

Publishers Advertising Playbook

Misleading and Deceptive conduct



*Tips and tricks
to keep retailers
out of trouble.*



Penalties

Whether an advertisement appears in print or on a digital platform it must comply with the relevant legislation.

The Australian Consumer Law is the major consumer protection law in Australia. In relation to the ACL, the Australian Competition & Consumer Commission has stated that media companies ‘must take particular care in relation to the products and services they advertise for their clients. They should know their clients’ business and be aware of the requirements under the ACL to minimise the risk of breaching the law’.

The ACCC’s enforcement powers are extensive—for some contraventions it can seek remedies such as criminal or civil pecuniary penalties the greater of \$10 million, three times the value of the benefit received, or where the benefit cannot be calculated, 10 per cent of the annual turnover in the preceding 12 months. Penalties against individuals under the ACL can be \$500,000 per breach.

There are also infringement notice penalties of up to \$108,000 for publicly listed companies, \$10,800 for corporations and up to \$2,160 for individuals, disqualification orders, injunctions to prevent ongoing conduct and corrective advertising orders.

The ACCC, the state and territory consumer protection agencies and any other individual or group can take legal action against businesses for contraventions of the ACL.

Australian Securities & Investments Commission regulates the financial services industry and people engaged in credit activities under a number of Commonwealth laws. ASIC can seek a remedy that punishes a person or entity in response to a wide variety of types of misconduct, from minor regulatory offences (eg. failure to file a form) through to serious offences involving dishonesty or that have a large impact (e.g. through loss of investor funds or damage to the integrity of our markets).

Examples of punitive actions are:

- » prison terms and court orders, such as community service orders; and
- » financial penalties or fines under criminal law or pecuniary penalties under civil law.



All advertising should tell the truth about a product or service and allow consumers to make well-informed decisions.

This is an easy-to-follow guide for anyone preparing or publishing material which advertises goods and services. It will help you ensure that your advertising material is fair and accurate.

When preparing advertising it is important to keep the target audience in mind. Courts have concluded that advertisers should know that readers will include the shrewd and the gullible, the educated and uneducated, with varying degrees of experience in commercial transactions.

Prospective buyers should not have to “read between the lines”. This means that leaving out relevant facts can be just as misleading or deceptive as including inaccurate or incorrect information.

Accordingly, an advertisement may be considered misleading even though it may not deceive more wary readers.

Here are some specific advertising issues that can cause problems...

Misleading & Deceptive Conduct

Businesses that demonstrate legal and ethical conduct build a strong reputation and earn long term customer loyalty. Legal and ethical conduct also protects your business from legal risks.

Good sales performance means more than just knowing how to meet sales targets. You also need to understand your legal obligations.

The key principles of fair advertising

So what is a fair ad?

An advertisement will be compliant with advertising laws if it meets the test of truthfulness and does not attempt to hide or not disclose important information which would otherwise assist the prospective purchaser to make an informed choice.

Consequently, important information should not only be disclosed using language that the reader will understand, but also not be hidden in the fine print.

Similarly, any limitations or exclusions in the offer being made should be disclosed and should not be hidden in the fine print.

Start by asking two fairly straight-forward questions: ‘Is it the truth?’ and ‘Does the advertisement convey a truthful impression overall?’.

Courts have also adopted the following as a test to what is misleading, “the advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions”.

The advertiser is not entitled to assume that the reader will be able to supply for themselves omitted facts or to resolve ambiguities.

In general terms you need to take care that your client’s promotion and marketing are not likely to mislead or deceive people.

An advertisement may be misleading even though it fails to deceive more wary readers.

Potential penalties for breaches of consumer protection legislation are high, up to \$1.1 million for businesses and more than \$200,000 for individuals along with the possibility for civil penalties for those who seek damages as a result of harm or loss caused by misleading and deceptive conduct. This can include publishers.



Pricing

Price is a major factor in most consumer purchasing decisions. Advertisements referring to price should clearly indicate the price at which people responding to an advertisement can buy the advertised goods.

It is illegal to advertise special prices and imply substantial savings when, in fact, the goods and services are normally sold at those “special prices”. Such claims create a belief that savings are possible when they are not and are therefore deceptive and misleading.

Advertisements offering to sell goods at a reduced price, a discounted price, a special price or a lower than normal price, must be accurate.

Recommended retail price

To claim that prices are reduced from the “manufacturer’s recommended retail price list” is misleading and deceptive unless the prices are those at which goods are normally sold within that industry.

If the recommended retail price is not widely accepted in the trade, the comparison may be misleading as no real saving is being offered.

This is particularly relevant in industries where technology changes rapidly or models are continually upgraded.

For example, a television may have a recommended retail price of \$1,000 and at the same time be a two-year-old superseded model, which is actually selling elsewhere for \$600. In this instance it would be considered misleading to advertise “Recommended retail price \$1,000 - now \$600”.

Percentage discounting campaigns

Advertising campaigns that state “Up to 50% off” are likely to cause consumers to believe a number of items are discounted by 50 per cent and that all other items within the store will also be discounted to some degree.

An advertiser should not advertise this type of saving if only a few items are offered at 50 per cent off and the remaining items in the store are offered with little or no discount at all.

They must be able to show that the customer is really saving money.

To limit the stock included in this type of campaign, you could use terms like “Up to X% off all DVDs” or “Up to X% off selected items”.

The test is that it must be clear to the consumer that not all stock is discounted.

Non-stop sales

Continuous advertising of goods or services at “sale” or “reduced” prices is illegal. For example, if a retailer regularly had a “50% off sale” over a period of time, the 50 percent price would be considered the retailer’s normal or regular selling price.

“Clearance”, “closing down” and “liquidation” sales should all clearly distinguish imminent business closure from mere stock clearance.

Bait advertising

Bait advertising is so called because it offers a “bait” to draw customers to the store or business and they can get “caught” as a result.

Enticing prospective customers into stores when there are reasonable grounds for believing that the goods will not be in the store or are unlikely to be available for a reasonable time at the advertised price, is unlawful.

Reasonable stocks must be available to satisfy the expected demand generated by any advertisement.

The definition of what is a “reasonable period” or “reasonable quantities” will vary from one situation to another, depending on the nature of the goods or services advertised.

An advertiser can specify exactly how many items are available for sale at the special price, providing it is made clear in the advertisement.



If an advertiser claims prices have been reduced, they must be able to prove it.

If an advertiser is unable to supply goods at the advertised price, they may offer a “rain-check” or equivalent goods at the advertised price to maintain goodwill.

An advertiser has the option of nominating the period of time for which such an offer is available.

However, any restrictions must be stated clearly. For example, statements such as “Today only” or “Weekend Special” or “Only until Saturday” are acceptable, but must be clear to the reader.

Fine print exclusions

In monitoring advertising standards, Consumer Protection agencies pay particular attention to “fine print exclusions”.

The overall impression created by an advertisement is important.

Qualifications of claims in small print may not correct a misleading impression created by other more prominent words in the advertisement.

Courts have sent clear messages that they expect qualifying expressions in advertising or product descriptions to feature as prominently as other elements that create a general impression.

For example, a fine print exclusion would materially alter the overall impression of an advertisement if a bold banner claiming “50%

off all stock” was supplemented by small print stating “Except cutlery and furniture”.

“Conditions apply” or fine print at the bottom of an advertisement must not contradict the basic message of the advertisement.

Images

Photographs, drawings and other images must correspond with the advertised price and product.

The consumer should reasonably expect to be able to buy the product featured in the advertisement at the price mentioned.

For example, it would be a breach of consumer law to show a current model product if, in fact, the price shown is for a superseded or inferior model.

Similarly, it would be misleading to use the words “From \$X” and depict only the top of the range product, and not the product that is available for the advertised price.

Testimonials

Testimonials are a popular tool for advertisers when promoting their business.

Any testimonial must be truthful and genuine and reflect the honest view of the person providing the testimonial.

Gifts or Prizes

If rebates, gifts or prizes are a part of an advertising campaign and the advertiser does not intend to supply them or intends to supply different items to those advertised, then this would breach the law.

If consumers were required to pay more to claim a “free gift” or if a cash prize was advertised when only store credit will be offered, the advertisement would be unlawful.

Cash back offers or Rebates

Cash back offers or rebates are a form of discounting.

There are no problems with this marketing approach, but care should be taken in using it. Any conditions, limitations or restrictions should be made clear to the consumer before the purchase.

Any advertisement offering a rebate must show the goods or service for sale at the price the consumer will pay for that particular item. Not the price after the rebate has been given.

All conditions to the offer must be included in the advertisement.

Free range

Using claims such as free range can influence a consumer’s purchase decision when buying eggs or meat.

Using free range claims must not be used unless the advertiser can prove that their products are free to roam.

An advertiser must also be vigilant about the use of images and the effect they have. If the image shows animals roaming freely and this is not the case then the use of the image may be considered to be misleading.

The ACCC has taken action against a number of advertisers for misleading claim in relation to their animals being allowed to roam free. One advertiser was ordered to pay costs and penalties of \$375,000 whilst other advertisers have been fined similarly.

“Conditions apply” or fine print at the bottom of an advertisement must not contradict the basic message of the advertisement.

Premium Claims

Premium claims are ones which go beyond generic descriptions and which influence a purchase based on a person's emotional response.

Examples of claims are ones that may suggest a product is superior to others by stating that the product or service may be 'all-natural', 'environmentally friendly' or 'improve physical and mental performance beyond the benefits of other products'. All these claims could be considered to be misleading if there is no basis for making the claim.

Health claims and other benefits

When advertising health products and services it is essential that any claims can be well substantiated. Any reference to the findings from clinical trials or studies must be legitimate and should be peer reviewed.

Due to the potential risk to a person's health it is important that any claims made in relation to these products and services are not misleading.

Claims should be truthful and enable a person to make an informed choice.

Environmental Claims

Claims in relation to being green, safe, recycled and non-toxic are very appealing to many environmentally-conscious consumers.

Any environmental claim should be truthful and not misleading and be advantageous to the environment.

Correction notices

Consumer protection regulators recognise that while advertisers generally endeavour to be accurate, there will be occasions when errors occur.

If consumers were required to pay more to claim a "free gift" or if a cash prize was advertised when only store credit will be offered, the advertisement would be unlawful.

We recommend that as soon as a mistake is identified, an apology or clarification statement is placed in the publication in which the error occurred. If the error was in a catalogue or brochure, then a newspaper correction would be acceptable.

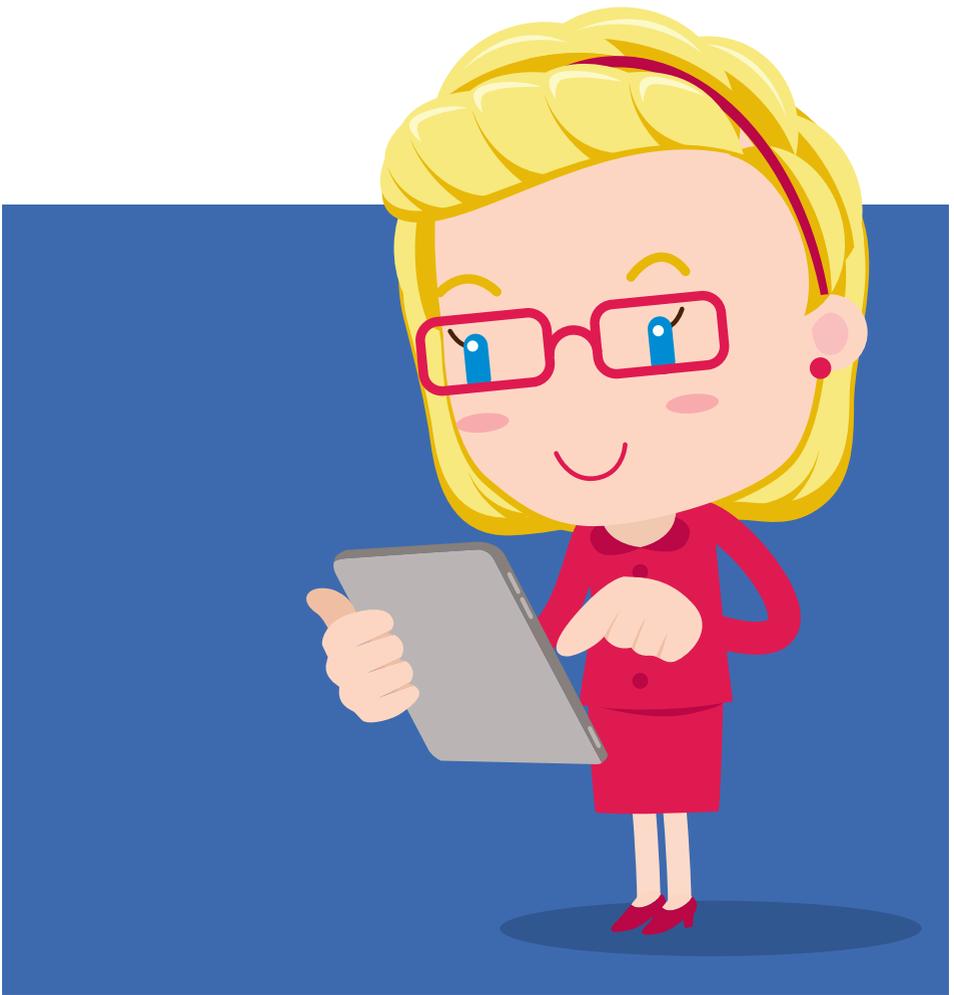
Prominent notices at store level informing prospective customers of the misrepresentation are also good practice.

Publication of corrections does not mean that, in some circumstances, regulators will not make further investigations.

Puffery

Puffery is an over-exaggerated claim. 'I make the world's best coffee' is an example of puffery and given the nature of the claim and its far-fetched nature it would not be misleading.

Any claim which is vague or one which a consumer would understand to be larger-than-life and highly unlikely would not be considered to be misleading.





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