"taken on board" by courts, whether or not they have acknowledged the source. This second edition is able to trace many such developments, especially in Australia. Yet it is as full as the first of critical comment about the existing law, so is as likely as its predecessor to serve as a weathervane for future developments.

The work covers the whole field of civil liability affecting the Crown or its servants and agents. It deals with remedies, procedural and evidentiary rules as well as substantive rights. Crown rights and duties in tort, contract and other civil obligations are discussed in detail, with full access to relevant overseas authorities. There is a timely collection of the cases involving the limits of immunity of judges and prosecutors. There is even a chapter about federal questions, which deals with issues such as jurisdiction and choice of law in a federal context.

This book is a must for those involved in suing the Crown - and isn't that practically everybody these days.❑

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Misleading or Deceptive Conduct

Deborah Healey and Andrew Terry
CCH Australia Limited, 1991, RRP $64.00)

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." (s.52(1), *Trade Practices Act* 1974 [Cth]).

The authors of this important, substantial and useful work, respectively a Sydney solicitor and a Sydney legal academic, point out in its preface that there are now over five hundred reported or digested cases in the *Australian Trade Practices Reports* on s.52 of the *Trade Practices Act* 1974 (Cth). In relation to this "myriad" of authorities generated by those 23 words, they quote the comment of McGechan J of the New Zealand High Court: "To dip is rewarding; to swim is to drown." The importance of this work is that it will help readers keep their heads above water when grappling with s.52 and with the almost identical words of s.42 of the States' Fair Trading Acts.

And grapple they surely will, and increasingly frequently. For as the authors say:

> "Section 52(1) is a 'comprehensive provision of wide impact' which is expressed in 'very general language' and 'cast in the widest terms' to ensure its effectiveness as a 'catch-all' provision for conduct falling outside the specific prohibitions of Div. 1. Its metamorphosis from its intended role as a residual consumer protection provision to a versatile and significant action for purely *inter partes* and essentially commercial litigation is of a magnitude without parallel in Australian jurisprudence. Section 52 in conjunction with the flexible remedies of Part VI provides a broad-spectrum antidote to a wide range of conduct falling short of the norm that it establishes. It does not simply add to the general law, but in some circumstances totally embraces common law actions." (pages 2-3)

Because of this, practitioners are now used - indeed, resigned - to the presence of s.52 claims in many commercial proceedings which previously would have been cast in contract or in tort, or not brought at all. They may soon see even more claims under s.52 given the recent decision of the Supreme Court of New South Wales in *AMP Society v Specialist Funding Consultants Pty Limited* [1991] ATPR 41-137 (Rogers CJ in Comm Div). There it was held that a claim for damages under s.52 could be brought outside the three-year period for bringing actions established by s.82 of the Act, if the claim amounted to an equitable defence (at 52,988). Alternatively, it could be brought beyond the three years because "[u]sing s.52 as a defence to a claim is not an 'action' [under s.82]" (id).

The ability to use s.52 in this way may solve the common problem that arises where action is brought for breach of contract and the party sued attempts to allege that entry into the contract was induced by the plaintiff's misleading or deceptive conduct. Before the *Specialist Funding* decision, such attempts could often be defeated by the fact that more than three years had passed since entry into the contract - the time at which the three-year period normally begins to run. Previously, if the victim of misleading and deceptive conduct remained misled or deceived for the whole three years, he or she was thought to be without a remedy under s.52 - an injustice lamented by the Full Federal Court in *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314 at 318.

Readers should note that in *Spedley Securities Limited (in liq) v Bank of New Zealand* (Supreme Court of NSW, 19 September 1991, unrep.), Cole J declined to follow *Specialist Funding*, relying instead on the decision of the Full Federal Court in *State of Western Australia v Wardley Australia Ltd* [1991] ATPR 41-131.

Wardley's primary significance lies in its holding that the three-year period does not begin to run when mere "potential" or "likely" damage has been suffered; there must be "actual" damage before time runs. This decision will make application of the three-year rule more difficult, and practitioners can look forward to many hours of pondering the distinction drawn by the Full Court (which declined to follow the reasoning of a differently-constituted Full Court in *Jobbins*). Special leave to appeal from the decision of the Full Court in *Wardley* was granted by the High Court on 5 September 1991. Until the High Court rules, trial judges are in the "very unusual situation" of being confronted with two conflicting decisions of the Full Federal Court: *Thannhauser v Westpac Banking Corporation* [1991] ATTR 41-136 at 52,983 (Pincus J restoring on the basis of *Wardley* paragraph to a Statement of Claim that he had earlier struck out on the basis of *Jobbins*).

Misleading or Deceptive Conduct, after several introductory chapters, deals with the law that has developed around s.52 under four categories where an action for misleading or deceptive conduct can lie:

- as a general advertising remedy;
- as an "unfair competition" remedy;
- as a remedy for misrepresentation in pre-contractual negotiations;
- as a remedy for "advice" or "information" in other areas.

The authors point out that the third category represents the majority of s.52 cases and comment:

> "The most controversial use of sec.52 is characterised by one party to a private commercial contract seeking a remedy under sec.52 in respect of pre-contractual representations which, prior to the Act, would have been sought to be redressed, with little hope of success, in an action for breach of contract, deceit, or negligent misstatement. ... The application of sec.52 to such contracts is of fundamental significance to the conduct of business in Australia. The ramifications of subordinating the convenience and certainty of a negotiated written contract to the vagaries of the 'misleading or deceptive' test are immense." (page 33)

Indeed, the reality is that s.52 now "lurks in the background of all negotiations" (at page 32). Nor can one contract out of s.52. And because s.52 operates on pre-contractual conduct, whether a disclaimer or an exclusion clause in the resulting contract is effective or not becomes a question of evidence and not a question of law. The authors discuss in detail whether disclaimers can be effective, either by preventing liability or (more likely) by negating reliance on pre-contractual representations (see pages 316-22).

This book is particularly welcome because it satisfies the need for a comprehensive treatment of the law generated by s.52. The practitioner's standard reference, R V Miller's *Annotated Trade Practices Act* (12th ed 1991), had been overwhelmed by s.52 decisions. It offers the reader 25 pages of annotations to the section without any table of contents to them, followed by synopses (apparently only in chronological order) of about 120 cases. And Heydon QC's *Trade Practices Law*, for all its many merits, cannot in its one chapter on s. 52 provide the same depth of coverage as *Misleading or Deceptive Conduct*.

There is a minor criticism to be made: although the work is a CCH publication, readers are entitled to expect citations to the authorised reports. But the *only* citations given are to CCH's *Australian Trade Practices Reports*.

Finally it should be said, given the abundance of cases that has led to the need for this book, that one hopes the authors have frequent editions in mind! ❑ Robert S. Angyal

Environmental Litigation

Brian J Preston
The Law Book Company Limited. Hard Cover RRP $87.50

The review of this book was made much easier by my having attended a lecture in the Bar Common Room late last year. The author was giving a lecture to barristers interested in entering the parks and gardens field and was introduced by Murray Tobias QC. In Tobias' words "This book is a must in the library of any barrister who wants to practise in the field. It is a very excellent work". He also took the opportunity to extol the virtues of the environmental and planning field as an area of practice for barristers.

With 18 chapters, a comprehensive table of cases and statutes and a detailed index, the book is indeed a valuable guide to practitioners wishing to practise in this field.

There is a very helpful first chapter which outlines the course of environmental litigation, discusses new legislation and defines specialist courts.

This chapter also outlines the scope of the work and contains an outline of litigation procedures taking the reader through the steps necessary to start one wandering in the field of Parks and Gardens. The second chapter is a worthwhile addition to any book covering the steps preparatory to commencement of litigation and providing a more than adequate description of limitation periods, particularly statutory limitation periods.

Chapter 5, headed "Relator Actions, Representative Actions, Class Actions and Reform", focuses on today's emphasis on environmental causes and conservation issues in the community, providing an introduction to some of those areas which have been explored in other countries. It is disappointing that the movement in the American States towards the right to sue on behalf of the fish and fauna of the country is not given more discussion. Nevertheless a helpful footnote does indicate the way to go in terms of additional reading.

Chapter 6 deals with Legal Aid, again what might be described as a policy issue. Chapters 7 to 12 deal in some detail with numerous matters which might be described as the commencement of civil proceedings, attending callovers and discovery and inspection of documents, interrogatories, subpoenas and some very practical suggestions, including those under the Freedom of Information Act.

The final chapter deals with Alternative Dispute Resolution and sets out guidelines as to the use of this mechanism, including its problems and how to mediate.

In the light of the recent controversy surrounding resource security legislation, there is no doubt that this book is, in the words of the Vice President, "a valuable guide". It can be recommended as a must for any person who wishes to appear in the Parks and Gardens area.

Although the book answers many questions in relation to policy, it still remains a mystery to me as to why the legislation is entitled "Environment and Planning Act" rather than, as common in other countries, "Planning and Environment". The mystery remains and is not answered in the book. However when in doubt at the Bar rely on good rumour! Which leads me to the suggestion about our late colleague, the then Minister for Environment and Planning and his fellow architect of the scheme (now a senior consultant with a major firm of solicitors in Sydney, practising in this area). These gentlemen, it is rumoured, did not wish to be known respectively as either the MOPE or the person in charge of DOPE.

Preston's book is a worthwhile addition to any practitioner's library, incorporating as it does very practical chapters which help to unfold the mysteries of discovery and interrogatories. ❑ Gary McIlwaine