

False or misleading claims

What are false or misleading representations?

It is unlawful to make false claims or misleading descriptions:

- about the supply or possible supply of consumer goods or services
- when promoting the supply or use of goods or services.

For instance, your business must not make false or misleading representations

- the standard, quality, value or grade of goods or services
- the composition style, model or history of goods
- whether the goods are new
- a particular person agreeing to acquire goods or services
- testimonials by any person relating to goods or services
- the sponsorship, approval, performance characteristics, accessories, benefits and uses of goods or services
- the price of goods or services
- the availability of repair facilities or spare parts
- the place of origin of a product - for example, where it was made or assembled
- a buyer's need for the goods or services
- any guarantee, warranty or condition on the goods and services.

Courts have found false and misleading representations in these cases:

- a manufacturer sold socks, which were not pure cotton, labelled as 'pure cotton'
Legal reference: TPC v Pacific Dunlop limited (1994) ATPR 41-307
- a retailer placed a label on garments showing a sale price and a higher, strikethrough price. However, the garments had never sold for the higher price
Legal reference: TPC v Cue Design Pty Ltd (1996) A Crim R 500; ATPR 41-475

- a business made a series of untrue representations about the therapeutic benefits of negative ion mats it sold
Legal reference: ACCC v Giraffe World Australia Pty Ltd (1999) 95 FCR 302; 166 ALR 74
- a motor repairer told a customer more repair work was needed on their car than was necessary
Legal reference: Dawson v Motor Tyre Service Pty Ltd (1981) ATPR 40-223

Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation that misleads one group of consumers may not necessarily mislead another group.

Example – 'misleading' depends on circumstances

People concerned about their body image may be more vulnerable to products claiming to enhance beauty.

A representation can be misleading even if it is true. For example, an advertisement falsely claiming a person has benefited from using a product, even though they have never used it. The product may work but the advertisement is still misleading, because the person has never used the product.

Testimonials

It is unlawful to make false or misleading testimonials.

Testimonials are statements from previous customers about their experience with a product or service.

These can give consumers confidence in a product or service on the basis that another person - particularly a celebrity or well-known person - is satisfied with the goods or services.

Misleading representations can persuade customers to buy something to their detriment, based on belief in the testimonial.

Example - false and misleading representations about testimonials

- A supplier published a newspaper advertisement about a 'nasal delivery system' to treat impotence or erectile dysfunction. The advertisement quoted an interview with a celebrity that falsely claimed he had suffered from impotence and the nasal delivery system had assisted in dealing with this condition. Legal reference: ACCC v Advanced Medical Institute Pty Ltd (No 3) (2007) ATPR (Digest) 46-269
- Advertisements falsely representing actors as real people, such as a family claiming they have reaped financial benefits from distributing health care products.

In court, a representation about a testimonial is presumed to be misleading but not false.

A business accused of making a misleading representation has to provide evidence to show it is not.

TIP - Make sure testimonials are true and correct when using them to endorse products.

Sale or grant of an interest in land

Your business must not make false or misleading representations about the sale or grant of an interest in land.

You must not:

- represent that your business has a sponsorship, approval or affiliation when it does not
- make false or misleading representations about the:
 - nature of the interest in land
 - price, location, characteristics or use that can be made of the land
 - availability of facilities.

Example - misleading representation about sale of land

A real estate agent would be misrepresenting the characteristics of a property if advertising 'beachfront lots' that do not front the beach.

Employment and business activities

It is unlawful to make false or misleading representations about the:

- availability, nature or terms and conditions of employment
- profitability, risk or other material aspect of any business activity that requires work or investment by a person.

Example - misleading representations about employment and business activities

A second-hand truck dealer falsely told buyers they could get employment from certain places if they bought the dealer's trucks. The truck dealer was found guilty of misleading the buyers and fined.

Legal reference: Wilde v Menville Pty Ltd (1981) 50 FLR; 3 ATPR 40-195

Offering rebates, gifts, prizes and other free items

It is unlawful to offer rebates, gifts, prizes or other free items without intending to provide them, or not providing them as offered.

The rebate, gift, prize or other free item must be provided within the specified time or, if no time was specified, within a reasonable time.

Example – misleading representations about a promotion

A stereo equipment retailer held a promotion. Customers went into a draw to win prizes when they bought stereo equipment. The retailer felt the promotion had not been a financial success, so the closing date was extended and fake names were added to the draw. The retailer pleaded guilty and was fined.

Legal reference: TPC v Calderton Corp Pty Ltd (1994) ATPR 41-306

Misleading conduct as to the nature of goods and services

Your business must not engage in conduct likely to mislead the public about the:

- nature
- manufacturing process
- characteristics
- suitability for purpose or
- quantity

of any goods or services.

Example - misleading conduct about the nature of goods

An importer sells bicycle helmets with labels indicating the helmets met a mandatory safety standard, even though the helmets were not tested during manufacture.

Unconscionable conduct

Generally, 'unconscionable conduct' is a statement or action so unreasonable it defies good conscience.

Your business must not act unconscionably when:

- selling or supplying goods and services to a consumer
- supplying or acquiring goods and services to or from a small business.

Examples - unconscionable conduct by a trader

- not properly explaining the conditions of a contract to a person they know does not speak English or has a learning disability
- not allowing sufficient time to read an agreement, ask questions or get advice
- using a friend or relative of the customer to influence the customer's decision
- inducing a person to sign a blank or one-sided contract
- taking advantage of a low-income consumer by making false statements about the real cost of a loan
- failing to disclose key contractual terms
- using high pressure tactics, such as refusing to take 'no' for an answer.

Note: these are examples and not a complete list of unconscionable conduct and sometimes these instances will not be unconscionable - it depends on the circumstances.

Bait advertising

'Bait advertising' usually happens when a business advertises goods at a certain price but does not have a reasonable supply for customers to buy, and urges them to buy higher-priced or lower-quality goods.

Example - bait advertising

An electronics retailer runs a major national campaign, advertising 50-inch televisions at a low price of \$799 for a week-long sale. The retailer usually sells about 30 televisions of this type every week.

The retailer only stocks two televisions at the advertised price and refuses to take customer orders. When customers attempt to buy the television at the advertised price, they are told it is out of stock and are offered a more expensive unit for \$999. This is likely to be bait advertising as the retailer does not have a reasonable supply.

Wrongly accepting payments for goods or services

Businesses must not accept payments for goods or services:

- they do not intend to supply
- if they know, or should have known, they would not be able to supply the goods or services in a timely manner.

Example - Wrongly accepting payment for goods

A landscaper contracts to provide yellow paving stones, knowing that only grey paving stones are available at the time of the agreement.

This part of the law is not intended to affect businesses who genuinely try to meet supply agreements. A business may avoid prosecution if:

- the failure to supply was due to something beyond its control, and
- it exercised due diligence and took reasonable precautions.

Exceptions for information providers

'Information providers' include media organisations such as:

- radio stations
- television stations
- publishers of newspapers or magazines (including online).

They are not subject to misleading and deceptive conduct laws when carrying out the business of providing information.

Example - information providers

A motor car trader who places a misleading advertisement in the a major newspaper is liable for misleading or deceptive conduct statements in the advertisement, but the newspaper publisher is not.

Consumer guarantees - guarantees, conditions and warranties

It is unlawful to make false or misleading representations about consumer guarantees.

For more information, visit the consumer guarantees page on the Fair Trading website.

Penalties

Making false or misleading representations is an offence.

The maximum fine is \$220,000 for an individual and \$1.1 million for a body corporate. Criminal penalties for the same amount apply.

Before prosecution, fair trading agencies can:

- require a business to provide information that will support claims or representations made about goods or services
- accept court-enforceable undertakings
- issue public warning notices.