CONCRETE CONSTRUCTIONS (N.S.W.) PTY LTD v. NELSON[1]

In the preceding decade, s. 52(1) of the Trade Practices Act 1974[2] has steadily increased in its scope and reach. It has been used in areas as diverse as takeovers,[3] industrial relations,[4] and employer/employee relations.[5] Thus, the certainty of commercial agreements has been subordinated to the vagaries of the 'misleading or deceptive' test.[6] It should come as no surprise, then, that in *Nelson*, the High Court has taken the opportunity to narrow the scope of the section. What perhaps is surprising is the manner in which this has occurred. By a four-three majority,[7] the High Court has held that the expression 'in trade or commerce' is to be interpreted restrictively. In this note, I will attempt to show that the reasoning of the individual minority judgments is to be preferred. The minority judgments restrict s. 52(1) to persons affected in their capacity as consumers. This is both easier to apply, and more in line with the policy of the statute.

FACTS

The respondent (the worker) was an employee of the appellant (Concrete Constructions (N.S.W.) Pty Ltd). He alleged that, through acting on incorrect information provided to him by the company's foreman, he fell to the bottom of an air-conditioning shaft, sustaining serious injuries. At first instance, Einfield J. of the Federal Court held that this did give rise to a cause of action under the Trade Practices Act 1974. The case went to the High Court on a point of law; namely whether injuries sustained during the course of employment could give rise to a cause of action under s. 52(1) of the Act.

THE MAJORITY: MASON C.J., DEANE, DAWSON AND GAUDRON JJ.

The majority address the question of whether s. 52's prohibition extends to purely internal communications between employees in the course of their employment. In doing so, they note that 'it is unnecessary that we refer to the decided cases in any detail.'[8] Such cases are held not to be directly applicable to the circumstances of the present case.

First, the majority examine the role of the heading to Part V of The Act 'Consumer Protection'. Whilst noting its applicability in the case of ambiguity, they hold that:

> The heading does not, however, control the permissible scope of the substantive provisions of Pt V and cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions.[9]

Thus, they feel that the heading cannot be used to confine the general words of s. 52. Rather, they hold that the significance of the heading is that it 'is of importance in determining the effect of the words 'in trade or commerce'.[10] The majority then go on to examine s. 52(1)'s requirement that a corporation must engage 'in trade or commerce', noting that the use of the word 'in' is to be compared to the wider term 'with respect to'. They show that there are two possible constructions of the phrase 'in trade or commerce'. The first, and wider, possibility is that it refers to conduct which is

1 (1990) 64 A.L.J.R. 293. High Court, 3 May 1990, Mason C.J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

2 A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

3 *Industrial Equity Ltd v. North Broken Hill Holdings Ltd* (1986) A.T.P.R. 40-682; *Orison Pty Ltd v. Strategic Minerals Corporation NL* (1987) 77 A.L.R. 141.

4 *Patrick v. Steel Mains Pty Ltd* (1987) A.T.P.R. 40-794.

5 *Wright v. T.N.T. Management Pty Ltd* (1989) 15 N.S.W.L.R. 679.

6 Terry, A., 'Consumer Protection for Business Interests: The Application of Section 52 of the Trade Practices Act to Commercial Negotiations' (1987) 10 *University of New South Wales Law Journal* 260, 262.

7 Mason C.J., Deane, Dawson, Gaudron JJ.

8 (1990) 64 A.L.J.R. 293, 294.

9 *Ibid.*

10 *Ibid.* 294-5.

'undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business.'[11] Such an interpretation would extend to the present case, where inaccurate information was given by one employee to another in the course of carrying on the building activities of a commercial builder. The alternative, narrower, interpretation suggests the conduct 'in trade or commerce' refers only to conduct 'which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.'[12]

In support of the narrower proposition, the Court adapts Dixon J.'s definition of commerce in *Bank of N.S.W. v. The Commonwealth*.[13] There, Dixon J. held that the words 'in trade or commerce' referred to the 'central conception' of trade or commerce, and not to the 'immense field of activities' in which corporations may engage. The majority note that '[a]s a matter of mere language, the arguments favouring and militating against these alternative constructions of s. 52 are fairly evenly balanced.'[14] How, then, does the majority determine which is preferable?

The interesting solution proposed by the majority is to interpret the section restrictively, by reference to its heading. They hold:

> In the context of Pt V of the Act with its heading 'Consumer Protection', it is plain that s. 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 purposes of, its overall trading or commercial business.[15]

That is, the context in which s. 52(1) is to be found, under the heading 'Consumer Protection', is used to justify the majority's preference for the narrower meaning of 'in trade or commerce'. Thus, the majority restricts the operation of s. 52(1) by narrowing the term 'in trade or commerce' to its 'central conception'. In the present case, therefore, the internal communication from one employee to another is held not to be 'in' trade or commerce. The corporation's appeal is, thus, upheld.

CRITIQUE OF THE MAJORITY JUDGMENT

The brevity of the majority's judgment conceals a number of striking flaws. For a start, there is an illogicality in confining the section, by giving the words 'in trade or commerce' a narrow construction. As Justice McHugh notes:

> It seems almost paradoxical to hold that the general prohibition of misleading or deceptive conduct in s. 52 requires rejection of the construction that the section is limited to consumers and at the same time to hold that the words 'in trade or commerce' which are part of that general prohibition have a restricted meaning.[16]

Section 52(1) is a general prohibition. It is artificial to narrow it by restricting the term 'in trade or commerce'. If, as the majority state, the section extends beyond consumer protection, it is (again citing McHugh J.) 'unlikely that the Parliament . . . would intend those general words to proscribe only some kinds of misleading or deceptive conduct occurring in the course of trade or commerce.'[17]

The test proposed by the majority restricts the term 'in trade or commerce' to its 'central conception'. McHugh J. refers to this as the 'essence' of trade or commerce.[18] But what exactly is meant by this term? The majority acknowledge that:

> In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.[19]

And Brennan J., in a characteristic flourish of language, incisively notes the flaw in the majority reasoning when he states '[t]here is no scalpel of principle which can dissect the conduct out of the activity or transaction "in" which it is embedded.'[20] The majority have provided the broad outlines of

11 *Ibid.* 295.
12 *Ibid.*
13 (1948) 76 C.L.R. 1, 381.
14 (1990) 64 A.L.J.R. 293, 295.
15 *Ibid.*
16 *Ibid.* 302
17 *Ibid.*
18 *Ibid.*
19 *Ibid.* 295.
20 *Ibid.* 296.

a test, with little indication as to how the test is to be applied. They do emphasize the importance of looking at the relevant relationship, noting that the construction of a building pursuant to a building contract is trade or commerce as between the builder and building owner, but is not (as in the present case) as between the builder and employee.

The High Court majority has established broad brush-strokes, without filling in the finer detail. Their examples do little to clarify the situation. Importantly, it is difficult to know the standing of previous law.[21] Thus, the majority has replaced the previous uncertain scope of the section, with a test (the 'central conception' of trade and commerce) of uncertain application. Their broad test has done little to clarify, its ultimate width being uncertain.

Further, the High Court majority states that '[s]uch conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods and services to actual or potential consumers.'[22] It is difficult to know why promotional activities are part of the 'central conception' of trade and commerce, rather than part of its 'immense field of activities'. In the relation between suppliers and the unidentified public, why do such activities bear upon the essence of trade and commerce?

Again, the inherent problem of the majority judgment becomes apparent. There is no 'scalpel of principle' able to dissect what is of the essence, and what is simply incidental. For surely if anything is going to be incidental, promotional activities are. By establishing a principle, and providing only limited indications of its width, and the way it is to be interpreted, the High Court has raised more questions than it has answered. What exactly is encompassed by trade and commerce's central conception is unknown, and there is little indication in the judgment as to how it is to be determined.

A further problem with the majority judgment is its failure to have regard to the object of s. 52(1). In his second reading speech, the Attorney-General The Hon. L. K. Murphy stated categorically that '[t]he consumer needs protection by the law and this Bill will provide such protection.'[23] As McHugh J. states 'the protection of consumers has continued to be the chief, and almost exclusive, object or purpose of Pt V.'[24] And the majority, itself, recognize this when they state:

> While the cases make plain that consumer protection lies at the heart of the legislative purpose to be discerned in s. 52, the precise boundaries of the territory within which that section operates remains undetermined.[25]

It is remarkable, then, that they pay no regard to the headings, other than to confine the term 'in trade or commerce'. Section 52's object, its purpose, is to protect consumers; even the majority judgment acknowledges this. So for the majority to disregard the consumer protection objective, preferring to restrict the section's operation by confining the expression 'in trade or commerce' is to fail to have regard to the section's purpose, as evidenced in parliamentary speeches, the heading of the section, and as even acknowledged by the majority itself. Thus, not only is the majority's judgment uncertain in its application, it also fails to look at the section's object; that of protecting consumers.

McHUGH J.:

In a complete about face from his judgment in *Wright*,[26] Justice McHugh holds that s. 52 is limited to conduct which affects members of the public in their capacity as consumers. As already noted, he finds that the object of s. 52, indicated both by its heading, and by parliamentary speeches, is to protect consumers, and not other persons.

McHugh J. cites *Ragless v. District Council of Prospect*[27] for authority that a heading may be

21 For example, *Industrial Equity Ltd v. North Broken Hill Holdings Ltd* (1986) A.T.P.R. 40-682, which involved allegedly misleading statements in the context of a takeover, and would presumably no longer be caught (or would takeovers be seen as the essence of trade or commerce?).

22 (1990) 64 A.L.J.R. 293, 295.

23 Senator The Hon. L. K. Murphy, Q.C., *Senate Parliamentary Debates*, 30 July 1974, Hansard Vol. S. 60, 541. Senator Murphy also noted that '[t]he Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices': at 540.

24 (1990) 64 A.L.J.R. 293, 301.

25 *Ibid.* 294.

26 *Wright v. T.N.T. Management Pty Ltd* (1989) 15 N.S.W.L.R. 679, 693.

27 [1922] S.A.S.R. 299, 311.

taken into account to determine the scope of a provision expressed in general terms. He also notes Mason J.'s judgment (supported by the majority of the Court), in *R. v. Credit Tribunal; Ex parte General Motors Acceptance Corporation*.[28] There, Mason J. held that the *meaning* of misleading would be 'influenced, indeed decisively influenced, by the context in which it was found.'[29] McHugh J. holds that this is 'precise authority' for the proposition that the heading can be used to determine the *scope* of s. 52.[30] Surely, though, there is a noticeable difference between using the heading to interpret meaning, and to determine scope. McHugh J.'s precise authority, is, at best, tenuous.

With regard to the words 'in trade or commerce', McHugh J. refuses to confine them to activities which are the essence of trade or commerce. With a persuasive argument, (and at the same time a stinging attack on the majority), he argues that restricting the term will 'result in a reduction of protection for consumers, the very persons whose interests Pt V was intended to protect.'[31] He notes that much conduct affecting the market place, and thus consumers' choice, is of a 'social, sporting, industrial or political character',[32] and clearly not of the essence of trade or commerce. And in a logical analogy, he shows that:

> It would unduly limit the operation of s. 52 if a corporate shopkeeper was liable for the misleading statement that its products were safe but not for the misleading window sign that it financially supported the Australian Olympic team.[33]

He goes on to state that '[b]oth statements would be designed — one directly, the other indirectly — to induce consumers to buy the corporation's goods.'[34]

This is surely a valid criticism. Restricting the term 'in trade or commerce' will mean that some activity, affecting consumers and unfairly influencing their choice, will go unpunished. So instead, McHugh J. restricts the scope of s. 52 by applying the section to conduct which 'affects or is apt to affect members of the public in their capacities as consumers or potential consumers.'[35]

Further, he cites previous High Court authority which supports using the heading to construe the scope of the section. He shows the uncertainty in Stephen J.'s judgment in *Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd.*[36] Whilst the judgment appeared to reject the applicability of taking the heading into account,[37] Stephen J. noted that the heading 'does colour the meaning to be given to the sort of conduct against which the section is aimed.'[38] He also noted that s. 52 was 'exclusively concerned with consumer protection.'[39] Barwick J., too, held that s. 52 is concerned 'with conduct which is deceptive of members of the public in their capacity as consumers of goods or services.'[40] And Mason J. in *Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd*,[41] even if appearing to reject the use of the heading,[42] was really concerned to deny that the heading to Pt V meant that only consumers could *enforce* s. 52.

McHugh J.'s reasoning is to be preferred to the majority. Narrowing the scope of s. 52(1) by confining it to conduct affecting persons in their capacity as consumers, rather than confining the term 'in trade or commerce' to the essence of trade or commerce, better promotes the object of the statute, as evidenced by its heading and parliamentary speeches. It allows greater certainty in arm's

28 (1977) 137 C.L.R. 545.
29 *Ibid.* 561.
30 (1990) 64 A.L.J.R. 293, 302.
31 *Ibid.*
32 *Ibid.*
33 *Ibid.* 302-303.
34 *Ibid.* 303.
35 *Ibid.*
36 (1978) 140 C.L.R. 216.
37 'To subject the clear and quite general words of s. 52 to some limitation derived from the heading to Pt V is, I think, especially inappropriate in the case of this particular legislation': *Ibid.* 225.
38 (1978) 140 C.L.R. 216, 224.
39 *Ibid.* 227.
40 *Ibid.* 220.
41 (1982) 149 C.L.R. 191.
42 'The general words of s. 52(1) should be widely interpreted without being read down by reference to the heading of Pt V "CONSUMER PROTECTION" or to the more specific succeeding sections': *Ibid.* 202.

length commercial transactions, by restricting the scope of the statute to conduct affecting consumers. It also avoids the artificiality of holding that 'in trade or commerce', which is part of a general prohibition, has a restricted meaning.

But one problem still remains: what is meant by a consumer? McHugh J. holds that the term is used 'in a broad and general sense . . . not confined to those persons fulfilling the conditions set out in s. 4B.'[43] Like the majority, there is an uncertain grey area. But surely a court will find it easier to recognize a consumer than it will to determine what is the essence of trade or commerce.[44] Surely consumers are easily recognizable, so that in most cases there will be no dispute, and no difficulty in applying the test.[45] Like the majority's test, McHugh J.'s test provides little indication of what a consumer is; but unlike the majority, his test is more easily applied, even if there is a small grey area of uncertainty. And this *relative* ease of application, combined with McHugh J.'s observance to the object of the section, strongly suggest why his judgment is to be preferred to that of the majority.

BRENNAN J.

The ratio of Justice Brennan can be simply stated. Following McHugh J., he holds:

> I would construe s. 52 in the light of the heading to Pt V and hold that the conduct it proscribes is limited to conduct which misleads or deceives or is likely to mislead or deceive a person in his capacity as a consumer.[46]

And Brennan J., although agreeing that s. 52 may be enforced by persons other than consumers,[47] holds that '[t]hat consideration, however, does not affect the construction of s. 52 or alter the character of the conduct it proscribes.'[48]

Further, Brennan J. disagrees with the majority's reading down of the phrase 'in trade or commerce'. Rather than narrowing s. 52 by imposing an artificial restriction on the phrase 'in trade or commerce', he feels that the width of the section is restrained by its heading. Prohibited conduct must affect a person in his capacity as a consumer. Applying this to the facts here, he allows the appeal on the basis that Mr Nelson was not affected in his capacity as a consumer (but rather as an employee).

TOOHEY J.

Justice Toohey begins by looking at the extent to which the language of s. 52(1) gains meaning from the context in which the sub-section appears (namely, Part V of the Act). He notes that '[s]ection 52(1) does not exist in a vacuum' but 'is to be found in Part V of the Act, headed Consumer Protection'.[49] Like McHugh J., he also shows how previous High Court dicta[50] set s. 52(1) within a framework of consumer protection.

Toohey J. stresses that a 'person is not precluded from asserting a breach of s. 52(1) because that person does not answer the description of a consumer.'[51] That is, a remedy may be invoked by a

43 (1990) 64 A.L.J.R. 293, 304.

44 So in the present case, for example, Mr Nelson is clearly an employee, as compared to a consumer.

45 Terry, *op. cit.* 275, adapting John Morley, stated that consumers, like elephants, were easily recognizable, even if not able to be described. Outlandish as this is, it nevertheless makes the point that it is easier to determine what is a consumer, than it is to determine what is the essence of trade and commerce.

46 (1990) 64 A.L.J.R. 293, 296.

47 In *R. v. Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 C.L.R. 113, Mason J. made the interesting observation that enforceability by a competitor actually enhanced the protection which the Act gave to consumers, 'noting [t]he consumer who is misled or deceived in consequence of an unfair practice is unlikely to be a suitor for injunction against the contravening corporation; he is more likely to seek damages': at 128.

48 (1990) 64 A.L.J.R. 293, 296.

49 *Ibid.* 297.

50 *Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd* (1978) 140 C.L.R. 216, 220, 223, 227; *Parkdale Custom Build Furniture Pty Ltd v. Puxu Pty Ltd* (1982) 149 C.L.R. 191, 197.

51 (1990) 64 A.L.J.R. 293, 298.

competitor in business as well as by a consumer. Nevertheless, Toohey J. makes it clear that 'Pt V of the Act is intended to protect consumers against unfair trading practices.'[52] Further, he emphasizes that the conduct must mislead or deceive persons in their capacity as consumers of goods or services.

Toohey J. goes on to make an interesting point: using *Yorke v. Lucas*[53] as an analogy, he holds that it is not necessary that the representation is made to an actual consumer. Rather, it is sufficient if the representation is '*capable* of misleading or deceiving persons in their capacity as consumers.'[54] (my emphasis). This allows great scope for the meaning of 'consumer': whether or not the representee is an actual consumer, s. 52(1) can be breached if the representation would be capable of being made to a consumer. Along with Toohey J.'s statement that '[i]t is with consumers in the widest sense of that term that s. 52 is concerned',[55] his judgment suggests that consumers will be construed very broadly.

On the question of the meaning of the term 'in trade or commerce', Toohey J.'s position is between the restrictive interpretation adopted by the majority, and the broader interpretation of the two other minority judgments. Whilst allowing that the words 'trade or commerce' are of the widest import,[56] and that it is trade or commerce in general terms with which the statute is concerned, Toohey holds that 'the preposition "in" clearly operates by way of limitation.'[57] Thus, the conduct must be 'a part of' trade or commerce, rather than the wider 'in relation to' trade or commerce.

And the restrictive operation of the preposition 'in' is shown by Toohey J.'s application of the law to the facts here. Conduct incidental to the business of constructing buildings is held not to be 'in trade or commerce'. Thus, on the question of the width of 'in trade or commerce', Toohey J. would appear to be closer to the majority, than the other minority judgments. Mr Nelson, then, is unsuccessful both because he was not deceived in his capacity as a consumer, and because of the restrictive interpretation of 'in trade or commerce'.

CONCLUSION

Prior to *Nelson*, the scope of s. 52(1) had extended to transactions involving commercial parties negotiating at arm's length. The infiltration of s. 52(1) into those areas was undesirable. As Gibbs J. stated in *Parkdale*:

> Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions.[58]

Thus, it is not surprising that the High Court has taken the opportunity to confine the scope of the section. What is surprising, and also disappointing, is the manner in which the majority has achieved this. By restricting the term 'in trade or commerce' to its central conception, the majority has adopted an approach which is artificial and against the consumer policy objectives of the section. Furthermore, it is a test difficult in its application, and there are few guidelines as to how the essence of trade is to be determined.

By contrast, McHugh J. (supported by Brennan J.) proposes a test which is logical, in keeping with the section's purpose, and has a relative ease of application. It is unfortunate that in this landmark judgment, it will be the majority judgment which will be applied by the lower courts. Finally, it will be interesting to observe whether these courts (particularly the Federal Court) will extend the operation of the 'central conception' test, thus slowly broadening again the scope of s. 52(1).

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52 *Ibid.*

53 (1985) 158 C.L.R. 661. In *Yorke*, a statement was made by an agent to the potential purchaser of a business. Toohey J. suggests that what is important is whether the purchase could (even if not here) be made by a person in his capacity as a consumer.

54 (1990) A.L.J.R. 293, 299.

55 *Ibid.*

56 *Re Ku-ring-gai Co-Operative Building Society (No 12) Ltd. (1978)* 36 F.L.R. 134, 167, per Deane J. Ironically, in *Nelson*, Deane J. is part of the majority which restricts the term 'in trade or commerce'. Perhaps the two cases can be reconciled, for in *Re Ku-ring-gai*, Deane J. was looking only at the words 'trade or commerce' (in the context of s. 47), without the restriction imposed by the preposition 'in'.

57 (1990) 64 A.L.J.R. 293, 300.

58 (1982) 149 C.L.R. 191, 197.

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