

Misleading or deceptive conduct

What is misleading or deceptive conduct?

'Conduct' includes actions and statements, such as:

- advertisements
- promotions
- quotations
- statements
- any representation made by a person.

Business conduct is likely to break the law if it creates a misleading overall impression among the intended audience about the price, value or quality of consumer goods or services.

Whether you intended to mislead or deceive is irrelevant; what matters is how your statements and actions - your 'business conduct' - could affect the thoughts and beliefs of a consumer.

Is puffery misleading or deceptive?

'Puffery' is wildly exaggerated, fanciful or vague claims that no reasonable person could possibly treat seriously.

Example - puffery

- A café owner claims to make 'the best coffee in the world'
- 'All your dreams will come true' if you use a certain product.

There is no legal distinction between puffery and misleading or deceptive conduct.

Whether a court considers puffery as misleading or deceptive depends on the circumstances of each case.

Silence

A business can break the law by failing to disclose relevant facts to a customer.

Silence can be misleading or deceptive when:

- one person fails to alert another to facts known only to them, and the facts are relevant to the decision
- important details a person should know are not conveyed to them
- a change in circumstance meant information already provided was incorrect.

Whether silence is misleading or deceptive will depend on the circumstances of each case.

Example – when silence can be misleading

The following could be misleading:

- A restaurateur is selling her restaurant. When asked the reason for sale, she does not mention that she is selling because a similar restaurant is opening nearby.
- A consumer who lives in a regional area is buying a mobile phone. The phone salesman knows where the consumer lives but fails to tell him that the coverage is poor in that area.

Relying on disclaimers and small print

Your business cannot rely on disclaimers and small print as an excuse for misleading or deceptive conduct.

Example – relying on disclaimers and small print

A large department store engaged in misleading conduct when it advertised '25 per cent off all clothing' but in small print excluded certain clothing and stated '15-40 per cent off house wares'. A court found this to be misleading conduct.

Legal reference: ACCC v Target Australia Pty Ltd [2001] FCA 1326

However, consumers cannot ignore disclaimers. Prominently displaying disclaimers may be enough to protect a business, depending on the circumstances.

Example - prominently displaying disclaimers

A bank advertises low credit card interest rates for the first 12 months. The advertisement clearly indicates the low rates are only available to new customers who apply within a certain period. This disclaimer is sufficient because it clearly informs consumers about the terms and conditions.

TIP - Prominently display all disclaimers and small print.

Predictions and opinions

A statement about the future that does not turn out to be true is not necessarily misleading or deceptive.

But promises, opinions and predictions can be misleading or deceptive if the person making the statement:

- knew it was false
- did not care whether it was true or not
- had no reasonable grounds for making it.

Example – predictions and opinions

A real estate agency was selling apartments with a view of the sea.

The agency assured prospective buyers that the view was protected because the land between the apartment block and the sea was zoned for low-rise development. This was based on information provided by a council officer.

However, the council officer was wrong. The zoning was about to change, allowing high-rise development. The agency had made a false statement about a future matter but had reasonable grounds, so was not liable for misleading consumers.

Legal reference: (2009) 17 TPLJ 25

A court will consider the circumstances and the effect or impact on the consumer when deciding if a prediction or opinion was misleading or deceptive.

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 their business of providing information.

For example - information providers

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

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
- disqualification orders.

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