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Abstract
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Keywords
auditing, liability, Trade Practices Act, Fair Trading Acts

Comments and Notes

AUDITORS AND PROFESSIONAL OPINION:

A COMMENT ON SECTION 52 OF THE TRADE PRACTICES ACT

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Introduction

In the wake of the House of Lords decision in *Caparo Industries v Dickman*[1] there has been some apprehension within the auditing profession that there might be possible alternative liability under section 52 of the *Trade Practices Act 1974* (Cth) and associated legislation. Baxt[2] stated shortly after the case that in the absence of common law liability, section 52 'might well be the way in which individual shareholders will seek to make the auditor liable'. Based on their wide operation in other areas[3] the professional journals[4] have suggested that section 52 and similar provisions of State *Fair Trading Acts* apply to create strict liability for even honest errors or omissions of auditors. There is particular concern that such strict liability may be owed to a wide range of investors beyond the shareholders of the audited company. These fears are probably unfounded. On the contrary, auditors may be uniquely placed to escape this wide net of liability.

Statutory Duties of an Auditor

The content of the statutory audit is contained in section 332 of the

1 [1990] 1 All ER 568; in the Court of Appeal at [1989] 1 All ER 798 and at first instance before Sir Neil Lawson at [1988] BCLC 387.

2 In an interview with Neales S, 'Auditors Liability Risk Still High, Despite UK Finding' (1990) *Australian Financial Review* 6th March.

3 Note Pengilly W, 'Section 52 of the Trade Practices Act: A Plaintifs New Exocet?' (1987) 15 *Australian Business Law Review* 247.

4 Akhurst B and Bodger A, 'Trade Practices Law: Proceed with Care' (1991) *Charter* April at 54 and also Forster P, 'The Caparo Illusion' (1991) *Charter* October at 50.

Corporations Law. The auditor must state in regard to the financial statements[5] required under Part 3.6 Division 4[6] whether they are, in his opinion, properly drawn up:

* so as to give a 'true and fair view' of the company's profit and loss and its state of affairs;[7]

* in accordance with the provisions of the Act;[8] and

* in accordance with the applicable accounting standards.[9]

If the accounts have not been drawn up in accordance with the applicable accounting standards, then the auditor must state his opinion as to whether the accounts would, or would not,[10] have given a true and fair view had they been so drawn up.[11] Usually the auditor must state his opinion as to the financial effect of a failure to draw up the accounts in accordance with the standards,[12] and this is obligatory where the directors have attached a statement[13] quantifying this financial effect.[14] The auditor must point out any 'defect or irregularity' in the accounts, or any omission, without regard to which a true and fair view would not be obtained,[15] and any other matter with which the auditor is not satisfied.[16]

Operation of section 52 The Trade Practices Act provides:

> 52.(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

In *Brown v The Jam Factory*[17] Fox J noted[18] that this was a provision 'of wide impact'. The 'corporation' tag may be misleading. Professional requirements prevent incorporation of accounting practices, except under unlimited liability, and most auditors operate within large partnerships. Although section 52 uses the term 'corporation' to fall within Commonwealth legislative competence,[19] extended meaning is provided through section 6. It

5 I am ignoring the relevant provisions dealing with group accounts. See *Corporations Law* ss 332(3)(c) and 332(4)(d).
6 *Corporations Law* ss 292 to 300 inclusive: profit and loss statement (s 292), balance sheet (s 293), and group accounts, if applicable (s 295).
7 *Corporations Law* s 332(3)(a)(i).
8 Ibid s 332(3)(a)(ii).
9 Ibid s 332(3)(a)(iii).
10 Ibid s 332(3)(b)(ii).
11 Ibid s 332(3)(b)(i).
12 Ibid s 332(3)(b)(iv).
13 Ibid s 301 or s 302.
14 Ibid s 332(3)(b)(iii).
15 Ibid s 332(3)(d).
16 Ibid s 332(3)(e).
17 (1981) 53 FLR 340.
18 At 348.
19 *Constitution* s 51(xx).

permits a natural person to be treated as a corporation, provided another head of power can be used to enforce the provision. A natural person is a 'corporation' within the Act[20] if he engages in international or interstate trade or commerce,[21] makes use of postal, telegraphic, telephonic, radio and television services,[22] or the conduct takes place within a Territory.[23] The impact of recently enacted state legislation mirroring that of the Commonwealth is far more wide reaching. The *Fair Trading Acts* now in force within all States have identical provisions to section 52.[24] Since they emerge from state parliaments, they expressly apply to persons.

The primary remedy for aggrieved parties is an application for damages under section 82 and corresponding state provisions:[25]

> 82.(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

It is important to note that section 82 makes no limiting statements as to the range of parties to whom an auditor may be made liable, except that the loss or damage suffered must be 'by conduct' breaching section 52. The right to sue can rest in anyone whose loss flows from a contravention. This is causation as the 'man in the street, and not as either the scientist or metaphysician' would understand it.[26] If section 52 applies to auditors, then it permits a far wider ambit of liability than found in *Caparo*, even by the majority in the Court of Appeal.[27] Where, as in the auditor's case, the breach will be some form of representation, reliance on audited statements should be shown.[28] However the representation need not be the only reason for a someone taking action to their detriment, provided it plays at least a minor part.[29] In contrast to common law actions, contributory negligence in any form will not prevent liability under section 82, and it is uncertain whether it

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20 *Trade Practices Act* 1974 (Cth) s 6(3)(b). The constitutionality of s 6 was upheld in *Ex parte CLM Holdings Pty Ltd* (1977) 13 ALR 273.

21 *Trade Practices Act* s 6(2)(a); or commerce involving the Commonwealth or one of its instrumentalities: s 6(2)(a)(iv).

22 *Trade Practices Act* s 6(3)(a); see *Handley v Snoid* (1981) ATPR ¶40-219 (television).

23 *Trade Practices Act* s 6(4)(a); the Commonwealth holds plenary powers over the Territories.

24 *Fair Trading Act* 1987 (NSW) section 41; *Fair Trading Act* 1987 (SA) s 56; *Fair Trading Act* 1985 (VIC) s 10A; *Fair Trading Act* 1987 (WA) s 10; *Fair Trading Act* 1989 (QLD) s 38; *Fair Trading Act* 1990 (Tas) s 14.

25 New South Wales: s 66; South Australia: s 83; Victoria: s 36; Western Australia: s 72; Queensland: s 99; Tasmania: s 37.

26 *Yorkshire Dale SS Co v Minister of War Transport* [1942] AC 691 at 706 per Lord Wright.

27 [1989] 1 All ER 798.

28 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) ATPR ¶40-850 at 49,154.

29 *Sutton v A J Thompson Pty Ltd* (in liq) (1987) 73 ALR 233 drawing from *Gould v Vaggelas* (1985) 157 CLR 215 at 256 per Wilson J.

will reduce the measure of damages.[30]

Professional activity and conduct in trade or commerce

These Acts may not apply since the professional activities of auditors may fall outside the meaning of trade or commerce. That conduct must be in trade or commerce is a necessary requirement for section 52 as well as corresponding provisions of state *Fair Trading Acts*, even though for the states, and in many cases under section 6 the Commonwealth Act, this is unnecessary for constitutional validity. Trade refers primarily to the buying and selling of goods and services.[31] Combined with commerce the phrase can cover intangibles, such as banking transactions, as well as the movement of goods and persons.[32] Commerce in isolation has yet to be defined by Anglo-Australian courts. Traditional interpretation does not extend this to the conduct of professionals. *Halsbury's Laws of England* notes that trade is distinct from the 'liberal arts or learned professions'.[33] Although this might easily be dismissed as a reflection of the English class snobbery against being in 'trade', our own High Court in *Hornsby Shire Council v Salmon Holdings*[34] found in the case of running a private hospital that, although it could be characterised as a business, it was not a trade. Menzies J stated:[35]

> Although the word 'trade' has a wide and flexible meaning, statements in decided cases which would extend its meaning to cover any commercial activity or any non-residential use of land are, in my respectful opinion, too widely stated.

In the recent decision of *Street v Queensland Bar Association*.[36] Dawson J pointed out that at the time the Constitution was framed, a distinction was drawn between the recognised professions and trade or commerce. The professions included the law together with divinity and medicine.[37] This was significant since in his opinion, the Constitution must be interpreted in light of the meaning of the words at the time it was created. With the passage of time the words may be applied to novel situations, but it is an accommodation to changing facts, not changing language.[38]

To test whether activities fall within trade or commerce, the traditional approach is represented by *Holman v Deol*,[39] where the matter was whether a

30 *Sutton v A J Thompson Pty Ltd* (1987) 63 ALR 233 at 241.
31 *Higgins v Beauchamp* [1914] 3 KB 1192 at 1195 per Lush J.
32 *Re Ku-ring-gai Co-operative Building Society (no 12) Ltd* (1978) 36 FLR 134 at 139 per Bowen CJ.
33 (3rd Ed) 38 ss 8-10 (emphasis added).
34 [1972-73] ALR 421.
35 At 423.
36 (1989) 88 ALR 321.
37 At 371.
38 *R v Commonwealth Conciliation and Arbitration Commission; ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267 per Windeyer J.
39 (1979) 1 NSWLR 640.

solicitor fell within the definition of trader in the *Consumer Claims Tribunal Act* 1974 (NSW), which meant a person 'who in the field of trade or commerce carries on a business of supplying goods or providing services'.[40] Although services was defined to include work of a professional nature, the overriding qualification was that conduct must be within the field of trade or commerce. Lee J found that the proper approach was to examine the activities of the person and see whether they are primarily mercantile in character. For instance, the activities of a pharmacist, apart from the dispensing of prescriptions, is little different from that of any other shopkeeper selling goods.[41] The definition of services was to make it clear that simply calling oneself professional was insufficient. Some who call themselves professional within looser parlance were identified as dental technicians, taxation consultants, real estate valuers, teachers of music and language, beauticians, and hairstylists.[42] To fall outside trade or commerce the activity must bear the hallmarks of the traditional conception of a profession. In *Carr's* case[43] Du Parcq L J suggested this to be the existence of some special skill or ability, or some special qualifications derived from training and experience. Recognised professions include the law together with divinity and medicine.[44]

Auditing as a Profession

Partlett[45] distinguishes professional services by two criteria:

1. the application of skill to the performance of a task or the rendering of advice; the skill springs from a body of knowledge accumulated by intellectual effort that is the product of formal training; and

2 the performance of the tasks or the rendering of the advice is accompanied by ethical undertakings usually enunciated by a representative body of practitioners.

He notes that this definition would include accountancy. Du Parcq LJ in 1944 was able to refer to chartered accountancy as a profession which had recently arisen.[46] Auditors are qualified accountants whose representative bodies in Australia are the Institute of Chartered Accountants and the Society of Certified Practicing Accountants. Each requires some form of tertiary qualification in addition to experience and supervised training for admission. In addition, each subscribes to a code of professional conduct, aimed at maintaining ethical standards, and can apply disciplinary action upon its members. Under the *Corporations Law*, the Australian Securities

40 Section 4(1).
41 (1979) 1 NSWLR 640 at 646 per Lee J.
42 At 651.
43 *Carr v IRC* [1944] 2 All ER 163 at 166.
44 *Street v Queensland Bar Association* (1989) 88 ALR 321 at 371.
45 Parlett DF *Professional Negligence* (1985) 3-4.
46 *Carr v IRC* [1944] 2 All ER 163 at 166.

Commission shall not register a person as an auditor unless the applicant is a member of one of the recognised professional bodies;[47] holds a degree, diploma or certificate from a recognised university or other higher institution, which represents at least 3 years study of accounting and auditing, and at least two years of commercial law;[48] or has other equivalent qualifications and experience.[49] The applicant must also have had sufficient practical experience,[50] must be considered capable of performing the duties of an auditor, and be otherwise fit and proper.[51] These requirements suggest that auditors are probably professionals in the traditional sense.

Trade or commerce under section 52

The traditional approach in *Holman v Deol* has not been used by the federal courts in dealing with the *Trade Practices Act*. The expression trade or commerce was initially given a very wide meaning. It was held to cover the entire field in which the nation's trade or commerce is carried on, and not confined to any particular event which may occur in the conduct of a business.[52] A test derived from American decisions on the United States' commerce power[53] was predominant. Conduct was within a trade or commerce if it was at least indirectly related to some form of business activity. For example, in *Goldfarb v Virginia State Bar*[54] the Bar was accused of price-fixing through a system of minimum fees, and action was taken under the *Sherman Act*.[55] That their activity fell within the a commerce power was upheld. Firstly, it was thought that the exchange of money for services was commerce in the ordinary sense of the word. Secondly, the activities of lawyers played an important part in commercial intercourse, therefore anti-competitive activities by lawyers are a restraint on commerce in general.[56] This second factor would not of course apply to performing a statutory audit.

This approach created a dichotomy between the business and private spheres. A notable exception to arise was that of a private sale of a parcel of land not used for any business activity.[57] In *Bond Corp v Theiss Contractors*[58] a firm of consulting and supervising engineers unsuccessfully argued that their provision of services in a professional capacity was not conduct in trade or commerce, since the term referred to activity of the

47 *Corporations Law* s 1280(2)(a)(i).
48 Including company law: *Corporations Law* s 1280(2)(a)(i).
49 Ibid s 1280(2)(a)(iii).
50 Ibid s 1280(2)(b).
51 Ibid s 1280(2)(c).
52 *Larmer v Power Machinery Pty Ltd* (1977) 29 FLR 490 (the display of a brochure in the foyer of a corporation was conduct 'in trade or commerce').
53 See *Lautner v Carson* (1978) 373 NE(2d) 973 at 977.
54 (1975) Trade Cases ¶60-355.
55 The Australian equivalent to the *Sherman Act* s 1 is the *Trade Practices Act* s 45.
56 (1975) Trade Cases ¶60-355 at 66, 498.
57 *O'Brien v Smolongov* (1983) 53 ALR 107.
58 (1987) 71 ALR 615.

mercantile kind, and not 'what is essentially an intellectual activity'.[59]

In *Glorie v W.A. Chip and Pulp Co.*[60] a film was produced as a political exercise to explain to the public the way in which the South West Forest was managed. The conduct was found to be within trade or commerce since a reason for exhibiting the film was to indirectly protect the commercial interests of members of the Forest Producers Association.[61] Similar reasoning may be used to imply that auditors are engaged in trade or commerce, since they act to protect the commercial interests of companies. However, the analogy is not as close as it may seem, since in *Glorie's* case the Association was a representative body for the timber companies. Auditors are not a representative body for the companies they audit.

Australia operates under a different constitutional framework than the United States in respect of the commerce power. Zines[62] suggests the difference in our Constitution lies in the specification of distinct powers including banking,[63] insurance,[64] trademarks,[65] and conciliation and arbitration.[66] The American Constitution contains the simple commerce power to cover all these areas. To that extent, social and political pressures which might have affected the United States Supreme Court in interpreting the commerce power have not been so prevalent in Australia. By 1913 it was clear that the commerce power in the United States not only extended over all commercial matters of national importance, but included also a power to be used for the general welfare, commercial or otherwise.[67] After 1937 it was clear that the Supreme Court allowed Congress to determine what the national interest required, and that it would usually accept that determination.[68] Indeed, some writers have commented that there is no judicially enforceable limit to this power.[69]

As shown above, the interpretation of trade or commerce in this country has traditionally been more limited. In analysing *Goldfarb*, Heydon commented that although it was likely that lawyers might engage in trade or commerce under the *Trade Practices Act*, such a conclusion did not necessarily follow from the American finding, pointing to the 'narrower scope of our trade and commerce power'.[70] Indeed Windeyer J. in the High Court expressly disapproved of the 'later American cases, which seem to see

59 At 617 per French J.
60 (1981) 55 FLR 310.
61 At 320 per Marling J.
62 L Zines *The High Court and the Constitution* (1981) 42.
63 *Constitution* s 51(xiii).
64 Ibid s 51(xiv).
65 Ibid s 51(xviii).
66 Ibid s 51(xxxv).
67 Note *US v Hill* (1918) 248 US 420 and *Brooks v US* (1925) 267 US 432.
68 *US v Southeastern Underwriters Associates* (1944) 322 US 533 at 588 per Jackson J.
69 For instance N T Dowling and R A Edwards *American Constitutional Law* (1954) 156.
70 Heydon JD, 'Lawyer's Fees and the Trade Practices Act Section 45' [1976] *Australian Current Law Digest* 27.

the horizon of the commerce power ever receding, and the persons and things within it ever increasing'.[71] The United States Supreme Court has adopted, on the whole, a more organic interpretation of the Constitution than has the High Court.[72]

In 1990 the High Court did rule that trade or commerce was in fact more limited. The majority[73] in *Concrete Constructions (NSW) v Nelson*[74] held that it was not sufficient merely to show a nexus between the conduct and trade or commerce. To be in trade or commerce the conduct itself must bear a trading or commercial character on its face.[75] This definition is not only narrower than the previous definition, but is also more limited than the corresponding constitutional head of power.[76] *Concrete Constructions* heralds a return to the traditional approach. *Street's* case, in contrast to *Goldfarb*, rejected the argument that a barrister was operating within "trade or commerce" by taking a fee, since his conduct involved the 'application of special learning, and the maintenance of standards imposed, not by the terms of his retainer, but by the nature of his calling',[77] and although he may represent commercial interests, the essential role of a barrister as a professional adviser remains the same:[78]

> A barrister appearing for or advising a person engaged in trade does not thereby become a trader any more than a barrister engaged in a criminal case becomes a criminal.

Interestingly enough, a footnote to the judgment in *Goldfarb* states that it would be unrealistic to view the practice of professions as interchangeable with other business activities in every situation, so as to apply to it concepts which originated in other areas.[79]

More recently in *Helco v O'Haire*,[80] a case concerning a representation by solicitors as to the sufficiency of their client's assets to cover personal guarantees, the Full Federal Court expressly left open the question whether the conduct of the solicitors fell within trade or commerce. The Court unanimously held that each case had to be assessed on its merits, and noted the danger of a *priori* labelling of conduct as professional to exclude section

71 *R v Foster* (1959) 103 CLR 256 at 310.
72 Nygh PE, 'An Analysis of Judicial Approaches to the Interpretation of the Commerces Clause in Australia and the United States' (1967) 5 *Sydney Law Review* 353.
73 Mason CJ Deane, Dawson and Gaudron JJ.
74 (1990) ATPR ¶41-022.
75 The High Court ruled that advice given by a foreman to the injured plaintiff that certain grates had been secured was not 'in trade or commerce'.
76 *Constitution* s 51(i). For instance, the 'step' theory in *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.
77 (1989) 88 ALR 372.
78 At 372.
79 (1975) Trade Cases ¶60-355 at 66,498 note 17.
80 (1991) ATPR ¶41-099.

52.[81] This sentiment echoes the approach of Lee J. in *Holman v Deol*.[82]

Statutory Definitions

The situation is slightly muddied by varying definitions within the statutes. Section 6(4)(b) of the *Trade Practices Act* includes within trade or commerce the promotional activities of professionals. The explicit extension of the operation of the Act in this way implies that ordinary professional activities should excluded.[83] In other words, representations made by auditors as to their expertise or capability to perform certain tasks should fall under the provision, whereas the actual performance of their duties, namely certifying accounts as true and fair, ought not. This follows from the heading to Part V: Consumer Protection. Brennan J[84] in *Concrete Constructions* suggested that although nonconsumers have a right of action,[85] the conduct on which it is founded must be conduct which misleads or deceives, or is likely to mislead or deceive, a person in his capacity as a consumer. The clear implication of section 6(4)(b) is that non-promotional professional activities do not fall under the Act.

The same is not necessarily true in the states. In response to *Holman v Deol*,[86] New South Wales expressly included professional activity within the definition of trade or commerce in its *Fair Trading Act*.[87] This is mirrored in Queensland.[88] The Victorian Act contains no mention at all of professional activity. The South Australian Act includes professional activity within the definition of business, which affects the meaning of trader.[89] While this affects other sections of the Act, it plays no part in its section 52 equivalent. Similarly Tasmania[90] and Western Australia[91] define services to include work of a professional nature, identically to the Commonwealth.[92] This ought to mean in the light of *Holman v Deol*[93] and *Helco* that the essential

81 At 52, 576. At first instance, Einfeld J assumed without deciding that the conduct was within trade or commerce: (1990) ATPR ¶41-040.

82 *Supra*.

83 *Expressio unius est exclusio alterius*. An alternative argument would be that it is already assumed that the Act covers professionals, but by this provision extends its operation to their promotional activities. Such an extended definition would be curious, and unsupported by the Parlimentary working documents. However note *Bond Corp* (1987) 71 ALR 615.

84 With Toohey and McHugh JJ in dissent.

85 By ss 80, 82, and 86.

86 It is interesting to note that the Act in question was amended by the *Consumer Claims Tribunals (Amendment) Act* 1987 (NSW) to include section 4(3A) which provides that a person is treated as engaged in a 'business activity' whether 'in the course of a profession *or* in the field of trade or commerce' (emphasis added).

87 *Fair Trading Act* s 4(1).

88 Ibid s 5(1).

89 South Australia: s 3(1); Western Australia: s 5(1).

90 Ibid s 3.

91 Ibid s 4.

92 The South Australian Act heads Part X with the title 'Application of Commonwealth Provisions'.

93 (1979) 1 NSWLR 640.

qualification of trade or commerce is unaltered.

It can be noted that the Trade Practices Review Committee in its 1976 report (The Swanson Report) rejected a submission that professionals were not part of the general business community. The report states:

> 10.35 Division 1 of Pt V sets certain minimum standards of business conduct. Most, if not all, professions impose equal, if not stricter, standards upon their members. We see no reason why these provisions should not apply to the professions nor would we expect its application to cause the professions any concern.

In *Bond Corp*, however, French J noted that this Report was made at a time when the full potential of section 52 to create liability for honest non-negligent statements was not widely appreciated.[94]

Opinions and misleading or deceptive conduct

Unlike common law negligence, under section 52 there is generally no requirement of fault. The fact that a person could have discovered the misrepresentation does not prevent liability.[95] More importantly, there is no requirement to show intention to mislead or deceive,[96] and a company that acts honestly, and also reasonably (without negligence) can still be liable.[97] All that is relevant for the court to decide is whether the conduct was misleading or deceptive.[98] For instance, in *Greco v Bendigo Machinery*[99] a dealer who made an inaccurate but completely innocent representation concerning the state of repair of a front-end loader was found to be in breach. The possibility of faultless liability is one which should alarm most auditors, indeed, most professionals involved in giving information and advice to large business interests. However, where the conduct is the stating of an opinion, it becomes critical that section 52 is only breached through misleading or deceptive *conduct*.[100] It is the making of statements, and not the statements themselves, which must be misleading or deceptive. This is a subtle but important point since it means that the statement cannot be viewed in isolation, but within the context in which it was made. The conduct in making statements will not be actionable unless it conveys a misrepresentation.[101] By a misrepresentation is meant a false impression of some fact, or set of facts, created in the mind of another.[102]

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94 (1987) 71 ALR 615 at 618.

95 *Neilsen v Hempston Pty Ltd* (1986) 65 ALR 302.

96 *York v Lucas* (1985) 158 CLR 661.

97 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 per Gibbs CJ.

98 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216 at 223 per Stephen J.

99 (1985) ATPR ¶40-521.

100 This is defined by s 4(2) to include 'doing or refusing to do any act'.

101 *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177.

102 J S Ewart *An Exposition of the Principles of Estoppel by Misrepresentation* (1900) 12.

An opinion is not a fact in itself. An opinion can be a misrepresentation in that it conveys the impression that the speaker actually holds that opinion. According to Bowen LJ, the 'state of a man's mind is as much a fact as the state of his digestion'.[103] For instance, in *Industrial Equity v North Broken Hill Holdings*[104] a number of pamphlets were distributed by the Board to shareholders in regard to a proposed takeover offer, strongly arguing that the offer should be rejected. The predator corporation sued under section 52. It was found that the statements contained in the pamphlets were not of a matter of physical observation 'such as the dimensions of a block of land', but a conclusion or opinion about the takeover offer.[105] In this regard, the Court found that the statements should not be held to be misleading or deceptive simply if they are incorrect, unless it could also be shown that the opinion was not honestly held.[106]

In deciding whether conduct is false or misleading, the meaning conveyed by the representation must be ascertained.[107] In *Melbourne Banking Corp v Braugham*[108] a valuation of a mortgage security at £15,000 did not represent that the security was worth the stated sum, only that the valuers had themselves estimated that particular value. Gummow J, in *Elders Trustee* outlined the scope of section 52 and stated:[109]

> Where what is relied on for contravention of section 52 of the *Trade Practices Act* is a statement of opinion, it will not be misleading or deceptive or likely to mislead or deceive merely because it misinforms or is likely to do so; the situation may differ if the evidence shows that the opinion was not held *or that it lacked any, or any adequate foundation.*

This last point is significant, since it assumes that alongside the impression that an opinion is actually held, an impression is created that there are reasonable grounds for holding that opinion.[110] This qualification can be rationalised as a matter of policy to make it easier for plaintiffs to show that opinions are in some instances misleading or deceptive. Evidence to show that an opinion was not in fact held will be difficult to obtain. This policy is demonstrated by section 51A(1)[111] which provides:

> 51A.(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter . . . and the corporation does not

103 *Edgington v Fitzmaurice* (1885) 29 Ch D 483.
104 (1986) 64 ALR 292.
105 At 300.
106 At 301.
107 *Bisset v Wilkinson* [1927] AC 177.
108 (1882) 7 App Cas 307.
109 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 242 (emphasis added).
110 '...commonly, at least...': note *Global Sportsman v Mirro* (1984) 55 ALR 25 at 31 per the Full Court.
111 Inserted by Act No 17 of 1986; compare *Fair Trading Acts* New South Wales: s 41; Victoria: s 10A.

> not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

Despite the policy overtones, the requirement for a reasonable basis on which to form opinions appears well established.[112] In addition, where the opinion offered is that of an expert, the requirement for a reasonable basis is stricter. In *Bateman v Shatyer*[113] cash flow projections were obtained for a proposed Barbara's House & Garden franchise. No serious attempt had been made to establish a basis for the figures by directors who held considerable experience in this kind of business. Burchett J. held that an opinion carries with it the representation that it is 'honestly held upon rational grounds involving an application of the relevant expertise'.[114] Given the expertise of the directors, they could not have believed that the figures were soundly based. The conclusion can therefore be drawn that where conduct is the giving of opinions or advice, then a test of reasonable grounds can be imported and these reasonable grounds will vary with the level of expertise. In most respects this is importing a standard of care similar to ordinary negligence. Yet this itself is a narrow view. On a wider view it could be argued that mere errors or omissions in the application of expertise to arrive at an opinion does not make it misleading or deceptive. All that the auditor would need to show is an honest attempt to ascertain whether the certified accounts represent a true and fair view. The opinion would have to be without any reasonable foundation (as in *Bateman*) or be so grossly negligent that it could not be said to be a real application of his expertise.

The nature of the audit function

The auditor is primarily concerned with ascertaining whether the accounts reflect a true and fair view. This is not a concrete concept in the same way as ascertainment of money held in bank deposits, but an opinion dependent upon a knowledge of generally accepted accounting practices and supplemented by requirements of Schedule 5. Furthermore, the duties of the statutory auditor prescribed by section 332 are expressed at all important instances to be the formation of an Opinion.[115]

> An auditor shall, in a report under this section state whether the accounts...are *in the auditor's opinion* properly drawn up so as to give a true and fair view...

Statutory auditors, and, it would appear, other types of auditors, should not be made liable for incorrectly certifying accounts, unless a want of reasonable grounds, based on their expertise, can be found. This will reflect the common law view that the auditor is not an insurer who guarantees the correctness of every item in the accounts, but need only exercise reasonable

112 *MCP Muswellbrook Pty Ltd v Deutche Bank (Asia) AG* (1988) 91 FLR 159.
113 (1987) 71 ALR 553.
114 At 559.
115 *Corporations Law* s 332(3)(a)(i); (emphasis added).

care and skill.[116] The impression conveyed by certifying the accounts is simply that the auditor has applied his expertise to ascertain whether the accounts are a true and fair view.

Conclusions

Although the liability of auditors under section 52 of the *Trade Practices Act* and related provisions in the *Fair Trading Acts* is yet to be tested in the courts, it is suggested that the fears within the profession of faultless liability where accounts are found to be incorrectly certified may be unfounded. Recent cases suggest a return towards the distinction between trade or commerce and the professions in the traditional sense, although in two states it has been expressly included within statutory definitions. This may mean that outside New South Wales and Queensland auditors will not fall within the legislation, at least with respect to the certification of accounts. With the recognition of the potential for faultless liability to a wide scope of parties, the courts will probably be more hesitant in bringing auditors within these provisions. If the legislation applies, then on a narrow view of the legislation the nature of the audit function in providing an opinion should allow auditors a defence of acting honestly and without negligence. On a wider view, auditors will only be caught where no real attempt has been made to apply their expertise, or are in some sense grossly negligent. Even on a narrow view this would be good news to the auditing profession.

116 Re London and General Bank (No.2) [1895] 2 Ch 673 at 683.