

CONSUMER LAW

1. Overview

Importance of the Australian Consumer Law (ACL)

The ACL regulates the accuracy and fairness of marketing, advertising and selling to consumers.

The ACL refers to the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)). The ACL and the State/Territory Fair Trading Acts (to the extent their provisions are not replaced by the Australian Consumer Law) now constitute the general consumer protection regulation framework in Australia.

Complying with the Australian Consumer Law

Compliance and enforcement of ACL is on a 'one law, multiple regulators' model. The regulators include the Australian Competition and Consumer Commission (ACCC) and State/Territory consumer protection agencies.

ACL regulators can exercise a range of civil, administrative and criminal enforcement remedies to ensure compliance with the law, including:

- Criminal conviction, fines
- Disqualification orders, civil pecuniary penalties
- Non-party redress orders, adverse publicity orders, non-punitive orders, public warning notices
- Declarations, injunctions, damages, compensation orders
- Infringement notices, court enforceable undertakings
- Education, advice and persuasion, voluntary industry self-regulation codes, formal written warnings.

Beyond compliance and enforcement by its regulators, ACL also creates private rights that consumers can enforce through Commonwealth, State and Territory Courts and Tribunals.

Breaches of many of ACL's criminal offences are subject to criminal fines of a maximum of \$1.1 million for a body corporate, and \$220,000 – \$500,000 for a person other than a body corporate. The same monetary limits generally apply to ACL's civil pecuniary penalties.

Who must comply with Australian Consumer Law?

In summary, ACL relates to practices:

- in business-to-consumer situations (this can apply to both advertisers and their agencies)

- in trade or commerce (e.g. relating to the selling and marketing of all types of goods and services)
- mainly in the pre-sale context, although certain post-sale practices are also covered
- across all media (including company websites and social networking sites).

2. Common issues for advertisers with the Australian Consumer Law

The following section provides an overview of the key provisions of the ACL governing advertising and promotion. These include misleading or deceptive conduct, false or misleading representations, bait advertising, and offering gifts and prizes.

Misleading or deceptive conduct

Section 18 of the ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. This prohibition is not limited to the supply of goods or services.

Remedies for a contravention of this prohibition include injunctions, damages and compensatory orders. Civil penalties, criminal sanctions and disqualification orders do not apply to this prohibition due to its broad scope.

There is a three-step approach to determining whether an advertisement is misleading or deceptive:

1. Identify the relevant audience (e.g. potential reach and influence on the public)
2. Determine the message or impression being conveyed to an ordinary and reasonable person in the relevant audience (an advertisement can carry multiple messages to different ordinary and reasonable members of the relevant audience). Even if only one of those messages is false or deceptive, the advertisement will be held to be unlawful
3. Determine whether the message or impression is true or false.

The 'take out' of an advertisement must be considered holistically from a consumer's point of view. Mere confusion, or consumers being 'caused to wonder', does not always amount to misleading or deceptive conduct.

False or misleading representations

Section 29 of the ACL prohibits a person from making false or misleading representations in connection with the supply, possible supply or promotion of goods or services.

False or misleading representations banned by the ACL include false claims as to:

- Goods being of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use
- Services being of a particular standard, quality, value or grade
- Goods being new
- A particular person agreeing to acquire goods or services
- A testimonial by any person relating to goods or services
- Goods or services having sponsorship, approval, certain performance characteristics, accessories, uses or benefits
- The person making the representation having a sponsorship, approval or affiliation
- The price of goods or services
- The availability of facilities for the repair of goods or of spare parts for goods
- The place of origin of goods
- The need for any goods or services.

Misleading representations as to future matters

Section 4 of the ACL prohibits a person from making a representation with respect to any future matter (including the doing of, or the refusing to do, any act) where that person does not have reasonable grounds for making the representation, in which event the representation is taken to be misleading.

Offering gifts and prizes

Section 32 of the ACL prohibits a person from offering rebates, gifts, prizes or other free items in connection with the supply or possible supply or promotion by any other means of goods or services with the intention of not providing them. This includes not providing them as offered within the time specified in the offer and, if no time is specified, within a reasonable time.

A 'reasonable time' is determined on a case-by-case basis, based on the nature of the gifts and prizes offered and the representations made as to their availability.

Bait advertising

Section 35 of the ACL prohibits a person from advertising goods or services at a specified price if there are reasonable grounds for believing that the person will not be able to offer the appropriate goods or services.

Goods or services offered at a specified price must be offered at this price for a reasonable period and in reasonable quantities, having regard to the advertisement and the nature of the market. It is important to clearly and prominently disclose if there are only a certain number of goods or services at a particular price, or in the offer is only available for a specific time period.

Component advertising

Section 48 of the ACL prohibits a person from advertising goods or services in its component parts, instead of a single figure. For example, a concert ticket plus 'GST' plus 'online booking fee'. This can create an impression that the goods or services are being offered for sale at a lower price than they actually are.

3. Exercising caution with certain advertising practices

Advertisers have often fallen foul of Section 18 and 29 of the ACL where use of the following advertising techniques has resulted in a false impression. It is important to be careful and seek advice if you want to deploy them:

- Broad taglines
- Cash back offers
- Comparative advertising and use of consumer "surveys"
- Country of origin claims (such as 'made in Italy')
- Disclaimers, elucidators and fine print -advertisements with limitations or disclaimers using an asterisk (*), 'conditions apply', and other clichés to limit the expectations of the audience
- Endorsements and use of celebrities, characters, businesses or brands
- Environmental & carbon off-set claims
- Opinions and exaggerations - although "puffery" is acceptable. 'Puffery' means an obvious exaggeration which no one would take literally
- Popular advertising words and phrases – "guaranteed" "free"; "\$0"; "cost price"; "new"; "cheapest"; "sale"; "discount"; "save"; "best"; "lowest"; "was/now"; "while stocks last"; "exclusive".