Australian Competition & Consumer Commission

# Advertising and selling

January 2007

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**Important notice**

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see www.consumerlaw.gov.au.

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

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# 1 INTRODUCTION

## Introduction

For the first time, from 1 January 2011, Australian businesses and consumers have the same legal protections and expectations in relation to advertising and selling practices wherever they are in Australia. These are contained in the Australian Consumer Law (ACL), which is a schedule to the *Competition and Consumer Act 2010.* The ACL applies nationally and contains simple rules to ensure that businesses trade fairly with consumers.

It is important for the entire community that businesses and consumers know their rights and responsibilities in the marketplace. Fair business practices ensure that there is genuine competition, leading to lower prices and better quality goods and services for consumers. Fair business practices also increase consumer trust and improve relationships between consumers and business.

These rules support the sound and ethical business practice of telling the truth. They protect consumers from potentially harsh business practices. They also provide a means of redress when consumers are treated unfairly.

All businesses are required to abide by the consumer protection rules contained in the ACL. These are enforced at the federal level by the Australian Competition and Consumer Commission (ACCC), with state and territory consumer protection agencies responsible for administering and enforcing the same rules in their own states.

Legal action for a breach of these rules can be taken by government agencies (usually the ACCC or the state and territory consumer protection agencies) or by businesses or consumers who feel they have been badly affected by the breach.

The issues covered in this guide are very general; consumers or businesses with a specific question are advised to contact the ACCC Infocentre on 1300 302 502, or the consumer protection agency in their state or territory.

Those seeking information about consumer protection issues relating to investments, superannuation, banking and insurance should contact the Australian Securities and Investments Commission (ASIC) on 1300 300 630 or via email to infoline@asic.gov.au, or visit www.asic.gov.au.

## Changes to the legislation since the last edition

This edition includes the:

- *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*
- *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*.

These amendments changed the name (from 1 January 2011) of the national law governing advertising practices from the Trade Practices Act to the Competition and Consumer Act, harmonising the differences that previously existed under different state laws.

It should be noted that responsibility for consumer protection in financial products and services lies with ASIC. (This does not include consumer protection in health insurance, which is an ACCC responsibility.) Inquiries about any form of financial product or service should be directed to ASIC.

# What this guide covers

Part 2 defines advertising and selling activities and summarises the basic rules.

Part 3 looks at some areas where businesses must take special care in marketing.

Part 4 discusses some of the specific rules that relate to particular selling practices.

Part 5 covers some practices, prohibited under the ACL, that take unfair advantage of consumers.

Part 6 provides advice to help businesses comply with the law.

example

Examples are used to illustrate the principles discussed in the guide. Many are based on court cases or investigations, and others on the ACCC's experience and observations.

?

Questions are posed throughout the text. These summarise the issues and considerations that should be taken into account when undertaking, or assessing, advertising and selling activities.

The ACCC has a number of other publications to help businesses meet their obligations—including general compliance manuals, industry-specific guides and basic training programs. Copies can be obtained from the ACCC Infocentre on 1300 302 502 or from the publications page at www.accc.gov.au.

# 2 THE QUICK GUIDE

The quick guide

This section contains a quick guide to chapters 2 and 3 of the ACL, which deal with unfair practices and consumer protection. The obligations of businesses when advertising and selling are expanded upon in later parts of this guide.

## Advertising and selling defined

Chapters 2 and 3 of the ACL apply to any kind of conduct or behaviour in commercial matters that could give another party the wrong impression or idea about the real situation. This includes areas such as:

- information provided by call centres
- advertisements
- promises and negotiations
- terms of leases, contracts and agreements
- predictions about risk, profitability or value
- statements in labelling and packaging
- descriptions of goods or services
- infomercials and advertorials
- silences or omissions which mean something in a given context
- claims of association with other products or persons
- mimicking of products or names, also known as 'passing off'.

The provisions of the ACL are aimed at any commercial conduct that could be misleading, deceptive or untruthful. In this sense, this guide is about much more than advertising and selling—these provisions cover a wide range of commercial conduct and behaviour.

## Businesses covered by the ACL

The ACL reaches all businesses in their dealings with both private and business consumers.

In the context of advertising and selling, companies that provide marketing services must take particular care. These businesses work closely with clients and media operators to formulate marketing strategies and activities. Marketers must know their clients' business thoroughly and be aware of the ACL in order to help clients avoid misleading advertising, unconscionable conduct and other conduct prohibited by the ACL. Marketers may be held responsible for any breaches of the ACL.

### The media

If media operators—newspapers, television, radio and internet service providers—are only the vehicle for someone else's misleading message, they may not be liable. But if a media outlet actually adopts, advises on or endorses the misleading message, they may be held liable for any breach of the ACL.

If commercial messages appear blatantly misleading or otherwise in breach of the ACL, media operators should take steps to remove these messages or refuse to carry them, to ensure compliance with the ACL.

Consumer protection laws also apply in the online environment. The principles apply to websites in the same way as they do to a classified advertisement in a newspaper or to oral or written representations made to a consumer.

# What is misleading and deceptive conduct?

The ACL prohibits businesses from engaging in behaviour which:

- actually misleads or deceives, or
- is likely to mislead or deceive

consumers (including other businesses) with whom it has any form of commercial contact. This can be through personal discussions or negotiations, print advertisements, or any of the other varieties of communication or conduct referred to in 'Advertising and selling defined' on p. 4.

A common meaning of 'mislead and deceive' is 'lead into error'. The courts have considered the phrase 'mislead or deceive' in many cases and have generally focused on 'mislead'. In practice, to mislead is a broader category of conduct, and those who are misled are almost by definition deceived as well. Therefore, it is the definition of misleading conduct that is the focus of this part.

Misleading someone may include:

- lying to them
- leading them to a wrong conclusion
- creating a false impression
- leaving out (or hiding) important information
- making false or inaccurate claims.

Conduct that actually misleads others may be easy to identify. Conduct that is **likely** to mislead is also illegal and may be more difficult to identify. Whether particular people are likely to get the wrong message from a business's conduct is a subjective question. It can be answered only when all the circumstances are known, and does not depend on the intent of the business.

The 'do not mislead' principle requires businesses to be honest and forthcoming in what they say and do commercially. It is about promoting best practice. Goods and services should sell on their merits, not by virtue of a smoke-and-mirrors approach.

The 'do not mislead' principle applies to **all commercial dealings**. As noted above, it is not only advertising that can potentially mislead. The principle covers any kind of commercial dealing—for example, selling presentations, product descriptions, packaging, contract terms, negotiations, representations—where a message is sent

that creates or is likely to create the wrong idea or wrong impression on the part of the recipient.

Generally, if the 'do not mislead' rule is broken the companies and individuals responsible may be sued and made subject to orders for damages.

Note that the ACL also prohibits making a false representation about products or services. A false representation is one that is contrary to fact or incorrect. To potentially breach the ACL, the representation need not be intentionally false or even false to the knowledge of the person making it. In effect, the ACL says that businesses must not make erroneous representations about their products or services. False representations are considered more serious breaches of the ACL than misleading conduct, and therefore carry higher penalties.

? Does the commercial conduct send a message that creates or could create the wrong impression in the minds of others?

# The key principles

Three important rules guide the application of the 'do not mislead' principle: overall impression, potential audience, and intent. It is also important to choose the appropriate medium for your message. This is discussed further in part 6 of this guide.

## Overall impression

The most important factor in determining whether conduct may be misleading is the overall impression imparted to the audience. A selling approach that seems clear and well structured to its designers may sometimes be confusing to an audience. An audience may be misled because of the emphasis placed on different aspects of the offer, or by mistaken but understandable (and uncorrected) assumptions and preconceptions.

?

How will susceptible members of this audience react?

What will they be led to think the offer is?

How will they interpret the important points?

What could they possibly miss or fail to appreciate?

What aspects of the offer need a stronger emphasis?

While technically accurate information is important, it may not always adequately guide or control the overall impression created. The message needs to be seen from the viewpoint of the potential audience to determine what the impression might be.

Bear in mind that the overall impression that matters is that of the layperson who is likely to have little knowledge of the product or service involved.

?

What overall impression or likely impression could the message give to its audience?

Does this impression match the true facts and the real picture?

## Potential audience

The target audience that an advertising campaign is trying to capture may be very different to the actual audience that receives the message. The actual audience may be much wider than the target audience the business had in mind.

Whether something misleads depends on the actual audience that receives the message. Audiences can be groups of any size, from a large number of people (as in a media audience) down to one person (as in the case of the recipient of an oral sales presentation).

Identifying the potential audience will help determine the likely impact of the message. The audience is likely to vary in age, education, experience and sophistication. This variation is a factor in whether a message may mislead. Perhaps only the more susceptible members of an audience could be misled, but this may still breach the ACL.

**?** Who is your selling presentation aimed at?

Who else is likely to see it?

## Intent

The 'do not mislead' principle applies to all commercial messages. This includes both messages sent by people deliberately breaking the law and careless but nonetheless misleading messages. Much unlawful misleading conduct stems from mismanagement or inadvertence. This means that prevention should be an absolute priority.

## Puffery

Puffery is a term used to describe wildly exaggerated, fanciful or vague claims for a product or service that no one could possibly treat seriously, and that no one can reasonably be misled by. Examples of puffery are 'best food in town' and 'freshest taste ever'. Although there is no legal distinction between puffery and misleading or deceptive conduct, puffery is an area where the law has traditionally allowed some latitude to advertisers and sellers.

## The basic principles of misleading and deceptive conduct

The following points provide a quick glance at conduct that is prohibited under the ACL. Each is described in one short paragraph, followed by examples. Most are discussed further in parts 3 and 4 of this guide.

The relevant sections of the ACL are not mutually exclusive—that is, the same misleading conduct may breach several different sections at the same time. For example, because it has broad coverage, section 18 will usually be involved along with others.

- A business must have **reasonable grounds** when predicting future events. Businesses should consider, or adequately address, the range of uncertainties and variables involved (section 4).

example

An oven retailer falsely stating that their ovens were 'risk free' as they could be returned within 12 months if the buyer was not satisfied.

- Commercial conduct must not **mislead or deceive, or be likely to mislead or deceive**. This is a very broad provision (section 18).

example

A fruit juice producer representing a product as being 100 per cent cranberry juice, when the product is 50 per cent orange juice.

A company representing that an international calling card has no fees, other than timed call charges, when in fact other fees are charged.

- Businesses must not make **false or misleading representations** about the characteristics of goods or services, including sponsorship, price, place of origin, guarantees, availability of spare parts and the buyer's need for goods (section 29).

example

A car company misrepresenting that a car has five doors when it actually has three.

A seller claiming that a product with significant imported components is 'Australian made'.

- Businesses must not engage in **false or misleading** conduct, or in certain other practices, when buying or acquiring an interest in land (section 30).

example

An agent misrepresents fixtures to be included with rural land, the position of a 'beachfront' lot or suitability for strata conversion.

- Businesses must not engage in conduct that **misleads or is likely to mislead** people about the details of possible employment (section 31).

example

An educational institution offering 'scholarships via paid training courses' when, in fact, applicants are required to pay a substantial fee, there is no employment provided and the scholarships don't exist.

- If a seller makes a **representation** about part of the cost of goods or services it **must also specify the cash price** of those goods or services (section 48).

example

A used car dealer advertising the price of a car as periodic repayments without stating the actual cash price of the vehicle.

- Businesses must not engage in conduct that **misleads or is likely to mislead** the public about the characteristics, suitability or quantity of services (section 34).

example

An allergy treatment company stating that it can cure or eliminate virtually all allergies or allergic reactions when the company actually can't do this.

- The ACL prohibits **false or misleading conduct** in connection with work at home schemes, or other business schemes requiring investment and/or labour by participants (section 37).

example

A person being misled about the profitability of a worm farm investment scheme.

A company misrepresenting the level of business available to drivers.

# Other techniques of advertising and selling

Apart from misleading and deceptive conduct, chapters 2 and 3 of the ACL prohibit other conduct that has inherent problems for businesses and consumers.

Businesses should therefore make sure their advertising and selling methods definitely do not include techniques such as those described below.

## More examples of prohibited conduct

The ACL prohibits a range of sales practices and conduct, including bait advertising, pyramid schemes and misleading conduct relating to employment, or to the nature of goods or services. Some of these are explained in more detail below.

- Businesses must not, in the course of the possible sale or promotion of goods or services, **offer gifts, prizes or free items** with the intention of not giving them, or not giving them as promised (section 32).

example

In relation to a promotion offering prizes, a retailer extends the closing date for a prize draw and adds fictitious names to the pool, with the result that the prize offered is not actually given to any customer.

- A business must not advertise products at a specific price if there are reasonable grounds for it to anticipate that those products will not be available in reasonable quantities and for a reasonable period at that price. This practice is commonly known as **bait advertising** (section 35). A defence exists where the business promptly offers an acceptable substitute product.

example

A car dealer advertises certain vehicles at a special price. Customers are then told that the vehicles have been sold or are out on a test drive. No cars are ever available at the advertised price.

- Businesses must not induce consumers to buy goods or services by offering them a rebate, commission or other benefit in exchange for the names of potential customers, if receipt of the benefit depends on an event occurring after the sale—that is, if getting that benefit depends on the business making further sales to the people whose names were provided. This practice is commonly known as **referral selling** (section 49).

example

A sales assistant offers a consumer 10 free CDs to go with their new stereo on the condition that they give the business the names of five of their friends and that these friends all buy stereos from the business.

- A business must not accept payment for a product if it intends **not to supply that product or to supply a materially different product**, or it should have known it could not supply the product within the time limit specified (if any) or within a reasonable time (section 36).

example

A company selling mobile phones accepts payment for mobile telephone services it is not able to supply as the telecommunications carrier has little or no mobile coverage.

- Businesses must not use **undue harassment, coercion or physical force** relating to the supply of goods or services, or to the collection of payments for goods and services (section 50).

example

A debt collector uses threatening and offensive language when speaking to a person about their outstanding debt.

- A business must not **induce** people to join in a trading scheme on the basis that they will receive benefits if they introduce other people. This practice is commonly known as **pyramid selling** (section 44).

example

A business sells cheap products to consumers for $100 on the basis that they will receive a portion of the $100 amounts subsequently paid by others recruited into the scheme.

- A business **shall not send credit or debit cards unless requested to do so in writing** by the prospective user, or unless the card is a replacement. Nor shall a company convert debit to credit cards, or vice versa, unless requested (section 39).

example

A 'renewal' credit card is sent to a person although one has not been requested and the previous such card has not been used.

- A business **must not assert a right to payment for unsolicited provision of goods or services** (section 40). The ACL also contains specific provisions dealing with unauthorised entries or advertisements in business directories (section 43).

example

An unordered book or CD is sent to an individual and payment is demanded.

A business is billed for an entry in a bogus directory and threatened with legal action to extract payment.

## Third line forcing

Third line forcing occurs when a business refuses to sell a product or service to a consumer **unless** that consumer also buys some product or service from a different business.

example

A travel agent offers certain flights to London on the condition that prospective passengers also acquire travel insurance from nominated insurance companies—that is, a prospective passenger will not be allowed to buy these flights (product 1) from the agent unless the passenger also buys the insurance (product 2) from a certain other business.

The effect of third line forcing is to limit consumer choice and thus any benefits that flow from competition. Third line forcing is illegal under the Competition and Consumer Act and, like other anti-competitive breaches, is the subject of potentially much higher penalties than breaches of the ACL.

Third line forcing arrangements commonly involve the improper linking or tying of the sale of particular goods with the purchase of a financial service, such as a loan or line of credit.

example

A car dealer offers buyers a larger trade-in allowance on the condition that they obtain financing through a particular credit provider.

On some occasions the products of **different** businesses are bundled into a package for sale to consumers. Such product linking can give rise to concerns about possible third line forcing conduct.

example

In the telecommunications market a particular service may be offered on a free or discounted basis on the condition that the consumer acquire a second type of service from a second supplier. These services can relate to pay television, local telephones, mobiles or long distance calls.

However, businesses can use the notification or authorisation processes (by applying to the ACCC) to seek possible legal protection against the consequences of a breach of the third line forcing prohibition. Businesses seeking exemption must be able to show that the public benefit of the conduct outweighs the public detriment. Third line forcing is actually covered by the anti-competitive provisions of the Competition and Consumer Act, as technically it is behaviour which restricts competition rather than a breach of fair sales practices.

Third line forcing does not occur when the same company that sold the first product also sells the second. That is, a business can make the purchase of one of its own products conditional upon purchase of a second of its own products, and this will not breach the third line forcing rule. This is commonly known as bundling or full line forcing and will only breach the Competition and Consumer Act if it substantially lessens competition in a market.

? Do any of your advertising and selling techniques require your customers to buy products or services from another business?

## Consequences of breaking the rules

Most businesses are fair and ethical traders, give excellent client service and are quite unlikely to be involved in a breach of the ACL. However, it is important for businesses and the community to know what the consequences of such a breach can be. People who have suffered loss or damage can seek damages up to six years after the conduct occurs.

The ACCC is involved in only a small number of the thousands of consumer protection legal actions taken each year. The ACL allows private parties harmed by a breach to take their own independent legal actions. These private parties can be either consumers or businesses—in practice they are usually businesses—and most seek orders for damages and/or injunctions from the court.

The courts may make orders for:

- damages
- injunctions (see explanation below)
- declarations that the law has been breached
- findings of fact that can be used in subsequent actions for damages
- refund of money
- rescission (cancellation) of contract
- individuals or organisations to do things such as publishing corrective advertisements, establishing compliance programs, and performing community service.

An injunction restrains a party from engaging in further prohibited conduct, or requires certain positive action by the party. An order for corrective advertising requires a party to publish, at their expense, advertisements that fully and adequately dispel the effects of any wrong or misleading information given to the public. Community service orders can require a business to perform a particular activity that benefits consumers affected by the conduct.

The ACCC also has a range of powers which may be used before it goes to court. These include substantiation notices, infringement notices and public warning notices, which it can use where it has reasonable grounds to believe that a person has contravened certain provisions of the ACL.

## Further information

Further information on the ACCC's powers to issue substantiation notices, infringement notices and public warning notices can be found in *News for business: ACCC powers to issue infringement, substantiation and public warning notices*.

This publication is available on the ACCC website at www.accc.gov.au or by contacting the ACCC Infocentre on 1300 302 502.

# 3 MARKETING

## Marketing techniques that require extra care

Despite the best efforts of all concerned, advertising and selling will continue to give rise to issues under the law. The temptation to use particular techniques may be too strong, especially if other businesses seem to be using them and there is constant pressure to stay ahead or respond to new consumer demands. Advertisers and sellers also sometimes miscalculate the legality of particular conduct.

This part discusses marketing and sales techniques that need extra care. The information may also help consumers to recognise potential hazards.

## Disclaimers and fine print

It is commonplace to see advertisements with limitations or disclaimers using an asterisk (*), 'conditions apply', and other clichés to limit the expectations of the audience. Fine print is often used in:

- advertisements on television, in print media (newspapers, catalogues and brochures) and on the internet
- contracts
- labelling
- signage.

These qualifications usually appear close to the lead selling point. If an asterisk appears near the word 'free', for example, the copywriter may be trying to trade on positive reactions to the selling point, while trying to keep within the law by putting the conditions in the fine print. This may not protect that business from breaching the ACL.

The main selling point used for a product or service may make such a strong impression that no fine-print disclaimer can dispel it. In this situation it is not acceptable for the advertiser to make the important facts—the real terms and conditions of the offer—unclear or unreadable by means of, for example:

- text at obscure locations
- text that is too small
- text that is flashed on screen for only a moment
- voiceovers that are too quick or too quiet.

example

A national department store ran a series of advertisements in newspapers and on television for a sale. The television advertisements prominently stated that discounts would apply to all clothing. Another series of television advertisements stated that discounts would apply to housewares. In fine print both ads excluded items that would commonly be considered clothing and housewares. Related newspaper advertisements did not make any reference to the exclusion of certain housewares.

Remember that whether or not something misleads an audience relies on the overall impression created. In the situation above, the actual facts (that is, the exclusions) were not balanced with the offer in the headline. The consumer is not required to exhaustively search for those facts. Instead, the advertiser must clearly direct the consumer's attention to the most significant terms and conditions. The consumer can then make a reasonably informed judgment about whether to buy.

## Catalogues

Disclaimers and fine print are often seen in catalogue advertising. Catalogues convey an enormous amount of information about products, prices and availability. The sheer mass of detail involved, however, does not free the catalogue advertiser from the obligation to be accurate and to create a correct overall impression with the audience.

Advertisers should be reasonably expected to be able to supply products and services as they are listed in a catalogue. It should be clear that supply is subject only to particular qualifications or disclaimers that have been made highly visible, clear and specific for the consumer. Generic disclaimers (that is, 'subject to availability' or 'not available at all outlets') may not help the catalogue advertiser to avoid breaking the law. Advertisers should also consider the rules in part 4 of this guide on bait advertising and failure to state the single price.

### Television and billboards

Some advertising media—such as television and billboards—may not be suitable to convey complex offers requiring detailed qualification. These media generally do not allow enough time for a consumer to see and read the details of the offer, let alone consider its complexity. It may be more appropriate to convey these offers using careful print advertising, well-drafted brochures and fully informed salespeople. Choosing the right medium for the message is discussed further in part 6 of this guide.

### Websites

Websites sometimes display disclaimers such as '*conditions apply' in an attempt to limit their liability or to qualify other information on the site. These disclaimers are often accessed via a link at the bottom of a page in relatively small print where there is no guarantee that consumers will see them. It may be more appropriate to place disclaimers on a compulsory page so that consumers must view them at some stage while in the site. Alternatively, disclaimers could appear in a dialogue box that opens on a user's screen when they access the home page or at an appropriate moment in the transaction before the consumer initiates a purchase. Any disclaimers that materially affect a representation should be closely linked to that representation on the site.

Businesses may wish to consider whether consumers respond positively to asterisks and similar devices. Through constant exposure some consumers have learnt that asterisks are the signal that a selling pitch is too good to be true. Others, however, may still be misled.

## Qualifications and exclusionary clauses

Businesses should get advice to ensure that the limitations they wish to make are legal. Misleading consumers about their rights, even inadvertently, is specifically prohibited under section 29(m) of the ACL and is taken very seriously by the ACCC.

?

Does the asterisk and associated fine-print disclaimer hide limitations to the offer and make the overall impression misleading?

What needs to be brought out from the fine print and emphasised to make the overall impression balanced and accurate?

## Silence or omission

Failure to make any mention of an important matter in the context of an overall representation can sometimes be misleading conduct. What is not mentioned may be an important element in creating an accurate overall impression about the product or service. Silence can thus be conduct that misleads or is likely to mislead.

However, the ACL does not create a general duty to disclose information in all situations in advertising and selling. The only time a duty arises under the ACL is where a fact that relates to the offer would, if disclosed, change the representation significantly. Businesses also need to be aware that there are other laws that may require specific disclosures depending on the industry or the product, particularly in the area of financial products and services.

example

A supplier of wood shavings to be used in the exporting of live crayfish neglected to inform the buyer that a chemical used in treating the wood shavings was toxic.

Businesses should tell consumers about the important points of what is offered to allow them to make an informed choice. Leaving out one of the fundamentals distorts the choices made by consumers.

Silence or omission can also mislead if the characteristics of known products or of ongoing services change in significant respects. If they do, businesses may need to tell their customers, to dispel any mistaken assumptions.

Remember that intention is not a required element of a breach. This means that businesses must take responsibility to ensure that the necessary facts have been considered in the overall presentation.

**?** What are the fundamental things that consumers need to know about the product or service so they can make a properly informed choice?

Are there any details that need to be brought to their attention that may significantly change the representation?

# Country of origin claims

The fact that a product has been made or modified in Australia (or other country with positive associations) can be a positive marketing and selling point. Therefore, it is imperative to make sure any claims about the country of origin are correct.

A country of origin representation is any labelling, packaging, logo or advertising that makes a statement, claim or implication about which country goods originate from. The most common claims are 'Made in Australia', 'Product of Australia' and similar claims about goods from other countries.

## The law

The general prohibition against misleading and deceptive conduct applies to false or misleading claims about which country goods originate from. Such a claim may also constitute a misrepresentation, which could result in criminal penalties.

To help businesses that wish to make country of origin claims regarding their goods, the ACL defines three defences, or 'safe harbours', for goods that pass certain tests. Businesses need to be aware that using these defences is not mandatory and they only apply in certain circumstances. If you plan to use country of origin claims you should seek more information about your obligations under the ACL.

## 'Made in Australia' defence (section 255)

The first safe harbour is for general country of origin claims. They may include 'Made in ...', '... made' and 'Manufactured in ...'.

The defence has two requirements that must be met:

- the goods must have been substantially transformed in the country claimed to be the origin
- 50 per cent or more of the costs of production must have been incurred through production carried out in that country.

## Substantial transformation

The ACL defines substantial transformation as:

> A fundamental change ... in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

This means that simple treatments or processing—such as repackaging or mere assembly—are not likely to qualify an otherwise imported good for the 'Made in Australia' claim. Although no such regulation currently exists, the government can prescribe certain changes (unsophisticated processes) as not being fundamental changes for the purposes of the legislation.

## Costs of production

Under the ACL, three broad categories of costs of production or manufacture are considered: expenditure on materials, labour and overheads. Materials costs are generally straightforward to calculate. They can be allocated to the final goods fairly easily. Labour and overheads only count towards costs of production where they can reasonably be allocated to the final goods.

Again, although such regulations do not currently exist, the government can disallow certain costs from being counted towards production and manufacturing costs.

## 'Product of Australia' defence (section 255)

'Product of ...' is considered a premium claim about a good's origin. The safe harbour for claims that a good is a product of a certain country is much stricter than the one for general claims. To qualify, two rigorous criteria must be met:

- each significant component (or ingredient) of the good must originate from the country of the claim
- all, or virtually all, of the production processes must take place there.

These apply to any variations of the words 'product of', such as 'produce of' and 'produced in'.

example

For an apple and cranberry juice to be permitted to carry a 'Produce of Australia' label, both the apple juice and the cranberry juice would have to be sourced from Australia. This is despite the cranberry juice being, on average, only about 5 per cent of the total volume of the product. However, provided both the apple juice and the cranberry juice are sourced from Australia, it is legitimate to employ a 'Produce of Australia' label if, say, an imported preservative is added to the juice. This is because the preservative does not go to the nature of the good.

## 'Grown in Australia' defence (section 255)

From 1 January 2011 a new defence will exist for claims that goods, or components or ingredients of goods, are grown in a particular country. Section 255 sets out a number of requirements that must be met in order to qualify for this defence.

Goods, or components or ingredients of goods, are considered to be grown in a country if they:

- are materially increased in size or materially altered in substance in that country by natural development, or
- germinated or otherwise arose in or were issued in that country, or
- are harvested, extracted or otherwise derived from an organism that has been materially increased in size or materially altered in substance in that country by natural development.

### Qualified claims

The ACCC takes the view that suitably qualified claims do not have to meet the substantial transformation or 50 per cent content test. So, where the imported content of a product is greater than the local content, the label claim should read, for example, 'Made in Australia from imported and local ingredients'. Where the local content is greater, the label claim could read 'Made in Australia from local and imported ingredients'.

Other claims made about country of origin will be assessed on their merits. This may include the use of qualified claims or terms that imply a lesser connection with the country, for example 'built in …' or 'assembled in …'. Therefore, companies making such claims run the risk of legal action by the ACCC, a competitor or an interested party.

## Comparative advertising

Comparative advertising tries to directly promote the superiority of one company's products over another's. It may involve claims about the company's better price or its more comprehensive range of goods and services. If done well and accurately, comparative advertising can result in real and deserved commercial advantage.

This marketing strategy appeals to consumers because it is bold and speaks directly about matters important to them. It also reflects confidence in the product and the company producing it.

Comparative advertising is a direct challenge to competitors. There are three major risks with comparative advertising:

- Is the comparison accurate?
- Are the products or services being compared reasonably similar?
- Will the comparison be valid for the life of the promotion?

example

A battery manufacturer packaged its batteries in a pack with a red sticker that claimed the batteries would last longer than two other high-profile brands of batteries. The claim was supported by independent tests, but only against some of the other brands' batteries. The sticker failed to identify that the claim did not apply to all of the other brands' batteries. While there was a more precise reference to the comparison on the back of the pack, the sticker on the front still made the packaging misleading.

example

A supplier of international telephone services runs advertisements comparing its **special** Chinese New Year rate with the **standard** rate of a competitor. However, the competitor actually had three different rates available, including a corresponding special rate.

Even though the first company's rates were cheaper for the products in the advertisement, readers were still misled, because the second company actually had a more comparable product.

Businesses should consider the duration and extent of advertisements planned and the likely reaction of competitors. If a competitor is aware of a comparative campaign they may move quickly to change their product or service, and this could render the initial campaign misleading.

Competitors are naturally motivated to defend their products if the claim is untrue. They are also likely to know their products better than the opposition company running the comparative advertisements. Competitors often see and willingly tell the ACCC or the courts about advertisements that are misleading.

?

Have enough resources been devoted to research to understand the competitor's product?

Is the comparison being made between reasonably similar products?

Have all the important characteristics been considered in making the comparison?

# Two price advertising

A comparison between two prices is a common device used by advertisers and sellers. Consumers are attracted by the idea that they are paying less than they otherwise would.

The advertisement may attempt to favourably compare the actual price being charged with:

- the company's own previous or normal price
- a competitor's price
- what the product is 'worth'
- a recommended retail price.

These comparisons, however, will mislead consumers if the savings are not real.

example

A clothing retailer told its staff to write a made-up price on labels, cross that price out and then write the true price. The retailer hoped that consumers would think a price reduction had occurred and that savings were now available. The price reduction was an illusion and clearly misled consumers.

Some of the principles that apply to two price advertising are the same as those relating to comparative advertising. Accuracy in such price comparisons is vital.

All forms of two price advertising, or price comparisons, seek to portray the seller's current price as the most attractive and preferable. There is nothing wrong with this, so long as the prices being compared are genuine and accurate, and the savings implied are real, not illusory. The key here is that the price comparison, if closely examined, must be solidly and truthfully defensible based on the actual facts of the particular case.

A business can compare its current prices with its own previous or normal prices, so long as the previous ones were genuine and applied to a sufficient and reasonable number of items, for a reasonable period. How long this 'reasonable period' is may depend upon factors such as the type of product or market involved and the usual frequency of price changes.

Comparisons between an advertised price and what the product is worth are also potentially troublesome. Any such statement of worth or value would need to be supported by objective evidence. An advertiser cannot merely rely on its intuition or

an educated guess. This is because the consumer is likely to believe that there is some reliable substance behind the statement of worth and will be misled if the statement is not actually supported by facts.

Another type of deceptive two price advertising involves comparisons with the recommended retail price (RRP). If, as is sometimes the case, this price is not actually charged by the company or its competitors, it would be misleading to advertise goods and compare the price to the RRP. For example, if the product's RRP was $150 but it regularly sold for $140, a '$10 off RRP' offer of $140 would probably be misleading. In that situation the consumer is led to believe that the RRP is the same as the market price or the advertiser's own previous price, whereas it may be quite different.

?

With what other price is the current price being compared?

Is that other price a genuine and accurate one that reflects actual market circumstances?

Does the two price comparison involved have real substance, or is it misleading?

## Environmental claims

Consumers keen to contain the environmental consequences of their lifestyle may prefer products that have environmental benefits or cause less environmental harm. This motivation to buy 'green', coupled with the vague nature of many 'green' claims, can lead to problems with misleading conduct.

The ideas that consumers may get from an environmental claim are not easy to control. Consumers may readily form a broader image of the claim than was intended.

example

A company that supplies air-conditioning products to installers used images of a green frog and phrases such as 'green air conditioning' and 'environmentally preferred', and the logo 'Ozone Care™' directly in association with FR 12™ in its technical and promotional materials. FR 12™ contains a component gas that has ozone-depleting potential. There was a comparable component available in the market at the time that had no ozone-depleting potential at all.

In the example above, general terms, a trade mark and the image of a frog were used to indicate that the product would not be harmful to the environment (in particular to the ozone layer) or was the least environmentally harmful product available. Reference was made to a component that might be harmful, but the lack of explanation about that limitation created an overall misleading impression of the product.

Terms such as 'green', 'environmentally safe' and 'fully recycled' may have more than one meaning. If the meaning taken by consumers is different to the facts then consumers may be misled. Advertisers and sellers must be careful, as these terms are difficult to use with complete accuracy.

Similarly, consumers are likely to view technical terms such as 'biodegradable' as being uniformly positive, and may not realise that biodegradability provides no net benefit to the environment if the products of the decay are themselves toxic or the item will not biodegrade in normal conditions.

Terms used in environmental claims may also change in meaning and relevance as technology and our understanding of environmental processes change.

Businesses involved in advertising and selling need to carefully consider any environmental claims they wish to make. To avoid misleading consumers, the 'green' attributes of the product need to be explicitly identified and the details of these features accurately conveyed to the consumer.

example

This symbol appeared on certain batteries imported and sold in Australia. Consumers rightly understood the symbol to mean that the batteries were recyclable. People buying the batteries, however, were unaware that suitable recycling facilities did not exist within Australia.

In the example above, consumers were misled because, while the batteries were technically recyclable (making them more attractive than disposable batteries), it was not possible for them to be recycled in Australia.

Claims may only relate to one aspect of the product—for example, the packaging, ongoing energy use or manufacturing process. Such claims need to make it clear which aspect they relate to.

?

Does the product have any environmental benefits or not cause harm to the environment?

What exact parts of the product do the 'green' claims relate to (e.g. the contents or the packaging)?

Have the technical meanings and limitations of any claims been explained?

Are the claims supported by the existence of a real and overall environmental benefit, or is there an environmental downside to the product which is unstated?

Has the information been conveyed to the audience in a way which does not give false impression?

## Cash back offers

Cash back offers are a form of discounting. Instead of marking down product prices, manufacturers and retailers maintain the price but offer to return some of the consumer's money after purchase. There are no intrinsic problems with this marketing approach, but care should be taken in using it.

example

Certain cans of deodorant have shrink-wrap packaging carrying the words '$3 Cash Back'. After returning home and opening one of three cans purchased, a consumer finds that the offer is limited to one can per customer, and that in any event the offer expired a week earlier. The consumer has been misled and would not otherwise have made the purchase.

In this situation the packaging was misleading because the bold representation of the cash back offer was made without equally prominent mention of the limitations. As a result the consumer believed the offer applied to each product purchased. This kind of packaging prevents consumers from inspecting the limitations on the offer.

?

Has the cash back offer been structured properly?

Are the marketing representations and terms and conditions of the offer sufficiently and clearly accessible to potential buyers?

## Consumer guarantees

All goods and services purchased from 1 January 2011 will have consumer guarantees attached to them. Consumer guarantees replace the implied conditions and warranties which previously existed in national, state and territory laws.

Consumer guarantees give consumers a basic, guaranteed level of protection for the goods and services they buy.

Many businesses choose to offer extra warranties or promises—often called voluntary or extended warranties—in relation to their goods or services. However, consumer guarantees automatically apply regardless of any other warranty given by a seller or manufacturer of goods or services.

## What are the guarantees?

In relation to the supply of goods to a consumer, consumers have guarantees that:

- goods are of acceptable quality; that is, they are safe, durable and free from defects, are acceptable in appearance and finish and do what they are ordinarily expected to do
- goods are fit for any purpose specified by the consumer or supplier
- goods match any description given to them, either verbally or on packaging or labelling
- goods match any sample or demonstration model shown
- repair facilities and spare parts will be reasonably available for a reasonable time
- any express warranty given will be complied with
- they will have clear title to the goods
- they will have undisturbed possession of the goods
- there will be no undisclosed securities or charges attached to the goods.

Consumers have guarantees that services provided to them will be:

- provided with due care and skill
- fit for any purpose specified by the consumer or supplier
- provided within a reasonable time, where no time has been agreed.

Statutory rights apply whether the goods are new, 'seconds' or second-hand.

The consumer guarantees will also generally apply to goods purchased online.

## What happens if the guarantees aren't complied with?

If any of these guarantees are not complied with, then the consumer may take action to obtain a remedy from the supplier or, in some cases, the manufacturer or importer. The remedies are generally a refund, replacement, repair or having an unsatisfactory service performed again. If the guarantees have been met, the consumer guarantees do not require businesses to provide a remedy.

Generally, if a failure to comply with a guarantee is minor and can be easily remedied, the supplier can choose whether they wish to repair or replace goods or fix problems

with services. However, when a failure to comply with a guarantee is major, the consumer can choose their preferred remedy.

example

A consumer purchases a desk for $800 from a furniture store and specifies that they need it to hold a computer and other electronic equipment. When the consumer puts their computer on the desk the legs snap and the computer is damaged.

In this case the consumer guarantees in relation to acceptable quality and fitness for purpose have not been met, as a reasonable consumer would expect an expensive desk to hold a computer without breaking.

example

A consumer contracts with a painter to paint the outside of their house. The painter does not remove the old paint before doing so and after a few months the new paint begins to flake and peel off.

In this case the consumer guarantee in relation to due care and skill has not been met and the consumer would be entitled to a remedy.

## Misleading consumers about their rights

Consumer guarantees for goods or services cannot be altered or waived by sellers or consumers. Any term in a contract which tries to limit or exclude consumers' rights under the consumer guarantees will be void, which means that the business cannot rely on it to avoid providing consumers with a remedy.

Further, if a business attempts to restrict or limit consumers' rights under the guarantees, it is likely to also breach the provisions on misleading or deceptive conduct and false or misleading representations.

## Voluntary warranties or warranties against defects

Some promises are made voluntarily by a seller to make products or services more attractive, such as a higher level of after-sales service than would ordinarily be expected. It is these promises that consumers are most familiar with, because sellers often highlight them. These are the 'voluntary' warranties and are an explicit part of the contract between a buyer and a seller.

In contrast to the consumer guarantees, voluntary warranties can be changed by agreement between the parties.

Advertisers and sellers must note this difference between voluntary warranties and their responsibilities under the consumer guarantees and be particularly careful not to deny consumers their rights in law.

No set time frames apply to the consumer guarantees. How long they apply depends on the nature of the good or service in question. The consumer guarantee may apply after any voluntary warranty has expired.

**?** Could any of the terms or conditions, or advertising or selling techniques, give the impression that any statutory rights do not apply?

If so, what changes are needed?

For more information about these issues, see *Business snapshot: Consumer guarantees*. The ACCC has also produced a video training module for businesses to use to train their managers and sales staff about the consumer guarantees. Both are available from the ACCC website at www.accc.gov.au/consumerguarantees.

## Lay-by sales

A lay-by agreement is one whereby goods are delivered to the consumer only when the total price of the goods has been paid, and the transaction involves payments spread over at least three instalments (including any deposit), or two instalments where the agreement specifies it is a lay-by agreement.

Sections 96–99 of the ACL set out some basic rules about lay-by agreements including:

- a lay-by agreement must be in writing and a copy must be given to the consumer
- a consumer may cancel a lay-by agreement at any time, subject to the payment of a termination charge, which must not be more than reasonable costs incurred by the supplier
- a supplier may cancel a lay-by agreement only if:
  – the consumer has breached a term of the agreement, or

– the supplier is ceasing to engage in trade or commerce, or
– the goods are no longer available

- in the event of cancellation by either party, the consumer is entitled to a full refund of amounts paid.

Where a consumer cancels a lay-by agreement, the supplier is entitled to recover a reasonable termination charge. This amount may be withheld from any money repaid to the consumer or recovered from the consumer if the total amount paid by the consumer under the lay-by agreement is not enough to cover it.

### Offences, remedies and penalties

Contraventions of the lay-by sales rules of the ACL are subject to fines of up to $30 000 for a body corporate and $6000 for an individual, and can attract injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders. Contraventions can also attract civil pecuniary penalties, with maximum penalties of $30 000 for a body corporate and $6000 for an individual, and public warning notices.

## Words and phrases—handle with care

As noted previously in relation to environmental and country of origin claims, certain words and phrases can create problems. Jargon in particular can mislead. Words and phrases that are used every day by some industry sectors may have an entirely different meaning for ordinary consumers. If consumers take a different meaning to the one that is intended, they may be misled.

An area of concern is the use of simple words that have universal meaning. Words like 'free' and phrases like 'cost price' are powerful marketing tools but may have multiple meanings in a given context. Advertisers and sellers naturally want to harness this commercial power, but they should avoid the possible costs of misleading consumers and breaching the ACL.

**Free (in relation to price)**. Even after decades of use, the word 'free' remains a marketing marvel. The idea of getting goods or services without charge can excite keen interest in consumers. In their anticipation consumers will usually think of 'free' as absolutely free—a justifiable expectation. However, the business making the offer may be thinking about the costs of that offer, its structure and the limitations that will apply.

When the costs of a free offer are recouped by means of price rises elsewhere, it is not truly free. An example is a business that makes a 'buy one, get one free' offer, but raises the price of the first item to largely cover the cost of the second (free) item.

A business cannot make a free offer and at the same time try to finance it from the pockets of consumers. To do so is to mislead consumers, who may not expect (unless they are explicitly told) that 'free' does not really mean free.

Another example is a manufacturer's use of the phrase '10 per cent free'—meaning that the price to the consumer is the same but they receive an additional 'free' volume of the product. But if the consumer pays more for the product this could be misleading, because the additional volume is not actually free. This often happens because the manufacturer is unable to control the eventual price that retailers charge.

Businesses using a phrase like '10 per cent free' must be careful to anticipate and deal with hidden cost recovery or price changes occurring as the product passes from manufacturer to wholesaler to retailer.

Simply put, businesses may get into trouble with free offers if they do not reveal the complete truth. The previous discussion on disclaimers and fine print illustrates some of the problems.

What is said above about the word 'free' applies to all commonly used marketing words and phrases.

**Free (in relation to content).** The word 'free' is also popular in the marketing of products when the seller wants to indicate that the product does not contain a particular attribute or ingredient. The most obvious example is food. As discussed above, the word 'free' is powerful and absolute. If the product does in fact contain the thing that it claims to be 'free from', the seller should consider a different claim that more accurately describes the product. Food labelled as 'lactose free' should be 100 per cent free of lactose—even a 0.1 per cent concentration may be perceived as misleading or deceptive.

A full list of powerful words and phrases requiring care would be very long. Its length would be a tribute to the inventiveness of marketers and to the almost infinite variations made on basic formulas. Some words and phrases not mentioned so far are discussed below.

**Cost price.** Cost price reflects only the landed cost of the goods to the retailer—the cost of the goods plus any other costs involved in placing the product in store, e.g. shipping, packaging and transit insurance. This phrase will mislead consumers if the retailer is actually charging a price higher than this and therefore recovering a profit over and above the landed cost.

**Cost plus $5.00.** This is a variation on the above, and plainly a problem if the price of the good is really cost plus more than $5.00.

**New.** This indicates not used, repaired, reconditioned or used in display, and also not old or already known.

**Cheapest.** All superlatives (such as cheapest, best, most used) are comparisons of one product with all others. As noted in the discussion on comparative advertising, comparisons that do not withstand factual scrutiny are likely to be challenged by competitors and/or the ACCC. Such a challenge may succeed in instances where the 'cheapest' claim is said to be supported by specific evidence, such as price surveys, that turn out to be unreliable.

A statement such as 'cheapest car prices in the galaxy' may qualify as puffery, as no one would reasonably be misled or be deceived by it. If a claim could potentially mislead some member of the target audience, the retailer should either refrain from using such a claim or reword the advertisement to avoid misleading consumers.

**Sale.** Depending on the circumstances in which it is used, the word 'sale' may indicate that some goods are now on offer for a certain period and perhaps for certain reasons at less than their normal price. It can also mean that goods are simply available for purchase. Care must be taken in the way the word 'sale' is used.

example

A store has a 'CLOSING DOWN SALE' sign permanently displayed, despite the fact that the retailer has no intention of closing the business. Consumers may be misled into believing that goods will be discounted as liquidators are trying to sell them quickly.

**Discount.** Is the discount a real one with a truthful basis in fact? If a discount is not completely bona fide, consumers may be misled and the trader may be in breach of the ACL.

In summary, these kinds of words and phrases should only be used when there are defensible facts and circumstances supporting their use. When they are used in a limited or qualified sense, this must be made apparent to the consumer.

Remember that these words and phrases work well because they grab the interest of and receive favourable responses from consumers. However, the responses can be broad, so careless or uncontrolled use can result in consumers being misled. Along with possible ramifications of a breach of the ACL, consumers and businesses suffer when this happens.

?

What does the word or phrase mean—not for the business but for the part of the community that will hear and/or see it?

Has the word or phrase been used with exactly that same meaning, or has a different or limited use of it been made?

If the latter, what is that difference or limitation? Is the advertising or selling designed to convey the difference or limitation to the audience?

Are there any other commercial considerations (business or cost structures, cross-subsidisations, hidden interests, etc.) that cut across or negate the apparent meaning of the word or phrase?

If so, has the truth of the commercial arrangements, and their effect on the words or phrases used, been made apparent to the audience?

# 4 POOR SELLING

Poor selling practices

This part looks at some specific practices that are prohibited under the ACL. These practices can arise through sloppy, thoughtless or intentionally misleading drafting. They don't give consumers the complete picture—meaning that consumers do not have all the facts when making purchasing decisions.

## Multiple pricing (section 47)

Under the ACL a business must not supply goods if:

- the goods have more than one displayed price—'contain multiple prices', and
- the supply takes place for a price that is not the lowest of the displayed prices.

### 'Displayed price'

A 'displayed price' is a price, or any representation that may reasonably be inferred to be a representation of a price, including a partly obscured price, that is:

- attached to or on:
  - the goods
  - anything connected or used with the goods
  - anything used to display the goods
- published in a catalogue available to the public, when:
  - the deadline to buy at that price has not passed
  - the catalogue is not out of date
- that reasonably appears to apply to the goods.

A price is not a 'displayed price' when it is:

- entirely obscured by another price, or
- a price per unit of measure and shown as an alternative means of expressing the price, or
- not in Australian currency, or unlikely to be interpreted as Australian currency.

A displayed price published in a catalogue or advertisement ceases to be a displayed price if a retraction is published to a similar circulation or audience to the original advertisement.

If the price clearly states that it applies only to goods at a specific location, this provision won't impact on goods sold elsewhere.

## Not stating the single price (section 48)

Providing consumers with the single, total price payable for goods and services is not just good business practice—it is required by law. Section 48 of the ACL provides that, if a business makes a representation about a part of the price payable for a good or service, it must also provide the single total price of that good or service, in a prominent way. For the purposes of the ACL, a 'prominent way' means 'at least as prominent as the most prominent' part shown.

The single price must include all components payable by the consumer to obtain the goods or services, including any fees, taxes or surcharges that can be calculated at the time the price representation is made.

example

A television costs $1200, incurring GST of $120 and a compulsory warehouse collection fee of $50. That could be advertised as:

Television: $1200 + $120 (GST) + $50 collection fee = **$1370**

or:

**Television: $1370**

It could **not** be advertised as:

Television **$1200** (+ $120 (GST) + $50 warehouse collection fee = $1370) because in this case the single total price payable is not as prominent as the most prominent component.

It could also **not** be shown as:

Television **$1200** (+ $120 (GST) + $50 warehouse collection fee) because in this case the representation does not include the single total price payable.

## Bait advertising (section 35)

Special offers are a legitimate means of getting consumers into your store. The rules on bait advertising, however, require that consumers are given a reasonable chance of actually buying the goods on special offer. If there is not a reasonable chance that the goods will be available at the advertised price, the business may have broken the law.

A 'bait' is an especially attractive special offer made to lure customers to a business premises. When customers arrive, that bait may be gone (either because it was a single item and sold to the first person or because it never existed) and customers are encouraged to buy other, more expensive goods.

example

A used car dealer advertises a certain vehicle at a very special price. When interested customers arrive they are falsely told that the vehicle is already sold or is on a test drive. An effort is then made to sell similar but more expensive vehicles.

When goods or services are part of a particular promotion or sales campaign it can be difficult for businesses to determine how much stock they need. Acting in good faith a business may misjudge demand and be faced with more customers than it can supply products to. The ACL makes allowance for this kind of situation but requires quick remedial action by the business to show that it was sincere when it made the offer.

example

A leading department store holds annual sales of bath linen. In past years, customers have bought more than 100 000 items. A week before the store's ads ran this year it found out it could obtain only 30 000 items from suppliers. The store decided to proceed with the sale on the basis that overall reduced consumer spending would lower its level of linen sales; however, customers sought 115 000 items. The store responded quickly and efficiently by offering customers the same or equivalent linen goods at the same prices within two weeks (that is, offering rainchecks).

In the above example the store could have misled consumers by deciding to go ahead when it knew or should have known it could not meet likely demand. Offering rainchecks means that consumers can still get the special deal even if the current stock has run out. By responding with excellent customer service the store may be able to raise a defence to an action for bait advertising.

When this kind of problem happens, businesses have to immediately ensure customers end up in the same position they would have been in had stocks been adequate.

?

For a promotion, what research and analysis supports decisions on the amounts of stock needed?

Has this research and analysis been documented?

Is the business ready to cope if the promotion is so successful that demand exceeds supply?

# Misleading statements about employment and business opportunities (section 31)

The ACL recognises that some businesses may try to take advantage of people who are unemployed or looking for higher pay. This type of business may print leaflets or put advertisements in newspapers offering high income and exciting opportunities but giving no details. Or it may make employment sound attractive without saying that pay is based on commission. This is likely to constitute a breach of the ACL if it misleads people about what is offered.

If employment or business opportunities are being offered they must actually exist and must be fairly and fully described. This rule applies not only to offers of direct employment with a company but also to the promotion of the whole range of work-at-home, franchise and commission schemes.

example

A private company put job advertisements on various websites offering various IT positions, when it was not offering job opportunities but rather 'IT training' for which applicants had to pay up to $4700. The company also claimed to be offering IT scholarships, when this was not in fact true.

## Predictions

From the outset people are entitled to accurate information about how employment or business opportunities are likely to turn out. If a business advertises predictions about profitability, risk or other relevant aspects, it will need reasonable grounds and a defensible basis for those predictions. If complaints result, the absence of those reasonable grounds will make it hard for the business to show that it properly informed people.

example

An office support franchisor advertised franchises and made a range of representations, including predictions in relation to earnings and profit. It advertised that the annual earnings of a franchisee would be $85 140 for a 30-hour week, $99 330 for a 35-hour week and $127 710 for a 45-hour week, and that net profits would be $52 809 for a 30-hour week, $64 278 for a 35-hour week and $87 328 for a 45-hour week, despite the fact that there was less than 30 hours work a week available.

Businesses should not offer employment or business opportunities in ways that leave those who accept them open to misleading assumptions. To avoid misleading people, those offering employment or business opportunities should:

- have a truthful basis for any offers that are being made
- fully and accurately describe what is offered
- state how payment or other remuneration will be made (for example, commission only, wages or salary)
- ensure that the related advertisement appears under the appropriate heading or classification in the newspaper.

Honestly speaking, what is the true nature of, and prospects for, a given employment or business opportunity?

Has the actual detail of this been shared with those who might take up the opportunity?

Can it be said that they entered the transaction with their eyes open and on an informed basis?

For more information about these issues, see the publication *Misleading job and business opportunity ads: how to handle them*, which is available on the ACCC website at www.accc.gov.au.

## Misrepresentations about interests in land (section 30)

Section 30 of the ACL applies the general rules about misleading conduct to the specific situation concerning interests in land. Interests include the full range of possible legal and equitable interests such as outright ownership, strata title, a mortgagee's or mortgagor's interest, leases, easements and many others. The ACL prohibits misrepresentations about the nature, conditions or circumstances of any kind of interest in land.

example

A business advertises waterfront blocks on an island. The blocks are described as large and having direct water access. Some purchasers buy sight unseen. Others are shown the land at carefully controlled times of the day. As it turns out, most of the blocks are partly submerged by the high tide twice every 24 hours.

In this situation potential buyers have been misled to believe that the blocks are above water when in fact, for a great deal of the time, parts of them are not.

Like all other rules of advertising and selling, rules about interests in land can be used to provide a legal remedy by one business against another.

example

The owner of a shopping complex offered small retailers a variety of inducements (including periods of free rent) to encourage them to occupy prime sites. However, significant terms of the leasing arrangements were not brought to the attention of the retailers before agreements were signed. The retailers discovered that facilities available at the sites were limited, and that there were significant fit-out and lease renewal obligations. The retailers succeeded in their claim that they were misled.

Using complex technical and legal language when advertising and selling interests in land may confuse or mislead. Real estate agents as well as other businesses must exercise care to know exactly what they are offering and to convey all significant details to the interested parties.

?

What is the legal extent of the interest in land being offered and what are the limitations?

Are there any significant but hidden problems or characteristics of the land/building/lease?

Has the seller told the interested party about the important details?

# Falsely offering prizes (section 32)

The ACL states that advertisers and sellers must honour their promises to give gifts, prizes or other free items. These promises are not kept if the items are not provided or if what is given is different from what was originally offered.

example

An electronics retailer commenced a 'Win your System' promotion. Advertising for the promotion described the drawing of tickets for an $8000 high-quality audio system. People were able to enter the draw by attending the retailer's premises, which they did in large numbers. Although the promotion succeeded, the retailer did not want to part with the prize, so it created a large number of tickets bearing made-up names.

If prizes are to be used as an inducement there must be no misleading statements or hidden catches about them. Examples include:

- the offer of a prize did not inform consumers about the requirement to pay the shipping and delivery costs for the goods
- the cost of the 'free' item promised is actually already included in the price being paid—for example, where 'free' updating is offered with a publication but the price paid is the same as that normally paid for the publication, which includes the updating service as a matter of course
- when a prize is offered but actually it is only the further **chance** of winning such a prize that is given.

?

Do the promises made about the gift, prize or free item match what will be given?

If limitations or conditions apply, has the advertiser or seller told consumers about them?

Is there a catch in the offer?

5

# ADVANTAGE

## Practices that take advantage of consumers

This part discusses conduct that is prohibited under the ACL because its sole purpose is to deceive people into parting with their money.

## No intention to supply (section 36)

Businesses should not accept payment if they know, or should know, that they cannot provide the kinds of goods or services promised. A business can breach the ACL by accepting payment when it:

- does not intend to supply the goods or services at all
- intends to supply materially different goods or services
- should have known it could not provide the goods or services within the specified time or a reasonable time.

example

A company selling mobile phones accepts payment for mobile telephone services it is not able to supply as the telecommunications carrier has little or no mobile coverage.

These rules are largely aimed at unscrupulous businesses that know or should know better. All businesses need to be careful to anticipate, wherever they can, interruptions in supply and to adjust their marketing and processing mechanisms accordingly.

?

If goods or services are unavailable, is substitution an option?

Can goods or services be offered that are materially the same?

What precautions and client service measures should be employed?

Are there procedures in place to anticipate supply interruptions and quickly alter company practices (for example, stopping promotions or offering rainchecks)?

## Inertia selling (sections 40, 41, 42)

Inertia selling occurs when a business seeks payment for unsolicited goods or services. Unscrupulous businesses may try to place consumers (or other businesses) in a position where they will either:

- inadvertently pay for unsolicited goods or services—one method is to 'sell' a company an entry in a (perhaps non-existent) business directory by:
  - obtaining the 'authorisation' of a junior member of staff
  - sending an invoice along with a copy of the entry.

  The person running this scheme hopes that payment will occur in the normal course of business and the fact that no goods or services are delivered will go unnoticed. Specific provisions are in the ACL to stop business directory schemes.
- pay for them as the way out of an unpleasant situation.
  In this case a consumer may find that telephone demands for payment are made for something like an unsolicited CD that arrived the previous month. The demands seek to place the consumer in an uncomfortable position.

In these situations, the businesses are depending on the fact that some consumers may ultimately find it easier to pay than to assert their legal rights, or may be tricked into believing that they genuinely owe payment for the goods.

example

A horticulturalist delivers parcels containing small trees to a number of homes. People who inquire about the trees are told they are offered on a trial basis for inspection and planting. The horticulturalist refuses to collect the trees. A month later invoices are received. Those who don't pay during the following fortnight are told that formal collection efforts, including small claims court proceedings, may commence.

Any effort that the horticulturalist makes to collect payment for the unsolicited trees will breach the ACL. Section 41 allows those who received the trees to immediately write to the horticulturalist stating that the goods are not wanted and that they are available for collection at that person's address or another specified location.

The horticulturalist then has one month to collect the trees. The consumer must make the goods available for collection. If no written notice is given to the horticulturalist (i.e. the supplier of the unsolicited goods), the trees become the recipient's property after three months.

?

Are goods or services being provided without the request of the recipient?

Has any effort been made to collect payment or suggest that the consumer owes money for the unsolicited goods or services?

What are the legal rights that the recipient can exercise in response?

## Unsolicited credit and debit cards (section 39)

When the problem of unsolicited credit card offers first emerged, banks and lenders regularly sent millions of cards to consumers. The expectation was that many consumers would take up the offer of credit and consumer lending would increase. However, because many consumers either did not want the cards or could not afford to use them, the provision of credit and debit cards is now closely controlled by the ACL.

Credit and debit cards can now be sent to consumers only if:

- the person who will incur the liabilities has asked for the particular card in writing
- the person who will incur the liabilities has asked in writing for a renewal, replacement or substitute card of the same kind as previously held
- the card is sent (without request) as a renewal, replacement or substitute card for the same kind of card as one that the person who will incur the liabilities has actually used.

Businesses cannot add a debit facility to a credit card, or vice versa, without a written customer request.

example

A consumer requests a credit card but does not use it. A card of the same kind, from the same lender, appears in the mail one year later. The lender involved has breached the ACL since it is not allowed to automatically send replacement cards to those who have not used the original card they requested.

A business may think that new cards with added features could be sent to existing customers. However, this may be an unsolicited offer of credit if it is sufficiently different to be considered a separate product to the one currently held by the customer.

Sometimes businesses provide consumers with a card to make payments on credit agreements for particular purchases. The business should be clear about whether the card can be used as an ongoing credit facility for other purchases. If not, consumers could be misled about the nature of the contract.

?

Does the business provide credit or debit products?

When cards or details necessary to operate an account are dispatched, replaced or changed, is care taken to ensure that previous cards or accounts have been used or that a new card or account has been requested in writing?

Is the new offer being made to existing customers different enough to be considered an entirely new product?

# Referral selling (section 49)

Referral selling occurs when consumers are induced to buy a product partly because of promises about rebates, commissions or other benefits they will receive once they introduce other buyers to the product and those other buyers actually purchase the product.

The ACL prohibits the use of such promises to induce or persuade a person to buy the product when the rebate, commission or benefit depends on the introduced party performing some action, usually making a purchase. Because receipt of the rebate or commission is dependent on the third party performing an action, the consumer may never receive the benefit.

If such an arrangement is entered into after the sale then this is not prohibited by the ACL. The consumer's decision to purchase would be unrelated to the commission or rebate.

example

A business sold 'negative ion mattresses' that it claimed had positive health benefits. A benefit of the purchase was that consumers could become part of a club that would allow them to receive commissions on the condition that they got other people to join the club or buy mattresses.

?

Is the consumer being persuaded to purchase by promises of a later rebate, commission or other benefit?

Is this reflected in a higher initial price?

Should the consumer really expect to 'finish ahead' in the end?

# Pyramid selling (sections 44, 45)

Pyramid schemes are illegal selling arrangements in which:

- consumers make a payment to join the scheme (a participation payment)
- consumers are substantially induced to join the scheme on the basis that they can subsequently earn payments for inducing others to join the scheme.

Some pyramid schemes require recruits to simply buy a place in the scheme. Others try to disguise themselves by selling a product that has no real use or value. These schemes are closely related to referral selling schemes. The main difference between the two is that the revenue from pyramid selling schemes is based on recovering a portion of the participation payment (i.e. the joining fee) from those you introduce to the scheme, whereas referral selling involves the sale or resale of goods or services with the promise of a commission for subsequent sales to other parties.

example

A scheme based on an imaginary airliner has four levels of players comprising the pilot, two co-pilots, four crew and eight passengers. New players enter as passengers and pay a fee directly into a trust account. When all seats are filled the plane 'takes off', the pilot leaves with the winnings, the flight splits into two games, and everyone left is 'promoted'.

The reality of pyramid selling is that it tends to heavily reward the very top of the pyramid at the expense of everyone below. The vast majority who join the scheme late are led to believe that they will also benefit financially. They don't; they just lose their money.

The ACL prohibits pyramid selling because unscrupulous operators use it to exploit consumers.

?

Does the commercial proposal put to consumers have the characteristics of a get-rich-quick pyramid selling scheme?

Are these characteristics hidden by the positive claims about the scheme's benefits?

Should consumers be wary about the promises being made?

# Multilevel marketing

Multilevel marketing schemes differ from pyramid schemes in that they have a reward system for sales of products and services rather than for recruiting other players. Businesses considering multilevel marketing need to be extremely careful that their scheme doesn't have the characteristics of a pyramid scheme.

Multilevel marketing schemes are more likely to be considered genuine if there is a real demand for the products on a continuing basis. If there isn't, participants would have to depend on an ever-increasing number of participants to generate income. This is more likely to represent a pyramid scheme. While products in multilevel marketing schemes are generally highly priced, the price should still reasonably reflect the value of the product.

The ACCC also differentiates between referral selling and multilevel marketing. Multilevel marketing participants are not classified as consumers for the purposes of the ACL, as the products purchased are intended for resale. Therefore, the provisions prohibiting referral selling do not apply.

?

Does the commercial proposal seem too good to be true?

Does it offer a genuine product that is likely to be in continuing demand by consumers?

Does the proposal rely on continuing recruitment of new members to generate income?

Does the price reflect the actual value of the product?

Does it appear that there is a greater focus on the benefits of the scheme rather than the benefits of the product?

# Undue harassment and coercion (section 50)

The ACL prohibits coercion, undue harassment or physical force in connection with the supply or possible supply of goods or services, or the payment for them. The provision is quite broad and may apply to:

- a prolonged personal visit by a sales representative who ignores requests to leave
- unwanted persistent telephone solicitations, particularly if calls are made early in the morning or late at night
- bill collectors who call repeatedly and make threats about the legal consequences of non-payment
- use of particularly over-the-top methods of hard selling.

Coercion could occur in the course of aggressive selling. A seller may try to exploit known facts about, circumstances of or statements made by a customer, to force them to agree to a purchase. Such tactics may take advantage of fears about personal safety, age or cultural factors and place the consumer under duress when making a decision on whether or not to purchase a good or service.

example

A debt collector made an excessive number of telephone calls to debtors. The tone of the calls was threatening, abusive and aggressive. The collector misled debtors and others about debt recovery procedures and the consequences of non-payment.

A corporation is entitled to take reasonable steps to pursue a debt. In such circumstances a debtor is entitled to be treated fairly, with respect and courtesy, and not be unduly harassed or coerced. The example above is a real-life example of where the courts upheld the prohibition against coercion, harassment or physical force in relation to payment for goods and services.

The ACCC has guidelines on debt collection and the ACL. These state that an excessive number of telephone calls, using threatening or abusive language or misleading consumers about debt recovery procedures and the consequences of non-payment could constitute undue harassment and coercion, depending on the circumstances of the case. The guidelines cover issues such as:

- where the debtor should be contacted
- how the debtor should be contacted (by phone, in person or through their representative)

- misleading and deceptive conduct
- coercion
- language, violence and physical force.

Are the sales techniques of a business designed to exploit the weaknesses of consumers?

Do the debt collection practices of a business seek to wear the consumer down through embarrassment or threats?

## Unconscionable conduct (sections 20, 21, 22)

Directly advertising and selling products to consumers can be an effective selling technique and is extensively used today. However approaching consumers directly also raises the risk of engaging in unconscionable conduct.

A disparity of bargaining power often arises between a business and its customers. This can be caused by a lack of explanation or adequate information, a failure to properly understand the transaction, or some inherent characteristic of the consumer. Whatever the reason, businesses are not allowed to unfairly exploit a disparity of bargaining power. While the law is not intended to prevent the bargaining inherent in normal commercial dealings, it recognises that unfair situations sometimes arise between businesses and consumers.

Section 21 of the ACL prohibits a business from engaging in unconscionable conduct in consumer transactions—that is, in relation to the supply or possible supply of goods or services. It sets out a range of factors for the court to consider when determining whether unconscionable conduct has occurred:

- the relative bargaining strengths of the business and the consumer
- whether the arrangement contains requirements which are not reasonably necessary for the business to protect its commercial interests
- whether the language in any documentation makes it difficult for the consumer to understand

- whether the business used any undue influence or pressure, or unfair tactics on or against the consumer
- the ability of the consumer to acquire the goods (or an equivalent) elsewhere on comparable price and terms.

This list is not intended to be exhaustive and the court may also take into account any other factors that it regards as being relevant. Particular situations where a high risk of unconscionable conduct may arise are as follows.

*When a consumer has difficulty understanding your advertising message or associated contracts used in marketing the goods or services.*

This may happen because of different levels of English language skills among consumers, a lack of experience in commercial or legal transactions and limited education or numeracy skills. The consumer may be 'tricked', often inadvertently, into making a decision which they do not fully understand. Businesses should take care to fully explain the transaction and ensure that the consumer is completely aware of what they are doing.

*When a consumer has a particular disability—including intellectual impairment, physiological disability and psychiatric or psychological disability.*

Consumers in this category may have difficulty understanding your advertising message, any qualifications that apply, or associated contracts—particularly if lengthy documents are involved. This may be the case when their particular personal situation or characteristics renders them unable to completely judge the value or usefulness of a product for their needs. Businesses should not use any such characteristics to leverage an advantage over the consumer.

*When a consumer's age, health or social situation makes them particularly vulnerable to promotions regarding certain products.*

Elderly or seriously ill consumers may hold concerns for their health, and therefore more readily accept claims of increased wellbeing or longevity. Similarly, young consumers may be more susceptible to advertising that concentrates on popularity or self-image.

Those advertising or selling products to these kinds of consumers should take care that they do not attempt to prey on the fears or insecurities of consumers in conducting their business.

*When a consumer may feel intimidated or threatened.*

High-pressure sales tactics, particularly in door-to-door sales, can make a consumer feel uncomfortable or threatened. Using this fear to improve the negotiating position of a business is likely to be considered unconscionable conduct, as well as possibly violating the harassment and coercion principles outlined above.

Particular care should be taken when consumers may be especially susceptible to intimidation due to age, physical size, infirmity, sex or cultural background.

*When a consumer has limited alternatives to the product being presented—this may arise from:*

- *location—e.g. consumers in remote towns and rural locations*
- *socioeconomic situation—e.g. consumers who have low incomes, lack access to credit or are otherwise financially disadvantaged*
- *market conditions—e.g. companies with a monopoly on a specific good or service, or a market where all competitors use standard form contracts and there is little or no ability to negotiate.*

In these situations, businesses may find themselves with significant power over consumers. Companies should be careful not to exploit this advantage over consumers by charging higher prices or imposing onerous conditions. A company exploiting its market power may also violate many of the competition laws.

Unconscionable conduct is covered more completely in the ACCC's *Guide to unconscionable conduct*, available from the ACCC website at www.accc.gov.au.

6

THE LAW
Operating inside the law

## Choosing the right medium for your message

Advertisers and sellers should choose appropriate media for their promotional messages. This may be influenced by the customers they are targeting, the nature of the goods or services, and the type and complexity of the offers. Regardless of the medium, the general rules against misleading consumers discussed in part 2 of this guide (such as intent, overall impression and target audience) apply.

### Labelling

Labels are used by businesses to convey important information about most goods such as foods, clothing and packaged goods. Sometimes this information is required by law (as with the mandatory product information standards under the ACL) or by industry-specific regulation (such as the Food Standards Code). Labels are also used voluntarily by businesses to promote special features of their goods that may be attractive to the consumer or when the consumer cannot see the contents of a packaged product.

The ACL imposes specific labelling requirements in areas such as voluntary claims concerning country of origin or certain compulsory consumer product standards. These have been addressed in earlier parts.

Labels must accurately reflect the contents of the product, as consumers may depend on this information when they can't see inside the packaging. This is often the case with cleaning products, cosmetics or food, and accuracy is particularly important when there are health or safety considerations. The following example demonstrates the importance of correct information on food labels to diabetics.

example

A manufacturer of a fruit ice confection product labelled its product with the claim 'No Added Sugar' and indicated in the nutritional information panel that the sugar content was zero. The product actually contained a significant amount of naturally occurring sugar from its high fruit content.

Labels on clothing or food products can be quite small. They should be large enough and placed to draw attention to any features that consumers need to know. Manufacturers need to check whether there are government regulations or industry guidelines that specify the requirements of a legible label.

### Unit Pricing Code

The Unit Pricing Code makes it compulsory for certain grocery retailers to use unit pricing when selling non-exempt grocery items to consumers. This enables consumers to assess the price of a range of comparable items by using a common measure, or unit price, when purchasing grocery items.

For further information on the Unit Pricing Code, see *Unit pricing: a guide for grocery retailers*. This publication is available on the ACCC website at www.accc.gov.au or by contacting the ACCC Infocentre on 1300 302 502.

## Television and radio

Television and radio are popular media for advertising and marketing campaigns because they reach a wide audience. However, they do have limitations. There are two ways in which they can convey information:

- brief advertisements broadcast during breaks in or between programs
- segments that form part of the actual program or entertainment.

Brief advertisements (usually about 30 seconds long) can only convey limited amounts of information. Therefore, it may only be possible to make simple offers or to advertise the availability of goods and services in a general way. Television advertisements may use a combination of images, text and commentary to create an overall impression. These elements should be balanced in a way that ensures none of the important elements of the offer are obscured by other parts of the presentation. Misrepresentations may occur through using graphics that divert attention away from important text, or commentary that is too briefly displayed or spoken or too faint to be understood or heard.

Important qualifications should appear for sufficient time on screen (as text, symbols or graphics) to be understood by the audience and reinforced by voiceovers.

example

A television commercial for an internet service provider is busy with flashing images and loud music that indicate an unlimited service. A barely audible voiceover announces that the service is only available in capital cities.

Program segments or 'infomercials' can be a problem when there is some ambiguity about their purpose. Consumers may be misled if specific products are promoted in conjunction with matters of public interest, such as news or advice about health and wellbeing, and it is not clear that the presentation is made on a commercial basis. Many infomercials include a statement at the bottom of the screen that the program being viewed is a paid presentation—a feature seen by the ACCC as good practice.

Endorsement of certain products, services and industries by eminent people is a common advertising method. However, consumers may be led to believe that such endorsements have been provided based on that person's own analysis of the product or service, rather than under a commercial agreement. This is particularly important where the presenter's position, representation or status suggests that they can be relied on to have special knowledge about the products or services. As with infomercials, advertisers should take care to ensure that consumers are aware of the fact that a commercial message is being presented.

## The internet

The internet is an effective arena for advertising and marketing because of its pervasiveness and interactivity. Some businesses have an internet presence complementing their 'bricks and mortar' operation. For others, the internet is their shopfront—they have no physical retail premises. Businesses need to understand that they have the same obligations online as they do offline.

Entire transactions, from the initial offer to the final purchase, can be done on the internet. All of the information that the consumer needs to evaluate the purchase should be available at the time they make their decision. Websites can provide a great deal of information to consumers. However, providing every bit of information about the offer may not be enough to stop consumers from being misled if the information is not organised to give the correct impression.

Internet traders also potentially have access to a worldwide audience and need to be aware that people from other countries can view the site. The consumer protection laws of those countries will apply to the site because the trader is effectively carrying

on business in those countries. Therefore, businesses should either restrict their offerings to particular countries where they meet applicable consumer protection laws or have in place a system to ensure universal compliance.

If you would like to find out more about internet commerce, visit the ACCC website at www.accc.gov.au.

## Unsolicited consumer agreements

From 1 January 2011 a single national law will cover unsolicited sales practices, including **door-to-door selling**, **telephone sales** and **other forms of direct selling** which do not take place in a retail context. This national approach replaces the eight state and territory regulatory regimes and simplifies the rules that apply to unsolicited sales.

The new laws provide express consumer rights, including a 10-day cooling-off period and the right to terminate an agreement **after** the 10-day cooling-off period in various circumstances.

The ACL also sets out the disclosure obligations when making an unsolicited agreement. These include:

- providing a copy of the agreement—after it is signed by the consumer—if the agreement is made in person
- if the agreement is made by telephone, providing a document evidencing the agreement **within five business days** after the agreement is made (or a longer period agreed by the parties). This document can be given personally, by post or, with the consumer's consent, by email.

Permitted hours for telephone sales are regulated under the *Do Not Call Register Act 2006* and associated telemarketing standards.

Other forms of contact regulated by the ACL, such as door knocking, specify that dealers are only permitted to call on consumers to negotiate a sale between the following hours:

- Monday to Friday—from 9 am to 6 pm
- Saturday—from 9 am to 5 pm.

Dealers are prohibited from calling on a consumer on Sundays or public holidays.

The provisions of the ACL relating to misleading and deceptive conduct also apply to all direct forms of selling. In the case of door-to-door selling, success usually depends on signing consumers up on the spot. In this situation businesses must ensure that their sales staff do not stray from truthful representations to make a sale.

## Outdoor advertising

Outdoor advertising includes:

- posters on hoardings
- billboards
- signs at sporting venues
- electronic and neon signs
- aerial displays
- transit advertising on buses, taxis and commercial vehicles
- signs identifying premises.

Outdoor advertising is often viewed from a distance or from a moving vehicle. In most cases such advertising will only hold the viewer's attention for a moment. Depending on the location, it can also be viewed by a wide audience. So the principles discussed in part 2 are particularly important. All elements of the presentation should be legible, including any fine print. For this reason outdoor advertising may be better suited to promoting brand or product recognition or very simple offers.

example

A car rental company advertised cars and trucks on billboards at a single price per day. No other information was provided, but when consumers contacted the company they found that there were other costs such as insurance, or that conditions applied such as minimum periods of rental. Consumers were misled because these details were important considerations to the overall price.

## Brochures, pamphlets and flyers

Brochures, pamphlets and flyers are a traditional form of promotion that can provide consumers with extensive information or a summary of information about a product or service. Consumers can take them away and digest the information in their own time. This is useful if the offer is complex or when there is technical information associated with the product or service.

It is the responsibility of the business making the offer to ensure that the important details are brought to the attention of consumers. While consumers should exercise common sense, they are not required to search exhaustively for the facts. This may include time limitations or conditions on the offer.

example

A telecommunications provider promoted a mobile phone package through a brochure that was distributed through a range of service station outlets. The brochure did not disclose several costs that would be incurred by consumers and in particular failed to disclose a minimum call cost during off-peak periods. This compromised the ability of consumers to make informed decisions.

## Contracts

Written contracts can be the last stage in which representations about an offer are made before the consumer agrees to purchase—usually after other representations such as advertisements, brochures or discussions with sales representatives. Consumers can be misled when the contract has terms or conditions such as exclusions that conflict with earlier representations made. Sellers must draw the consumer's attention to any details that differ between the original representations and the final contract.

Another concern is silence—as discussed earlier in part 3. A contract that fails to mention important aspects of an offer can mislead consumers into entering an agreement, with particular terms and conditions only becoming apparent later.

This has led in some instances to regulation that requires specific disclosures before a contract is entered into, especially in the credit and superannuation industries. Some industries, such as the telecommunications industry, also have codes of conduct that require specific disclosures to consumers.

In addition to the above, the ACL contains rules around the use of unfair terms in standard form consumer contracts—the Unfair Contract Terms (UCT) provisions. Under the UCT provisions, any term of a standard form consumer contract found by a court to be unfair becomes void—that is, treated as if it does not exist. The contract itself continues to operate to the extent that it can without the unfair term.

In determining whether a term is unfair, the court must apply a three-limbed test:

- that the term creates a significant imbalance in the rights and obligations of the parties to the contract, and
- that it is not reasonably necessary to protect the legitimate interests of that party that seeks to rely on it, and
- that it would cause detriment (financial or otherwise) if it were relied upon.

The court must also consider the contract as a whole, and the transparency of the term, when deciding if the term is unfair.

More information on the UCT provisions is available in the publication *A guide to the unfair contract terms law*, which can be found on the ACCC website www.accc.gov.au.

## Agents

Businesses often engage others to prepare promotional material or to make representations on their behalf. This may include advertising agencies, newspapers, magazines, call centres or sales representatives. These services can be either performed in-house or outsourced to other businesses.

A business that has engaged an agent is generally responsible for their conduct. If the agent breaks the law, the business may also have broken the law. Even if the business is not responsible for the agent's actions, the adverse publicity could be damaging to the business. This means that businesses should take care to supervise the activities of their agents.

example

A cleaning franchise commences a new advertising campaign. The company contracts a call centre to take overflow capacity. Consumers telephone to get quotes and to book services. When the services are provided, their price or nature is different from that described on the phone. The cleaning business tries to say that it is not responsible for inaccurate information given by the call centre.

In this situation the cleaning business is responsible for the representations made over the telephone to the consumer. The consumer has made a decision to purchase the service based on the information provided by the call centre. The call centre is acting as an agent for the cleaning business.

# Contacting the ACCC

ACCC Infocentre: 1300 302 502

Website: www.accc.gov.au

Small business helpline: 1300 302 021

For other business information, go to www.business.gov.au

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