

# SCHOOL PROSPECTUSES AND THE POTENTIAL LIABILITY OF PRIVATE SCHOOLS UNDER SECTION 52 OF THE TRADE PRACTICES ACT 1974 (CTH)

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*Private (and public) schools in Australia compete nationally and internationally for students. As schools have become increasingly more competitive and market-oriented, they have employed a range of marketing strategies to advertise their schools. The school prospectus is still an important marketing tool used by many schools to promote their educational products and services that include aspects such as quality educational programs, professional and skilled staff, diverse extracurricular activities, top-class facilities and key educational achievements. This article examines the scope and application of section 52 of the Trade Practices Act 1974 (Cth) to school prospectuses, and discusses the potential liability of private schools to parents and students for statements made in a school prospectus.*

## I INTRODUCTION

Marketing has become an important function of school management. Private<sup>1</sup> and public schools in Australia have become increasingly more competitive and market-oriented, competing nationally and internationally for students. Vining<sup>2</sup> notes that ‘a new priority is emerging in government schools in Western Australia as they come to terms with changing enrolment patterns’. Renner (cited in Vining)<sup>3</sup> also observes that ‘schools now operate in a competitive marketplace where student retention is as vital as student recruitment’.

The marketing of schools has seen the emergence of a number of professional marketing services that will help schools develop sophisticated marketing plans and strategies.<sup>4</sup> There is also a growing body of literature on how to market schools.<sup>5</sup> According to Vining,<sup>6</sup> research conducted by the Centre for Marketing Schools showed that in 2006 ‘schools are planning to spend more on marketing and to include more people in the marketing process’. However, there is little in the literature on the issue of school marketing and consumer legislation.<sup>7</sup>

Marketing in any context is fundamentally about recruiting and retaining customers. Harvey<sup>8</sup> states that one of the major purposes of marketing is ‘to explain to potential clients the services or products they are about to purchase, as well as trying to persuade them to buy a particular brand’.<sup>9</sup> As far as schools are concerned, marketing is about promoting their educational products and services, as well as their reputation. Schools have to identify and communicate their competitive edge and advantage, so as to persuade parents and students to choose the education product on offer. Spring<sup>10</sup> expresses the view that in terms of marketing, the size and type of school does not matter but ‘what matters is that you stand out from your competition in a positive way’.

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To this end, schools have a wide range of marketing tools at their disposal including the school prospectus, brochures, websites, advertisements, videos and expos. The traditional school prospectus is still an important and useful marketing tool used by many schools today. School prospectuses, including online versions, promote educational products and services that invariably espouse and promise quality educational programs, professional and skilled staff, diverse extracurricular activities, individualised pastoral care, top-class facilities and high educational achievements. Such promotional material creates certain expectations with regards to quality, standards and successful educational outcomes, and will inevitably influence parents and students in their choice of school. Research indicates that parents' choice of schooling is influenced by various factors including small classes, strong discipline, a friendly environment, good facilities, solid academic achievement, and the quality of staff.<sup>11</sup> Schools that offer these features are likely to be successful in recruiting students. However, what happens if a school does not live up to the promises made and expectations created in the school prospectus?

This raises the question of whether or not schools may be liable to parents and students under consumer protection legislation. Imagine if a school prospectus promises excellent, state-of-the-art facilities, and claims that students will each have their own computer and receive specific amounts of computer training on the latest computers, when in fact the school has a limited number of outdated computers. Does this constitute a misleading or deceptive statement in a school prospectus? What is the likelihood of a school being found liable under provisions of the *Trade Practices Act 1974* (Cth)? This article examines the scope and application of section 52 of the TPA with regards to school prospectuses and discusses the potential liability of private schools to parents and students for statements and claims made in a school prospectus.

## II THE TRADE PRACTICES ACT 1974

The *Trade Practices Act 1974* (Cth) (TPA) aims to enhance the welfare of Australians by advancing and protecting competition and consumers.<sup>12</sup> Part V of the TPA is headed 'Consumer Protection'. The object of Part V is to protect the consumer by eliminating unfair trade practices. Consumer is defined in section 4B as a person acquiring particular goods or services not exceeding a prescribed amount or, if the goods or services do exceed a prescribed amount, the goods and services are of a kind usually acquired for personal, domestic or household use. Users of educational services are likely to be consumers for the purposes of this section. Unfair trade practices include misleading and deceptive conduct, false or misleading representations and defective products.

Misleading and deceptive conduct is the overarching unfair practice in Part V against which consumers are protected. Section 52 provides 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>13</sup>

Whether or not parents or students can bring an action against a private school for misleading and deceptive conduct under section 52 of the TPA will depend on whether the school falls within the scope of section 52. For an action to succeed, the school must be a corporation, must have engaged in conduct that has occurred in trade or commerce, and the conduct must have been deceptive or misleading, or likely to mislead or deceive.<sup>14</sup>

## *A Schools as Corporations*

Section 52 requires that a *corporation* is engaged in misleading conduct. In general, most private schools operate as a separate legal entity, most commonly as an incorporated association or as a company limited by shares and as such would fall within the definition of a corporation.<sup>15</sup> This is the case even though the body corporate is often a not-for-profit association.<sup>16</sup> What is significant is whether the body corporate is a ‘constitutional corporation’ for the purpose of the TPA.

The TPA will not apply to every corporation, only those which are a ‘constitutional corporation’. Section 4 of the TPA defines ‘corporation’ in terms of a trading corporation, a financial corporation or foreign corporation. Trading has been defined as ‘activity providing for reward, goods or services’. Murphy J noted that ‘trading is a term of very wide scope’.<sup>17</sup> When considering whether or not a corporation is a ‘trading corporation’, Australian courts have applied a test based on the current activities of the corporation, although this is not the only criterion and the courts will consider other factors. In terms of the current activities test, the High Court has held that for a corporation to be a ‘trading corporation’ its trading activities must form ‘a sufficiently significant proportion of the corporation’s overall activities’;<sup>18</sup> they must be carried out ‘on a significant scale’;<sup>19</sup> and the trading is ‘not insubstantial’.<sup>20</sup> An activity does not have to be the organisation’s main or primary activity to be categorised as a trading activity. According to Murphy J a trading corporation ‘does not mean a corporation which trades and does nothing else or in which trading is the dominant activity. A trading corporation may also be a sporting, religious, or governmental body’.<sup>21</sup> Murphy J further noted that ‘the commercialisation of sport, education, religion, medicine and other social or professional activities is a world-wide phenomenon’.<sup>22</sup> An entity that is incorporated under incorporated associations legislation will not necessarily be precluded from being characterised as a trading corporation if the activities warrant inclusion.<sup>23</sup> Moreover, entities that are also largely voluntary associations and provide a public service may be a trading corporation.<sup>24</sup> However, as Mason J argues ‘[n]ot every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz. religion or education in the case of a church or school, that it could not be described as a trading corporation’.<sup>25</sup>

Similar considerations regarding the necessity for constitutional corporations apply in relation to the federal *WorkChoices* legislation.<sup>26</sup> In 2006 the Queensland Industrial Relations Court held that a not-for-profit company, jointly owned by the Anglican and Uniting churches, which provided educational services was a constitutional company for the purpose of the *WorkChoices* legislation.<sup>27</sup> The company in question, EDUCANG Limited was a public company limited by guarantee. The Court looked to the purpose for which the Company was formed to assist in determining its current activities. The Court found that while the ultimate purpose of the Company was to ‘develop a community of faith based on a belief in God and a Christian way of life’,<sup>28</sup> the means by which that was to be achieved was through ‘the conduct of co-educational school’.<sup>29</sup> The Court considered in detail the business activities by which that purpose was to be achieved. The Constitution of the Company clearly contemplated participation in financial transactions (borrowing and investment), the levying of tuition fees on both domestic and international students and the marketing of the business. In addition to the tuition fees received by the schools, ancillary services that had been promoted were also considered in determining whether the Company was a trading corporation and included such things as study tours, additional programs (adult education and homestay) and before and after school care. Other income included interest earned on investments, application fees, uniform shops and canteens. State and federal recurrent grants

received by the schools for the provision of educational services were disregarded by the Court in determining the Company's status as a trading corporation.<sup>30</sup> The Court found that the high percentage of operating revenue (53%)<sup>31</sup> derived from activities other than government grants and the fact that these activities were aimed at ensuring the successful conduct of co-educational schools strongly supported the conclusion that EDUCANG Limited was a trading corporation.

Universities are also considered trading corporations for the purpose of the TPA, notwithstanding the high level fees paid by the Commonwealth to Universities. In *Quickenden v O'Conner*,<sup>32</sup> the Full Court of the Federal Court found that the University of Western Australia was a trading corporation. The Full Court did not consider the revenue derived from government funding as revenue from trading. When considering whether the subsidiary activities of the University should be included for the purpose of the current activities test, the Court stated activities that 'are a substantial, in the sense of non-trivial, element, albeit not the predominant element of what the university does' did amount to trading activities.

Given the nature of most private schools' constitutions, with regard to both the stated purpose and the contemplation of entering into financial transactions, coupled with the need for most private schools to levy not insignificant fees and engage in other revenue raising activities, it is very likely that a private school would be a trading corporation for the purposes of the TPA. It should be remembered that the activities are not limited to those directed at making a profit, but encompass all activities aimed at raising revenue.<sup>33</sup> This will be the case unless the trading activities are an insignificant portion of a school's overall activities. Moreover, section 6 of the TPA extends section 4 to regulate the conduct of natural persons (and unincorporated bodies). Of particular interest in this context is section 6(4) which extends the consumer protection provisions to conduct in the 'course of promotional activities of a professional person'. This would encompass the promotional activities of teachers. Therefore, unincorporated private schools, and those not considered trading corporations may also fall within the scope of the legislation.

## B Conduct in Trade or Commerce

The expression 'in trade or commerce' has been given the plain meaning 'to traffic by way of sale or exchange or commercial dealing'.<sup>34</sup> 'In trade and commerce' encompasses activities or transactions that have a trading or commercial character. In *Re Ku-ring-gai Co-op*, Deane J stated that 'the terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend on varying phases of development of trade, commerce and commercial communications, the terms are clearly of the widest import ...'.<sup>35</sup> Advertising and promotional material have been characterised as activities that are 'trade, commerce and commercial communication'. For example, in *Larmer v Power Machinery*,<sup>36</sup> a brochure displayed in the foyer of the company was an activity 'in trade or commerce' and in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisation Inc*,<sup>37</sup> the Court held that an advertisement placed in a national newspaper by the appellant was conduct 'in trade or commerce'.

To characterise schools as entities carrying out conduct 'in trade or commerce' may at first glance appear problematic, especially if the school is a not-for-profit organisation. However, education and training functions and services may constitute 'trade and commerce'. As Varnham<sup>38</sup> points out, the education climate has changed and 'educational institutes sit in the market place along with other service providers'. Varnham, for instance, argues that tertiary institutions 'are businesses and activities of commerce especially in relation to their promotional material and course information'. Bessant<sup>39</sup> similarly notes that universities are no longer immune from

trade practices law and that according to Fels (former Chairman of the Australian Competition and Consumer Commission) ‘many activities universities now engage in amount to providing goods and services in exchange for reward. This means that universities are engaging in trade or commerce’.<sup>40</sup> In *Monroe v Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia*,<sup>41</sup> it was held that education and training functions carried out by the Institute of Chartered Accountants in Australia (ICAA) in connection with its CA Program are ‘in trade or commerce’. Lindgren J concluded that ‘it seems to me that this conclusion is compelled by the fact that the ICAA sells those services to many students for a very substantial monetary return on a highly organised, systematic and ongoing basis. While it may not be necessary that all of those features be present in order to satisfy the expression “in trade or commerce”, the presence of all of them makes it clear that the expression is satisfied in this case’. Similarly, private schools provide education and training services and operate on a business and commercial model.<sup>42</sup> Private schools are ‘in trade’ in respect of the marketing and promotion of their schools through avenues such as school prospectuses and trade expos.

### C Engage in Conduct

A third element of section 52 is that a corporation must ‘engage in conduct’. This key phrase is given a broad definition in section 4(2) to include doing or refusing to do an act. ‘Refusing to do an act’ includes refusing to do an act or making it known that an act will not be done. Although actions under section 52 may involve a representation,<sup>43</sup> section 52 merely requires that ‘conduct’ be misleading or deceptive. Moreover, there is no requirement that the conduct must arise out of a special relationship or a contractual arrangement.<sup>44</sup> Conduct is also not interpreted to include conduct in general but rather conduct that is ‘in trade and commerce’. The Court has held that:

It is plain that section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purpose of, its overall trading or commercial business ... the reference to conduct ‘in trade or commerce’ in section 52 can be construed as referring only to conduct which itself is an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.<sup>45</sup>

In the case of private school prospectuses, the conduct is more likely to involve the ‘doing’ of an act. Thus advertising and promoting the school on websites, through the media and in school prospectuses constitutes ‘engaging in conduct in trade or commerce’. Although the courts recognise some latitude in advertising, the fine line between mere exaggeration and puffery on the one hand and misleading conduct on the other is drawn by the court having regard to the facts of each case.<sup>46</sup> In *Fasold v Roberts*,<sup>47</sup> the Court held that:

A person undertaking public presentations, such as exhibiting films or publishing advertisements, engages in conduct in trade or commerce if the presentations are designed to advance or protect the commercial interests of the exhibitor or the publisher, or trading entities represented by the exhibitor or publisher.

### D Misleading or Deceptive Conduct

The final element under section 52 is that the conduct must be ‘misleading or deceptive ... or likely to mislead or deceive’. Conduct is only misleading if it induces or is capable of inducing error.<sup>48</sup> Conduct is deceptive when there is an element of intention or recklessness.<sup>49</sup> The words to ‘mislead’ or ‘deceive’ were given their plain dictionary meaning by Franki J in *Weitmann v Katies*

*Ltd*<sup>50</sup> in which he referred to the Oxford English Dictionary: ‘the most appropriate meaning for the word “deceive” in the *Oxford Dictionary* is “to cause to believe what is false; to mislead as to a manner of fact; to lead into error; to impose upon, delude, take in”. The most appropriate definition in that dictionary for the word “mislead” is “to lead astray in action or conduct; to lead into error; to cause to err”’.

The courts have laid down a number of principles for determining whether or not conduct is misleading or deceptive.<sup>51</sup> In the first instance, the relevant section of the public must be identified that is most likely to be affected by the said conduct. Second, the matter must be determined with reference to a significant number of people who fall within the section of the target group and who are likely to be exposed to the conduct. In *Taco Bell*,<sup>52</sup> Franki J noted that the matter is to be considered by reference to all who come within target group ‘including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly-educated, men and women of various ages pursuing a variety of vocations’. However, when considering conduct said to be misleading or deceptive that is directed to the public at large, the conduct must be tested against ordinary and reasonable members of the class of people.<sup>53</sup> Puffery or a claim that is an obvious exaggeration that is not believable does not constitute misleading or deceptive conduct.<sup>54</sup> In the case of private education, the relevant section of the public would be consumers of private education (parents and guardians) and the test of whether or not promotional material is misleading or deceptive would be determined by the impact on the reasonable and ordinary parent.<sup>55</sup>

Third, evidence that someone has actually formed an erroneous conclusion may be persuasive but is not essential. It is not necessary that a person was actually misled or deceived;<sup>56</sup> it is sufficient that the statement created a misleading impression that influenced the person’s actions.<sup>57</sup> Fourth, it is necessary to enquire why the misconception has arisen in order to determine that the person was led into error and was not merely confused: ‘no conduct can mislead or deceive unless the representee labours under some erroneous assumption’.<sup>58</sup> Mere confusion is not sufficient: ‘irrespective of whether conduct is likely to produce confusion, it cannot be categorised as misleading for the purpose of section 52 unless, in all of the circumstances, it contains or conveys a misrepresentation’.<sup>59</sup> Conduct is likely to mislead or deceive if ‘that is a real or not remote possibility, regardless of whether it is less or more than fifty per cent’.<sup>60</sup>

Although there is no reported case in Australia involving private schools and section 52, the *ACCC v Black on White Pty Ltd*<sup>61</sup> case provides a clear indication that misleading statements in promotional material by an educational institution may contravene section 52, and serves as a caution to private schools. In this case, Black on White Pty Limited was trading as the ‘Australian Early Childhood College’. The promotional material, including pamphlets and brochures, advertised certain courses offered by the College and it was stated that these courses were accredited by the Vocational Education and Training Commission of Queensland (VETEC) and had national accreditation via the National Framework for the Recognition of Training. It transpired that the courses did not have accreditation and consequently legal action was taken against Black on White by the ACCC for contravening various sections of the TPA including section 52.<sup>62</sup> It was alleged that the conduct was misleading or deceptive. There was no dispute that the company concerned was a corporation, as at the time it was registered under the Corporations Law,<sup>63</sup> or that such promotional advertising is conduct ‘in trade or commerce’. The issue was whether the statements made about the accreditation of courses amounted to misleading or deceptive conduct. Spender J was satisfied that the statements made contravened section 52

stating that the ‘conduct was clearly conduct in trade or commerce, and in my view, was conduct that was misleading or deceptive or likely to mislead or deceive’.<sup>64</sup>

Relevantly for private schools, the College also contravened section 52 in relation to misrepresentations as to:

... the terms on which the college would take enrolment forms from prospective students and the basis on which students were entitled to cancel their enrolment, particularly as to their entitlement to refund of fees paid, and their liability with respect to the fees which would otherwise be incurred for the tuition to be provided. This included representations regarding the deferred payment plan of tuition fees students ...<sup>65</sup>

The representations were contained in promotional material, the College regulations and statements made by employees. Private schools should take care to ensure that any information provided by it regarding tuition fees is accurate and consistent across the different medium in which the information is set out, be it on websites, enrolment forms, school regulations or in the school prospectus and application forms. In an ACCC media report Professor Allan Fels warned that care must be taken when young consumers and their guardians sign contracts but that the ‘Trade Practices Act can come to their aid when they are subjected to sharp practices’.<sup>66</sup>

Private schools should also be aware that even if a school has acted honestly and reasonably, it could still be held in contravention of section 52 if the conduct, such as information in a prospectus, was misleading or deceptive. Miller notes court decisions that indicate that the maker of a misrepresentation will not necessarily be absolved of liability where a person could have discovered the misrepresentation if proper enquiries had been made.<sup>67</sup> Therefore, if a school fails to deliver on claims made in a prospectus, the fact that parents could have made more enquiries about the matter will not necessarily avoid potential liability. The use of disclaimers in a school prospectus to avoid liability, particularly those in the ‘small print’<sup>68</sup> will not necessarily protect a school. Disclaimers as to the truth of a representation should not ‘absolve the maker of the representation’ from liability.<sup>69</sup>

### III APPLICATION OF SECTION 52 TO SCHOOL PROSPECTUSES

The preceding discussion demonstrates that private schools may be subject to trade practices law and liable for misleading and deceptive conduct. For the purpose of this section, a range of private school prospectuses were examined in terms of statements made that may constitute misleading or deceptive conduct for the purpose of section 52 of the TPA if they cannot be supported.<sup>70</sup> The statements drawn from the prospectuses are grouped into certain categories that are illustrative of the types of statements that may be scrutinised under section 52. Parents are likely to make decisions about a school based on a number of factors especially in relation to the quality of education provided, the facilities provided and the range of programs that a school offers.

#### *A Statements about Educational Quality and Learning Outcomes*

The following statements illustrate the kinds of claims schools make in their prospectuses regarding the quality of education offered and expected learning outcomes.

All pupils will be able to read and write with confidence, fluency and understanding.

Our Primary students consistently achieve outstanding results in the annual National Literacy and Numeracy benchmarking tests.

In all external examinations and competitions our students perform at a very high level.

The College learning programs cater for a diverse range of student abilities and interests ...

An inclusive education is offered to nurture academic, emotional, social, physical, aesthetic and moral development.

Students with ... will have their individual needs met to a high degree.

ABC High School already has a great record for attendance and achievement.

More than ... teaching staff are IB Examiners and may have extensive international teaching experience.

Schools who fail to meet these claims may be held liable under the TPA. For instance, in an unreported case, a Melbourne parent reached a confidential out of court settlement with a private school that had failed to address her child's literacy problems as promised by the school. The parent argued that the school had claimed that they had the necessary resources to fix her child's reading skills. However, her child's reading skills only improved when she hired a private tutor.<sup>71</sup>

### B *Statements about Programs and Facilities*

The following are some examples of statements made in school prospectuses which are likely to be attractive to parents and students:

Class sizes are small and a high staff to student ratio ...

The school offers internationally recognised courses ...

The library provides an impressive stock of fiction and non-fiction books, periodicals, videos and CD-ROMS as well as housing a dozen networked computers.

All classes have access to computers within their classrooms which are directly linked to our ICT suite in the main school building.

We are the only school in Australia with a registered yacht club.

Teaching areas include a state-of-the-art Information Technology Centre and a modern science building with twelve laboratories ...

The policy of the College is to limit the growth of the school so as to keep class sizes to a minimum.

Development of expertise in the use of modern technologies is paramount ... and made possible through extensive resources ...

The promise of small classes, world-class facilities and a wide range of state-of-the-art facilities are likely to attract parents to a school and influence their choice. However, as Rochford states, 'after attracting the students to enrol in the institution, statements made to those students may also attract the [Trade Practices] Act'.<sup>72</sup> This was demonstrated in a case in the United States. In *Alsides v Brown Institute*, a Minnesota appellate court held that a private for-profit school had contravened deceptive trade practices law for falsely advertising that students would receive specific amounts of computer training on state-of-the-art equipment.<sup>73</sup>



### *C Statements about Services Provided*

A number of the school prospectuses examined included statements about a range of services that promote the school's professional, caring, supportive, and safe environment. School safety and good discipline are key characteristics of a high performing school, and parents tend to place high priority on such matters when choosing a school. Schools that make certain statements or claims in their promotional and advertising material about the quality and quantity of services provided need to ensure that the claims are accurate and that they can be delivered. Examples of such statements are:

Teachers are also available everyday in the playground before and after school to discuss any immediate concerns with parents on an informal basis.

Tutorials are offered in all subjects.

Pastoral care is a promise.

All classes participate in a strong buddy system offering security and leadership.

After school care facilities are provided.

If schools make a claim that can be measured or tested against objective criteria in some way or compare themselves with other schools then these types of claims must be accurate.<sup>74</sup> It is these types of statements that fall outside the courts inclination to see claims made in promotional material against a backdrop of a common understanding that a promoter will naturally be enthusiastic in highlighting the strengths of its product.<sup>75</sup>

### IV CONCLUSION

This article has considered the application of section 52 of the TPA to private schools and their potential liability under this section with particular reference to school prospectuses. Private schools are not immune from liability under consumer protection law. Private schools are by and large corporations, with marketing and advertising activities falling within the definitions of 'conduct' and 'trade'. However, such marketing activities would need to be conducted on a 'significant scale' for a school to be categorised as a 'trading corporation' for the purpose of section 52. School prospectuses are important for advertising and promoting schools and attracting parents/students to a school. They may be highly persuasive in convincing parents to choose a particular school. They are also likely to create expectations about quality and services that parents can reasonably expect will be delivered. Schools therefore have a responsibility to ensure that the information in their school prospectus is accurate and truthful, and that claims about services, facilities, educational achievements and so forth can be substantiated.

Statements or claims that are misleading, or likely to mislead parents into making an erroneous assumption about a school upon which they make a decision to select a school, may constitute a contravention of section 52. Penalties for contravening consumer law may be considerable and some unfair practices amount to a criminal offence.<sup>76</sup> Individuals also knowingly concerned in, or who have aided and abetted the contravention can be individually liable.<sup>77</sup> Therefore, not only does the school as a separate legal entity need to take particular care when developing and publishing school prospectuses but so too school principals, finance directors, directors of marketing and members of governing bodies.

*Keywords:* private schools; independent schools; school prospectus; school marketing; consumer protection; trade practices.

## ENDNOTES

- 1 For the purpose of this article the term private school is used in its broadest sense to refer to non-government schools including independent schools, systemic schools under the auspices of the Catholic diocesan system and other non-government school systems. See also n 15 below.
- 2 Linda Vining, 'Marketing Today's Schools: Maximising Marketing on a Small Budget' (2005) 27(4) *The Australian Educational Leader* 31, 38.
- 3 Ibid 31.
- 4 See, eg, the Centre for Marketing Schools at <<http://www.marketingschools.net/>>.
- 5 See, eg, Johanna Lockhart, *How to Market Your School. A Guide to Marketing, Public Relations and Communications for School Administrators* (2005).
- 6 Linda Vining, *Money for Marketing*, Centre for Marketing Schools <[www.marketingschools.net](http://www.marketingschools.net/)> at 9 May 2008.
- 7 The issue has been considered in relation to tertiary institutions and their students. See, eg, Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15(2) *Griffith Law Review* 306.
- 8 Janet Harvey, 'Marketing Schools and Consumer Choice' (1996) 10(4) *The International Journal of Educational Management* 26.
- 9 The issue of whether marketing is ethical for schools or whether schools should be driven by a competitive-consumer model is not debated in this paper.
- 10 Karen Spring, 'Marketing Your School in the 21<sup>st</sup> Century' (2003) 15(4) *Montessori Life* 8.
- 11 See, eg, Ann West, 'Factors Affecting Choice of Schooling for Middle Class Parents: Implications for Marketing' (1992) 20(4) *Educational Management and Leadership* 212; Don Smedley, 'Marketing Secondary Schools to Parents – Some Lessons from the Research on Parental Choice' (1995) 23(2) *Educational Management and Leadership* 96; Janet Hunter, 'Which School? A Study of Parents' Choice of Secondary Schooling' (1991) 33(1) *Educational Research* 31. A review of literature revealed scant current research on factors influencing parents' choice of schooling.
- 12 *Trade Practices Act 1974* (Cth) s 2.
- 13 A contravention of s 52 does not itself give rise to liability; the consequences of contravening this section are found in other sections of the Act.
- 14 State and territory fair trading legislation would also be applicable and considerations regarding status as a corporation do not arise: *Fair Trading Act 1987* (WA); *Fair Trading Act 1987* (NSW); *Fair Trading Act 1992* (ACT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1999* (Vic); *Consumer Affairs and Fair Trading Act 1990* (NT).
- 15 *Corporations Act 2001* (Cth) s 57(A). Some schools may also operate as unincorporated associations or as trusts (distinct from a trading trust) and therefore may not fall within the scope of s 52.
- 16 Anne Hurley and Graeme Wiffen, *Outline of Trade Practices and Consumer Law* (2nd ed, 1999) 228.
- 17 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) HCA 6, 9 ('Adamson case').
- 18 Ibid 31 (Mason J).
- 19 *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 304 (Mason, Murphy and Dean JJ).
- 20 *Adamson case* (1979) HCA 6, 10 (Murphy J).
- 21 Ibid.
- 22 12 (Murphy J).
- 23 24 (Mason J).
- 24 See *Re: E v Red Cross Society of Australia* (1991) ATPR 41-110. Although the Society is a voluntary organisation, it was found to be a trading corporation because its trading activities were not insubstantial: 'But, leaving out of account the blood transfusion income, the first and second respondents each earn

considerable sums of money from the sale of goods. It is not easy to ascertain the precise figures from the annual reports. But, as I have said, in 1984-1985 the Society earned over \$2,000,000 in this way' (Wilcox J, 124).

- 25 *Adamson case* (1979) HCA 6, 33 (Mason J). See also *Forbes & Anor v Australian Yachting Federation Inc & Ors* (1996) ATPR 46-158 in which Santow J held that the Yachting Federation was not a trading corporation as the trading activities, which included selling rule books, were so small and insignificant. However, the fact that it was a not-for profit, incorporated association did not preclude it from being a trading corporation.
- 26 *Workplace Relations Act 1996* (Cth).
- 27 *EDUCANG Ltd v Queensland Industrial Relations Commission and Queensland Independent Education Union of Employees*, C/2006/35, 10 July 2006. This meant then that the federal WorkChoices legislation applied and therefore the state tribunal had no jurisdiction to hear the claim.
- 28 *EDUCANG Ltd C/2006/35*, 10 July 2006, 493.
- 29 *Ibid.*
- 30 *Ibid* 502, following *E v Australian Red Cross Society and Others* (1991) 27 FCR 310.
- 31 Moores Legal Employment Alert, *Workchoices in Review: Recent Cases* (2006) <<http://www.moorestraining.com.au/files/Employment%20Alert/Emp%20Alert02-05.pdf>> at 12 September 2008.
- 32 (2001) 109 FCR 243, considered in *EDUCANG Ltd v Queensland Industrial Relations Commission and Queensland Independent Education Union of Employees*, C/2006/35, 10 July 2006 at 502.
- 33 Moores Legal Employment Alert, above n 31.
- 34 *Re Ku-ring-gai Co-op Building Society* (No 12) (1978) ATPR 40-094, 17, 926.
- 35 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) CLR 594, 604.
- 36 (1977) ATPR 40-021.
- 37 (1992) 38 FCR 1.
- 38 Sally Varnham, 'Straight Talking, Straight Teaching: Are New Zealand Tertiary Institutions Potentially Liable to Their Students Under Consumer Protection Law?' (2001) 13(4) *Education and the Law* 303, 317.
- 39 Judith Bessant, 'Legal Issues in Higher Education and the Trade Practices Act' (2004) 26(2) *Journal of Higher Education Policy and Management* 251.
- 40 ACCC, 'Federal Court finds against Black on White Limited trading as Australian Early Childhood College' (Media Release #077/01, 6 April 2001). See, eg, *Quickenden*, above note 32; Kamvounias & Varnham, above note 7, 317-321 where they consider the authorities on this issue in relation to universities. Of interest is also the recent price fixing case, *ACCC v Kokos International Pty Ltd* (no2) [2008] FCA 5. The existence of a market for the provision of educational services is inherent.
- 41 [2001] FCA 1056, 139, 153.
- 42 The evidence of operating income and accounts provided in the EDUCANG case above are illustrative of this.
- 43 *Trade Practices Act 1974* (Cth) s 3 deals with false or misleading statements which is a narrower concept than 'conduct'.
- 44 Ray Steinwall, *Annotated Trade Practices Act 1974* (2004).
- 45 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) CLR 594, 602.
- 46 Russel Miller, *Miller's Annotated Trade Practices Act* (2008).
- 47 (1997) 70 FRC 530 (in which it was alleged that an academic misrepresented his qualifications and training in lectures and lecture slides).
- 48 See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 (CLR) 191.
- 49 Miller, above n 46, 483.
- 50 Victoria, 'Katie's' *Australian Trade Practices Reporter*, vol 1 (1977) ¶ 40-041.
- 51 Miller, above n 46, 484.
- 52 *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA (22 July 1982).
- 53 *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12, 103.
- 54 Miller, above n 46, 487.
- 55 For example, in *Cantarella Bros Pty Ltd v Valcorp Fine Foods Pty Ltd* [2002] FCA 8 it was held that

the capacity of grocery trade advertisement relating to coffee to mislead should be determined by their impact on small retailers: 'I think it appropriate to test the advertisements' capacity to mislead or deceive by reference to the assumptions and reactions, not extreme or fanciful, of a reasonable or ordinary small independent retailer, that is to say, the operator of a "mama and papa" store' (Lindgren J, 37).

- 56 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 49 CLR 19, 198.
- 57 A person seeking compensation under s 82(1) must establish that his or her loss or damage resulted from the contravening conduct.
- 58 *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA (22 July 1982).
- 59 *Ibid.*
- 60 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 87.
- 61 *ACCC v Black on White Pty Ltd & Ors* [2001] FCA 187.
- 62 The conduct was held to contravene s 53 (false representations) and s 51AB (unconscionable conduct) of the *Trade Practices Act 1974* (Cth).
- 63 During the proceedings the company went into liquidation and was deregistered under s 509(5) of the Corporations Law. It was accepted by the ACCC that no proceedings could be maintained against the company. Therefore, whether the company was a trading corporation for the purpose of the *Trade Practices Act 1974* (Cth) was irrelevant. This, however, did not prevent the Court from making orders against the other respondents.
- 64 *ACCC v Black on White Pty Ltd & Ors* [2001] FCA 187, 87.
- 65 *Ibid* 28.
- 66 ACCC, 'Federal Court Finds Against Black on White Limited Trading as Australian Early Childhood College' (Media Release #077/01, 6 April 2001). <<http://www.accc.gov.au/content/index.phtml/itemId/87695/fromItemId/622035>> at 2 April 2007.
- 67 Miller, above n 46, 486.
- 68 *Ibid* 520.
- 69 *Ibid* 501.
- 70 It should be noted that the various school prospectuses which were used for the purpose of demonstrating and analysing the scope and application of s 52, are bone fide school prospectuses and are unlikely to mislead or deceive the target group.
- 71 'Parent Sues School', *Futureminds*, 18(14) <[www.futureminds.com.au/educational news](http://www.futureminds.com.au/educational_news)> at 2 April 2007.
- 72 Fancine Rochford, 'Traders of the Lost Ark – Lectures and Liability' (2001) 13(2) *Education and the Law* 127.
- 73 Susanna Bogdan and R Nelson, 'A New Threat to Schools: Deceptive Trade Practice Laws' (2003) *Education Labor Letter* May 2003. Fisher & Phillips LLP Attorneys at <[www.laborlawyers.com](http://www.laborlawyers.com)> at 6 December 2006.
- 74 Miller, above n 46, 516 in relation to comparative advertising cases that often feature measurable claims such as 'our battery lasts up to 4 times longer than x': *Eveready Australia Pty Ltd v Gillette Australia Pty Ltd (No 4)* (2000) ATPR 41-751.
- 75 *Ibid* 513.
- 76 See, eg, *Trade Practices Act 1974* (Cth) s 75AZC.
- 77 *Trade Practices Act 1974* (Cth) s 75B, s 82.