

Battle of the Telcos: A timely reminder to avoid 'misleading' advertising

21 May 2018

4 min. read

[advertising campaigns](#) / [code of conduct](#) / [Telstra](#) / [Optus](#)

Legendary New York advertising creative of the sixties and seventies, Bill Bernbach, famously said:

"The most powerful element in advertising is the truth."

Bernbach's mantra is remarkably relevant for businesses required to navigate competition and consumer laws in contemporary Australia.

Advertising is an important tool for businesses to promote their products and services, draw new customers, and distinguish themselves from their competitors. The temptation for businesses to stretch the truth in hope of gaining an edge over the competition can often be too alluring. However, the consequence of stretching the truth could see businesses in breach of provisions of the *Australian Consumer Law* (Cth) (**ACL**).

Misleading or deceptive claims

The most common complaint in relation to 'untruthful' or inaccurate advertising is that the advertising is misleading or deceptive, or likely to mislead or deceive. This conduct is prohibited under section 18 of the ACL.

Claims for misleading and deceptive conduct can be brought against a business by any person or entity that could be affected or harmed by the conduct (such as consumers or competitors) or by the Australian Competition and Consumer Commission (**ACCC**), who is tasked with enforcing the ACL and promoting competition. Claimants can seek compensatory damages for any harm arising from the advertising, or seek injunctive relief to stop the advertising being used.

A stark example of rival businesses challenging each other for misleading claims is the ongoing battle between Telco heavy-weights, Telstra and Optus. This week Telstra successfully obtained an interim injunction in the Supreme Court of Victoria, preventing Optus from using advertising claiming that:

- "The [Optus] Mobile Network is now the best overall nationally"; and
- "The Optus Mobile Network has been ranked best overall in voice and data".

Telstra alleged that this was misleading as Telstra had the best mobile network. Optus states its claim was justified based on Optus being awarded the "Best in Test" by P3 in 2017 based on its mobile benchmarking test. Ultimately, Justice Robson held that Telstra may suffer irreparable injury (for which damages will not be adequate compensation) and that an interim injunction should be granted until the matter was determined substantively at trial.

Other Notable Breaches of the ACL

Relying on 'untruthful' or inaccurate advertising could also lead to claims that a business has made false and misleading representations, in breach of section 29 of the ACL.

In 2017, the ACCC successfully pursued numerous businesses for unsatisfactory advertising practices or making false, misleading or deceptive statements about their products. Notable examples of cases

pursued by the ACCC include:

- Telstra, Optus and TPG offering to compensate its customers after the ACCC alleged they had engaged in misleading or deceptive conduct or making false or misleading representations in promoting and offering certain NBN speeds, which they could not achieve.
- Lumo Energy Australia was required to pay a penalty of \$10,800 for alleged false and misleading representations to consumers that the Australian Energy Regulator caused it to increase retail gas tariffs, when Lumo had in fact raised them due to a commercial pricing decision.
- Snowdale Holdings Pty Ltd was ordered to pay penalties totalling \$750,000 for making false or misleading representations that its eggs were 'free range', when most of its hens did not go outside.
- Finder.com.au was required to pay a penalty of \$10,800 for alleged false and misleading representations on its website that its health insurance comparison service allowed consumers to "compare roughly 65,000 policies", when the number of policies compared was substantially less than this.

What you need to do

It would be a mistake to dismiss the Battle of the Telcos as an extreme example of posturing between two heavy-weight competitors. Claims for misleading and deceptive conduct against businesses are ever-prevalent and there is a particular susceptibility to claims in the area of advertising, where businesses are making claims about their own or their competitors' products.

The consequences to a business that is alleged to have misleading and deceptive advertising or to have made false and misleading representations can be devastating. It can cause a reputational blow to a business, consumers to lose confidence in their product, and can be used by competitors to try and gain an edge. These are all additional to the ramifications if a Court makes adverse findings and awards damages or grants an injunction after a lengthy legal battle.

To avoid expensive legal disputes, businesses should consider obtaining legal advice before embarking on substantial advertising campaigns, to minimise any risk that it will breach the provisions of the ACL.

For more information, please contact HopgoodGanim Lawyers' [Dispute Resolution](#) team.

21 May 2018

[advertising campaigns](#) / [code of conduct](#) / [Telstra](#) / [Optus](#)
[Previous article](#) [Next article](#)