

MISLEADING AND DECEPTIVE CONDUCT

**by
Paul Agnew**

State Manager – QLD

National Compliance & Risk Management Director



MISLEADING AND DECEPTIVE CONDUCT (PART ONE) by Paul Agnew

This is a four part paper on misleading and deceptive conduct. It is an area of law which impacts on nearly every business. To not be aware of and address such issues will lead to financial disaster.

Introduction

If you misrepresent a product the misrepresentation can lead to a breach of contract and damages. In addition to this, legislation has been created to provide additional protection for consumers in relation to unfair practices such as misleading and deceptive conduct. The prime examples of this are s.52 of the Trade Practices Act 1974 (“TPA”), various State Fair Trading Acts (“FTA”), the Consumer Credit Code (“Code”) and the Australian Securities and Investments Commission Act 2001 (Cth) (“ASIC Act”). The ASIC Act is the governing Act in relation to mortgage brokering.

An example of what the provisions state is as follows:

Section 12DA of the ASIC Act:-

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

This article details the basic issues relating to misleading and deceptive conduct in business.

Intent

The intent of the defendant is not relevant. All that is relevant is whether the conduct was misleading or deceptive or likely to mislead or deceive. (*Hornsby Building Information Centre Pty Ltd vs. Sydney Building Centre Limited* (1978) 140CLR216 at 223).

Puffery

At common law there is a clear distinction between a representation and mere puffery. Normally an advertisement is not seen as an offer but as mere puffery and cannot lead to a misrepresentation. However, the misleading and deceptive provisions do not make such a distinction. This does not mean the courts will regard all puffery as misleading and deceptive conduct. As always, it depends on all of the facts and circumstances (*General Newspaper Pty Ltd vs. Telstra Corporation* (1993) ATPR41-274).

Silence

Silence may also constitute misleading or deceptive conduct where it is a duty to reveal relevant facts. Justice Lockhart in *Henjo Investments Pty Ltd vs. Collins Marrickville Pty Ltd (No. 1)* (1988)79ALR83.

Although the courts have repeatedly stated that they are not overturning the common law rule that there is no general duty of disclosure in commercial dealings, they are quite willing, on a case-by-case basis, to form a view of whether disclosure should have been made to avoid a breach of the misleading and deceptive conduct provisions.

An example of where the courts have considered this point was in *Crisp vs. ANZ* (1994)ATPR41-294: A bank manager who insisted on additional security for an overdraft on which he had already dishonoured cheques was found to have breached s.52 TPA by not telling the guarantors of the dishonour when they gave the additional security.

Predictions and Opinions

In determining whether a statement is misleading or deceptive a distinction must be made between statements as to existing facts and predictions. Predictions would normally only be misleading or deceptive if the person making the prediction either knew it to be false or made it without regard as to whether it was true or false (*Thompson vs. Mastertouch TV Service Pty Ltd (No. 3)* (1977) 29FLR270).

Part Two of this paper deals with misleading and deceptive conduct issues relating to disclaimers, legal advice and giving free advice.



Paul Agnew
Mortgage Settlements Australia

This article is for the general information of Mortgage Settlement Australia’s clients and associates. The information contained in this article should not be relied upon without first consulting us and obtaining specific advice.

MISLEADING AND DECEPTIVE CONDUCT (PART TWO) by Paul Agnew

Disclaimer and Exclusion Clauses

As intent is not an element to determine whether conduct is in breach of the misleading and deceptive conduct provisions, a disclaimer as to the truth or otherwise of a particular representation should not, of itself, absolve the maker of the representation from liability. The same result should apply in relation to exclusion clauses. However, this does not mean the disclaimer and exclusion clauses are to be ignored completely for the purposes of misleading and deceptive conduct provisions. This is because in order for the courts to determine whether the conduct is misleading or deceptive the court must consider the conduct as a whole and should consider whether the representation in question, including the disclaimer or exclusion clause, is misleading or deceptive. (*Yorke vs. Lucas* (1985) 158CLR661).

Small print is a feature of modern advertising. Normally small print sets out the conditions and limitations applied to the advertisement. The issue for the courts has been to determine whether the small print is of sufficient prominence to ensure that, taken overall, the advertisement is not misleading. Advertisers often attempt to qualify statements made in advertisements with the addition of words such as “conditions apply”. In *TPC vs. Optus Communications Pty Ltd* (1996)64FCR326 a television advertisement about “weekend local calls were free” was found misleading notwithstanding a prompt which stated “some exclusions apply”.

Legal Advice

An applicant claiming to have been misled but he obtained legal advice will not be a determinative factor in deciding whether the applicant had been misled. However, the courts have taken into account that a solicitor represented an applicant in a transaction where the contract contained a clause expressly negating representations other than those contained in the contract.

Intermediaries

In the *Yorke vs. Lucas* the High Court suggested that a person that does no more than pass on information supplied to him, making it clear that he is merely passing it on for what it is worth and disclaimed its truth or falsity, may not have engaged in misleading conduct if the information proved to be incorrect.

However, the courts have eroded this principal in some cases by stating that if the person providing the information appears to be of a class of person who should know what the facts are, that they are representing on behalf of another, then they may also be liable.

An example of this is a firm of accountants who produced figures supplied to them by their client without checking the figures, and provided the figures to the purchaser of their client’s business, they were then found to be liable when the figures proved to be false. (*Macman vs. Stengold Pty Ltd* (1991) ATPR41-105).

Advice and Gratuitous Comments

A statement of opinion may constitute misleading or deceptive conduct.

If the provision of information is shown to be misleading or deceptive, the mere fact that the information was provided gratuitously will provide no defence. (*Menhaden Pty Ltd vs. CitibankNA* (1984) 1FCR542.)

Advice will be misleading if the person who gives the advice fails to attach appropriate qualifications to the advice, or fails to disclose that the advice is based on less than reasonable grounds (*Sweetman vs. Radfield Management Services Pty Ltd* (1994)ATPR41-290.)

In *Adour Holdings Pty Ltd (In liquidation) vs. Commonwealth Bank of Australia* (1991) ATPR41-147: the local bank manager and the branch loans officer made statements to a customer in relation to the likelihood of approval of the balance of their finance package which had been approved in principal. The balance was subsequently refused by the bank and the applicant was successful in proving a breach of the misleading and deceptive conduct provisions.

As this Part highlights, there are so many ways to fall foul of the misleading and deceptive conduct provisions. Even an “off the cuff” comment can lead to trouble. Part Three of this paper deals with defences to misleading and deceptive conduct and what damages, fines and orders can be granted against you for contravening such provisions.



Paul Agnew
Mortgage Settlements Australia

MISLEADING AND DECEPTIVE CONDUCT (PART THREE) by Paul Agnew

Enforcement and Remedies

Depending on which misleading and deceptive conduct legislation/Code is contravened, the Court may fine the offending party and/or grant:-

- (a) an injunction;
- (b) a community service order;
- (c) a probation order for a period no longer than three years;
- (d) an order requiring the person to disclose information;
- (e) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order;
- (f) an order to terminate or re-open and redraft the contract; and
- (g) damages in favour of the person who suffered loss.

Furthermore, some legislation (including the Code) provide that if a party contravenes, aids, abets, counsels or procures a person to contravene, induces or attempts to induce a person whether by threats or promises or otherwise to contravene or is anyway, directly or indirectly, knowingly concerned in or party to, contravention by a person or conspires with others to contravene a provision of the misleading or deceptive conduct provisions then such person is guilty and hence punishable on conviction. Therefore, to assist an offending party may also lead to contraventions of the misleading and deceptive conduct provisions.

Defences

There are various defences available to an offending party depending on which legislation/Code they contravene. Section 12 GI of the ASIC Act (s.12 GI) is an example of such a defence and provides that it is a defence if the defendant establishes:-

- (a) That the contravention in respect of which the proceeding was instituted was due to reasonable mistake; or
- (b) That the contravention in respect of which the proceeding was constituted was due to reasonable reliance on information supplied by another person; or
- (c) That:
 - (i) The contravention in respect to which the proceeding was instituted was due to the act or default of another person, to an accident or some other cause beyond the defendant's control; and
 - (ii) The defendant took reasonable precautions and exercised due diligence to avoid the contravention.

However, this section, like other defences relating to this area, places the onus of proving such a defence on the defendant.

As always, prevention is the best medicine. The Fourth and Final Part on this topic addresses ways to minimise the risk of breaching such provisions or lessening the impact on your business if such provisions are contravened.



Paul Agnew
Mortgage Settlements Australia

This article is for the general information of Mortgage Settlement Australia's clients and associates. The information contained in this article should not be relied upon without first consulting us and obtaining specific advice.

MISLEADING AND DECEPTIVE CONDUCT (PART FOUR) by Paul Agnew

How to Minimise Claims

Below are some steps which should be taken to minimise breaching the misleading and deceptive conduct provisions and the impact on your business if you do contravene the provisions:

a) A written agreement

A party's complaint normally occurs when it is not clear what the alleged party is obligated to do. To some extent this can be remedied by having a written agreement setting out what the parties will and will not do for each other.

Depending what industry you are in, there may be requirements for you to have your contracts in writing in order to be able to sue for damages. An example of same relates to real estate agents.

(b) File management

Proper file management practice and procedure is important for any professional. This will ensure a paper trail, which can be followed to find what passed between the parties if problems arise. These files can contain instructions and requests for information in writing, notes of all conversations between the parties and important dates to ensure they are not forgotten. Any e-mails between the parties should be printed and kept in a matter file. Never hesitate to ask the other party to confirm something in writing (particularly variations). If there is any dispute at a later time you will have a written record of their intentions.

(c) Membership of industry bodies

Become a member of a relevant organisation which sets out minimum requirements or a standard of conduct of its members. Even if membership to such bodies is voluntary, adherence to their respective codes of conduct can go a long way to assisting with risk management.

(d) Dispute resolution

In the normal course of events, if a client complaint cannot be resolved directly with you, then there is the possibility it will escalate into litigation. You and your clients should consider including a dispute resolution mechanism in your written contract. It may be that the dispute could be referred to a mediator or agreed arbitrator.

(e) Insurance and asset protection

Although it is not a 'front-end' way of avoiding risk in the first place, all business people are advised to carry appropriate professional indemnity insurance and to have an asset protection strategy. This will at least minimise the impact of any successful monetary claim by a former client.

As this Paper has highlighted, there are many traps for the unwary business person in relation to contravening the misleading and deceptive conduct provisions. Be mindful of the points raised and if in doubt, seek legal advice.



Paul Agnew
Mortgage Settlements Australia

This article is for the general information of Mortgage Settlement Australia's clients and associates. The information contained in this article should not be relied upon without first consulting us and obtaining specific advice.