



## 3 – CONSUMER LAW

### 3.1 Overview

#### Importance of the Australian Consumer Law

The Australian Consumer Law (**ACL**) (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) commenced on 1 January 2011, superseding the *Trade Practices Act 1974* (Cth) and certain provisions of the various Fair Trading Acts in the Australian States and Territories. The ACL (and the State/ Territory Fair Trading Acts to the extent their provisions are not replaced by the Australian Consumer Law) now constitutes the general consumer protection regulation framework in Australia.

The ACL has a particular focus upon regulating the accuracy and fairness of marketing, advertising and selling to consumers. An understanding of the ACL is therefore extremely important for advertising professionals.

#### Complying with the Australian Consumer Law

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

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

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

Beyond compliance and enforcement by its regulators, the ACL also creates private rights that consumers can enforce through Commonwealth, State and Territory Courts and Tribunals. However, even if a dispute is resolved between the consumer and trader, a regulator may still take compliance and enforcement action against the trader.

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

#### Who falls under the Australian Consumer Law?

In summary, the ACL relates to practices:

- in business-to-consumer situations (this can apply to both advertisers and their agencies);
- in trade or commerce (e.g. relating to the selling and marketing of all types of goods and services);
- mainly in the pre-sale context, although certain post-sale practices are also covered; and
- across all media (including company websites and social networking sites).

#### For example:

Failing to provide after-sales support as promised or making it unduly difficult for consumers to exercise their contractual rights;

The ACL generally provides protections to any person or corporation as a consumer of goods and services but certain protections (namely consumer guarantees, unsolicited selling and lay-by agreements) only apply to a defined class of 'consumers' (being individuals or businesses acquiring goods or services priced at less than \$40,000, or more than \$40,000 if the goods or services are 'of a kind ordinarily acquired for personal, domestic or household use or consumption', or vehicles for use in the transport of goods on public roads irrespective of price).

### 3.2 Common issues for advertisers with the Australian Consumer Law

The ACL addresses a number of consumer issues, including:

- misleading or deceptive conduct;
- false or misleading representations;
- bait advertising;
- offering gifts and prizes;
- unconscionable conduct;
- consumer guarantees;
- unsolicited consumer agreements;
- lay-by agreements;
- unfair contract terms;
- pricing;
- information standards;

- sales practices;
- product safety; and
- country of origin representations.

This guide will review the key provisions of the ACL governing advertising and promotion - misleading or deceptive conduct, false or misleading representations, bait advertising, and offering gifts and prizes.

### ***Misleading or deceptive conduct***

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

This prohibition is a particular exception to the enforcement powers under the ACL. Remedies for a contravention of this prohibition include injunctions, damages and compensatory orders. Civil penalties, criminal sanctions and disqualification orders do not apply to this prohibition due to its broad scope.

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

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

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

### ***False or misleading representations***

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

False or misleading representations banned by the ACL include those that falsely claim:

- goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- services are of a particular standard, quality, value or grade;
- goods are new;

- a particular person has agreed to acquire goods or services;
- to be a testimonial by any person relating to goods or services;
- goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- the person making the representation has a sponsorship, approval or affiliation;
- the price of goods or services;
- the availability of facilities for the repair of goods or of spare parts for goods;
- the place of origin of goods;
- the need for any goods or services;
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;
- any actual or implied requirement for a person to pay for a contractual right equivalent to a statutory consumer guarantee or any other statutory right or benefit that person may enjoy;
- to be testimonials; or
- guarantees, conditions and warranties for goods or services.

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

### ***Offering gifts and prizes***

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

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

### ***Bait advertising***

Section 35 of the ACL prohibits a person from advertising goods or services at a specified price if there are reasonable grounds for believing that the person will not be able to offer reasonable quantities of the goods or services at that price for a reasonable period, having regard to the advertisement and the nature of the market.

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

number of goods or services at a particular price, or that the offer is only available for a specific time period.

### **3.3 Exercising caution with certain advertising practices**

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

- Broad taglines;
- Cash back offers;
- Comparative advertising and use of consumer “surveys”;
- Country of origin claims;
- Disclaimers, elucidators and fine print - advertisements with limitations or disclaimers using an asterisk (\*), ‘conditions apply’, and other clichés to limit the expectations of the audience;
- Endorsements and use of celebrities, characters, businesses or brands;
- Environmental & carbon off-set claims;
- Opinions and exaggerations - although “puffery” is acceptable;
- Popular advertising words and phrases – “guaranteed” “free”; “\$0”; “cost price”; “new”; “cheapest”; “sale”; “discount”; “save”; “best”; “lowest”; “was/now”; “while stocks last”; “exclusive”;
- Predictions;
- Price of goods or services where components are listed rather than a single all inclusive figure;
- Qualifications and exclusionary clauses;
- Reproduction of dramatic events – eg from a movie or another trader’s ad;
- Scientific claims;
- Silence or omission;
- Simplifying material which is inherently complex;
- Sponsorship and ambush marketing;
- Two price advertising; and
- Warranties and refunds.