

Inaccuracies in customer reporting – Pinning the tail on the misleading or deceptive donkey

This article explores with some granularity the issue of whether transactional reporting, which is based on underlying processing errors, is misleading or deceptive.

In Part 1, we start with our analysis, including some recent case law. In Part 2, we conclude with a set of Guiding Principles.

Part 1 – Analysis

We have [previously](#) published material relevant to the assessment of whether inaccuracies in customer reporting constitute misleading or deceptive conduct. As we know, section 1041H of the Corporations Act and section 12DA of the ASIC Act are concerned with misleading or deceptive conduct. Conduct is regarded as misleading or deceptive if a representation communicated would have a sufficient tendency to cause the relevant persons to fall into error (i.e. to form an erroneous belief or state of mind). Whether this is the case is a question of probability, having regard to the surrounding circumstances.

The plot thickens, however, as product issuers grapple with practical examples and strive to understand where the dividing line lies. Case law reflects that, in certain circumstances, there will not be a sufficient tendency for a customer to have been misled into believing that reporting discrepancies convey an implied (or express) representation as to the correct¹ state of the recipient's product account ledger.

Record of transactions

Recent court decisions have found that a specified amount in a statement does not, *prima facie*, give rise to an implied representation that the statement is free from error. That is, there may not be any real chance of a misreported figure leading customers to deduce that the amount actually deducted is free from error. In *ASIC v NAB*, the Court observed at [255] to [257] that:

By their very nature, bank statements received by customers merely record the dealings which the bank claims have occurred in relation to the account, whether they be debits, credits, transfers or the deduction of fees. There is no *a priori* assumption that each of the recorded transactions had in fact or in law occurred in accordance with the customer's authority or in accordance with the terms and conditions of the account...

Applying this reasoning to exit and annual statements, there is a *prima facie* argument that the stated transactions (e.g. deductions) amount to a mere record, to which, although correct as a record, there is no attached assumption of correctness with respect to the transactions that have occurred. On this basis, there is also a *prima facie* argument that the deductions would not have a sufficient tendency to give rise to an implied representation in respect of non-error.

This position is reinforced by the Court's consideration that an ordinary and reasonable customer would not expect perfection from a product issuer in respect of annual and exit

¹ By the word "correct", we mean that the account reflects the true entitlement of the customer as opposed to the fact that the relevant transactions were actually made, albeit made in error, and/or comprised incorrect amounts.

statements.² In *ASIC v CBA*, it was found that customers may expect errors to arise in the generation of transaction reports, based on the scale of the institution and use of automated systems:³

The members of those classes of customers who entered a contract with CBA in relation to the relevant accounts are likely to be taking reasonable care of their own interests. They are also likely to have had their own personal experiences of, or otherwise be aware that there is at least some prospect of, computer systems malfunction, software design errors, and human error in relation to data input. They would be aware that CBA's systems are computerised and that CBA's processes involve human interaction with those systems. They would understand that customer account statements are generated by CBA's computerised systems and, having regard to the size of CBA's operations, are unlikely to have been reviewed by any of CBA's personnel before being issued. They would also be aware that the systems and processes within large organisations such as banks are not and cannot be expected to be perfect all of the time; that all organisations (even banks), and the people within them, sometimes make mistakes ...

Further, the ordinary and reasonable customer would not view a customer account statement as an invoice, but as a record of transactions that have occurred on the account. The ordinary and reasonable customer understands that a customer account statement is sent to customers so that they may acquaint themselves with those transactions and satisfy themselves that no disputed transactions have occurred, either by error of the bank, or mistake or malfeasance by third parties.

Applying this analysis, the deducting and crediting of transactions processed by many product issuers are generated by computerised systems, and are therefore vulnerable to system malfunction, design error and human error. Where a customer may reasonably be regarded as expecting such errors, as was determined in *ASIC v CBA*, by analogy, it may be argued that the customer may have reasonably anticipated that erroneous deductions could have occurred.

Although the case law indicates that reporting deductions may not have a sufficient tendency to convey an implied representation regarding non-error or correctness, whether this is the case will ultimately depend on the surrounding language and circumstances. To this end, the circumstances in which the representations were made will also be relevant to a determination of whether there is a real and not remote likelihood of a misrepresentation arising. For example, in *ASIC v NAB*, the lack of surrounding narration regarding the fees which characterised them as legitimately debited by NAB supported a finding of no misleading or deceptive conduct:

The critical issue is whether, in the circumstances, the statement impliedly asserts the legitimacy of the transaction. It is clear that there is no express assertion to that effect. There is also nothing in the language of the narration to justify any such implication. Whilst the reference to a "fee" suggests that it is an amount that is due from the customer, it is not necessarily an assertion that it was correctly debited by the bank to the account. No submissions, other than by way of broad assertions, were made by ASIC that any implication arose from the terms of the narration.

² See *ASIC v National Australia Bank Limited* [2022] FCA 1324 (*ASIC v NAB*); *ASIC v Commonwealth Bank of Australia* [2022] FCA 1422 (*ASIC v CBA*).

³ *ASIC v CBA* at [88]–[89].

Conflicting disclosures

As captured in *ASIC v NAB*, a product issuer should have regard to the “dominant message” communicated by the reported figures which are incorrect. ⁴ In making its assessment, a product issuer should have regard to how the reported figures were communicated to customers, and the likely expectations of affected customers in light of these representations. These circumstances will sway the relative strength or weakness of an argument that an implied representation did not arise. For example, the likelihood of an implied representation that an amount was correctly deducted or credited would be lower where:

- customers received contradicting (and correct) information regarding the amount that should have been deducted or credited (e.g. guidance regarding the frequency and magnitude of deductions or credits). This discrepancy would indicate to the customer the existence of error; or
- relevant exit and annual statements included prominent disclaimers warning customers that deductions may be incorrect.

However, an implied representation in relation to correctness and non-error may be more readily inferred where, for example:

- customers received corresponding invoices or liability statements in respect of deductions made and reported on relevant exit and annual statements; or
- representatives of the product issuer, in communications with relevant customers, had affirmed the accuracy of the reported figures.

Application to disclosure of account balances

So we now transpose the above analysis to a scenario where a customer’s account balance is accurately reported in their exit statement or annual statement (i.e. accurately reflects the position of their account), but includes debits and/or credits that were incorrectly made.

Here, the relevant question is whether disclosing the account balance could be seen as giving rise to an implied misleading or deceptive representation that each debit and credit applied to that balance is a correct amount. Or rather, is the only representation that these amounts were actually credited/debited and not that each amount is the correct amount.

As set out above, case law indicates that a representation as to fees actually charged will not necessarily convey an implied representation that these were accurately deducted. ⁵ This is on the basis that, as the Court has highlighted, there is “no a priori assumption that each of the recorded transactions had in fact or in law occurred”. ⁶

The ultimate finding of misleading or deceptive conduct will depend on the dominant message. So that, where an account balance is accurately reported (i.e. accurately reflects the value of a customer’s account), misleading or deceptive conduct will likely not arise in relation to the correctness of the amounts credited/debited and therefore the account balance itself. This is because the “balance” figure accurately represents the content of the account, and surrounding information neither calls into question nor asserts its legitimacy. This is the case provided that there is no express or implied recommendation as to the correctness of relevant constituent transactions.

⁴ *ASIC v NAB* at [257].

⁵ *ASIC v NAB* at [246]–[247].

⁶ *ASIC v NAB* at [246]–[247].

Awareness (or lack thereof) of the error on the part of the customer

In *ASIC v NAB*, Derrington J found that NAB erroneously charging fees without authority and/or contrary to account terms, or charging more than its entitlement, would not give rise to misleading or deceptive conduct. This was on the basis that the customer “would not even be aware of its having occurred” (emphasis added):⁷

The “charging” occurs when NAB deducts the purported fee from the balance of the amount which it records in its ledger as being owed to the customer. Before that deduction is communicated to the relevant customer it cannot amount to a representation, nor can it mislead that person. This was largely accepted by Mr Couper QC for ASIC in the course of oral argument, with the result that attention was focused on that part of the claim based on the narrations.

That is, to the extent that the customer is not aware of a mistake, it will be challenging to make out a real and not remote likelihood of them being led into error regarding its existence.

On this reasoning, a product issuer may argue that account balances reported in exit and/or annual statements (which do not individually specify the constituent transactions) do not impliedly represent that the balance is free from error. This conclusion may be drawn where the customer is not otherwise aware of how the account balance has been calculated and therefore is not capable of calling into question its legitimacy. Similarly, the customers were not aware that the relevant corresponding switches out had not occurred and therefore could not reasonably infer that their balances were overstated. In this regard, as noted above, the figure correctly represents the position of the customer’s account and arguably does not lead customers into error.

Summary

Unless there are reasons to conclude otherwise, disclosing an account balance (which accurately represents the value of the relevant customer’s account) will not by itself give rise to a sufficient tendency to lead a customer into error regarding the correctness of the balance’s constituent credits and deductions, where the correctness of those transactions is not reported or otherwise asserted.

In other words, the mere act of displaying a particular transaction or an account balance reported an exit and/or annual statement does not (without more) impliedly represent that those transactions are correctly incurred. As set out in Derrington J’s dicta in *ASIC v NAB* extracted above, this conclusion may be drawn where the customer is not aware of the constituent transactions and the circumstances under which they have occurred and therefore is not capable of drawing inferences regarding their legitimacy. In this regard, the figure arguably does not lead the customer into error.

However, as above, whether the account balance is indicative of misleading or deceptive conduct will depend on the surrounding circumstances. On one hand, disclaimers warning against perfection will strengthen the argument that a misrepresentation does not arise. However, on the other hand and for example, if customers have received particularised statements or disclosures representing that the amount actually (but erroneously) deducted or credited in a constituent transaction is the correct amount that should have been deducted or credited, this would contribute towards the formation of a misleading or deceptive representation in the customer’s mind.

⁷ *ASIC v NAB* at [246]–[247].

Part 2: Guiding Principles

Misleading or Deceptive Conduct Transactional Disclosure Ready Reckoner

The above decision/analysis can be articulated in the following checklist:

Factors in Law

(a) **Guiding Principle 1**

Customers should not expect a standard of perfection and should rather recognise that errors do occur.

(b) **Guiding Principle 2**

Reporting/recording of transactional errors is not prima facie misleading or deceptive where the report/record is accurate in terms of the transaction or transactions that occurred, even though those transactions may have occurred erroneously. In other words, such disclosure by itself does not convey an implication that the transaction(s) is/are correct.

Factors in fact

(c) **Guiding Principle 3**

A report/record of a single transactional item may be more likely to be found misleading or deceptive if it conveys expressly or implicitly that the fee or charge was correct. So, for example, a report/record of a fee or charge may indicate (or a customer might reasonably infer) not just that the fee or charge amount was in fact deducted, but that it was the correct fee or charge.

Contrast:

- (1) a statement that a premium of \$x, being the premium applicable to your age cohort and smoker status, was deducted from your account (and it was so deducted, but applying the wrong amount); with
- (2) a statement that simply notes that \$x of premium was charged to your account (and it was so deducted, but it was the wrong amount).

Statement (a) is more likely to be held to be a representation as to the correctness of the premium than statement (b).

(d) **Guiding Principle 4**

In the case of conflicting disclosures, look to see whether/which disclosure is dominant, if any. In accordance with longstanding High Court authority, this can be a determinative factor.

(e) **Guiding Principle 5**

Misleading or deceptive disclosure must also have regard to multiple reporting sources where applicable.

(f) **Guiding Principle 6**

As we have previously [commented](#) on, the presence of some neutralising disclosure text can also be determinative. But choose the right neutralising disclosure. Contrast statements:

- (1) **Statement 1:** Readers should be aware that errors can occur in transactional reporting; with



- (2) **Statement 2:** Errors can occur in transactional statements in relation to single transactions or account balances. Readers should accordingly check this disclosure against their own records including direct debit and other independent records.

The second text clearly offers superior protection.

- (g) **Guiding Principle 7**

Above all, the existence of misleading or deceptive disclosures will depend on a consideration of all the relevant facts and circumstances which can displace any or all of the Guiding Principles discussed above.