbatis** (CA 13,220) with **ACCC v Samton Holdings** (CA 13,225)
 - Can you explain the different decisions?

2. **Unconscionable conduct in connection with goods or services: s21** (CA 13,240)

- Meaning of unconscionable – not defined but:
 - 22(1)(a) – (l) lists the matters to consider. Read carefully.
 - See **ACCC v Lux** (CA 13,255)

3. **Unconscionable conduct and small business** (CA 13,265)

- Sections 21 and 22 also protect small businesses from the unconscionable conduct of large businesses. Same factors as listed in s22(1) apply.

- **The remedies** (CA 13,280)

- Pecuniary penalty
- Damages
- injunction