

# UNCONSCIONABLE AND MISLEADING CONDUCT: HOW THE TRADE PRACTICES ACT IS USED AND THE DUTY TO ADVISE\*

by

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## Introduction

Section 52 of the *Trade Practices Act* 1974 (Cth), in contrast with most obfuscatory legislative drafting, is simplicity itself. The Section says that:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.<sup>1</sup>

Section 52 has no criminal sanction. Its sanctions are damages, injunction and the granting of a wide range of “other orders” under s.87 of the Act. Other more specific sections of the Act, in particular s.53 and s.53a, which involve conduct which would, in all usual circumstances, also infringe s.52, give rise to both civil and criminal sanctions.

One of the most relevant aspects of s.52 is that it impacts not only on the principal offender but upon those who aid and abet or counsel or procure a breach of the section or who are “knowingly concerned” in such a breach. Usually this means that not only is a company liable for misleading or deceptive conduct engaged in by it but also the Director, Officer or Employee involved in such conduct is personally liable for its consequences.<sup>2</sup> The writer has elsewhere described s.52 as a section which has changed the length of the Chancellor’s Foot in but Twenty Three Words, such has been its impact in the fields of tort, contract and in areas as diverse as company law and defamation.<sup>3</sup> Allied with the topic of misleading or deceptive conduct is that of “unconscionable conduct” - a concept stemming from the 1983 High Court decision in *Amadio*<sup>4</sup> and codified in various similar but slightly differing statutes, the most well known of which is s.52a of the *Trade Practices Act*.<sup>5</sup>

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1 *Trade Practices Act* 1974 (Cth) s.52(1). Section 51(2) provides that nothing in the relevant Division of the Act shall be taken as limiting the generality of s.52(1).

2 *Trade Practices Act* s.82 permits action, within three years of the date of accrual of the action, against any party and also any person involved in the contravention. A person “involved in a contravention” is widely defined in s.75b of the Act. Injunction proceedings under s.80 are permissible in relation to persons in a broad category including persons aiding, abetting, counselling or procuring a contravention or being knowingly concerned in a contravention.

3 WJ Pengilley, “How to Change the Length of the Chancellor’s Foot and the Paths it Treads, in Twenty Three Words or Less”. Paper given at the 9th Commonwealth Law Conference, Auckland, New Zealand, 17 April, 1990.

4 *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 CLR 447.

5 Section 52a(1) of the *Trade Practices Act* provides that “a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable”. Subsections (2)-(6) of s.52A amplify this concept. That the provision is based on *Amadio* is clear from the *Explanatory Memorandum to the Trade Practices Revision Bill*, Paragraphs 79 to 87.

Other akin tests in various Statutes in the writer’s home State of New South Wales are contained in the *Contracts Review Act* s.7 (unjust contracts may be varied); the *Credit Act* s.145 (unconscionable, harsh or oppressive contracts or contracts in which the annual percentage rate is, in all the circumstances, excessive may be varied) and s.88f of the *Industrial Arbitration Act* (unfair, harsh or unconscionable contracts may be varied).

Sections 52 and s.52a of the *Trade Practices Act* have been enacted in "mirror" State and Territory "Fair Trading" legislation.<sup>6</sup> This "mirror legislation" was enacted because of the absence, for constitutional reasons, of full Commonwealth power to control the activities of individuals acting purely intra-State.<sup>7</sup> The Queensland *Fair Trading Act* 1989 provisions are different to those elsewhere in that damages actions for misleading or deceptive conduct can be brought only by "consumers". Under the *Trade Practices Act* and under the Fair Trading statutes of all other States and the Northern Territory there are no such constraints. [For simplicity of reference, the Commonwealth *Trade Practices Act* will be referred to in this paper and all section references in the paper are to that legislation.]

The purpose of this paper is to examine some of the areas in which s.52 (misleading or deceptive conduct) has been most utilised. This is done in Parts II to V of the paper. It is then intended to discuss akin utilisation of s.52a (unconscionable conduct). This is covered in Part VI. In recent times, these sections, and in particular s.52a, have given rise to certain requirements to explain material to parties and, in a number of cases, to require parties to seek independent advice. This requirement is discussed in Part VII.

## Section 52: The Basics of Misleading or Deceptive Conduct

### (a) General Principles

It is not possible to engage in a discussion of cases in relation to misleading or deceptive conduct without first setting out the basic principles of interpretation of the section. The writer's shorthand test to evaluate conduct under s.52 is that such conduct must both:

- be true in fact; and
- create a truthful impression.

A convenient summary of the relevant principles in somewhat greater length than that of the above shorthand test is contained in the judgment of Mr Justice Lockhart in *Henjo Investments*.<sup>8</sup>

The principles cited by his Honour are:<sup>9</sup>

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- 6 The State and Territory equivalents of s.52 and s.52a are: *Fair Trading Act* 1987 (NSW) ss.42, 43; *Consumer Affairs and Fair Trading Act* 1980 (NT) ss.42, 43; *Fair Trading Act* 1989 (Qld) ss.38, 39; *Fair Trading Act* 1987 (SA) ss.56, 57; *Fair Trading Act* 1990 (Tas) ss.14, 15; *Fair Trading Act* 1985 (Vic) ss.11, 11a; *Fair Trading Act* 1987 (WA) ss.10, 11. In relation to s.52a see Part IV of text and *Cooney Committee* comments at n.118. Section 99 of the Queensland *Fair Trading Act* is unique in State and Territory legislation in that it limits damages actions for misleading or deceptive conduct to actions by "consumers".
- 7 The prime constitutional powers of the Commonwealth to enact trading laws are the power over interstate trade and commerce [*Constitution* s.51(i)]; the power over telephone, radio and television [*Constitution* s.51(v) and see *R v. Brislan* (1935) 24 CLR 262]; the power over trading and financial corporations ["The corporations power" - *Constitution* s.51(xx)] and the power over Territories. Of these powers, the most relied upon is the "corporations power". This power has been held to permit the Commonwealth to control the trading activities of corporations [*Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 469]. If, however, an individual is acting solely within a State and not utilising radio, telephone or television facilities, then there is no Commonwealth Constitutional power to cover such person's conduct. Note, however, that the Commonwealth "corporations power" extends to covering an individual "aiding and abetting" a breach by a corporation. [*Ex parte CLM Holdings Pty Limited* (1977) ATPR ¶40-017 (High Court); *Fencott v. Muller* (1983) ATPR ¶40-350 (High Court)]. By its specific terms, the *Trade Practices Act* applies to the Commonwealth Government and Commonwealth Government instrumentalities when carrying on business and the "mirror" State and Territory "Fair Trading" legislation applies to State and Territory Governments and Government instrumentalities when carrying on business. Crown immunity which would otherwise exist in relation to Government business activities has thus been waived in the case of conduct discussed in the Paper. State Government Crown immunity remains in relation to the restrictive trade practices provisions of the *Trade Practices Act* as there is no equivalent State legislation on this subject.
- 8 *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd* (1988) ATPR ¶40-850 (Full Court). The principles in the text are taken from the judgment of Lockhart J.
- 9 The material in the text is taken from the judgment of Lockhart J in *Henjo* (n.8). It is in essence, however, a republication of these principles, as previously summarised by the writer - WJ Pengilly, "Misleading or Deceptive Conduct and Financial Institutions" (1989) 1 Bond LR 17 at 159; (1989) Commercial Law Quarterly 31 at 39 and WJ Pengilly, *Misleading or Deceptive Conduct in Relation to Conveyancing, Financial and Business Transactions: Commentary and Case Notes*, Legal Books, Sydney at 14-15.

- the concept of s.52 is broad and is designed to have a broad reach;
- the concept of s.52 is aimed to protect the consuming public from unfair trading practices, namely from being misled or deceived;
- intent is not a necessary element in breach of the section;
- “mislead” means to lead astray in action or conduct, to lead into error, to cause to err;
- “deceive” means to ensnare, to take unaware by craft or guile, to overcome, overreach, get the better of by trickery, to beguile or betray into mischief or sin, to mislead;
- the two words “misleading” and “deceptive” are not necessarily synonymous. There will, however, clearly be areas which overlap between the two;
- misleading or deceptive conduct is not necessarily confined to some sort of representation;
- it is necessary to look at the actual conduct involved in order to assess whether it is misleading or deceptive. Dictionary definitions of the term are not necessarily controlling. Neither are technical meanings of words necessarily controlling;
- silence may give rise to an actionable misrepresentation when there is a duty to reveal the truth. “Half truths” thus infringe the section because, in these circumstances, there is a duty to speak up and complete the full story; and
- it is no answer to a breach involving misleading or deceptive conduct to say that if a person had made his own enquiries, s/he would have discovered the true position.

The appropriate methodology to ascertain whether or not misleading or deceptive conduct is involved is to go through the following steps:<sup>10</sup>

- First ascertain the person or class of persons at whom the conduct is directed. This may be an individual or a group.
- Once the relevant section of the public is established, the conduct is considered by reference to all who come within it including:
  - “the not particularly intelligent or well informed”;<sup>11</sup>
  - “the knowledgeable and those who are not, the superficial reader ... as well as the profound, the gullible as well as the cautious”;<sup>12</sup>
  - “the astute and the gullible, the intelligent and not so intelligent, the well educated and the poorly educated”;<sup>13</sup> and
  - “the unsuspecting modest member” of the class.<sup>14</sup>
- Evidence that some person has in fact formed an erroneous conclusion is:
  - Admissible and may be persuasive but is not essential. Such evidence does not itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. The Court must determine that question for itself. The test is objective.<sup>15</sup>
- Finally it is necessary to enquire why any proven misconception has arisen. Only by this enquiry can it be determined whether the parties involved were misled by the conduct of the particular respondents involved.

A further point to be noted is that a contractual document cannot negate the effect of a pre-contractual representation which induces a party to enter into such contract. Thus, if a certain representation is made to a party during negotiations and relied upon by that party to his or her detriment, any negation of the effect of such pre-contractual representation in the contract terms themselves will be of no effect. The Courts have given a variety of reasons for their reasoning on

10 This line of logic, and others similar to it, has been stated in various cases. In the writer’s view, the best exposition of the point is in the judgment of Deane and Fitzgerald JJ in *Taco Bell Pty Ltd* (1982) ATPR ¶40-303 (Full Federal Court).

11 *McDonalds System of Australia Pty Ltd v. McWilliams Wines Pty Limited* (No.2) (1978) ATPR ¶40-140.

12 *World Series Cricket Pty Ltd v. Parish* (1977) ATPR ¶40-040.

13 *Supra* n.10.

14 *Henderson v. Pioneer Homes* (1980) ATPR ¶40-159.

15 *Supra* n.10.

this issue.<sup>16</sup>

### (b) "Future Predictions"

One of the significant difficulties encountered in relation to the operation of s.52 has related to "future predictions". [A tautological term which seems to have gathered some considerable usage amongst lawyers. Because the term is so frequently used in legal circles, the writer hopes he will be pardoned for its usage here.]

Statements in relation to the future may or may not eventuate in fact. Thus, it is difficult indeed to allege that such statements are misleading or deceptive at the time they are made purely because there is no yardstick of present fact against which to evaluate the statements. Mr Justice Franki in *Thompson v. Mastertouch TV*<sup>17</sup> was prepared to hold that s.52 was infringed, on the basis that a statement was presently false, if a statement was made either without belief that the representations stated would eventuate in fact or if the statement was made with a reckless indifference as to whether or not the representations would eventuate in fact. Notwithstanding this holding, the task of proving a breach in respect of representations as to future matters remained somewhat daunting.

In order to overcome this problem, the *Trade Practices Act* was amended with effect from 1 July 1986 by the insertion of s.51a into the Act. This section provides that representations in respect of future matters will be deemed misleading unless the representor has reasonable grounds for making the representation. The onus of proof of reasonableness lies upon the representor. This section is also enacted in the Fair Trading legislation of the States and Territories.<sup>18</sup>

It needs little imagination immediately to recognise how s.51a has changed the legal position in relation to all matters involving, for example, future profit projections. Section 51a, when coupled with s.52, has, for example, had a substantial impact in relation to disputes concerning sales of businesses and representations made in relation to franchise profitability.

### The Effect on Section 52 of the Limitation that Conduct must be Engaged in "in Trade or Commerce"

The scope to use s.52 of the *Trade Practices Act* is very broad indeed. This is because the wording of the section contains no express limitations other than that the conduct which attracts the section must be conduct "in trade or commerce". Unlike, for example, s.52 of the Canadian *Competition Act* in similar terms, there is no limitation in the Australian legislation that conduct must involve a representation to "the public".

Initially, in evaluating the section, one has to identify the limitations of the section imposed by the fact that a representation, in order to infringe, must be made "in trade or commerce".

16 The Courts have justified this conclusion on at least the following grounds: (i) Parties should not be permitted by contractual estoppel from asserting a statutory right of action [*Byers v. Dorotea Pty Ltd* (1987) ATPR ¶40-760]; (ii) The complaint of misleading or deceptive conduct will usually have occurred prior to the signing of the contract. If, as a result of the conduct, a person is induced to enter into a contract then an action in relation to the pre-contractual conduct causing the inducement should still be permitted [*Clarke Equipment Pty Ltd v. Covcat* (1987) ATPR ¶40-768]; (iii) If, in fact, a person is induced to enter into a contract by misleading or deceptive conduct, that inducement is not negated by a term in the agreement which states to the contrary [*Collins Marrickville Pty Limited v Henjo Investments Pty Limited* (1987) ATPR ¶40-782; On appeal (1988) ATPR ¶40-850]; (iv) It is always a factual issue whether a disclaimer has negated the effect of a misrepresentation. This issue is not determined purely by reference to formalities in a document [*Collins Marrickville (ibid)*]; (v) Exclusion clauses are generally ineffective to break the nexus between the misleading conduct and the making of the agreement [*Collins Marrickville (ibid)*]; (vi) There are public policy objections to the enforcement of exclusion clauses in contracts. It would be contrary to public policy for exclusion clauses in contracts to deny or prohibit a statutory remedy for offending conduct under the *Trade Practices Act* [*Collins Marrickville (ibid)*].

17 *Thompson v. Mastertouch TV Services* (1977) ATPR ¶40-027.

18 NSW s.41; NT s.41; Qld s.37; SA s.54; Tas s.11; Vic s.10a; WA s.9.

**(a) “Social” transactions are not caught**

The “trade or commerce” limitation, obviously enough, precludes statements which have purely social repercussions from infringing the section. This does *not* mean that misleading or deceptive conduct is excused purely because a statement is made at a social function. Statements made by a person at a cocktail party may have exactly the same consequences in law as statements made from behind the office desk. However, saying that you will turn up at a party when you have no intention of doing so is not a statement within the ambit of s.52. It is not a statement made “in trade or commerce”.

**(b) Priests and politicians are not engaged in “trade or commerce”**

This section exempts priests and politicians from liability for what they say as neither is engaged in conduct “in trade or commerce”.<sup>19</sup>

**(c) “Domestic” transactions escape s.52**

The section also exempts purely domestic transactions from its coverage as these are not engaged in “in trade or commerce”. The major example of such a transaction is the private sale of a person’s dwelling house. If an agent is used to effect such a transaction, however, the vendor will, *de facto*, be liable under s.52 in most circumstances. This is because the vendor’s agent is him or herself engaged in trade or commerce. He is thus liable under s.52 for his conduct and the vendor is liable to indemnify his or her agent in respect of his conduct if such conduct is engaged in within the scope of the agent’s authority.<sup>20</sup>

**(d) Certain “internal company transactions” are not caught by s.52**

The section also exempts certain “internal transactions” within a company. In its 1990 *Concrete Constructions* decision,<sup>21</sup> the High Court of Australia held that an employee could not

19 See *Durant v. Greiner* (1990) ASC ¶56-100. Parents of children attending a primary school unsuccessfully sued Premier Greiner for misleading or deceptive conduct when, during an election campaign, it was alleged that the Premier had misleadingly stated that the school would not be closed. The Court rejected the plaintiff’s submission that, because a person was a professional politician, necessarily he was engaged “in trade or commerce”. The words “trade or commerce”, said the Court, described the activity in which a person is engaged and not the status of the person engaging in the activity. Politics was held not to be a business or commercial activity and politicians were thus held not to be engaged “in trade or commerce”. It must be added in fairness to Premier Greiner that, whilst he successfully defended the claim on the above basis, he was also found, on the facts, not to have engaged in misleading or deceptive conduct in any event. To the writer’s knowledge, no cases have yet been mounted against priests alleging misleading or deceptive conduct because of an inability to prove the existence of God but, clearly enough, priestly conduct is not engaged in “in trade or commerce” for the same reason as Premier Greiner is not so engaged.

20 The difference between a “domestic transaction” and one engaged in “in trade or commerce” is one which has not been clearly articulated by the Courts. The case law is not totally clear but it is submitted that the following conclusions follow from the decided cases: (i) There is a distinction between the sale of a non-business asset such as a home and the sale of a business asset [*Lubidineuse v. Bevanere Pty Limited* (1984) ATPR ¶40-487; (1985) ATPR ¶40-565]; (ii) The sale of land upon which no business is conducted may, therefore, be the sale of a non-business asset and a transaction which is not “in trade or commerce” [*O’Brien v. Smolonogov* (1985) ATPR ¶40-418 (followed in *Lubidineuse* above)]; (iii) It is relevant to consider whether a sale is “in the course of business” or one which arises in “a business context” [*Lubidineuse*; *O’Brien* (above)]; (iv) Whether a transaction is in a business context involves consideration of the parties involved, whether similar transactions have previously occurred and the motivation of the parties - for example, if the motivation is to sell a home to move elsewhere, this is not a business motivation [*Lubidineuse*; *O’Brien* (above) adopting the United States test in *Lantner v. Carson* 373 NE 201 (1978)]; (v) It is not appropriate to read the term “trade or commerce” as relating only to transactions in the ordinary course of a person’s occupation or business [*Lubidineuse*; *O’Brien* (above)]; (vi) It is not necessary for a transaction to be repetitive in order to be “in trade or commerce”. An isolated transaction such as the sale of a capital asset used for business activities may be adequate [*Satna Holdings v. Jokade* (1985) ATPR ¶40-529]; (vii) One test is whether the proceeds of the sale are available for the re-investment in other business activities should the vendor so choose [*Lubidineuse* (above)]. In relation to agents, the principal’s liability follows as a matter of law in that a principal is liable to indemnify an agent for, and is liable for, an agent’s conduct within the scope of the agent’s authority [*MacCormick v. Nowland* (1988) ATPR ¶40-852; *Aliotto v. Broadmeadows Bus Service Pty Ltd* (1988) ATPR ¶40-873]. However, it has been held that the acts of an agent in selling a private dwelling house do not mean that the vendor is engaged “in trade or commerce” in relation to the sale [*Argy v. Blunts Lane Cove Real Estate* (1990) ATPR ¶41-015].

21 *Concrete Constructions (NSW) Pty Limited v. Nelson* (1990) ATPR ¶41-022.

sue his employer when the employee suffered damages by falling down a manhole previously stated by the employer to be safe. The logic of the High Court holding is that the words "in trade or commerce" in s.52 are not wide enough to cover the conduct involved. This is because the particular activity is not incidental to the carrying on of an overall trading or commercial business. The activity may have been "with respect to trade or commerce" but it is not "in trade or commerce" as required by s.52. The High Court gave as an example of activity "with respect to trade or commerce" but not "in trade or commerce" (as required by s.52) the case of a truck driver giving a misleading hand signal on the highway. The truck driver was clearly engaged in conduct "with respect to trade or commerce" but, as his activities were not incidental to an overall trading or commercial activity, he was not engaged "in trade or commerce" and could thus not be sued under s.52 for the consequences of giving a misleading hand signal. An employee falling through a hole in the course of his employment was, said the High Court in *Concrete Constructions*, in the same position as the truck driver in the example given. Obviously enough, the *Concrete Constructions* decision takes most workers' compensation claims and most motor accident claims outside the ambit of s.52.

**(e) Subject to the above, the expression "in trade or commerce" is to be broadly construed**

Subject to the above limitations, the expression "in trade or commerce" is to be broadly construed. It has been said that the terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge. The terms are "clearly of the widest import". They are not restricted to dealings in open markets which have the dominant objective of profit making.<sup>22</sup> Thus, the following have been held to constitute conduct engaged in "in trade or commerce":

- (i) ***a film made by a forestry trade association which related to burning, clearing, reafforestation and the creating of forest reserves.*** It was argued that the conduct involved in preparing such film was of a "political nature" and thus exempt from s.52. The Court's response was that the film was produced by a trade association whose production of the film was motivated by a desire to answer criticism levelled at the forest industry. The film was also made to influence the public and the Government, each of which threatened the activities of companies engaged in forestry activities. The conduct of making the film was, therefore, engaged in "in trade or commerce";<sup>23</sup>
- (ii) ***conduct of the tobacco industry in alleging that there was very little scientific evidence that cigarette smoking caused disease in non-smokers.*** Cigarettes were sold in trade or commerce and restrictions on their sale would have an impact in trade or commerce. Though participation in a debate on a matter of public, social or economic controversy will not constitute conduct "in trade or commerce", the Tobacco Institute was involved in such debate in order to ensure that cigarette sales were not affected by public or Government reaction and in order to protect the market for cigarettes. For this reason, the placing of the relevant advertisement was conduct "in trade or commerce";<sup>24</sup>
- (iii) ***dealings by employees with their employers which are not "internal" dealings in the sense referred to in Concrete Constructions*** (see III.4 above). It does not follow from *Concrete Constructions* that a transaction is outside s.52 purely because an employer is dealing with an employee. If a company which carries on business as a car dealer sells a motor vehicle to an employee, such conduct is engaged in "in trade or commerce" as much as is the same activity when engaged in towards a stranger.<sup>25</sup>

Similarly, the negotiation of an employment contract with a present employee is not

22 *Re Ku-Ring-Gai Co-Operative Building Society (No.12) Limited* (1978) ATPR ¶40-094.

23 *Marlish v. WA Chip & Pulp Co Pty Ltd* (1981) ATPR ¶40-259.

24 *Australian Federation of Consumer Organisations Inc v. The Tobacco Institute of Australia Ltd* (1991) ATPR ¶41-079.

25 An example given by Wilcox J in *Barto v GPR Management Services Pty Ltd* (1992) ATPR ¶41-162.

an “internal” transaction and thus outside the terms of s.52. If such negotiation had been engaged in with a non-employee, it would clearly be an activity “in trade or commerce”. It does not lose this characteristic purely because the negotiation is with an already existing employee. The relationship of the parties in such a case does not vary the intrinsic thrust of the negotiations involved, which is contractual in nature.<sup>26</sup> Likewise, if by misleading conduct, an employer induces employees to leave a certain location to take up employment elsewhere, this conduct is “in trade or commerce” so as to attract s.52 liability. Such liability is attracted not only in relation to the employees involved but also in relation to any damages suffered by the spouses of such employees.<sup>27</sup>

In relation to employment contracts and the negotiation of them, the present Court view seems to be that:

... conduct which occurs in the course of negotiations with a prospective or present employee in respect of that person’s employment contract is conduct capable of falling within s.52 of the *Trade Practices Act*.<sup>28</sup>

(iv) **conduct involving “mutuality” such as that of a co-operative building society towards a member is conduct engaged in “in trade or commerce”.**<sup>29</sup> The “mutuality” factor does not alter the fundamentally commercial nature of the dealings between the parties.

(v) **conduct of virtually any incorporated company will be considered to be conduct engaged in “in trade or commerce”.** This is because:

Except for charitable purposes, corporations are not formed except in rare instances other than for the purpose of trading in some manner and the first exercise of its objects should be regarded as conduct “in trade or ... commerce.”<sup>30</sup>

(vi) **gratuitous advice by a business adviser can constitute conduct “in trade or commerce” even if given to a person who is not a client or customer of the adviser and whether or not a fee is charged for the advice.** The advice is given “in trade or commerce” because it is part of the business activities of the adviser to give such advice.<sup>31</sup>

(vii) **advice given by professionals is given “in trade or commerce”.** The Court has said that this conclusion follows because:

... even allowing for widely different approaches to the definition of what constitutes a professional, there is no conceivable attribute of that aspect of professional activity which will take it outside that class of conduct falling within the description “trade or commerce.”<sup>32</sup>

## (f) Conclusion

Though s.52 is sensibly limited to commercial activities by the requirement that conduct must be engaged in “in trade or commerce” in order to come within it, this limitation only minimally circumscribes the broad thrust of the section. There are exemptions for priests and politicians. But the “political” exemption has, to date, been interpreted quite restrictively, as the forestry and tobacco industry have found. There is also a limitation of the section in that it does not apply to certain “internal” dealings with employees. This exemption, however, is not so broad as to take commercial activities outside the section purely because employees happen to be on the other side of them. Some “domestic” transactions may escape the section but, once again, the exemption is not a broad one. Subject to the above, virtually all commercial conduct comes within the broad

26 *Ibid.*

27 *Patrick & Ors v. Steel Mains Pty Limited* (1987) ATPR ¶40-794.

28 *Supra* n.25 per Wilcox J.

29 *Supra* n.22.

30 *Bevanere v. Lubidineuse supra* n.20.

31 *Menhaden Pty Ltd v. Citibank* (1984) ATPR ¶40-471. The adviser in this case was a Bank and advice was given to a non-customer.

32 *Bond Corporation Pty Limited v. Thiess Contractors* (1987) ATPR ¶40-771.

parameters of the section. Once conduct is within the terms of the section, all ingredients of such conduct are also within it. This is because:

... the terms 'trade' or 'commerce' are ordinary terms which describe all the mutual dealings, the negotiations, verbal and by correspondence, the bargain and the transport and the delivery which comprise commercial arrangements.<sup>33</sup>

### **In What Types of Transactions Has Section 52 Been Most Utilised?**

It is intended here to deal only with the *inter partes* utilisation of s.52, that is to limit this paper to cases other than those involving transgressions by conduct which misleads the public generally and which has no *inter partes* aspects. Even with this limitation, it is fair to say that s.52 has been so widely utilised that it is difficult to classify the major specific areas of such use. With this caveat, however, the following appear to be the major areas in which s.52 litigation has surfaced in an *inter partes* context:

1. "Passing off" actions.
2. Comparative advertising claims.
3. Sale of Business transactions.
4. Conveyancing and Land Transactions.
5. Finance Transactions.

#### **(a) "Passing off" transactions**

"Passing off", in broad terms, involves a misleading representation that certain goods or services provided by another party are, in fact, provided by the representor. In an alternative form, "passing off" may involve a misleading representation that there is an affiliation between two entities which does not exist. "Passing off" actions thus have a significant element of public deception though such cases are directed to private advantage by specifically utilising the image or product of another. They are not cases which relate only to public deception but they also heavily involve trader detriment. Notwithstanding the criteria previously stated (ie, that only *inter partes* matters are here considered) it is, therefore, appropriate to deal with such cases in this material.

In the "passing off" field s.52, though the major litigated section of the *Trade Practices Act*, is not alone. Section 53(a) of the *Trade Practices Act* illegalises false representations that goods have a particular quality. One such quality may, of course, be that it is produced by a particular company. Section 53(aa) of the Act illegalises false representations as to the quality of services. More particularly s.53(c) illegalises false representations that goods or services have, amongst other things, "sponsorship" or "approval" which they do not have. Section 53(d) illegalises false representations that a "corporation has a sponsorship, approval or affiliation which it does not have". Section 53a(1) prohibits, in the same terms as s.53(d), false representations in relation to sales of land.

What is clear in relation to "passing off" is that the relevant *Trade Practices Act* provisions are now invariably pleaded in conjunction with common law "passing off" claims. Indeed, in view of the differing principles extracted by different judges as to the precise scope of each remedy, it would be foolish indeed not to do this.<sup>34</sup>

<sup>33</sup> *W & A McArthur Ltd v. State of Queensland* (1920) 28 CLR 530 applied in *Lubidineuse supra* n.20.

<sup>34</sup> For example, in *Paul Hogan v. Koala Dundee Limited* (1988) ATPR ¶40-902, Paul Hogan was successful in a common law passing off action even though he had no reputation as a manufacturer of koala teddy bears. In this case, Mr Justice Pincus was prepared to hold that the common law action of "passing off" should be extended to cover circumstances where there was no business connection or common line of business between parties. In a judgment on the same day, Tracey Wickham was, however, unsuccessful in a common law passing off claim because it was held that she had no reputation as a pool builder and thus could not, at common law, restrain a pool builder using her name. The more traditional "common business affiliation" test was applied by the Court. She was, however, successful in her claim under s.52 of the *Trade Practices Act* [see *Tracey Wickham v. Associated Pool Builders Pty Ltd* (1988) ATPR ¶40-910].



The most interesting commercial cases in the law of passing off, and its akin *Trade Practices Act* sections, seem to the writer to be in the following areas:

(i) ***Character merchandising***

Character merchandising now receives protection which, prior to the *Trade Practices Act*, was not as readily available. In general terms, the Courts have now held that the public is aware that parties hold copyright in fictional characters and that licensing arrangements are involved in the exploitation of such copyright. This being so, parties will not be permitted gratuitously to "cash in" on characters developed by others.<sup>35</sup>

(ii) ***Misleading conduct and claimed "approvals" which occur when the circumstances surrounding transactions give rise to such a conclusion.***

Whilst there is nothing improper in claiming that one product is "compatible" with another if this is a fact,<sup>36</sup> it has been held that it is a false claim by one computer company that its product is "approved" by another when the first company hands out the Manual of the second with its own computer.<sup>37</sup> This, said the Court, was a representation by the first company (Wombat) that the second company (Apple) had "put its stamp of approval upon the sale or supply of the Wombat computer or Wombat software".

(iii) ***Passing off by use of company names, logos or other claims of affiliation.***

Most cases in the "passing off" area have involved the use of a company name, a company logo or some other direct representation as to affiliation. Thus, it breaches the Act to allege an affiliation between Prince Rainier and Princess Grace of Monaco with a Monte Carlo circus,<sup>38</sup> falsely to represent an affiliation with "Whirlpool" by a claim that a person has a Whirlpool licence when he or she does not<sup>39</sup> and falsely to continue to use a franchisor's name or logo after termination of a franchise or other agreement.<sup>40</sup> It is not, however, a claimed affiliation to sell a record giving, at the point of sale, the catalogue reference of a company because a purchaser would not assume any affiliation from this action.<sup>41</sup>

Many applications for injunctions under the *Trade Practices Act* have, however, failed at the interlocutory level.<sup>42</sup> In a number of such cases, the court has been unimpressed with assertions of applicants and has held that applicants have shown no arguable case. Clearly enough, many applicants have an exaggerated view as to what constitutes a false statement of affiliation. Particularly is this so when the false statement of affiliation is said to occur purely because a

35 *Hogan v. Pacific Dunlop Limited* (1988) ATPR ¶40-914; *Pacific Dunlop v. Hogan* (1989) ATPR ¶40-948; *Hogan v. Koala Dundee Pty Ltd* (1988) ATPR ¶40-902; *Surge Licensing Inc v. Pearson* (1991) ATPR ¶40-119. A common defence pleaded has been that the infringing item is a parody on the original. This defence has received little judicial sympathy in recent cases.

36 *Parke Davis Pty Ltd v. Wilkinson Sword Pty Ltd* (1982) ATPR ¶40-271. As to what is involved in "compatibility" see *Interlego AG v. Croner Trading Pty Ltd* (1991) ATPR ¶41-124. The case involved children's toy building blocks. "Compatibility" was said to mean that the products could be used interchangeably so that a child would not care whether he or she picked up one or the other. In fact, there were substantial areas of incompatibility.

37 *Apple Computer v. Computer Edge* (1984) ATPR ¶40-453.

38 *Michael Edgley International Pty Ltd v. Ashton's Nominees Pty Ltd* (1979) ATPR ¶40-125.

39 *Malleys v. Whirlpool Australia Pty Ltd* (1984) ATPR ¶40-455.

40 *Enzed Holdings Ltd v. Wynthea Pty Ltd* (1985) ATPR ¶40-507; *Dickson v. Gallagher* (1985) ATPR ¶40-550; *Budget v. Giboland* (1986) ATPR ¶40-684; *Wickham v. Associated Pool Builders* (1986) ATPR ¶40-471; (1988) ATPR ¶40-910 *Australian Solar Mesh Sales Pty Limited v. Tomlen Industries Pty Limited* (1991) ASC ¶56-091. Note, however, that it is not a breach of the Act purely (that is without claim of affiliation) to carry on techniques and procedures after the expiration of an arrangement which are common to the procedures adopted by another and which were the subject of the prior agreement. *Perceptual Development Corp v. Versi* (1988) ATPR ¶40-837.

41 *Festival Records Pty Ltd v. International Direct Marketing Pty Ltd* (1986) ATPR ¶40-664. For a similar holding in the context of s.53(c): see *Parke Davis Pty Ltd v. Wilkinson Sword Pty Ltd* (1982) ATPR ¶40-271.

42 See, for example, *Happy Landings Pty Ltd v. Magazine Promotions Pty Ltd* (1984) ATPR ¶40-459; *Lego Australia v. Pauls (Merchants) Pty Limited* (1982) ATPR ¶40-275; *Cue Design Pty Ltd v. Playboy Enterprises Pty Ltd* (1982) ATPR ¶40-321; *Kudos Pty Ltd v. Tully Corporation Pty Ltd* (1983) ATPR ¶40-415; *Greg Cotton Motors Pty Ltd v. Neil and Ross Neilson Pty Ltd* (1984) ATPR ¶40-443.

similar product name or company name is used. A useful summary of the position in this regard is contained in *Australian Telecommunications Corporation v. Hutchison Telecommunications (Australia) Limited*.<sup>43</sup> In this case, Telecom Australia alleged that Hutchison Telecommunications Limited was representing that it was in some way connected with Telecom Australia because of its use of the name "Hutchison Telecom". Telecom Australia alleged that the use of the word "Telecom" by Hutchison wrongly suggested that it is a "branch of Telecom Australia" or "a joint venture with Telecom Australia" or "trying to get as close as possible to Telecom Australia (with) ... advertising being calculated to achieve this result". In fact, although Hutchison used the word "Telecom" in its title and in its advertising, its logo contained a square "H" and was normally printed in a bright blue colour. Telecom Australia had a circular logo, gold in colour with the letter "T" in white on it. For present purposes, the following points emerge from this case:

- that any intending client reading the Hutchison brochure would not have been left with the impression that Hutchison Telecom had any affiliation with Telecom Australia;
- that there was evidence that the word "Telecom" was a convenient contraction of the word "Telecommunications" which was a word in wide usage. Further, the word "Telecom" itself was a word of wide usage. Evidence showed that the word was used as part of the company title of enterprises in England, Canada, France, Hong Kong, Sweden, Singapore, Japan and various other countries;
- that Hutchison's use of the word "Telecom" had not been copied from the use of that word by Telecom Australia but had been suggested by an advertising agency. However, even if the word had been copied, either deliberately or unconsciously, from Telecom's use of it, nothing of importance could be attached to this;
- that there is a price to be paid in commerce for the advantages flowing from the possession of an eloquently descriptive trade name. The very descriptiveness of such names ensures on occasions that they are not distinctive of any particular business and hence will have application to other like businesses. The use of a word in these circumstances will not ordinarily mislead the public even though there is some risk of confusion. For the Court to hold otherwise would be to give to one who appropriates to himself or herself distinctive words an unfair monopoly in those words and might even deter others from pursuing the occupation which the words describe. If a name is not more than merely descriptive of a particular type of business, its use by others who carry on that same type of business does not mislead the public; and
- it was not a sign of bad faith that Hutchison had not informed Telecom Australia of its intention to use the new name. No doubt Hutchison anticipated that Telecom Australia would object to such usage and to any trade mark or company registrations including the word "Telecom". At the very worst characterisation of Hutchison's conduct, it was nothing more than that of a shrewd businessman.

Normally, in the case of alleged affiliation by use of a name alone, it will be necessary to show some common field of activity or demonstrate some secondary reputation which has developed in a word of ordinary usage which attaches to a particular party.<sup>44</sup> Usually this secondary reputation in a word will require use of the word in connection with some logo or "get up" and

43 (1989) ATPR ¶41-008. The application was for interim injunction. This relief was denied. Although the court was of the belief that Hutchison Telecom had not breached the TPA, it was not able to say that there was no arguable case and the matter was set down for final hearing. For cases involving akin principles: see *Just Jeans Pty Ltd v. Westco Jeans (Aust) Pty Ltd* (1988) ATPR ¶40-867; (1989) ATPR ¶40-927; *World Impact Export Company v. Shueng Shing Pty Ltd* (1990) ATPR ¶40-988.

44 *Chase Manhattan Overseas Corp v. Chase Corp & Anor* (1986) ATPR ¶40-661; (1986) ATPR ¶40-750 [Despite extensive publicity of a company name in New Zealand, it was not proven that there was a secondary reputation in Australia]. On an akin theme: see *Taco Bell Company of Australia Inc. v. Taco Bell Pty Ltd* (1982) ATPR ¶40-303; *Australian Society of Accountants v. Federation of Australian Accountants Inc* (1987) ATPR ¶40-796; 1988 ATPR (Digest) ¶46-004 [Decision under s.52 holding that initials CPA (standing for Certified Practising Accountant) were

the use of the word alone will not be adequate. Cases in this area have been decided both under s.52 and in the field of trade mark law.<sup>45</sup>

It is, nonetheless, true that:

... where one company has established a product under a name made up of descriptive words that have become distinctive of that product, any other company seeking to market a product in the same or a closely allied field, and having all the rich resources of the English language available to it, would be wise to avoid the flirtation with danger (which the use of words and get up of an existing product entails).<sup>46</sup>

Clearly similar “get ups” can be in breach of the *TPA*. In particular this is so when it is clear that the purpose of the similarity is to obtain the advantage of the market name or reputation of a previous marketer.<sup>47</sup>

### (b) Comparative Advertising Claims

Comparative advertising, like “passing off”, involves public deception. For the same reasons as were given in relation to “passing off”, however, it is appropriate to discuss comparative advertising as an *inter partes* matter. Comparative advertising clearly involves the specific targeting of an opposition’s product and making comparisons with it. It thus relates to trader *inter partes* issues just as much as it relates to public deception issues.

The fundamental principle in relation to comparative advertising is that:

... it is obligatory on any person who advertises in this way to ensure that its statements and comparisons are accurate ... (advertising of this nature must be carried out) accurately and in a way which does without doubt compare like with like.<sup>48</sup>

Comparative advertising involves two broad issues, each of which is an application of the

identified with members of the Australian Society of Accountants]; *Rent-A-Ute Pty Limited v. Golden 44 Pty Ltd & Ors* (1987) ATPR ¶40-800 [the name “Rent-a-Ute” were merely descriptive words and not distinctive of plaintiff’s business]; *Miki Shuko Co Ltd v. Merv Brown Pty Ltd* (1988) ATPR ¶40-858; *TVAM v. Amalgamated Television Services* (1988) ATPR ¶40-891; *Lovatt v. Consolidated Magazines Pty Ltd* (1988) ATPR ¶40-903; *Miss World (Jersey) Limited v. Mrs of the World Pageants Inc* (1988) ATPR (Digest) ¶46-033 (it might be imagined that there was an affiliation between the two contests but it was a far step from this to say that there was a representation as to such affiliation); *Equity Access Pty Ltd v. Westpac Banking Corporation* (1990) ATPR ¶40-994. See also cases at n.45 below.

45 See, for example, *Rent-A-Ute Pty Ltd v. Golden 44 Pty Ltd* (1987) ATPR ¶40-800; *BM Auto Sales Pty Ltd v. Budget Rent-A-Car System Pty Ltd* (1977) 51 ALJR 254; for discussion of applicable principles under s.52 of the *TPA* at interlocutory injunction stage: see *Voyager Distributing Co Pty Ltd v. Cherry Lane Fashion Group Ltd* (1985) ATPR ¶40-536; *Hertland Investments Pty Ltd v. Coles KMA* (1985) ATPR ¶40-575; *Sitmar Cruises Ltd v. Carnival Cruise Lines Inc* (1986) ATPR ¶40-728; *Nylex Corporation Ltd v. Sabco Ltd* (1987) ATPR ¶40-752; *Lumley Life Limited v. IOOF of Victoria Friendly Society* (1990) ATPR ¶40-987; see *ACI Aust Ltd v. Glamour Glaze Pty Ltd* (1988) ATPR ¶40-868 (use of name alone was sufficient in the case of a well known producer of glass products). See also cases at n.44 above.

46 *R & C Products Pty Ltd v. Hunters Products Pty Ltd* (1988) ATPR ¶40-839; *Ductline Pty Ltd v. Acric Investments Pty Ltd* [Fed Ct: Sweeney J - 20 December 1991 (Unreported at the time of writing)].

47 *Abundant Earth Pty Ltd v. R & C Products Pty Ltd* (1985) ATPR ¶40-532; *Lelah v. Associated Communication Corporation of Australia Pty Ltd* (1985) ATPR ¶40-551 (“Exquisite ladies” advertisement); *INXS v South Sea Bubble Co Pty Ltd & Ors* (1986) ATPR ¶40-667; *Berzins Speciality Bakeries Pty Ltd v. Monty’s Continental Bakery (Vic) Pty Ltd* (1987) ATPR ¶40-819; *Telmark Teleproducts Pty Ltd v. Coles Myer Ltd* ATPR (Digest) ¶46-038, (1989) ATPR ¶40-966; *LSK Microwave Advance Technology Pty Ltd v. Rylead Pty Limited* (1989) ATPR ¶40-958; *R & C Products Pty Ltd v. Hunters Products Pty Ltd* (1988) ATPR ¶40-839; *LSK Microwave Advance Technology Pty Ltd v. Rylead Pty Limited* (1989) ATPR ¶40-958; *Hogan v. Koala Dundee Pty Limited* (1988) ATPR ¶40-902; *Hogan v. Pacific Dunlop Limited* (1988) ATPR ¶40-914; (1989) ATPR ¶40-948; *Ductline v. Acric* (n.46); see also cases cited at n.44 and n.45 above. For general coverage of “character merchandising problems”: see J McKeough, “Character Merchandising: Legal Protection in To-day’s Marketplace” (1984) 7 UNSWLJ 97; S Ricketson, “Character Merchandising in Australia: Its benefits and Burdens” (1990) 1 *Intellectual Property Journal* (4) 191-211; RG Howell, “Personality Rights: A Canadian Perspective: Some Comparisons with Australia” (1990) 1 *Intellectual Property Journal* (4) 212-241; MD Pendleton, “Character Merchandising and the Proper Scope of Intellectual Property” (1990) 1 *Intellectual Property Journal* (4) 242-256.

48 *State Government Insurance Commission v. JM Insurance Pty Ltd* (1984) ATPR ¶40-465.

above "like with like" concept. The first issue is whether a comparative price advertisement fairly compares "like with like". The second issue is whether a comparison of physical characteristics of products is a genuine comparison of "like with like".

(i) **Price Comparisons**

An advertisement of premiums for car insurance may well indicate that one policy is significantly cheaper than another. However, the advertisement may be misleading when the benefits payable are different - in particular when there is a different "excess" on one policy to that on the other and this fact is not disclosed. In such circumstances, the Court has said that:

... there is ... a heavy responsibility ... to ensure that ... comparisons are accurate, for inaccurate comparisons are inherently likely to mislead the public.<sup>49</sup>

In the case of insurance premiums for motor vehicles, the Court has noted how difficult it is, in fact, to make accurate comparisons.<sup>50</sup> Similar difficulties have occurred in relation to health insurance advertisements. As in the case of motor vehicle insurance premiums, it is misleading price advertising to compare health insurance premiums without disclosing in the advertisement that one policy is "excess free" when the other is not.<sup>51</sup> Price comparisons can also be implied by a claim that a particular health fund is "the best value". Such a claim is not "product puff" and has to be substantiated.<sup>52</sup>

(ii) **Comparisons of the physical characteristics of products**

One has to go no further in this field than the *Power Drills* case<sup>53</sup> and the *Washing Machines* Case.<sup>54</sup>

In the *Power Drills* Case, the applicant (Makita) claimed that a television advertisement by the respondent (Black & Decker) constituted misleading or deceptive conduct because it was based on a "torture test" in which the two competitive drills were pitted against each other. The advertisement claimed to be "an amazing demonstration". The two drills were mounted facing each other and linked by a 10mm shaft. The Makita drill was turned on first followed a few seconds later by the Black & Decker drill which almost instantaneously reversed the Makita drill's shaft rotation. In each of four completed "takes", at an interval of between 5.84 and 9.57 seconds, visible smoke emanated from the Makita drill followed by intense smoke 8 to 12 second later. However, the commercial had been edited to reduce this time to 2.7 seconds. None of the footage which showed the Black and Decker drill had stalled on two occasions and started to smoke at the end of one demonstration was shown. The unchallenged evidence was that, in five out of six contests where experts simulated a challenge between the two drills, the Black & Decker drill emitted smoke. The test of the drills by experts was accepted as the "typical" situation. The television commercial was thus atypical. The television commercial was misleading because it left the impression not only that the Black & Decker drill was superior in that it was completely unaffected by the ordeal but also that the Makita drill was completely devastated by the contest because it quickly overheated and smoked. This was contributed to by the editing of the advertisement. On the basis that the claims made conveyed a misleading or deceptive impression of the comparative attributes of the drills involved, an

49 *Supra* n.48. See also *Stuart Alexander & Co (Interstate) Pty Ltd v. Blenders Pty Ltd* (1981) ATPR ¶40-244; *Insurance Commissioner v. Australian Associated Motor Insurers Ltd* (1982) ATPR ¶40-299.

50 *Supra* n.48.

51 *Switzerland Health Fund Pty Ltd v. FAI Health Benefits Ltd* (1988) ATPR ¶40-844.

52 *HCF Australia Ltd v. Switzerland Australia Health Funds Pty Ltd* (1988) ATPR ¶40-846. This situation can be contrasted with advertisements for project homes which were claimed to be "best value". In this case, the Court held that such statement was "product puff" and not an objective claim of superiority of one product over another. *Collier Constructions Pty Ltd v. Foskett Pty Ltd* (1990) ATPR (Digest) ¶46-063.

53 *Makita (Australia) Pty Ltd v. Black & Decker (Australasia) Pty Ltd* (1990) ATPR ¶41-030.

54 *Hoover (Australia) Pty Ltd v. Email* (1991) ATPR ¶41-149.

injunction was issued and corrective advertising was ordered to be placed in the *Australian Hardware Journal*.

The *Washing Machine Case* involved an advertisement by Email which showed an unevenly loaded Hoover Washer “walking” whereas the Email machine with the equivalent load remained stationary. The depiction was true in fact, given the loading of the Hoover machine. However, the Hoover machine was not, in fact, loaded with an uneven load of washing but with 2kg of lead shot. The Court held that the comparative advertisement involved was misleading or deceptive as it omitted the particulars necessary to make the comparison fair. The advertisement purported to show that the Hoover machine “walked” when it was washing a couple of towels and a few sheets and pillow cases when this was not the fact.

An interesting gloss on the “like with like” comparative advertising concept recently occurred in the *Najee Clothing Case*.<sup>55</sup> In this case three suits were advertised side by side with a photograph of a male model wearing each suit. The same description “pure wool gaberdine suit” was across the bottom of each photograph. Each photograph bore different words, these being:

“Country Road	\$995”
“Hugo Boss	\$795”
“Najee	\$349”

The reader was asked “Why pay more?” and along the bottom of the advertisements were the words “Compare suits, then compare prices”.

Country Road claimed that the advertisement was misleading because it created the impression that each suit worn by the model was of the same quality when this was not the case. The fact that the quality of suits was different was not disputed. However, Najee said that there was no representation made that the quality of each suit was the same.

The Court held in favour of Najee. It held that the invitation “Why pay more?” was not a hypothetical question. The reader was, in fact, invited to compare suits. The Court thought that the photographs did not in any way vary the meaning of the written words. If the advertisement was not misleading without the photographs, the addition of the photographs could not make it so, said the Court.

If the *Najee Clothing* case represents good law, in this writer’s opinion, it opens up a considerable scope for advertisements which do not, in fact, compare “like with like”. One would think that all comparative advertisements, actually or by implication, invite price and product quality comparisons. A specific invitation to compare adds very little to this general position. The whole point of a comparative advertisement is to influence a potential customer to buy a particular product. As a matter of advertising reality, the *Najee Clothing* case, in the writer’s view, sits uneasily with the general principle that advertising comparisons must be of “like with like”. Far from being of little or no importance, as the Court held, the photographs of the model were, in the writer’s view, basic to the impact of the advertisement. If *Najee Clothing* is correctly decided, advertisers will be able to compare the cheaper price of a “standard” model car with the dearer price of an opposition vehicle containing air conditioning, stereo gear, power steering and servo assisted brakes without disclosing the hidden differences provided that the advertisement asks the viewer to compare the products and also asks “Why pay more?”. Clearly this is not a comparison of “like with like” and neither, in the writer’s view, was the *Najee* advertisement. Caution is thus in order in applying the *Najee Clothing* case too enthusiastically in light of the many cases holding that comparative advertising must genuinely compare “like with like”.

55 *Country Road Clothing Pty Limited v. Najee Nominees Pty Ltd* (1991) ATPR ¶41-106.

(iii) ***General Principles Applicable to Television Advertisements***

Some latitude is allowed in television advertisements because of the nature of the medium. Mr Justice Lockhart evaluated one television advertisement involving two coffee jars with money in them.<sup>56</sup> The impression was that one brand cost 100% more whereas it was, in fact, only 53% more expensive. His Honour declined to make “too fine and precise” a distinction. He held that “the overall impression is that Moccona is considerably more expensive than Andronicus and that it is”. It is appropriate to regard this case as one where no misleading “impression” was created (and hence no misleading or deceptive conduct was involved) rather than as a variation of the fundamental obligation to compare “like with like”. It is to be noted that the price comparison of car insurance premiums and the power drill comparisons referred to above both involved television advertisements. In each case, it was suggested that “voice-overs” or printed material would be adequate to correct the failure to compare “like with like”. In each case, the Court rejected this as a solution to the illegality created by the misleading comparison.

(c) **Sale of Business Transactions**

(i) ***General Observations***

There is a veritable barrage of cases involving the sale of businesses. It is impossible to deal with all such cases and only the more interesting ones are selected for comment.

It is probably in relation to the sale of business that the “half truth” has come into its own as an art form. In all such cases, the fundamental principle is that stated in *The New York Deli* case.<sup>57</sup> In this case, the vendor represented that it could seat 128 people in the restaurant business being sold. In fact, the maximum seating allowed by the liquor licence issued for the premises was 84 people. The vendor stated that the representation made, that 128 people could be seated, was true in fact. As a matter of actuality, the vendor was seating this number of people. The purchaser, on the other hand, submitted that there was a “half truth” involved in that the vendor’s representation had to be interpreted as one that 128 people could be legally seated. So viewed, the vendor’s statement was misleading or deceptive. The issue, of course, was not purely academic. The restricted seating impacted significantly on the profits which the purchaser might expect to receive from the conduct of the business. Mr Justice Lockhart’s judgment in the Full Federal Court says as follows in relation to this issue:

...silence can give rise to an actionable representation where there is a duty on the misrepresenter to reveal a matter if it exists, and where the other party is therefore entitled to infer the matter does not exist from the silence of the representor ... silence may be relied upon in order to show a breach of s.52 where the circumstances give rise to an obligation to disclose the relevant facts ... the duty to disclose is not confined to particular cases where there are particular relationships, such as trustee and beneficiary or solicitor and client, principal and agent and guardian and ward. There is no useful purpose in seeking to analyse the circumstances in which the duty to disclose will arise as this must depend upon the facts of each case.

In the present case, the vendor sold a business knowing it was subject to serious limitations on its lawful seating capacity ... which vitally affected the business, its goodwill, takings and profitability and knowing that in fact the restaurant was being conducted contrary to law with a substantial element of overseating ... In my opinion these circumstances give rise to a duty on the part of Henjo as vendor to reveal the true position to Collins Marrickville, the potential purchaser, before any contract was signed ...<sup>58</sup>

56 *Stuart Alexander & Co (Interstate) Pty Ltd v. Blenders Ltd* (1981) ATPR ¶40-244.

57 *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd* (1987) ATPR ¶40-782; On Appeal (1988) ATPR ¶40-850.

58 *Ibid* at 49,152-49,153 per Lockhart J.

It is also of importance to note that misrepresentations made during negotiations are treated as continuing representations. Representations which are true in fact when made may subsequently become untrue and thus give rise to a duty of correction.<sup>59</sup>

In the *New York Deli* case a clause in the contract excluding the effect of any pre-contractual representations was held not to defeat a claim under s.52 because:

... an exclusion clause of that kind cannot oust the effect of the Act or deprive an applicant of remedies under it. If in fact there was misleading conduct by Henjo which induced Collins Marrickville to enter into the contract, that inducement was not negated because in the agreement the parties themselves may have said to the contrary.<sup>60</sup>

(ii) **Examples of Sale of Business Transactions in which s.52 litigation has arisen**

Some sale of business transactions which have involved s.52 are as follows:

(a) **Misrepresentations in relation to leases in shopping centre complexes.** It breaches s.52 to state to a prospective tenant that all shops in the centre will be let when he takes up his lease whereas in fact only two such shops were let.<sup>61</sup> Similarly, s.52 is breached when a lessee is told that he will be the sole fish and chip purveyor when this is not the situation in the lease documentation signed by, but not comprehended by, the lessee.<sup>62</sup>

(b) **Misrepresentations as to surveys conducted.** If a tenant is induced to enter into a lease on the basis that a customer survey has been conducted, s.52 will be breached when all the lessor had done was to drive around the locality of the proposed arcade to observe existing outlets and gather anecdotal information from local businessmen. The term 'survey' in the market research context carries with it the implication of questions being put to, and answers received from, a representative sample of potential customers. In some cases it may not go as far as this but at least the term implies that someone had carried out a professional assessment of the market and reached the conclusion that there was a significant need for the shop in question.<sup>63</sup>

(c) **Misrepresentations as to liquor licences and trading hours.** The *New York Deli* case referred to above is one example of this. But there are others.<sup>64</sup> In the latest of these cases,<sup>65</sup> a liquor licence was, in fact, held which permitted trading until 2am. A representation was made to this effect. In fact, Council regulations prohibited trading after 12 midnight. Nothing was said about this. The vendor stated that his representation was true in all respects as his sole representation was in relation to his permitted liquor licence trading hours. The purchaser claimed that the vendor should have advised in relation to the Council trading restrictions. The Court held:

... the failure of the respondent vendors to inform the applicant as to the true restrictions as to trading hours, a crucial element in the operation of a nightclub - restaurant, was conduct which would, or was likely to, lead a purchaser into error (and thus was in breach of s.52).

(d) **Misrepresentations as to takings of businesses.** Possibly the most usual misrepresentation case in relation to the sale of a business is a misrepresentation made as to takings. In a sense, misrepresentations in relation to liquor licences and trading hours,

59 *Tiplady v. Gold Coast Carlton Pty Ltd* (1984) ATPR ¶40-472 [on Appeal (1984) ATPR ¶40-491 but the point not there discussed]. See also *Bikane Pty Ltd v. Netaf Pty Ltd* (1988) ATPR (Digest) ¶46-061.

60 *Supra* n.58 at 49,155. See *supra* n.16 for a summary of various reasons found by the court to negate the effect of exclusion clauses in relation to s.52 conduct.

61 *Brown v. The Jam Factory Pty Limited* (1981) ATPR ¶40-213.

62 *Dibble v. Aiden Nominees Pty Ltd* (1986) ATPR ¶40-693.

63 *Musca v. Astie Corporation Pty Ltd* (1986) ATPR ¶40-855.

64 *Rumpe v. Camrol* (1985) ATPR ¶40-522; *McMahon v. Pomeray Pty Ltd* (1991) ATPR ¶41-125.

65 *McMahon v. Pomeray Pty Ltd* *ibid.*

as discussed above, are ultimately also misrepresentations as to takings. However, misrepresentations in this field may be far more direct.

It is of importance to note that since 1 July 1986, s.51a of the *Trade Practices Act* has considerably assisted plaintiffs in s.52 cases relating to statements as to future matters. The takings of a business is a classical example of a future matter. Such statements have to be made on reasonable grounds and the onus of proving reasonableness is on the representor [See above].

A major point to note in this area is that representations will not be read in any technical sense. Thus, a claim that a business will take \$3,000 per week with overheads of \$1,600 will be read as giving a takehome profit of \$1,400 per week. Even if the technical interpretation of the word "overheads" excludes certain expenses, this would not be the understanding of a non-accountancy trained reader and the advertisement should, therefore, not be read in this way.<sup>66</sup> This is because:

The assertion of 'overhead' \$1,600 per week in the entire context was likely to lead persons reading the advertisement, unversed in accountancy terms, to the conclusion that overheads meant 'expenses'. This was the intention of the advertisement - it was an eye-catcher and led the applicants to believe that current weekly profits from the business would be the difference between turnover and overhead.

Misrepresentations have also occurred when businesses have had turnover misrepresented<sup>67</sup> or when representations are misleadingly made that a business should attract 500-700 customers per day resulting in an annual profit of between \$78,000 and \$114,500 per annum.<sup>68</sup> Motels have been represented as having an 80 per cent occupancy rate whereas such rate has been less than 30 per cent.<sup>69</sup> Perhaps the most interesting, but desperate, plea by a defendant in the misrepresentation of profit area is in the 1991 *Paper Sales* case.<sup>70</sup> In this case the vendor delivered a false profit statement. In particular, one invoiced sale for \$22,500 (which was for an amount slightly more than the net profit as represented) was fictitious. The defendant claimed that the fictitious invoice was raised "as a practical joke and erroneously included in the accounts of the business". Not surprisingly, the Court's view was that:

The humour was too recondite for the Court to divine. The purported sale was recorded only two weeks before the business was advertised for sale and was of an amount slightly more than the net profit of the business as represented in the profit and loss statement delivered to ... (the) prospective purchaser.

It was the term of the sale that the vendor collect all book debts and, therefore, any falsity in the representation of past sales would not have become apparent to a purchaser in the ordinary course of events.

- (e) **Misrepresentations that certain staff would stay with a business.** Obviously some key staff can be crucial to the profitability of a business. Misleading representations to a purchaser that certain key staff will stay with a business after completion when it is known that such staff do not intend to do so is misleading or deceptive conduct breaching s.52.<sup>71</sup>

66 *Ward v. Premier Ice Skating Rink Pty Ltd* (1986) ATPR ¶40-681.

67 *Yorke v. Treasureway Stones Pty Ltd* (1982) ATPR ¶40-313.

68 *Burnett v. Big Al's Sandwich Joints Pty Ltd* (1982) ATPR ¶40-279. This case was brought under s.88f of the *Industrial Arbitration Act* (NSW) alleging the contract was unfair.

69 *Neilsen v. Hempston Holdings Pty Ltd* (1986) ATPR ¶40-686.

70 *Paper Sales (Australia) WA Pty Ltd v. PSA Pty Ltd* (1991) ATPR ¶41-142. For damages assessment in this case see n.116.

71 *Lubidineuse v. Bevanere Pty Ltd* (1984) ATPR ¶40-487; (1984) ATPR ¶40-565; (1985) ATPR ¶40-597 (as to damages).



(f) **Misrepresentations as to the legality of business activities under town planning ordinances.** A vendor who sells a motor car sales business conducted on land not zoned for this purpose may, even if no representation at all is made as to the land use legality of the business, be in breach of s.52. This is because the impression given of the business (which was the selling of cars) was that such business could be legally conducted on the premises. The Court held that:

... such conduct amounted to fraudulent misrepresentation. In the circumstances, having given the very strong impression that the premises constituted an excellent site for the conduct of a business selling new and used cars generally, the respondents had a duty to disclose any impediment to the carrying on of such a business. In no way did they seek to correct the impression which had been given.<sup>72</sup>

(g) **Misrepresentation as to the financial status of parties.** If persons are represented as being “good tenants” when a business freehold is purchased, this means that the tenants are not in arrears of rent. It also implies that all relevant facts are disclosed. If, therefore, there is a “rent holiday” (and hence the tenants are not in arrears of rent) but the tenants have said that they would be in difficulty when rent repayments had to be recommenced, it is not appropriate to describe such tenants to a purchaser of the business as being “good tenants”.<sup>73</sup>

(iii) **Conclusion**

The above examples of s.52 cases in connection with business transactions illustrate the broad application of the section in this area. What is extraordinary to contemplate is that, prior to the enactment of s.52 in 1974, probably most of the business purchasers described in the examples given would have been without remedy - either because the representation was not “fraudulent” at common law or because a “complete contract” exemption clause would have precluded any action in respect of representations made during pre-contractual negotiations.

(d) **Conveyancing and land transactions**

Section 52 also has a considerable “hit record” in relation to conveyancing and land transactions. Again it is important to recall that the provisions of a contract cannot negate the effect of s.52 in relation to pre-contractual representations which have induced a party to enter into such contract.<sup>74</sup>

Section 52 has impacted upon conveyancing transactions in the following areas:

(i) **Zoning and land usage cases**

A major area of s.52 impact on conveyancing transactions relates to misleading or deceptive conduct in relation to zoning and land usage. In an early case, it was held that land described as “a wonderful place to live” carried with it the conclusion that a purchaser could build a house on the block of land being purchased. If this was not the case because of zoning restrictions, the representation was misleading or deceptive.<sup>75</sup> If a representation is made that Council approval to subdivide has been given and, in fact, no formal application has been made for such approval, then the statement made is misleading or deceptive.<sup>76</sup> As stated previously,<sup>77</sup> the sale of a business on land which appears to be zoned for purposes of selling cars will be upset under s.52 if such use of the land is not permitted. This is regardless of any representations made, the conclusion being reached

72 *GA Nominees Pty Ltd v. Barden Motors Pty Ltd* (1985) ATPR ¶40-519.

73 *Scott v. Windsor Holdings Pty Ltd* (1986) ATPR ¶40-737. See also *Pappas v. Sonlac Pty Ltd* (1983) ATPR ¶40-411.

74 *Supra* n.16 for the various reasons given by the Courts for this conclusion.

75 *Given v. Pryor* (1979) ATPR ¶40-109.

76 *TPC v. Sterling* (1980) ATPR ¶40-145.

77 See n.72 and related text.

because of the impression created that the business being sold was being legally carried on. A sale will be upset if a property is purchased as a "three room residence with superb two bedroom home on the rear of the block" if, in fact, under zoning restrictions, the "two bedroom home on the rear of the block" cannot be lawfully used as a residence.<sup>78</sup> It is misleading or deceptive conduct to claim that Council has no objection to the use of a property as town houses when no Council approval has been given to such use. The statement was, in fact, made on the basis that approval had been given to a prior developer to erect town houses and discussions had been held which indicated probable approval of the development in question.<sup>79</sup>

Section 52 can impact on zoning approval clauses in some quite subtle ways. In *Pemberton's case*,<sup>80</sup> a contract was entered into pursuant to a coloured brochure prepared by an agent. The brochure highlighted the fact that the building was a commercial building. The purchaser wished to use it as such. Investigations post-contract showed that the building was in fact able to be used as a commercial building. But it was not zoned "commercial". It could be so used only because of existing user rights. If the purchaser wished to use the premises for commercial purposes, he would be entirely dependent upon the vendor for evidence of the facts necessary to establish an existing commercial use. It was held that the vendor must have known that there was a problem in relation to zoning and that the zoning representation by the vendor was misleading or deceptive. The represented zoning use was not absolute. Commercial use of the building depended entirely upon the co-operation of the vendor to prove an existing use in order that it could be used as represented.

Another difficult zoning case involved the question of Council approval of a restaurant on the first floor of a shopping centre. The sale documentation said that "the largest of the upstairs shops is currently before the Council for approval as a restaurant". In fact, there had been a prior Council refusal of permission for approval of a restaurant on the first floor and Council continued to display some considerable reluctance in this respect. The purchaser claimed, in effect, that the vendor had warranted that approval for a restaurant would be granted. The vendor submitted that, at its highest, there was only a representation that there was an application before Council to obtain permission for use as a restaurant. The Court held that misleading or deceptive conduct had been engaged in by the vendor. The vendor had failed to tell the purchaser the truth as to the actual situation and to convey to the purchaser the real possibility that Council approval would not be forthcoming. The vendor had an obligation to disclose all relevant facts and, by omitting certain important details (ie, the Council's attitude to a prior application), the vendor engaged in conduct which breached s.52.<sup>81</sup>

#### (ii) *Subdivision Cases*

Perhaps the most interesting recent case concerning subdivisions is *Benlist Pty Limited v. Olivetti*.<sup>82</sup> In connection with the sale of a particular building, an agent's brochure made the representation that "a great opportunity exists to upgrade the building for a new tenant, owner/occupier or a developer who will strata the building". There was in existence, but unmentioned in the agent's brochure, a letter from a surveyor which had originally accompanied a survey report of the building. This letter pointed out that, in order to strata the building, it would be necessary to effect a subdivision to overcome encroachments by the building beyond its title boundaries. The building was sold and the purchaser

78 *Latella v. LJ Hooker Limited* (1985) ATPR ¶40-555.

79 *Ketillion Holdings Pty Ltd v. Tabeh Holdings Pty Ltd* (1987) ATPR (Digest) ¶46-029.

80 *Pemberton Australia Pty Ltd v. CPS Services Pty Ltd* (1990) ATPR ¶41-034.

81 *Lowe & Sze Tce Holdings Pty Ltd v. Cudal Nominees* (1991) ATPR ¶46-076.

82 *Benlist Pty Ltd v. Olivetti Australia Pty Ltd* (1990) ATPR ¶41-043.

acknowledged that he was aware of certain encroachments. When the purchaser sought to strata the building (after abandoning an original plan to develop it as a hotel), he became aware for the first time that the encroachments reported in the original survey constituted a significant impediment to his planned action. The purchaser took the view that the agent's original statement that the building was "a great opportunity for ... a developer who will strata the building" constituted misleading or deceptive conduct and sought rescission of the contract. The purchaser's contention was that to suggest that the building was suitable for strata was misleading or deceptive when rectification of the problems involved would involve considerable time and expense and the outcome was uncertain. The purchaser's submission was upheld.

Subdivision cases may also involve misrepresentations as to facilities available to land in subdivisions. This aspect is covered in sub-paragraph (c)(iii) below.

(iii) ***Misrepresentations in relation to the nature of the property involved.***

(a) A representation that premises are "bigger and better" than other premises may be misleading conduct when there is a direct comparison with other premises and, in fact, the represented premises are not "bigger and better" than those with which they are compared.<sup>83</sup>

(b) A representation that land was "good grazing land" was held misleading when the Federal Court concluded that the land was not "good grazing land".<sup>84</sup> By akin logic, a representation that premises are "sturdily built" or "well constructed" would appear to constitute misleading conduct where this is not the case, notwithstanding the observation in *Halsbury's Laws of England*, 3rd ed, vol.34 at 10 to the effect that such statement may be regarded as "product puff". If the structure or quality of premises is misrepresented (for example, the premises are represented as "brick when they are "Besser brick"<sup>85</sup> or if "fill" on land is inadequately disclosed<sup>86</sup>), then s.52 will be infringed.

(c) Misrepresentations as to the availability of certain services to premises or to certain subdivisions (eg, electricity, gas, sewerage, water and the like) may be misleading or deceptive if they are, in fact, not accurate.<sup>87</sup>

(d) Misrepresentations may be made as to the views available from certain buildings - a matter of particular importance when contracts to purchase premises on certain floors of high rise buildings are agreed to "off the plan" and before the buildings are constructed.<sup>88</sup>

(iv) ***Misrepresentations as to the legal position of parties or as to finance availability.***

Cases in this area hold that s.52 of the *Trade Practices Act* will be breached if:

(a) A party states that he has an "option" whereas, in fact, the party making the statement has no legal means of enforcing the "option" in question.<sup>89</sup>

(b) A representation is made that there is a "fully executed lease" in respect of a certain property when such lease certainly exists but the use of the premises by the lessee is an illegal use. The failure to mention the qualification involved makes the representation misleading.<sup>90</sup>

(c) A misrepresentation is made as to finance availability. One case involved a statement as to the availability of finance which it was impossible for a company to fulfil in view

83 *Byers v. Dorotea Pty Ltd* (1987) ATPR ¶40-760.

84 *Smolonogov v. O'Brien* (1982) ATPR ¶40-312.

85 *MacCormic v. Nowland* (1988) ATPR ¶40-851.

86 *Phillip & Anton Homes v. The Commonwealth* (1988) ATPR ¶40-838.

87 *Sackville v. Mansard Developments Pty Ltd* (1981) ATPR ¶40-255; *Ceravolo v. Peter Economou Real Estate Pty Ltd & Anor* (1985) ATPR ¶40-635.

88 *Sanrod Pty Ltd v. Dainford Ltd* (1984) ATPR ¶40-464; (1985) ATPR ¶40-513.

89 *Obacelo Pty Ltd v. Taveraft Pty Limited* (1986) ATPR ¶40-703; (1987) ATPR (Digest) ¶40-829).

90 *Aliotta v. Broadmeadows Bus Services Pty Ltd* (1988) ATPR ¶40-873.

of its commitments to prior applicants.<sup>91</sup> Another case involved a representation as to finance but the represented finance was available only for a short period of time, refinancing at higher rates than there being necessary.<sup>92</sup>

The Trade Practices Commission has issued a guideline in relation to finance misrepresentations and is considering action against various financial institutions because of misrepresentations as to finance terms and availability. Details of these matters are set out in Appendix "A" to this paper.

(v) **Conclusion**

The above cases are examples of how s.52 has impacted upon conveyancing and land transactions. Many more cases could be cited but the above are more than adequate to demonstrate the wide ranging scope of s.52 and its use in relation to conveyancing disputes. What is clear is that conveyancing lawyers need to have a knowledge of the cases decided under s.52 if they are properly to advise their clients. The cases also illustrate that representations made prior to formal contract are just as important, and perhaps more so, as anything said in the contract itself. Statements made in agents' brochures have assumed a new importance since the enactment of s.52. As has been seen, misleading statements in such brochures can induce a person to enter a contract and misleading conduct inducing a person to enter into a contract cannot be negated by subsequent contractual provisions.<sup>93</sup>

(e) **Finance Transactions**

(i) **Misleading representations as to finance availability.**

As noted,<sup>94</sup> it breaches s.52 to represent the availability of finance or that finance is available when such availability is for a short time only and refinancing at a higher rate is then necessary. However, the cases in relation to representations as to finance availability have gone much further than this. In *Serrata Investments*,<sup>95</sup> a director of a company intending to purchase certain real estate represented to the intending vendor that the company would have sufficient funds with which to complete the purchase. On this basis, a contract was entered into. When the time for completion arose, the purchaser company did not have the requisite funds. The vendor sued the director of the purchaser company in respect of the representations made. The Court held that the statement was one as to a future event ie, that, at the time of completion the company would have the requisite funds. Pursuant to s.51a of the *Trade Practices Act*, a representor must, in these circumstances, have reasonable grounds for making the relevant representation, the onus of proof of "reasonableness" being upon the representor. The representor could fulfil this onus by showing that there was an ability to perform the contract when the statement was made but that there were intervening events which were non-foreseeable and prevented performance. The representor, however, failed to demonstrate reasonableness under this test.

It is to be noted in *Serrata Investments* that the vendor's action was successful against the Director of the vendor company personally. Section 52 is available against both the actual representor and any party "aiding and abetting" or being "knowingly concerned" in a representation. At general law, the only action is against the purchaser company itself - obviously a futile pursuit as the purchaser company had no cash. The Director representor was held personally liable for damages calculated on a lease rental basis and the actual

91 *Brookhouse v. NSW Mutual Real Estate Fund Limited* (1978) ATPR ¶40-064.

92 *Henderson v. Pioneer Homes Pty Ltd* (1980) ATPR ¶40-159.

93 *Supra* n.16 for a summary of the various reasons found by the Court to negate the effect of exclusion clauses in relation to s.52 conduct.

94 *Supra* n.91 and n.92.

95 *Serrata Investments Pty Ltd v. Rajane Pty Ltd* (1991) ASC ¶56-092. This case was brought under the Western Australian *Fair Trading Act*. For consistency, references in the text are to the equivalent sections of the *Trade Practices Act*.

verdict returned personally against the representor was \$46,600 plus interest.

The *Serrata Investments* case had an interesting variation in *Helco Pty Limited v. O'Haire*<sup>96</sup> which, though involving a representation in relation to a conveyancing transaction, is directly relevant also to representations as to finance availability and financial standing. In this case, Mr O'Haire, a solicitor acting for the purchaser of a property advised the vendor that:

... to our knowledge (the directors of the company) jointly have personal net worth well in excess of the debt to be guaranteed by them arising out of this transaction.

Acting on this assurance, the vendor took guarantees from the directors and did not take security on the land sold for the balance of the purchase moneys (\$225,000) owing. The purchaser company went into liquidation prior to payment of the balance of purchase moneys and had a net liability of \$3 million. The Directors went into voluntary bankruptcy, a joint statement of affairs showing a deficiency of \$2.3 million. Helco (the vendor) took proceedings against O'Haire, the solicitor for the liquidated purchaser company, on the basis that O'Haire's statement was misleading or deceptive and that, in reliance upon it, the vendor had acted as he did. The Court held that there was no contravention. The solicitor's statement had to be understood not as one purporting to be made with full knowledge of the affairs of the Directors but as one made only as to the best of the solicitor's knowledge. The statement was honestly made in this latter sense and s.52 was not infringed.

*O'Haire's* case must, in the writer's view, be treated somewhat cautiously. In the writer's view, Mr O'Haire was extremely fortunate to receive the interpretation of his statement which he did. It appears as if the purchaser did, in fact, act in reliance upon O'Haire's statement. It also appears that a person might reasonably interpret this statement as meaning:

**We know that** (the directors have the relevant net worth) rather than (as the Court interpreted it):

**'as far as we know'** or **'to the best of our knowledge'** (the directors have the relevant net worth).

In order to put the issue beyond doubt, this writer believes that some sort of express disclaimer (such as "we believe this to be true but we have not ourselves verified the information") should have been used. Only in this way can the s.52 position be absolutely clear.

In short, *O'Haire's* case is a finely balanced decision. Although Mr O'Haire was successful in his defence, there are probably many who would disagree with the Court's interpretation of his statement. The case illustrates the importance of clearly setting out any reservations or conditions in relation to assurances as to finance availability or financial status.

Section 52 can also be infringed in relation to finance "availability" when parties are misled by financial administrators as to the true state of play regarding finance applications. Perhaps the best example of this point is the *Adour Holdings* decision.<sup>97</sup> Adour Holdings sought a loan from the Commonwealth Bank of Australia. The loan was for \$5.4 million for a development project, the first stage of which involved land acquisition for \$1.45 million. A loan of the \$1.45 million was approved. The approval specifically stated that it was not to be construed as a commitment to the development as a whole. The

96 *Helco Pty Limited v. O'Haire* (1991) ATPR ¶41-099. This case should be contrasted with *Stanton v. ANZ Banking Group* (1987) ATPR ¶40-755. In *Stanton*, a bank officer gave an opinion that a person was a "good bloke" and "would not do the dirty on anyone". This was held to be opinion only and, to the Bank employee's knowledge, was true when expressed.

97 *Adour Holdings Pty Limited (In Liquidation) v. Commonwealth Bank of Australia* (1991) ATPR ¶41-147.

Administrative Division of the Bank which approved the loan specifically requested the local Bank Manager to impress this point on Adour Holdings. The Bank Manager advised Adour Holdings of the loan approval and also of the fact that this did not indicate approval of, or commitment by, the Bank to the balance of the moneys required.

Subsequently, however, the Bank Manager and the Branch Loans Officer made statements to the effect that the Bank would not have approved the initial loan of \$1.45 million unless it was satisfied as to the total project. When concerns were expressed by Adour Holdings as to the splitting of the loan into two parts, the Branch Manager and the Branch Loans Officer stated that this was normal procedure and there was no cause for concern. This encouragement was given to Adour Holdings over a number of months. In due course, the application for the balance of the loan was formally rejected by the Bank's Administrative Division.

It was held that Adour Holdings was entitled to rely, and did rely, upon the local branch advice as to whether the Bank was satisfied with the project in principle. Adour Holdings would not have entered into the transaction in the first place if it had not been relying on this advice. The Branch advice was to the effect that the Bank was satisfied in principle as to the loan and required only confirmation that the final plans and building contracts would be in accordance with the feasibility study contemplated. This was not the case at all. The Court held that even if the Directors of Adour Holdings were aware that the Bank was not totally committed, they were not aware of the real nature of the Bank's reservations and, in this case, this made a considerable difference. They were given to understand that the prospects for approval of the further loan they needed were very rosy indeed - very much rosier than they actually were. If they had known the true position, they would have sought finance elsewhere or exercised their right to terminate the purchase of the land in question. The Court held that the conduct of business would be impossible if business persons had to rely on representations made at the highest level of management. Customers of a Bank are entitled to proceed on the assumption that Branch Managers and Loan Officers are able accurately to communicate the Bank's attitude towards an application for a loan. The Court also rejected the defence that the local Branch advice constituted statements of opinion as to the likely approval position. They were, said the Court, statements of fact - namely the attitude of the Bank towards the application for finance in respect of the total project.

(ii) ***Misrepresentations in relation to the nature of finance.***

The most high profile s.52 cases in relation to representations as to the nature of finance are undoubtedly the "foreign loans" cases. The prime misleading conduct in relation to such loans has been that they have been "promoted" on the interest factor whilst nothing has been said about the potential for exchange rate fluctuations. *Chiarabaglio v. Westpac*<sup>98</sup> is a good example of the point. Chiarabaglio borrowed \$A500,000 in Japanese Yen in 1982. Due to the severe fall in the value of the Australian dollar, the size of his indebtedness to Westpac had doubled in six years. Chiarabaglio brought proceedings against Westpac for breach of s.52.

It was held that the following representations by an officer of Westpac were, in the circumstances of the case, misleading or deceptive and in breach of s.52:

- it was good business to borrow offshore in the sum of \$500,000;
- there was no significant risk in an offshore loan;
- the worst situation that could occur was if the Australian dollar devalued by 15% -this would not, in any case, threaten the advantage gained because of the lower foreign

<sup>98</sup> *Chiarabaglio v. Westpac Banking Corporation* (1989) ASC ¶55-932. To similar effect see *Donkin v. AGC (Advances) Limited* (1991) ATPR (Digest) ¶46-078; *Thannhauser v. Westpac Banking Corporation* [Fed. Ct: Pincus J -9 December 1991 (Unreported at time of writing)].

interest rate;

- hedging an offshore loan was not worth the cost of doing so and was not necessary; and
- the Australian Dollar would stay strong against the Japanese Yen.

The Court held that, even allowing for the fact that the Bank Officer was representing a wrongly held opinion rather than a fact, there was no reasonable basis for the opinion and the opinion, in the circumstances, constituted misleading or deceptive conduct. Chiarabaglio put great faith in the Bank, he was suggestible in money matters and the statements of the Bank Manager had to be interpreted in this context.

In *Chiarabaglio*, Westpac was “marketing” Japanese Yen foreign loans. In a further recent Westpac Case (*Thannhauser v. Westpac*<sup>99</sup>) the Court found that the Westpac employee whose duty it was to advise customers was “marketing Euroloans”. His employee performance review spoke of his “capture of the Euroloan business” and of the expansion of his marketing to include major provincial cities in “the promotion of international products”. The Court’s conclusion was that the Bank’s income from international products at the relevant time (1984) was at a record level and that the employee involved was a substantial contributor to this income. The Court was of the view that:

It is not easy to believe that if Mr Look had truly engaged in the negative conduct which he claimed to have done, he would have achieved such success, reaping for the bank millions of dollars of profits in a single year.

The Court did not believe the Bank employee, Mr Look, who said that his role was to warn people of the risks of offshore borrowing. The truth, said the Court, was that it was his job to try to persuade people to borrow in that way because of the large profits which the bank would earn from this type of transaction. Not surprisingly, the Court did not believe Mr Look’s explanation of a diary note referring to the “soft sell” of offshore loans when he said that the term “soft sell” meant “providing the customer with information”.

A financier does not have to make representations in as positive a manner as in *Chiarabaglio v. Westpac* or *Thannhauser v. Westpac* in order to breach s.52 of the Act. In *David Securities Pty Limited v. The Commonwealth Bank*,<sup>100</sup> the representation that a foreign loan was “cheap money”, without any qualification as to currency exchange rates, was held to infringe s.52. It was also held in this case that misleading or deceptive conduct may occur no matter how informal the occasion on which the representation was made.

All “foreign loan cases” are variations on the above themes and are not infrequently interwoven with claims of unconscionable conduct and common law negligence where this is appropriate [unconscionable conduct is dealt with below].

Clearly enough statements in relation to foreign loans require appropriate qualification if s.52 liability (and, on occasions, unconscionable conduct liability -see below) is to be avoided. However, foreign loans are but one aspect of the more general loans picture. The Trade Practices Commission has issued a Guideline covering the advertising of deposits

<sup>99</sup> *Thannhauser v. Westpac Banking Corporation* *ibid.* In *Thannhauser* the prime representation made was that the Swiss Franc (CHF) was the safest currency in which to borrow. There was, however, no discussion as to the risk of borrowing in a foreign currency. Much was made of discovered Bank documents as to the role of Mr Look, the Bank employee involved in the dealings in the case. The Bank itself gave no evidence as to its procedures for advising customers of the risks involved in foreign loan transactions. There was, however, evidence from the Bank’s discovered documents as to senior managerial concern at the Bank’s procedures. For another case involving Mr Look see *Ferneyhough & McDonagh v. Westpac Banking Corporation* [Federal Court of Australia: Lee J - 18 November, 1991 (Unreported at the time of writing)].

<sup>100</sup> *David Securities Pty Limited v. The Commonwealth Bank of Australia* [Federal Court : Hill J - 11 May 1989 (Unreported)]. Note, however, in this case the Commonwealth Bank was successful in its defence of the s.52 claim brought against it because it had corrected any misleading impression prior to the foreign loan contract actually being entered into.

and loans.<sup>101</sup> This Guideline is summarized as Appendix "A" to this paper. It provides an excellent checklist of matters to be considered in order that deposit and loan advertisements will not be considered misleading or deceptive because of the omission of relevant facts. A further illuminating study on problems of credit misrepresentation is that conducted by Mr Clem Mitchelmore, Deputy Chairman of the Commercial Tribunal of New South Wales in the Tribunal's 1987 *Rural Credit Enquiry*. Details of the major examples of finance misrepresentations found by this Enquiry are set out in Appendix "B" to this Paper.

Of course, borrowers, like everyone else, have to rely upon the representations made in order to recover damages for breach of s.52. The question of reliance is dealt with in Part V of this paper which follows.

## **Damages for Breach of Section 52 Do Not Flow Unless There is Reliance by a Party on the Misrepresentation**

### **(a) Reliance**

Section 52 gives rise to a variety of remedies, the chief of these being injunction, damages and a variety of "Other Orders" under s.80 of the *Trade Practices Act*. We deal here with damages and the necessity for a party claiming damages to be able to demonstrate reliance upon a representation in breach of s.52 in order to be successful in a damages claim. Without reliance upon a misrepresentation, no damages are claimable.

Damages, to be claimable, must be shown to be caused by the misleading or deceptive conduct in question.<sup>102</sup> It is not, however, necessary that the misleading or deceptive conduct be the only cause of the damages suffered. If it can be seen, in a material sense, that damage is caused by misleading conduct, this is sufficient. Where a misrepresentation is part only of the cause, if it is established that the misrepresentation was in part an inducement to enter the contract, this fact entitles a person affected to claim damages or to rescind the contract, as the case may be.<sup>103</sup> It has been held that "it is sufficient so long as (the misrepresentation) plays some part even if only a minor part in contributing to the formation of the contract".<sup>104</sup>

It is a defence to a s.52 action, on the basis that there is no reliance upon misleading or deceptive conduct, to show that the party bringing such action knew the true facts or that the party did not rely upon the representation in question.<sup>105</sup> A party loses a right of action if, knowing the true situation, such party affirms the contract.<sup>106</sup>

Some further points in relation to reliance are as follows:

- (a) It is not relevant that a person could have ascertained the true position by making his own enquiries. There is no preclusion of a s.52 action on the basis that a party did not exercise reasonable care to look after his own interests;<sup>107</sup> and
- (b) the chain of causation between misleading or deceptive conduct and damages is not broken by what a party might have found out had his solicitor made a proper enquiry. Neither does a person have knowledge imputed to him because such person's agent or solicitor may be aware of the true position. Notional notice of a matter does not negate an actual belief to the opposite effect.<sup>108</sup>

In foreign loan cases, it is a defence if the Court finds that a party:

101 *TPC Guideline on Advertising of Deposits and Loans*: TPC Guideline No.29.

102 *Smolgov v. O'Brien* (1982) ATPR ¶40-312. *Supra* n.2 as to the statutory provisions in relation to damages.

103 *Ibid* n.102. See also *Sanrod Pty Ltd v. Dainford Ltd* (1984) ATPR ¶40-464.

104 *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd* (1988) ATPR ¶40-850 per Lockhart J.

105 *Ibid*.

106 *Tiplady v. Gold Coast Carlton Pty Ltd* (1984) ATPR ¶40-472; (1984) ATPR ¶40-491.

107 *Supra* n.104.

108 *Ibid*.



... appreciated from the outset that she had to repay either the amount of Swiss francs borrowed or its Australian equivalent at the time of repayment.

and that the party's

... lack of sophistication was (not) so complete that she was able to convince herself that there were simply two alternative sources of loan capital, one at 8 per cent and the other at 15 per cent, the former having no substantial disadvantage but simply possessing the characteristic (irrelevant from the customer's point of view) that it was derived from a foreign source ... the applicant (in the Court's view has) exaggerated her commercial or pecuniary naivety.<sup>109</sup>

In similar vein, Courts have been somewhat sceptical of real estate purchasers who have entered into contracts with the expectation of a rising market and have alleged misleading or deceptive conduct when the market falls. In these circumstances, the Court is likely to find that "they were satisfied purchasers until the prices began to fall", that "the purchaser was making a purchase on the basis of an assessment of a rising market in which he hoped to make a quick profit"<sup>110</sup> or that the "application was a desperate attempt to avoid completion of the contract because the market had fallen." Two cases succinctly demonstrate the point. In *Barnett v. Abvay Pty Limited*<sup>111</sup> the Court held that:

The case appears ... as one in which disappointed speculators have turned their minds back to earlier conversations, which they quite possibly recalled imperfectly, from which in any event they have taken too much. They did not protect themselves contractually, or by any other means, and have suffered a loss. They have sought to put their case in a variety of ways but none of them permits them to recover damages against (the vendor's agent).<sup>112</sup>

In *Thompson Building v. Allan Property Services*<sup>113</sup> the Court said:

I am satisfied that (the applicant) did not rely on the alleged misleading conduct in deciding (to enter into the) respective contracts. The background also ... that the real estate market was buoyant at the time of entering into contracts, but depressed at the time for completion is also relevant. I am satisfied that these applications were a desperate attempt to avoid completion of the contracts because the market and fallen.

### (b) Quantum of Damages

The correct principle in assessing damages in s.52 cases is:

... to compare the position in which the applicants might have been expected to be if the misleading conduct had not occurred with the situation they were in as a result of acting in reliance on the conduct ...<sup>114</sup>

A party suffering damages has a duty to mitigate these. However, a party may reasonably take the view that it is better to trade on in a purchased business rather than to sell straight away at a considerable loss. A party may well believe that his interests are better served by holding on in the hope of improving the situation. In this event, the question arises as to what is a reasonable time within which a party should make a decision. The Courts have held that sufficient time should be allowed to a party to consider his position and find a buyer. A party may affirm a disadvantageous contract if he wishes to do so. However, after a reasonable time the additional costs of this decision must be charged to the affirming party rather than to the misrepresenter as

<sup>109</sup> *Kullack v. ANZ Banking Group Ltd* (1988) ATPR ¶40-861.

<sup>110</sup> *Turner v. Jenolan Investments* (1985) ATPR ¶40-571. The case involved a purchase of a Gold Coast Unit "Off the Plan". There was a justifiable complaint at the size of the balconies of the unit but it was held that, even if there was a misrepresentation in this regard, the purchaser did not rely upon it in making his purchase decision. His sole motivation for purchase was to make a quick profit on the unit.

<sup>111</sup> *Barnett v. Abvay Pty Ltd* (1985) ATPR ¶40-518. See also *Turner v. Jenolan Investments* *ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *HW Thompson Building Pty Ltd v. Allen Property Services* (1983) ATPR ¶40-371.

<sup>114</sup> *Brown v. The Jam Factory Pty Ltd* (1981) ATPR ¶40-213.

additional costs cannot run against a misrepresentor indefinitely.<sup>115</sup>

Loss of earnings from an alternative profitable business which a party can show would have been carried on if the deception had not occurred are sufficiently direct to be recoverable. So also is interest on borrowed funds to purchase a misrepresented business. This can lead to the result that damages recoverable may exceed the price paid for a misrepresented business. Not only can the purchase price of the business be recovered but also a number of additional costs and losses. In *Cambridge v. The Bakery Fun Factory*,<sup>116</sup> the purchase price of a business was \$25,000. The purchaser was placed in the difficult position of having to stay with the business which was, in fact, going downhill prior to the purchase – a fact which was misrepresented to him. The Court considered it reasonable, in these circumstances, that the respondent vendor should reimburse the purchaser for losses incurred in staying with the business for a reasonable period. A verdict was entered against the respondent vendor in the sum of \$46,614 even though the business was originally sold by him for only \$25,000.

### Section 52a: Unconscionable Conduct

The concept of unconscionable conduct in Australia springs from the 1983 High Court decision in *Amadio*.<sup>117</sup> “Unconscionability” is thus a factor which can be taken into account in any transaction.

In *Amadio* the High Court stated that the Court will give relief to an innocent party in a transaction whose will is overborne in such a manner that that person is not capable of making a worthwhile judgment as to what is in his or her own best interests in engaging in a transaction.

The various statutory provisions relating to unconscionability are glosses on the above general test of unconscionability but do not replace it.<sup>118</sup> The statutory tests give pointers to those matters which, in certain circumstances, can be taken into account in determining unconscionability. The best known statutory provision on the subject of unconscionability is s.52a of the *Trade Practices Act*. This section does not define “unconscionability.” The *Amadio* decision provides this general definitional test. Section 52a only directs the Court to take into account certain factors in assessing whether conduct is unconscionable. These factors are:

- the relative bargaining strengths of the parties;
- whether conditions imposed were or were not reasonably necessary for the protection of the legitimate interests of the company involved. The Court may thus consider whether contractual terms bear reasonable relationship to business risks;
- whether a party was able to understand the relevant documents. Non-comprehension of documents may arise from language barriers or other barriers to comprehension or from ambiguities or other difficulties in the documentation itself;

<sup>115</sup> *Cambridge v. The Bakery Fun Factory* (1984) ATPR ¶40-493.

<sup>116</sup> *Ibid.* The latest example of this point at the time of writing is *Paper Sales (Australia) WA Pty Ltd v. PSA Pty Ltd & Ors* (1991) ATPR ¶41-142 (see also n.70). In this case, in addition to the amount paid for the business (\$100,000) being recoverable, the purchaser also recovered trading losses Feb-June 1989 (\$46,939); trading losses July 1989-June 1990 (\$58,334) and interest on borrowed money to September 1991 (\$66,462) – a total of \$271,735.

<sup>117</sup> *Commercial Bank of Australia Limited v. Amadio* (1983) 151 CLR 447. See also comments at n.118.

<sup>118</sup> *Supra* n.6 as to these statutory provisions. See n.5 as to akin statutory provisions in New South Wales. The *Cooney Committee* [See Report by the Senate Standing Committee on Legal and Constitutional Affairs into “Mergers, Monopolies and Acquisitions: The Adequacy of Existing Legislative Controls” (December 1991) (Senator Barney Cooney, Chairman)] was given as one of its terms of reference to report on whether the provisions of s.52a of the *Trade Practices Act* should be extended to all commercial dealings. The Committee believed that s.52a did not enhance the protection afforded by common law decisions [the major such decision being *Amadio (ibid)*]. The Committee believed that relying on the common law alone would appear to be a reasonable option, particularly as Courts in Australia have shown a willingness to expand the existing doctrines and develop new equitable doctrines where justified. The Committee considered that it would be of greater benefit to those who suffer from unconscionable conduct if their remedy were left to the common law but that the Trade Practices Commission should be given the power to bring actions on their behalf and to bear any cost burden in this regard. Accordingly, the Committee recommended that s.52a be repealed..

- whether undue influence or unfair tactics were used against a party; and
- whether a party could have acquired the goods or services elsewhere. Any significant variation in the price of goods or services in a particular transaction compared with the general ruling price of those goods or services may be an indication of unconscionable conduct by a company.

Unconscionability thus has two aspects. A transaction may be unconscionable in the way it operates and thus give rise to substantive injustice. Alternatively, or cumulatively with substantive injustice, a transaction may be unconscionable because of the way in which it was made thus giving rise to procedural injustice.<sup>119</sup> In practice both procedural and substantive injustice issues frequently occur in the same transaction.

#### (a) Substantive injustice

Some of the most commonly used “standard” trading forms may be regarded as substantively unjust. The most dramatic example of this is a recent decision holding the standard form of agency agreement issued by The Real Estate and Stock Institute of Victoria (“RESI”) substantively unjust.<sup>120</sup> The agreement for sole agency stated that, at the expiration of the sole agency period, unless the vendor notified the agent to the contrary, the vendor continued to engage the agent as an agent for sale and agreed to pay commission if the property was sold by the agent unless the vendor was liable to another agent for such commission.

In *Collings v. Stevenson*,<sup>121</sup> an agent’s exclusive contract expired. Subsequently the agent found a purchaser ready, willing and able to complete but the vendor declined to sell. The agent sued for his commission.

The vendor resisted the claim on the basis that the RESI agreement was unconscionable. The Court struck down the agreement for the following reasons:

- The bold print heading “Exclusive Sole Agency Agreement” was contrary to the terms of the fine print clause extending the agency indefinitely. The agreement did not recite that it extended the agency and thus it was incorrectly and unfairly titled.
- The agreement stated that the agent had an agency for a specified period. This, too, was contrary to the extension provision.
- The likelihood of deception was carried even further by the fact that a marginal note to the agreement referred to the fact that a non-exclusive agency form was also available in Victoria. The import of this was that the exclusive agency was for a set period and, if a non exclusive agency was desired, another form was available for this purpose.
- It was unconscionable to impose upon a vendor a contingent liability to pay commission for an indefinite period after the expiration of the agreed period of exclusivity. The period could be several years in the future and in circumstances where the vendor might properly believe that the business relationship between the parties had been extinguished by effluxion of time.
- The vendor would not generally be aware of the obligation to terminate the extended agency period by written notice.
- The agreement “affronted justice and equity.”

The clear message of this case is that “standard contracts” can be attacked on grounds of unconscionability and all such contracts, if of some antiquity, should be reviewed. This message is reinforced by the treatment given to a “standard guarantee” document in the *Bridge Wholesale Acceptance* case.<sup>122</sup> The “standard” guarantee document in this case was signed without detailed

119 The latest case at the time of writing illustrating these issues is *National Australia Bank v. Georgouras* (1992) ASC ¶56-117. This case was decided under the *Contracts Review Act* (NSW) but the principles are applicable also to an analysis of s.52a of the *Trade Practices Act*.

120 *George T Collings (Aust) v. HF Stevenson (Aust) Pty Ltd* (1991) ATPR ¶41-104.

121 *Ibid.*

122 *Bridge Wholesale Acceptance (Australia) Ltd v. GVS Associates Pty Ltd* (1991) ASC ¶56-105. On the question of verbiage see also *Kennard v. AGC* (n.127).

explanation. It was not alleged that the substance of the document was unfair in what it purported to do but the wording of the document, plus the absence of suitable explanation to the guarantor, gave rise to the following observations by the Court:

The guarantee is not unusual in that no attempt has been made to express its provisions in plain English and each of its operative provisions consists of one long sentence. It is closely printed. The significance of a number of its provisions would be unintelligible to a lay person ...

(The provisions of the guarantee) do not by any means make it clear that the obligation of the guarantor is to grant a legal mortgage of any land then or later held and that he or she charges any such property as security for the performance by him or her of their obligations as guarantor, although a close and patient reading may yield this result ...

On her own evidence, Mrs Greenup gave only a very limited explanation. She explained that Ms Utting was guaranteeing the payments and what they were and she said that if there was trouble with the loan, Bridge might lodge a caveat (against her property). She did not say, as would have been appropriate, that the effect of the guarantee was that Ms Utting was giving a mortgage over her house, and any other real property she might own then or acquire subsequently, as security that she would pay any monies which GVS Associates became liable to pay under the lease ...

In my opinion, Ms Utting knew that she was assuming the obligations of a guarantor but I do not think that she understood that the effect of the document was to create a mortgage of her house and any future house as security performance by her of her obligations as guarantor.

The Court held, in light of the above, that the guarantee was unjust, in all the circumstances, in two respects - namely one clause which provided that the document was not a guarantee but an indemnity and in respect of another clause which provided for security. Both provisions were ordered deleted though the guarantor's personal liability under the guarantee remained.

Though this case may well be regarded as one of procedural injustice, the Court, fairly clearly, also looked at the document in substantive terms. Had the document been worded in plain English terms, the need for a detailed explanation of its provisions would have been considerably reduced.

In its paper entitled "Guarantors: Problems and Perspectives - Discussion Paper" issued in March 1992, the Trade Practices Commission illustrates another case of standard form which gave rise to injustice of the kind discussed above. In the case referred to by the Commission, there were also substantial elements of procedural injustice (not here discussed). The Commission took action under s.52a of the *Trade Practices Act* on behalf of a disadvantaged immigrant husband and wife and obtained orders preventing the National Australia Bank exercising its rights under certain securities. The matter was eventually settled out of Court. The settlement included terms that the National Australia Bank agreed to be bound by the following undertakings:

- amendments proposed by the Trade Practices Commission would be made to the Bank's lending manuals;
- the issue of unconscionability was to be included in the Bank's training programme and the Bank was suitably to publicise the undertakings; and
- the following amendments were to be made to the Bank's form of guarantee;
  - **marginal notes** broadly defining each clause;
  - **emphasis** in certain clauses; and
  - **a warning heading** to be placed on the document adverting to its importance and urging that professional advice be sought in respect to its signing.

This settlement with the Commission illustrates some areas in which standard forms can be modified in order to lessen the possibility of transactions based upon them being set aside as unconscionable.

**(b) Procedural injustice**

Most of the cases involving unconscionable conduct have involved procedural injustice though, as we have seen in, for example, *Bridge Wholesale Acceptance*,<sup>123</sup> the issues of substantive and procedural injustice are frequently intermingled.

Though the types of procedural injustice do not fall into precise categories, and such categories as exist frequently overlap one with the other, the case law shows that procedural injustice may occur in at least the following ways:

- (i) ***A Bank representing to a guarantor that the company he is asked to guarantee is “trading satisfactorily” when, in fact, the company has significant financial problems and has exceeded its bank overdraft.***

The leading case in this area is probably *Nobile v. The National Australia Bank*.<sup>124</sup> Factors to be taken into account in making an assessment of the injustice as stated in this case were that:

- it was plainly foolhardy for the guarantors to risk all their assets in a failing business. It was thus a transaction very much to the disadvantage of the guarantors;
- the transaction, on the other hand, was very much to the advantage of the Bank. The Bank was overcommitted. The guarantee gave it security for its loan;
- it was unconscionable that the Bank Manager, being in a conflict of interest situation, did not explain to the guarantors that they should seek independent advice. If this advice had been sought, the Court was of the view that the guarantors would not have entered into the transaction. The circumstances of the case “called out for the parties to be given the opportunity to take separate advice”; and
- the guarantors were under a special disability as regards their relationship with the Bank. When such circumstances exist, there is an onus on the stronger party to justify the transaction as fair, just and reasonable. The Bank had failed to justify the transaction in accordance with these requirements.

Guarantees, and misrepresentations in relation to them, are a matter of particular concern in the world of finance. Some of the observations of the Trade Practices Commission on these issues are set out in Appendix “C” to this paper.

- (ii) ***Misrepresenting, or not fully explaining, the effect of documents or transactions.***

Unconscionable conduct may occur when a representation is made at a meeting that a guarantee is limited to \$100,000 and is to be in effect for only six months but the documentation signed provides for unlimited liability for an unlimited time.<sup>125</sup> The representation pursuant to which the document was signed substantially altered the true agreement of the parties. The Court held that it was unjust for a financier:

... (to obtain) a signature to a virtually unread document containing a term having little relation to the substance of what the parties were doing.

Similarly, when mortgage documents are executed in blank, the transaction will be set aside if the documentation is completed otherwise than in accordance with arrangements made.<sup>126</sup>

Likewise in *Kennard v. AGC*,<sup>127</sup> a mortgage transaction was upset when the mortgagor

<sup>123</sup> *Ibid.*

<sup>124</sup> *Nobile v. The National Australia Bank* (1987) ATPR ¶40-787; (1988) ATPR ¶40-858.

<sup>125</sup> *SH Lock (Australia) Ltd v. Kennedy* (1988) ATPR ¶40-859. This case was decided under the *Contracts Review Act* (NSW) which has provisions akin to s.52a of the *Trade Practices Act*.

<sup>126</sup> *Levenson-Gower v. Esanda Ltd* (1986) ATPR ¶40-647. This case was decided under s.52 of the *Trade Practices Act* though the principles expressed in the judgment appear equally to support a verdict for the mortgagor pursuant to a case brought under s.52a of the Act. Section 52a had not been enacted at the time the transaction in questions was entered into.

<sup>127</sup> *Kennard v. AGC (Advances) Ltd* (1986) ATPR ¶40-747. This case was decided under s.52 of the *Trade Practices Act*. The same observations apply to this case in relation to s.52a as apply to *Levenson - Gower* (n.126).

signed a “third party mortgage” of a property of which he was tenant in common with another mortgagor. The representation by the financier pursuant to which the third party mortgage was signed was that the mortgage “would not affect (the “third party” mortgagor’s) equity in the property in any way whatsoever”. In fact, the mortgage, when executed, made the third party mortgagor totally liable for the debts of his co-tenant and contained no provision at all to protect the third party mortgagor’s equity. Amongst other things, the Court held that:

- there is a duty of positive disclosure in such circumstances to ensure that guarantors are not misled. This duty arises “when there are some unusual features in the particular case relating to the particular account which is guaranteed”. If the creditor should reasonably have known that the guarantor was acting under a misconception, the guarantee is unenforceable if the guarantor does not dispel the misconception;
- “The mortgage contain(ed) a great deal of verbiage which is inapplicable to the circumstances of the case and might with advantage have been deleted; but even if it had been, . . . few laymen would undertake the task of analysing such a complicated document to ascertain its true effect”.<sup>128</sup>

The misrepresentation of the effect of guarantee documents is a matter of particular concern to the Trade Practices Commission. Some of the Commission’s observations on this issue are set out in Appendix “C” to this paper.

(iii) ***Advantage being taken of parties under disability.***

In *Nolan v. Westpac*<sup>129</sup> a mortgagor put up her property “as security” for an advance to her prior husband by Westpac but believed that her prior husband was alone liable as debtor. Notwithstanding their divorce, the female mortgagor was still considerably influenced by her prior husband. This constituted a “special disability” on the part of the female mortgagor such that the Bank should have requested her to seek independent advice. The Court cited prior authority to the effect that a “special disability” may consist of a wide variety of factors including “poverty or need of any kind”, sickness, age disability, sex disability, infirmity of body or mind, drunkenness, illiteracy or lack of education, or “lack of assistance or explanation where assistance or explanation is necessary”. The common factor of all of these factors is that they place “one party at a serious disadvantage vis a vis the other”.<sup>130</sup> In *Beneficial Finance v. Comer*,<sup>131</sup> we find a contract of guarantee varied on the basis that a wife was asked to sign some documentation in relation to her husband’s business. She knew that the documents were about borrowing money but understood little else. She obtained no benefit from the transaction and there was no reason why, given all the circumstances, she would, if properly independently legally advised, have executed documents which put her own personal financial safety in peril. Similarly, in *Vital Finance*,<sup>132</sup> unconscionable advantage was taken over a person by taking a mortgage over his house to secure repayments on a truck. It was known to the financier that the mortgagor was in a fragile financial situation. He had no immediate cash to meet pressing commitments and, indeed, could not even come up with \$300 for a valuation fee. The mortgagor

128 *Ibid.* As to verbiage, see also *Bridge Wholesale Acceptance Australia* (*supra* n.122).

129 *Nolan v. Westpac Banking Corporation* (1989) ATPR ¶40-982.

130 *Ibid* citing *Blomley v. Ryan* (1956) 99 CLR at 405. See also *Nobile v. National Australia Bank* (*supra* n.124). Note, however, the observations on this point in *Halton Pty Limited v. Stewart Bros Drilling Contractors* (1992) ASC ¶56-128. In this case, the court said that a commercial transaction at arms length was one in which each party must guard its own interests. The court should thus guard against being too ready to discover a special relationship, such as that between a special adviser and a client, and to impose thereby obligations quite contrary to ordinary commercial expectations.

131 *Beneficial Finance Corp v. Comer* (1991) ASC ¶56-042. This case was decided under the *Contracts Review Act* (NSW) but the principles are applicable also to an analysis of s.52a of the *Trade Practices Act*.

132 *Vital Finance Corporation Pty Ltd v. Taylor* (1991) ASC ¶56-009.

was well outside the mortgagee's usual lending criteria. The mortgagor was also clearly a person of limited understanding and anyone dealing with him would have realised how limited, untutored and modestly educated he was. The mortgagor was, said the Court, "readily and effectively managed" by the finance company and was "putty in the hands of a large organisation". The representative of the finance company did not believe the financial projections which he put to the mortgagor, his only concern being to "push the deal through". In all the circumstances, the mortgage was set aside. This case seems to impose on finance companies some obligation to ascertain that there is a reasonable capacity in borrowers to repay loans or at least an obligation not to press borrowers to take on commitments which the finance company knows they are unable to meet. In *Westwill*,<sup>133</sup> Heath, an 80 year old man suffering from ill health and on medication for constant arthritic pain, entered into a land transaction. Heath was somewhat naive in commercial matters. He asked whether he should see a solicitor but was told that the transaction was straight forward and there was no need to do so. Heath was uncertain as to what was involved and what price was being offered. He was in considerable pain throughout the negotiations. In due course, he signed a contract document. The land being sold was a trotting track. Heath had no idea that the purchaser was, in fact, a developer. It was held to be unconscionable to take advantage of Heath's disabilities as the developer was clearly the stronger party. It was obvious that Mr Heath had medical problems. He was discouraged from seeing his own solicitor. Evidence that the property was sold at considerably less than its true value was also relevant though the test of unconscionability is not whether a hard bargain has been driven but whether a party knows, or ought reasonably to know, that the other party is under special disadvantage.

The taking advantage of parties under disability in guarantee transactions is a matter which has been of particular concern to the Trade Practices Commission. The Commission's observations on this issue are set out in Appendix "C" to this paper.

## Sections 52 and 52a and the Obligation to Advise

### (a) The Obligation to Advise

From what has already been said, it is obvious enough that there is a general obligation not to misrepresent any significant matter in a commercial transaction. Silence can constitute a misrepresentation where there is a duty to speak out. "Half truths" constitute a misrepresentation. Hence there is a general obligation on all parties to transactions to advise other parties accurately as to the effect of what they are doing. If this obligation is not fulfilled and a party suffers loss in reliance upon misleading conduct, then damages can be recovered for the amount of such loss.

However, obligations may go further than this. If there is a conflict of interest or if a party is under a special disability (which, as we have seen,<sup>134</sup> may be a disability of "poverty or need of any kind", a sickness, age or sex infirmity, infirmity of body or mind, drunkenness, illiteracy or lack of education or "lack of assistance or explanation where assistance or explanation is necessary"), then there is an obligation on the advantaged party to demonstrate that the transaction is "fair".

In some circumstances, dominant parties have been able to demonstrate fairness. *National Bank Limited v. Georgouras*<sup>135</sup> is a case in point. This case involved a guarantee executed by Mrs Georgouras in favour of the National Bank to secure an indebtedness of her daughter to the Bank.

<sup>133</sup> *Westwill Pty Ltd v. Heath* (1990) ATPR (Digest) ¶46-056. This case was decided under s.52 and s.53A of the *Trade Practices Act* but the principles are broadly applicable to unconscionability generally. The judgment in the case, in fact, basically detailed the law on unconscionability as being the basis of relief under the above sections.

<sup>134</sup> *Supra* n.129 and text related thereto. See also discussion in text related to cases referred to in n.130-n.133.

<sup>135</sup> *National Australia Bank Limited v. Georgouras* (1992) ASC ¶56-117. This case was decided under the *Contracts Review Act* (NSW).

Mrs Georgouras said that the guarantee was not subject to any negotiation and she did not obtain independent legal advice. She said she had never previously entered into a guarantee, the meeting with the Bank Manager had lasted only a few minutes and the Bank Manager had not pointed out certain things to her including the purpose of the loan to her daughter. On the other hand, the Court found that Mrs Georgouras, who was born in Australia and suffered no language or other disabilities, was of at least average mental capacity. She had previously entered into a large number of real property transactions. She knew that the document she was signing was a guarantee and she knew the effect of this. There was no pressure applied by the Bank Manager to sign the guarantee. The Bank Manager had made no misrepresentation to Mrs Georgouras nor suppressed any facts which suggested that her daughter would be unable to repay the Bank. The Bank had stated only that it would not advance the monies to Mrs Georgouras' daughter unless the guarantee was executed. In the circumstances, the Court found that there was no injustice such as to warrant setting aside the guarantee.

In the case of foreign loans, banks and financiers may be able to fulfil their duty to advise without the borrower being required to seek independent advice. There is no doubt, however, that, in these circumstances, the duty is to "advise carefully". Such a duty may arise before any loan is made or money deposited, ie, when an applicant is merely a potential customer. A duty of care arises because the Bank or financier makes representations or gives advice on a serious matter intending, by such advice, that a party acts in a certain way.<sup>136</sup>

The obligation on a Bank is to advise with due care and skill. Of course, an advisor cannot guarantee success in international trading because of the volatility of exchange rates. All such advisor can do is point out the facts and the risks involved.<sup>137</sup> In *Donkin v. AGC*<sup>138</sup> Mr Justice Beaumont held that, in the context of a foreign loan, a financier's obligations to advise are twofold. Firstly, there is a duty to disclose and explain the risk of loss and, secondly, there is an obligation to advise of the steps available to minimise those risks. Both duties must be satisfied. In *Donkin v. AGC*, AGC did not breach the first of these duties. However, it was liable to Donkin because of a failure to advise that it was possible to hedge selectively or to use a "stop-loss" mechanism. AGC should have explained the techniques available to remove or reduce the risks involved in offshore loans, the most important being the forward exchange contract. It could not be seriously suggested that such an obligation placed an unreasonable or onerous burden on AGC. No mention was made of the techniques available except a full hedge which was not feasible because of its prohibitive cost. None of this was to say that AGC itself had any obligation to "manage" the loan for the Donkins or to "monitor" its progress or degree. It was one thing to have a duty to explain the range of feasible techniques available. This was a duty to speak. It was quite a different thing to suggest that AGC had a duty to act. This it was not bound to do in the absence of contract or some other independent source of legal obligation.

If a Bank or financier advises with due care and skill and satisfies the Court in the case of parties with special disability that the overall transaction is fair, then the financier will have no liability for damages suffered by the party with whom it deals.

### **(b) The Obligation to Refer Parties to Independent Advice**

The cases, however, adequately demonstrate that matters of importance are frequently omitted, or simply not understood, at local managerial levels. Especially is this the case with parties suffering special disabilities. In such cases, the Courts are likely to say that the financier's

<sup>136</sup> *Kullack v. ANZ Banking Group* (1988) ATPR ¶40-861.

<sup>137</sup> *Cedrick Constructions Pty Ltd v. Elders Finance & Investment Co Ltd* (1988) ATPR ¶40-879; see also *Lloyds v. Citicorp & Anor* (Rogers J: Supt Ct of NSW: 22 Dec 1986 - Unreported); *Stafford v. Conti Commodity Services Ltd* [1981] All ER 691, 696-697; *Donkin v. AGC (Advances) Limited* (n.138).

<sup>138</sup> *Donkin v. AGC (Advances) Limited* (1991) ATPR (Digest) ¶46-078; affirmed on Appeal (1992) ATPR (Digest) ¶46-086. These comments were made both in the context of s.52 and in relation to common law negligence. AGC was held liable in negligence for the advice given.



obligation to ensure “fairness” can only be satisfied by the borrower seeking independent legal advice. In these cases, if there is any suggestion that a disadvantaged party suffers loss, it is likely that the Courts will assert, as was asserted in *Nobile v. National Australia Bank* (above), that the case “called out for the parties to be given the opportunity to take separate advice”. The Courts will draw adverse conclusions if a party is told that independent advice is not necessary – especially when independent advice could negate any disability because of non-comprehension as to what was occurring.<sup>139</sup> Where there is a conflict of interest (and in most financial transactions there can well be an actual or potential conflict in any dealing of complexity) the Courts have held that the conflict should be resolved by requiring independent advice<sup>140</sup> and wise practice, clearly enough, is to adopt this procedure.

In order to claim that independent advice has been given in a guarantee situation (and, with appropriate adaptations, in other situations as well), the solicitor giving advice must:

... be and be seen to be free to advise the prospective surety unencumbered by any ties to the principal debtor. The solicitor should be at pains to ensure that his client’s position is as free of the influence of the debtor as he can manage ...<sup>141</sup>

Thus a solicitor, whose presence is arranged by a Bank, who meets his client for the first time in a Bank Manager’s Office and who briefly advises a guarantor in the presence of the Bank Manager (the very person with whom the guarantor may have the relevant conflict) is “... hardly in a situation of being free to advise the plaintiff unencumbered by ties to the Bank ...”.<sup>142</sup> The solicitor, in these circumstances, should, at the very least, obtain independent instructions and advise at his office in the absence of the Bank Manager.

The present position in relation to independent advice seems to be that some major Banks require customer guarantors to obtain independent legal advice. Others suggest that they do so. Credit unions generally recommend that customer guarantors obtain independent legal advice but do not insist. Some financiers have expressed scepticism about the usefulness of such advice and question its quality. Others have noted that such advice does not appear to address the real issues [see *Trade Practices Commission: Guarantors – Problems and Perspectives* (Discussion Paper – March 1992)].

Notwithstanding the scepticism which some may feel about independent advice, there are clear advantages to Banks and financiers in insisting that this be taken if there is any suggestion of disability or conflict of interest. This is because the Courts have shown little sympathy for advice given to disadvantaged parties either by a “dominant” party or by its lawyers when an assertion is made by the disadvantaged party that the legal advice given has not been fully understood. The point is illustrated by two cases:

- (a) In *Beneficial Finance Corporation v. Comer*,<sup>143</sup> Mrs Comer attended with her husband at the offices of a solicitor who acted for the finance company involved. Such solicitor gave evidence that he fully explained the nature of the transaction. The Court accepted that he did this. Mrs Comer, however, said that she was completely distracted at the solicitor’s office from paying any attention to what was being said because of the activities of her son, then 18 months old. Like any boy of his age, he was doing things which required the attention of his mother to ensure that he did not damage or spoil any of the articles of furniture or documents in the solicitor’s office. The fact of the matter was that Mrs Comer went to the financier’s solicitor in the mistaken belief that she was required to sign some documentation only because the title to the land in question was in both her name and that of her husband. The solicitor’s explanation did not disabuse her of this. The document

139 *Supra* n.133.

140 *Commonwealth Bank v. Smith* (1991) ATPR (Digest) ¶46-077.

141 *Supra* n.129.

142 *Ibid.*

143 *Supra* n.131.

actually signed was a guarantee of her husband's indebtedness which the Court found she would not have signed if properly independently advised. The Court held that Mrs Comer had been led astray by her husband as to the purpose of visiting the financier's solicitors. The Court stressed the necessity for advice to be "independent". This meant that it had to be the advice of a solicitor with whom a party had a "true, real relationship" in order to overcome that party's special disadvantage.

- (b) In *Vital Finance v. Taylor*,<sup>144</sup> an appointment was made by a finance company for borrowers to attend the offices of the solicitor for the finance company. It did not occur to the borrowers that this solicitor was acting for them or had a role in advising them. The solicitor explained the legal nature of the transaction involved, ie, that they were leasing a truck and mortgaging a house. However, he gave no advice on the most important matter – the commercial wisdom of entering into the arrangements. Although the solicitor could not be expected to be an expert in the trucking business, he should, said the Court, have discussed the relevant aspects of the transaction and the consequences of it and discussed with the borrowers whether they should proceed or not.

To the writer's knowledge, there has been no case where truly independent legal advice has been ruled inadequate in correcting a problem in commercial transactions caused by conflict of interest or caused by some special disability. One would hope that the view will be taken that truly independent advice is adequate to correct any such problems and that "dominant" parties can enforce transactions, relying upon the fact that such advice has been given. There are good policy reasons for the Courts to so hold. Firstly, "dominant" parties can do no more than send parties to their own adviser. Secondly, independent legal advice breaks the chain of causation in respect of any representations made by a "dominant" party. A disadvantaged party no longer enters into a transaction because of what the "dominant" party says or does but because of what his independent adviser advises.

If, however, the adviser is in any way associated with the "dominant" party, the advice given will be tested by the Courts as to its adequacy. In effect, the Courts seem to be saying that the advice, for example, of a financier's lawyer is the advice of the financier itself, even though it is professional. The Courts have shown in such cases that they are prepared to test the advice given for its adequacy and also test the circumstances in which it was given. Thus such advice may be upset because a party does not realise why he or she is attending a professional adviser. It may be upset because the message does not get through. It may be upset because the professional adviser, though explaining the legalities does not explain the commercial realities of the venture. No doubt there are a number of other bases upon which to challenge advice given by solicitors acting for "dominant" parties, no matter how fully such solicitors attempt to advise. These bases will almost certainly surface in future cases. In short, whilst "dominant" parties appear to be protected when independent advice is sought by "disadvantaged" parties, this is far from the case when advice is given to a disadvantaged party by a dominant party's own solicitor.

If a borrower seeks his own legal advice, there will be a professional fee chargeable to the borrower. A financier may, however, be able to carry this cost as part of the overall cost of the loan and thus the borrower will be professionally advised, if he is advised by the financier's lawyer, free of cost. It should not be assumed that fees for independent advice will necessarily be cheap. Unravelling details of family arrangements and trading records over a period of years may be a very difficult and time consuming matter. Nonetheless, the Courts have not regarded cost as a matter which should obviate the necessity for obtaining independent advice. In *Beneficial Finance Corporation v. Comer*<sup>145</sup> Mr Justice Rogers said on this point that:

I should say that I am fully conscious of, and impressed by the validity of the submission by Counsel for the plaintiff that it is undesirable that the risks to lenders be increased

<sup>144</sup> *Supra* n.132.

<sup>145</sup> *Supra* n.131.

unreasonably with resultant increase in costs of borrowing and that it is important that there should be certainty in the conduct of commercial operations including the loan of money. However, it is also important that lenders recognise the risks inherent in ... allowing borrowers to utilise the services of the solicitors for the lender with whom the borrower has no true, real relationship. I should say at once that this is not intended to be a reflection on (the solicitor for the lender).

This writer has elsewhere suggested a managerial check list for banks and financial institutions to follow in relation to loans.<sup>146</sup> This list will not be here repeated.

## Conclusion

In 1987, the writer wrote an article entitled:

### *Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?*<sup>147</sup>

An Exocet is a weapon which has the capacity to sink enemy missile armed boats before they are near enough to launch their own attack. The Exocet is designed to be impervious to enemy electronic countermeasures. It is one of the most formidable naval weapons ever conceived. It penetrates the side of its target before its warhead explodes, thus causing maximum possible damage.<sup>148</sup>

Section 52 of the *Trade Practices Act* has all of the above characteristics. Refinements on previously decided cases have made Section 52 even more powerful than it was when the above article was written in 1987. Section 51a requiring statements as to the future to be made on reasonable grounds was, at the time of writing the above article, largely untested. It came into effect on 1 July 1986. At the time of writing the above article, no cases had been decided under that section as all litigated cases involved pre-1986 facts. There is no doubt that s.51a has considerably strengthened s.52. Further, when the above article was written, Section 52a of the Act covering Unconscionable Conduct was also largely an untested weapon, it also having come into effect only on 1 July 1986. This section, along with other akin provisions,<sup>149</sup> has also added to the striking power of s.52 (itself more powerful by the addition of s.51a) and, in some cases, the two sections have been launched into the attack contemporaneously. Even if one can be dodged, the other may well strike home.

By way of closing comment, it is appropriate to note that the Exocet is made by the French Company *Aerospatiale Societe Nationale Industrielle* which company has previously launched s.52 of the *Trade Practices Act* in defence of its *Ecureuil* helicopters with singular success.<sup>150</sup> The link between the Exocet and s.52 market actuality is thus not totally academic.

146 WJ Pengilly, "Misleading or Deceptive Conduct and Financial Institutions" (1989) 1 *Bond Law Review* 157 at 174-177.

147 (1987) 15 ABLR (4) 247-274. This article also features a photograph of an Exocet - an unlikely to be repeated event in the history of the Australian Business Law Review.

148 For further detailed performance and characteristics of the Exocet see M Taylor, *Missiles of the World*, London 3rd ed (1980) at 30-31; B Gunston (ed), *Encyclopaedia of World Air Power* Sydney (1980) at 362; R Berman & B Gunston, *Rockets and Missiles of World War III*, Sydney (1983).

149 For State "Fair Trading" equivalents of s.52a, see n.6. For "akin" provisions in New South Wales, see n.5.

150 *Aerospatiale Societe Nationale Industrielle v. Aerospatiale Helicopters Pty Ltd* (1986) ATPR ¶40-700.