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Rosalyn is a retail law expert, with more than 10 years' experience in the legal industry and a lifetime of experience in retail. Rosalyn has worked in a large international law firm as well as in-house counsel for a listed ASX retailer and is passionate about working with retailers of all types.

About Gladwin Legal

Gladwin Legal is an innovative law firm breaking the rules of traditional legal practice and has worked with clients in both goods and service industries as well as IT, automotive and start-up clients. With no time billing, the firm offers flexible retainer, fixed fee and capped fee arrangements as well as 'outsourced' in-house counsel arrangements.



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How retailers can avoid engaging in misleading and deceptive conduct

What is misleading and deceptive conduct?

There have been some significant fines handed out by the Australian Competition and Consumer Commission (ACCC) recently for misleading and deceptive conduct. It is important for retailers and their employees to understand their obligations under the Australian Consumer Law (ACL) to ensure that they don't inadvertently end up on the wrong side of it.

Misleading and deceptive conduct is illegal under Section 18 of the ACL. The ACCC considers people or businesses that create a misleading and deceptive 'overall impression' to be engaging in this activity. Under Section 29 of the ACL, conduct that can contribute to such an impression may include false or misleading claims about the quality, value, price, age or benefits of goods or services, or associated guarantees or warranties.

Overall impression

While it may seem self-explanatory, the activity that can fall under the category of misleading and deceptive conduct is very broad. For example, in 2014, the ACCC accepted an enforceable undertaking from Maggie Beer Products Pty Ltd, which acknowledged that its conduct in regards to ice-cream products, aged red wine vinegar, extra virgin olive oil and rosemary and verjuice biscuits were likely to be misleading and deceptive.

The ACCC alleged that the packaging gave the 'overall impression' that the product was made in the Barossa Valley, when in fact it had been produced elsewhere in Australia. Interestingly, the labelling did not expressly state that the product was made in the Barossa, but it read "Made in Australia" and featured the slogan "A Barossa Food Tradition" and the Maggie Beer Barossa address. The ACCC alleged that these features, in combination, may lead a reasonable person to assume that the product is manufactured in the Barossa Valley (Maggie Beer fully supported the ACCC's interpretation on provenance in food labelling and revised the labelling accordingly).

Misleading and deceptive conduct is not limited to packaging. Recently, energy companies have been hit with huge penalties for calculating

discounts by using rates that are not the standard rates of their customers, causing the discount to appear greater than it actually would be. Extra care needs to be taken in regard to discount offerings. As a result of a Federal Court case, Origin Energy Limited and two of its subsidiaries were required to pay a fine of \$325,000, along with expensive legal fees.

The fine print myth

Businesses can get caught out if they do not check that the message in their fine print is consistent with the main message they are selling. For example, the ACCC fined each of Fisher & Paykel and its warranty provider, Domestic and General, \$200,000 for advising customers that they had to purchase an extended warranty in order to avoid repair costs, when consumers' rights may have already been protected under the ACL. Although the fine print of their product did state the truth, the messages were inconsistent and were considered misleading by the ACCC.

The myth that businesses may rely on fine print to protect them is simply untrue. The best way to prevent getting caught out by your fine print is to ensure that your 'big print' claims are clear and honest and consistent with your fine print.

Salespeople

As a retailer, it is important to ensure your sales team is aware of the obligations under the ACL. Overenthusiastic salespeople, or those who omit certain information, could find themselves both in breach of misleading and deceptive conduct provisions as well as the consumer guarantee provisions under the ACL.

Penalties

The consequences for engaging in misleading and deceptive conduct can include hefty fines, damages, injunctions and, in extreme cases, imprisonment. As an alternative to court action, some businesses enter into enforceable undertakings with the ACCC, which can require the business to remedy the conduct by compensation, corrective advertisements, designing and repackaging products, administration changes or requiring you to pay for a compliance program.

Along with the monetary costs, fines and reputational damage

involved with being found to be engaging in misleading and deceptive conduct, the other long-term effects of the conduct can be very damaging for your business. Court proceedings tend to gain high publicity, and enforceable undertakings are also publically viewable on the ACCC register and can hurt your brand's good will.

Tips to avoid misleading and deceptive conduct

Consider these tips when making a claim about your products, whether it be introducing new offers or sales, designing your labelling and packaging or running your marketing campaigns on social media and elsewhere:

1. Check that your claims are current, correct and clear.

Check that you have accurately calculated any discounts and ensure the message you convey about your product or brand is truthful. Put yourself in the shoes of customers – will they be likely to assume something about your product because of the way you have represented it?

2. Check your fine print.

Ensure that any exemptions or fine print do not erode and are not inconsistent with the main message you are conveying.

3. Substantiate your claims with documented evidence.

Be ready to back up your claims with documented evidence you can easily access.

4. Have written guidelines for your employees.

Your employees represent your business, which means if they engage in misleading or deceptive conduct in the course of their employment with you, then you may be liable. Ensure that your sales representatives use honest and reasonable tactics to sell your product, and document your guidelines. ♦

Source:

- www.accc.gov.au/media-release/maggie-beer-products-acknowledges-labelling-likely-to-be-misleading.
- www.accc.gov.au/media-release/origin-companies-ordered-to-pay-penalties-of-325000-for-misleading-consumers-about-discounts-under-energy-plans.
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- www.accc.gov.au/media-release/finer-paykel-and-domestic-general-to-each-pay-200000-for-false-or-misleading-extended-warranty-representations-0.