



18TH INTERNATIONAL
ASSOCIATION OF CONSUMER LAW
CONFERENCE (IACL)

July 19–21, 2023

in Hamburg, Germany

Topic:

Challenges

and

Unanswered Questions
of Consumer Law



Hosted by: institut für finanzdienstleistungen e.V. (institute for financial services)

Further informations: www.iacl2023.com | contact@iacl2023.com

Workshop 26

Limits of Consumer Law

**The target audience test for misleading
or deceptive conduct in Australian law**

by

Michael Pearce SC

B A, LL B (Melb); M Int L (ANU)

Barrister, Melbourne, Australia

20,679* Physicians
say "LUCKIES are
less irritating"

"It's toasted"
Your Throat Protection
against irritation against cough

The figures quoted have been checked and verified to by EVERANIS, ROSS BROS. AND MONTGOMERY, Accountants

Misleading or deceptive conduct in trade or commerce?



THE AUSTRALIAN FEDERATION

- The Commonwealth of Australia
- Six States
- Two mainland Territories

The Australian Consumer Law (“ACL”)

- Uniform Commonwealth/State/ Territory Law
- Schedule 2 to the *Competition and Consumer Act 2010* (Cth)
- Adopted by State and Territory legislation, e.g.
 - *Fair Trading Act 1987* (NSW) s 28
 - *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8.

Prohibitions on:

- Misleading or deceptive conduct (Part 2-1)
- Unconscionable conduct (Part 2-2)
- Unfair contract terms (Part 2-3)
- Unfair practices (Part 3-1)

Other consumer protections such as warranties of suitability and safety of goods, manufacturer’s liability etc.

Misleading or deceptive conduct

Section 18(1) ACL

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

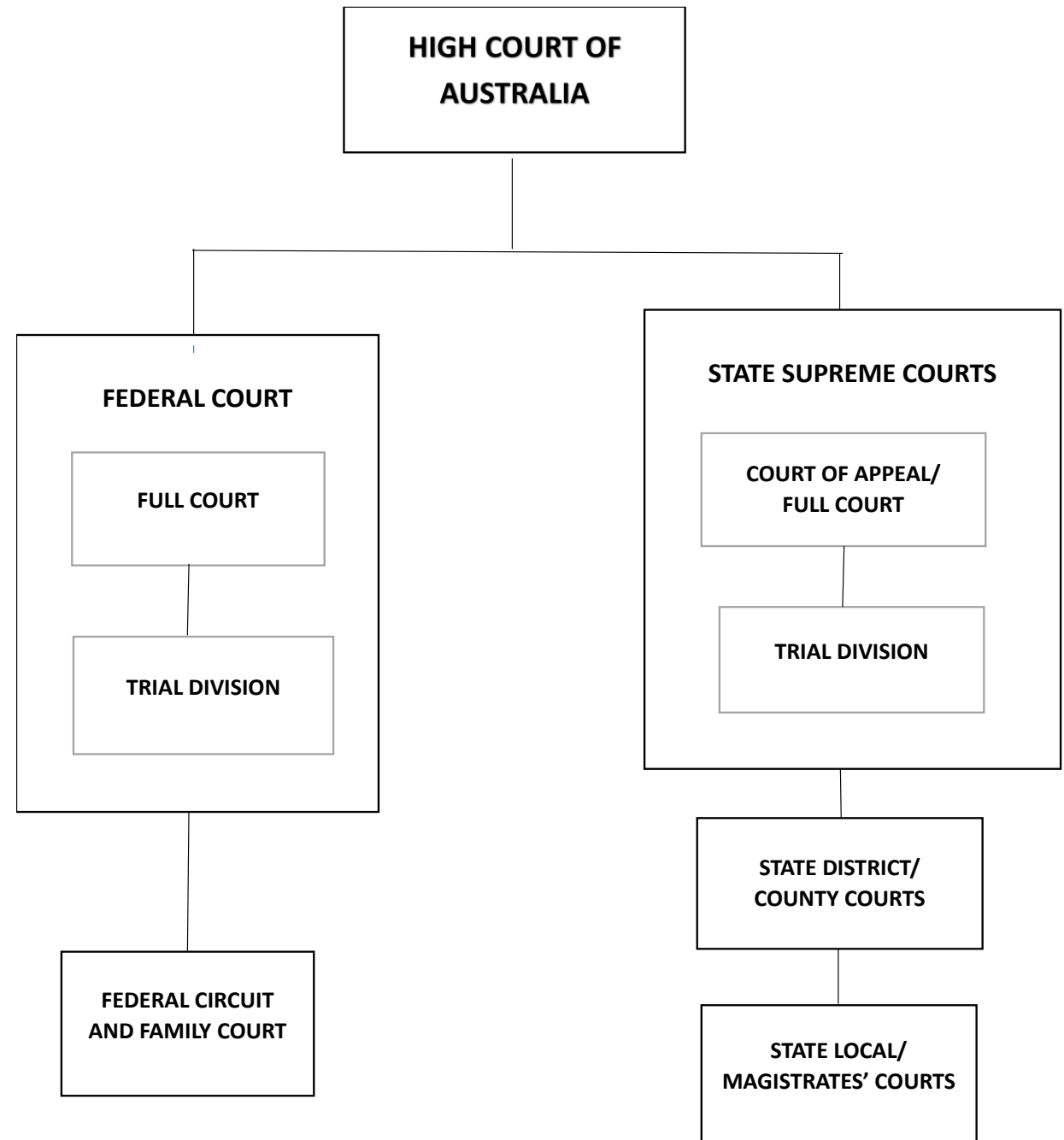
See also

- s 1041H *Corporations Act 2001* (Cth)
- s 12DA *Australian Securities and Investments Act 2001* (Cth)

Previous legislation

- s 52 *Trade Practices Act 1974* (Cth)
- State *Fair Trading Acts*, e.g. *Fair Trading Act 1987* (NSW) s 42; *Fair Trading Act 1999* (Vic) s 9.

HEIRARCHY OF COURTS IN AUSTRALIA



Settled principles of interpretation of s 18(1) ACL

1. Conduct which is alleged to be misleading or deceptive, or likely to mislead or deceive, must be considered as a whole in both its immediate and wider contexts.
2. There is no relevant distinction between the expressions “misleading or deceptive” in s 18 and “false or misleading” in s 29.
3. Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so.
4. It is not necessary to prove an intention to mislead or deceive.
5. It is unnecessary to prove that the conduct in question actually deceived or misled anyone. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself.
6. It is not sufficient if the conduct merely causes confusion.

Settled principles of interpretation of s 18(1) ACL (cont)

7. Where the impugned conduct is directed to the public generally or a section of the public, the question whether the conduct is likely to mislead or deceive has to be approached at a level of abstraction where the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful.

The *Campomar* test

*“Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, **it is necessary to isolate by some criterion a representative member of that class. The inquiry thus is to be made with respect to this hypothetical individual why the misconception complained has arisen or is likely to arise if no injunctive relief be granted.**”*

Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45 at 85 [103].

A singular or plural test?

*“Where the conduct was directed to the public or part of the public, the [inquiry] must be undertaken by reference to the effect or likely effect of the conduct on the **ordinary and reasonable members** of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. **It is necessary to isolate an ordinary and reasonable ‘representative member’ (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind.** This hypothetical construct ‘avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful’. The construct allows for a range of reasonable reactions to the conduct by the **ordinary and reasonable member (or members) of the class.**”*

Self-Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd (2023) 408 ALR 195 at 217-8 [83].

Shortcomings of the test

- Diverse or heterogenous target audience
- If singular hypothetical individual test, no misleading or deceptive conduct although some, possibly many, ordinary and reasonable members of the target audience would have been misled
- If plural test of whether some ordinary and reasonable members would have been misled:
 - how many to satisfy the test ?
 - should the test be satisfied if many ordinary reasonable members not misled or if hypothetical representative individual not misled?

Mayfair Wealth Partners Pty Ltd v ASIC [2022] FCAFC 170

- Whether issuer of promissory notes engaged in misleading or deceptive conduct in promoting the notes as alternatives to bank term deposits
- Target audience was “wholesale clients” or “sophisticated investors” under financial services law tests
 - Net assets of at least A\$2.5 million (approx €1.5 million), or
 - Annual income of at least A\$250,000 (approx €150,000), or
 - Investing at least A\$500,000 (approx €300,000).
- Issuer had relied on legal advice and argued hypothetical individual would not have been misled. Full Court held some ordinary and reasonable members of the class would have been misled. High Court refused special leave to appeal.
- Civil penalties of A\$30 million (approx. €18 million.)

Reform?

