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## AUSTRALIAN CONSUMER LAW AND CREATORS

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### Introduction

An artist will usually have rights that can be enforced by an action in the courts. Equally an artist have duties to other people; so that the artist can be exposed to a legal action as the result of something they have done, or failed to do, which is a breach of a legal duty that they owe to other people.

This information sheet explains what is 'liability' means in relation to legal actions under the Australian Consumer Law (**ACL**). It also covers some of the legal duties and equitable obligations that are recognised by the courts of Australia that are relevant to artists and creators.

### What is 'liability'?

Liability is your legal responsibility, duty or obligation to compensate a person for the harm you have caused by breaching your legal duties to that person.

### Australian Consumer Law (ACL)

#### Overview

The *Australian Consumer Law (ACL)*, set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), is the national consumer protection law in Australia. Under the ACL, all consumers, wherever they are in Australia, are protected from certain types of business misconduct and all businesses, wherever they operate in Australia, have a legal obligation to meet certain standards of business conduct. Creators may be both consumers (such as purchasing artist materials or musical instruments) and businesses (for example, most arts organisations but also individuals engaged in graphic design or video production or creating commissioned artworks).

The ACL imposes core customer protection provisions such as:

1. Prohibition on misleading or deceptive conduct;
2. Unconscionable conduct; and
3. Unfair terms in standard form consumer contracts.

These apply to businesses supplying goods or services in terms of their marketing and advertising, product safety, quality guarantees and product liability.

The Australian Competition and Consumer Commission (ACCC) is the national regulator of consumer protection although State and Territory governments are also responsible for enforcing obligations and responsibilities under the ACL.

The ACCC website contains further information about the effect of the ACL:

- **ACL consumer guarantees:** See [‘Consumer guarantees: a guide for business and legal practitioners’](#) (ACCC)
- **ACL prohibition in relation to unfair trading practices:** See [‘The avoiding unfair business practices guide’](#) (ACCC)
- **ACL protections in relation to standard form consumer contracts:** See [‘A guide to unfair contract terms law’](#) (ACCC)

## Misleading or deceptive conduct and misrepresentations

The ACL sets out an extensive code of commercial conduct: section 18 of the ACL prohibits misleading or deceptive conduct in trade or commerce; section 29 of the ACL prohibits false or misleading representations; and other sections of the ACL prohibit conduct that involves misrepresentations as to the supply of goods or services; or regulate how goods or services can be advertised.

For example, it is unlawful for person to claim that a product or service has certain attributes or qualities if the claim is false. If a paint manufacturer advertises its products as suitable for use outdoors when they are not, or a festival advertises a headline act who is not in fact appearing, then those statements are misleading and deceptive.

A failure to say or do something can also be held to be misleading or deceptive conduct. For example, if a customer makes it clear they are only interested in an artwork because it is created by an Aboriginal artist and the gallery owner ignores the comment and does not clarify that the artist is non-Indigenous, the gallery owner’s silence could be held to be misleading if the consumer purchased the work believing it to be authentic Indigenous art.

Remedies for misleading conduct include damages, injunction, rescission of contract and other measures.

## Unconscionable conduct

Section 21 of the ACL prohibits supplier of goods from engaging in unconscionable conduct where there has been serious misconduct or unfairness. The various factors considered by courts as indicators of unconscionable conduct include:

- The bargaining strength of each party (a big corporation vs an vulnerable person);
- Whether the consumer understood the documents relating to the transaction;
- Whether any undue influence, pressure or unfair tactics were used by the stronger party;
- Whether the stronger party was willing to negotiate the terms and conditions of a contract for supply;

- The extent to which each party acted in good faith; and
- The price and circumstances under which the consumer could have acquired the goods or services from a third party.

This is only a guide and the list is not exhaustive.

## Unfair contract terms

The ACL prohibits unfair contract terms in relation to standard form “consumer contracts”, such as you would find on a website that supplies goods or services. Consumer contracts are a contract for supply of goods or services to an individual whose purchase of the goods or services is for personal, domestic or household use.

In deciding whether a term in a standard form consumer contract is unfair the court will consider if it:

- would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

## Consumer guarantees

In addition to providing protections in relation to standard form consumer contracts, the ACL provides for consumer guarantees that are implied in any contract for the supply to a consumer of goods or services.

Under the ACL, all goods and services purchased by consumers are covered by statutory consumer guarantee. That is, consumers have guaranteed rights including:

- the supplier has the right to sell the goods;
- the goods are of acceptable quality;
- the goods match their description;
- the goods are fit for the purpose that the consumer makes known to the supplier;
- repairs and spare parts are reasonably available;
- the services are carried out with reasonable care and skill; and
- the services are completed within a reasonable time frame.

These consumer guarantees cannot be excluded or modified. The rationale behind this is that supplier and businesses should not be able to escape certain protections that benefit consumers. However suppliers may limit its liability to the repair or replacement of the goods or payment of the cost of replacing or repairing the goods.

## Disclaimers

A disclaimer may attempt to limit or exclude liability against loss for reliance on information given but it will not be effective if the information is found to be purposely misleading or if it amounts to fraud. An example of this might be found in promoting a music festival. The promoters may state that a popular performer, e.g. Lady Gaga, will be performing and then have a disclaimer at the bottom of their poster stating; *"To the best of our knowledge, the information provided is accurate and current. We do not make any representation or warranty as to the accuracy or completeness of the information"*. If the organisers of the event are found never to have secured Lady Gaga as a performer, and a Lady Gaga

impersonator actually performs, the statement is either misleading and deceptive or fraudulent and the organisers will not be covered by their disclaimer.

The supplier that presents terms and conditions that contain an unenforceable waiver which may mislead the consumer about their legal rights will be exposed to penalties for providing false and misleading information. That is, consumers are still protected by the consumer guarantees even if they agree that the consumer guarantees do not apply to the transaction.

See the Arts Law Information Sheet [Exclusion clauses, disclaimers and risk warnings](#)

## Other common law legal actions

Apart of the ACL, it is also possible to seek damages for a misrepresentation under the law of torts:

- the tort of deceit if the representation was fraudulent;
- the tort of negligence; and
- the tort of passing off.

In the case of fraud, there must be very clear evidence of the person lying. Whereas with a negligence claim, it must be established that the allegedly negligent person owes a duty of care to you. Both the claim in deceit and in negligence are more difficult to prove as compare to claims under ACL.

## Passing off and unfair competition

The tort of passing off applies to different situations in which there is damage to your business reputation as the result of a misrepresentation in relation to the supply of another business's products or services. The classic passing off is where a person misrepresents that his or her products have the same qualities as those in which you have developed a reputation. The misrepresentation could be the result of marketing the products under a business name or product name that is confusingly similar to yours or the products are sold in similar packaging ('get-up'). The consequence of the misrepresentation is that the public are misled into buying those products instead of your products. An example could be a band that chooses the same name as an existing more popular band to try and get more gigs. Or two confusingly similar fashion labels. This is a good reason when choosing a name to check thoroughly that there are no similar names already in use. It is frustrating to invest time and effort in building up a brand or reputation only to discover a pre-existing business with a similar name making claims against you for passing off.

To succeed in a claim for passing off you will be required to prove that your brand or name has developed a reputation in the market and that the other party's use of your mark falsely suggests a connection between their products or services and your business. Proving this can be difficult unless you are well-established in the market so for this reason, it is advisable to secure trade mark registration for any valuable name, brand or logo.

Any unfair competition that amounts to a passing off may also result in a breach of the ACL. That is, an action in passing off may co-exist with an action for misleading and deceptive conduct under s. 18 of the ACL.

Where you have a registered trade mark you may be able to make all three claims in respect of the misconduct - not only infringement of your trade mark, but also passing off and misleading or deceptive conduction under the ACL.

See the Arts Law information sheet [Trade marks](#)

See the Arts Law information sheet [Protecting your professional name](#)

Artists, authors, creators and performers may have remedies where there is a failure to attribute authorship of a work protected by copyright or there is a misrepresentation as to who is the author or performer of a work. Those remedies are found in the moral rights provisions of the Copyright Act.

See the Arts Law information sheet [Moral rights](#)

## **The ACL and the Copyright & Designs Acts**

Artists and creators are often upset and aggrieved when they see others using a style, subject matter or technique that they would describe as their own distinctive and original style, subject matter or technique. Generally the Copyright Act provides little assistance in this situation as it doesn't protect ideas, styles or techniques.

See Arts Law's information sheet [Copyright](#).

In some situations, even though the Copyright Act doesn't provide a remedy, it may be possible to use passing off or the ACL. An example in which the ACL has provided a remedy is the offering for sale of a painting that is a forgery. The representation in the catalogue of an auction house that Albert Tucker had signed a painting was determined by a court to be false and misleading as well as being conduct that was commercially reprehensible and unconscionable.

There are circumstances in which use of confusingly similar creative work can be an infringement of the ACL or a passing off. An advertiser used what they described as a "satirical take" on Telstra's Yellow Pages Goggomobil advertising campaign. The court found that there was no infringement in the copyright of the scripts of the Goggomobil advertisement, however the court held there was misleading and deceptive conduct and a misrepresentation of a connection between the advertiser and Telstra's Yellow Pages.

However these situations will be limited. Producing products which have a distinctively similar look or style or use the same techniques is generally not enough by itself to succeed in passing off or a claim under the ACL. As outlined above, you must be able to show that this conduct could mislead or deceive consumers or amounts to a false representation that the goods or services are supplied by you. It can be difficult to prove that matters of style, technique or subject are so closely associated with your own creative practice and your reputation that their use by another artist or business results in a misrepresentation or misleading or deceptive conduct – particularly where the other business or artist clearly identifies themselves as the creator of their work.

Australian courts have confirmed that it is possible to engage in direct copying of another design or work without breaching copyright or the ACL or passing off.

An example is when a furniture designer is selling furniture and that replicates other well known (and more expensive) furniture designs. Copyright protection has been lost for these designs once they entered commercial production. If they are not registered under the Designs Act and the rival manufacturer clearly markets them as 'replicas', then you may not have any remedies. That is, the sale by one supplier of products which closely resemble those of another supplier is not a breach of s. 18 ACL, nor will it be a passing off, if the products are properly labelled.

See the Arts Law information sheet [Protecting your designs](#)

## Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website ([www.artslaw.com.au](http://www.artslaw.com.au)) for more articles and information sheets.

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in [EPUB format](#), [MOBI format](#) & [eBook - PDF format](#); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); securities, sales and galleries (Ch 9); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12); sculptures (Ch 13); design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); and tax (Ch 18).

## Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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