



**Misleading or deceptive conduct does not need to be written or oral.**

**Non-contractual parties can take action under the Act.**

**Seek specific advice in any case that gives rise for concern.**



In case of difficulties, consult a senior manager or director, or your regular claims contact at your TT Club office. Further information can be obtained from the TT Club's Regional Centres.

## The Trade Practices Act 1974 - Australia

In 1974 the Australian Government enacted the Trade Practices Act to safeguard the public. This act continues to provide business with surprises - usually unpleasant ones.

There are several areas where Members can easily fall foul of the Act, the major one being that of Misleading and Deceptive Conduct.

### Misleading and deceptive conduct

The Act does not confine misleading or deceptive conduct to oral or written misrepresentation. It includes all conduct that is misleading or deceptive. An obvious source of vulnerability under the Act is the Member's advertising and promotional material. Vulnerability can equally arise from any other aspect of the Member's trading activities. An example would be where a party contracts with the Member on the basis of an informal discussion. Silence can constitute misleading or deceptive conduct if the Member allows the party to persist in a mistaken assumption of which the Member is aware.

Whether conduct is misleading or deceptive does not necessarily depend on whether the Member intends to mislead or deceive, or whether the Member's conduct was malicious. If the conduct has or is likely to have the effect of misleading or deceiving, then that is enough to constitute a breach of the Act.

The Act does not specify who must be misled or deceived. This allows a party to take action against another party even though the party allegedly misled or deceived is a further party, unrelated to the parties in the action. For example, an organisation may take action against a competitor even though the party allegedly misled or deceived is a consumer. However, in order to recover damages, a claimant will need to show a causal connection between the conduct complained of and the loss or damage suffered.

Disclaimer clauses, where the Member seeks to absolve itself from the truth or otherwise of its representation, will not necessarily provide protection against liability. This is so even if the contract properly incorporates such clauses. Disclaimer clauses generally have very little, or no, effect in the face of a claim for misleading or deceptive conduct under the Act.

The Act assists plaintiffs in proving misleading or deceptive conduct in relation to representations concerning future matters. If a Member predicts what it will do, then the Member must be able to show that it made this prediction on reasonable grounds if the prediction proves to be incorrect. For example, if a Member advertises that it will carry goods with skill and care, then in answer to a claim of misleading or deceptive conduct under the Act, it must show that procedures and systems are in place to ensure and promote a proper degree of care and skill. The Member may indeed be skillful - but must prove it.

### General

These comments in relation to misleading and deceptive conduct are of necessity extremely general. They call attention to the statutory provisions of the Trade Practices Act 1974 that may impact upon the operations of carriers and forwarders.

Isolated occasions of negligence may not themselves be misleading or deceptive. They may be evidence of a lack of proper procedures or systems that may render misleading or deceptive any representation that asserts that the Member is a competent practitioner in its field, leaving the Member vulnerable for breaches of the Trade Practices Act 1974.

Exclusion and limitation clauses in contracts may be ineffective in combating claims under the Trade Practices Act 1974.

The information contained in this Risk Management information sheet is not sufficient in itself to provide a full understanding of Members' potential exposure to claims under the Trade Practices Act 1974. It would be prudent to consult with a lawyer familiar with the Act if Members are unsure of anything that they may have done or said which may give rise to a possible claim under the Act.

This Act can apply to anyone trading in Australia. They do not have to be incorporated in Australia or as an Australian company.

The TT Club provides cover for legal liabilities that Members may incur under this Act, subject to the policy wording and the scope of cover requested.

For more detailed information on the Trade Practices Act 1974 please contact our regional office in Sydney -

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Further information, and additional copies, can be obtained from the TT Club's regional centres:

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