

Kim Tunbridge explains the implications of falling foul of s52 of the *Trade Practices Act*, which deals with misleading and deceptive conduct in trade or commerce.

The marketer's guide to section 52.

SO WHAT IS s52?

Section 52 of the *Trade Practices Act 1974* (TPA) is one of the most commonly used sections of the TPA and has serious and far reaching implications for all those involved in the marketing industry. Section 52 states that:

"A corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

This section applies to the conduct of corporations as well as to the promotional activities of professional persons (such as solicitors, accountants, doctors and engineers).

WHAT ARE THE IMPLICATIONS FOR MARKETERS?

In providing marketing services, marketers are typically engaging in conduct (either themselves or for the benefit of their clients) that is in trade or commerce. As a result, s52 should be a daily consideration.

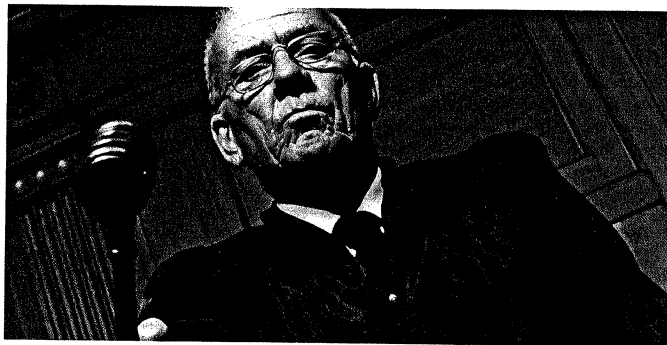
The real concerns for marketers are:

- ❖ whether their conduct or their clients' conduct will be misleading or deceptive or likely to mislead or deceive;
- ❖ whether the marketer will be held liable for such conduct; and
- ❖ even if the marketer is not held liable for such conduct, whether the marketer may be liable to the client for breach of contract or professional negligence.

WHAT CONSTITUTES MISLEADING AND DECEPTIVE CONDUCT?

Misleading and deceptive conduct may include:

- ❖ lying to a person;
- ❖ creating a false impression;
- ❖ making false or inaccurate claims;
- ❖ leading a person to an incorrect conclusion; or
- ❖ leaving out important information.



In determining whether s52 has been breached, it is necessary to determine the class of persons to which the conduct has been directed. Consideration is then made as to whether an ordinary or reasonable member of that class of persons would be misled or deceived or be likely to be misled or deceived.

IMPORTANT THINGS TO KNOW ABOUT s52.

Intention to mislead or deceive is irrelevant. A corporation that has acted honestly and reasonably may still be in breach. No one needs to actually be misled or deceived. It is sufficient to prove that there is a real or not remote possibility that conduct will mislead or deceive. It does not matter whether that possibility is more or less than 50 percent. Silence (including omitting or hiding relevant information) may constitute misleading and deceptive conduct.

BUT I'M ONLY FOLLOWING MY CLIENT'S INSTRUCTIONS...

Even if a marketer is taking instructions from a client in preparing an advertisement or other materials containing representations

regarding a client's product or service, the marketer may be held liable for breach of s52 for aiding and abetting in the breach. It is not enough to rely on a client's sign-off and the scrutiny of advertisements by a client's legal adviser. Wilful blindness or a 'don't ask, don't tell' policy won't relieve liability.

CONSEQUENCES OF BREACH.

If a marketer or a client breaches s52, the ACCC may seek an injunction to stop the offensive conduct. It is also possible for third parties (including consumers and competitors) to bring an action against the marketer or the client. Such a third party may seek an injunction and/or damages for loss and damage suffered as a result of the breach. The party may also seek court orders to require the marketer or client to undertake corrective advertising.

LEGAL TIPS FOR MARKETERS.

As marketers are often involved in the making of representations to clients or to consumers on behalf of clients, it is absolutely crucial that they consider the application of s52 in every-they do.

ACTING FOR CLIENTS.

When acting for a client, to minimise a breach of s52, marketers should:

- ❖ make inquiries regarding the accuracy of representations, especially if there is any reason to believe that they may not be true;
- ❖ ensure that clients sign a written service contract in which the client warrants that all representations are accurate, complete and up-to-date and that the client will indemnify the marketer for any ACCC or third party claims;
- ❖ require clients to sign off on all marketing and advertising materials and warrant that such materials are accurate, complete and up-to-date; and
- ❖ obtain a legal review and sign-off of all marketing and advertising materials.

PUFFERY.

Puffery consists of claims that are exaggerated or vague, which no one could treat seriously or be reasonably misled by (e.g. 'best food in town'). Its intention is to attract the interest of a potential purchaser. Such conduct is not a breach of s52. To minimise a breach of s52, marketers should:

- ❖ ensure that all statements are clearly 'puff' and could not be reasonably believed by a person in the class of person at which the statement is being targeted.

BRAND NAMES.

A client may select a new brand name for a product or service. If the name is deceptively similar to another competitor in a similar market, such conduct may constitute a breach of s52. It may also result in claims of trademark infringement and passing off. To minimise a breach of s52, marketers should:

- ❖ conduct searches of the Trade Marks register, ASIC register, *White Pages*, *Yellow Pages* and domain name registers to identify whether the proposed brand name is similar to an existing brand name; and
- ❖ ensure that the name is unique and distinctive.

SPONSORSHIPS AND ENDORSEMENTS.

A client may represent that a product or service is endorsed, approved or sponsored by another person or corporation. If such an endorsement or sponsorship is misleading or deceptive such conduct may breach s52. It may also be defamatory and/or a breach of contract. To minimise a breach of s52, marketers should:

- ❖ ensure that the endorsement, approval or

sponsorship exists and is true;

- ❖ ensure that details of, and the extent of, the endorsement, approval or sponsorship have been clearly understood by all parties (preferably in writing); and
- ❖ where practical, use a pre-agreed statement, which has been previously approved by the parties.

COMPARATIVE ADVERTISING.

A client may engage in comparative advertising by comparing its product or service with the product or service of a competitor and making a comparison with respect to the specific product or service attributes.

Comparative advertising is examined more critically as the consumer is less likely to regard what is said or written as a mere exaggeration. To minimise a breach of s52, marketers should:

- ❖ ensure that comparative advertising is performed fairly – compare 'like' with 'like';
- ❖ ensure the information is accurate; and
- ❖ ensure that all relevant information has been disclosed.

PRICE PROMOTIONS.

A client may use price comparisons to entice consumers to purchase a product or service with the belief that they are paying less than they otherwise would. Such comparisons may be used to compare an actual price with the client's own previous or normal price, a competitor's price, the recommended retail price or the worth of a product. If the savings are not real, such conduct will be in breach of s52. To minimise a breach of s52, marketers should:

- ❖ ensure that the price comparison is genuine and accurate;
- ❖ ensure that the statement can be supported by objective evidence; and
- ❖ ensure that any previous price was applied to a sufficient and reasonable number of items for a reasonable period.

PRODUCT PACKAGING.

A client may use product packaging to differentiate its product from its competitors' products and to build a brand and identity. If the packaging is deceptively similar to the packaging used by a competitor for a similar product in a similar market, the client may be in breach of s52. There may also be claims for passing off. To minimise a breach of s52, marketers should:

- ❖ research competitors to determine the types of products and services any competitors are distributing, and the look and feel of the products; and

- ❖ ensure that names, colours, size, and look and feel of the products are unique and distinctive.

DISCLAIMERS.

A client may use bold and/or exaggerated statements to sell a product or service and then attempt to qualify such statements by using disclaimers or fine print.

The use of disclaimers may prevent conduct from being misleading or deceptive, but only if the overall impression in the consumer's mind is clear and only if it is a true representation. To minimise a breach of s52, marketers should:

- ❖ ensure the disclaimer is prominent and the text is not too small;
- ❖ if using voiceovers, ensure that such disclaimers are not too quick or too quiet;
- ❖ if using television, ensure that such disclaimers are on screen for a sufficient time to allow a consumer to read them; and
- ❖ ensure that the disclaimer is consistent with the overall impression of the representation.

PUBLICITY.

A client may generate publicity by issuing media releases or participating in interviews with media. The client may also require the marketer to respond to the media on its behalf. If a statement is inaccurate, the client or marketer may be in breach of s52. To minimise a breach of s52, marketers should:

- ❖ be prepared and fully understand the topic being publicised or discussed; and
- ❖ obtain clear instructions on what representations and statements are authorised and the message to be conveyed.

OTHER LEGAL MATTERS.

In addition to s52, there are a number of other related legalities a marketer should consider in providing marketing services. These include breach of contract, defamation, privacy, spam, passing off, trademarks, copyright, confidentiality and other trade practices issues.

This article is an overview of s52 and should not be relied on as a substitute for legal advice. For detailed compliance advice, contact your lawyer or the ACCC. **M**

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