

Case Notes

Sykes v The Reserve Bank of Australia
(1998) ATPR ¶41-608 (at trial);
(1999) ATPR ¶41-699 (Full Federal Court on Appeal);
(1999) ATPR ¶41-700 (Trial Judge's assessment of damages)

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The jousts between Mr Sykes and the Reserve Bank have now been the subject of a Full Federal Court determination. There now is thus good authority on the question of what constitutes a representation as to a future matter within s 51A of the *Trade Practices Act 1974* (Cth).

The Law

Section 51A of the *Trade Practices Act* provides, as far as here relevant, states that:

- (1) where a corporation makes a representation with respect to any future matter and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading;
- (2) in relation to any representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable rounds for making the representation.

The effect of a statement being misleading is to make it subject to s 52 illegalising misleading or deceptive conduct in trade or commerce.

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Section 51A was enacted in 1986 to catch representations which, though highly implausible, could be argued, prior to the introduction of the section, as having a possibility of eventuating and, therefore, as not being misleading or deceptive for this reason. The section places a “reasonableness” onus on parties making representations as to the future and imposes the onus of proof of such “reasonableness” on the representor.

A problem with the section is in relation to what constitutes “a representation with respect to any future matter”. What is the difference between such representations and a statement of present “expectations” or “intentions” which, when made, are statements as to what might happen as distinct from what will happen? It was this issue which was at the heart of the litigation between Peter Sykes and the Reserve Bank of Australia. The case involved various statements by the Reserve Bank as to the release date of its new technology banknotes. Sykes was the designer of various equipment to be used in connection with these notes. Sykes said that he relied on Reserve Bank statements as to the release dates of the new notes and, when these release dates were not fulfilled, he suffered loss.

Sykes v The Reserve Bank: The Facts

1. The note issue activities of the Reserve Bank

The Reserve Bank of Australia, through its note printing division, commenced research in about 1968 to find a more secure currency note in order to prevent counterfeiting. A limited number of new technology bicentennial notes were issued in 1988. By 1990, the design of a new \$5 note was at an advanced stage. On 22 May 1990, the Reserve Bank announced that: “a new series of currency notes, commencing with the \$5 note, is to be launched later this year”. Subsequently, design and production delays resulted in a Press Release of 6 November 1990 which stated that the new notes were expected to be issued after Easter in 1991. Again, however, technical problems resulted and, on 16 May 1991, a Reserve Bank Press Release stated that the issue of the new \$5 note had been deferred. Subsequently, after further press statements both as to the release of the \$5 note and the deferral of that release, the new \$5 note was issued on 7 July 1992 and the new \$10 note was issued in November 1993.

There were also various oral conversations between Reserve Bank representatives and Mr Sykes which were broadly in accordance with the press releases referred to. Sykes was told on various occasions that there could be “hiccup” problems but that things should generally go well. The trial judge accepted that, on the occasion of various press releases, there was a forecast made in general terms as to a future occurrence.

Much depended in the case upon the precise terms of the various statements and releases and the Reserve Bank's reasons for its inability to meet projected release dates. Full details of these various matters are lengthy and cannot be set out here. Specific conduct is, however, here referred to when of particular relevance to a conclusion reached by the court.

2. The business of Mr Sykes

Mr Sykes, during the period 1990 to 1994, was engaged in the development, promotion and manufacture of equipment designed to assist banks, clubs and cash handlers in handling the Reserve Bank's new notes. He approached the Reserve Bank in mid-1990 in relation to his products and, with some encouragement from the Bank, he developed equipment to hold notes flat, the Bank's preferred method for handling the new notes. He also developed bands to hold notes in groups of 10 or 100 and dispensers to dispense these bands. In the case, the Sykes' developed products were referred to as "the devices". The trial judge accepted that the Bank's "encouragement" to Mr Sykes on various occasions was an encouragement to produce the devices. A company, Polybank Pty Ltd, was incorporated by Mr Sykes and his wife in July 1991 to market and sell the devices. It ceased trading in May 1994 because of the collapse of its business. In this commentary where we refer to Mr Sykes, we are to be taken as also incorporating reference to Polybank Pty Ltd and to Mrs Sykes, both of whom were co-applicants in the case.

3. The Sykes claim

Mr Sykes alleged that there had been a number of unqualified misrepresentations made by the Reserve Bank as to the various issue dates of its new technology notes, that these were made in respect of future matters and that the Bank did not have reasonable grounds for making them. Thus, the allegation was, s 51A of the *Trade Practices Act* had been breached and, because of this, s 52 of the Act relating to misleading or deceptive conduct was also breached. Mr Sykes alleged that, in reliance on the Reserve Bank's representations, he had spent monies and incurred liabilities in planning, developing and promoting the devices and thereby suffered loss and damage. Further claims were made in negligence, in that it was alleged that the Bank had a duty of care to ensure that its representations were accurate but failed to carry out this duty. Further, it was alleged that the Bank was negligent because it had failed, within a reasonable time, to inform Mr Sykes that the representations had ceased to be accurate in all respects.

4. The Reserve Bank defence

The Reserve Bank submitted that there was no statement as to the future but only a statement as to present intentions. In any event, the Bank submitted that, the statements made were made on reasonable grounds. The bank also denied negligence. These submissions are discussed in greater detail immediately hereunder.

The Findings of the Trial Judge

1. Future matter

The trial judge firstly decided whether there was any “future matter” within the terms of s 51A of the *Trade Practices Act*.

The Reserve Bank submitted that its statements were only ones of present “expectations” and “intentions” of what might happen and were not representations as to what would happen. They thus, said the Bank, reflected the Bank’s expectations when made. The Bank submitted that s 51A did not apply because the section was not concerned with the expectations of a present state of mind. The only question, submitted the Bank, was whether, when made, the statements in fact reflected the Bank’s view. If they did, there was no misrepresentation. It was not therefore incumbent on the Bank to prove that it had reasonable grounds for making the statement.

The trial judge held that this was “somewhat over subtle” in the circumstances of the case. The Bank was in a unique position to know all the facts and circumstances bearing on the case. In the circumstances, there was, in substance, no real distinction to be drawn between an expectation that notes would be issued on a certain date and a statement that this would, in fact, occur. Something does not cease to be a representation as to a future matter, said the trial judge, merely because it involves a representation as to the maker’s present state of mind. In the present case, a reasonable person would consider the statements made to relate to a future matter. His Honour concluded on this point that:

“After all, a future matter is simply another way of referring to an event or occurrence which may or may not occur in the future. There is no technical or special language used in the section”.¹

Thus if the Bank expected the issue of notes at a particular time in the future, this was a statement as to a future matter. The Bank therefore had to prove the reasonable grounds upon which its expectation was based.

¹ (1998) ATPR at p40, 618

2. Was the Bank involved in Trade or Commerce?

In order to breach s 52 of the *Trade Practices Act*, the Reserve Bank had to be engaged “in trade or commerce”. The Bank submitted that it was not so engaged because it was not engaged in the supply of goods or services within the meaning of those terms in the *Trade Practices Act*. The trial judge dismissed this submission on four grounds -

- the Bank made a profit from the issue of notes;
- the Bank made, or intended to make, profit from licensing its intellectual property rights in the technology from which the notes were produced;
- the *Banking Act* 1959 (Cth) set up the Reserve Bank for the purposes, amongst others, of “carry(ing) on business” as a Reserve Bank and also to act as banker and financial agent to the Commonwealth. That the Bank carried on business was also clear from its overall activities and from financial details in the Bank’s various Annual Reports; and
- the release of notes could properly be described as marketing or promotional activities in relation to the supply of services to actual and potential customers.

[NOTE: Whilst the various activities of the Reserve Bank, including the making available of banknotes were held to be a “service” within the *Trade Practices Act*, the banknotes themselves, being only a method of satisfying a debt, did not come within the definition of “goods” in the context of the *Trade Practices Act*.]

3. Did the Bank, have reasonable grounds for making the various statements?

The trial judge found, in relation to the various statements, that the following circumstances were justifications on reasonable grounds for their having been made:

- (a) the release dates were not selected in any arbitrary or random way;
- (b) the postponement caused by design changes was not unreasonable;
- (c) the production difficulties could not have been reasonably foreseen by the Bank;
- (d) reasonable efforts were made to meet production problems and release dates.

Having regard to the above, the representations made by the Bank could not be regarded as misleading or deceptive. The claim made under s 51A of the *Trade Practices Act* was thus not made out and s 52 of the Act relating

to misleading or deceptive conduct was, therefore, not breached.

4. Negligence at common law

The trial judge found that there was sufficient proximity between Sykes and the Reserve Bank for the Reserve Bank to have a common law duty of care towards Sykes. However, he was of the view that there was no breach of the relevant duty of care. The statements made were not unqualified and it was reasonable of the Bank to make them. The Bank had no general duty to warn Sykes of the general nature and extent of the production problems involved or to ensure that Sykes was privy to the progress and problems encountered in the production schedule.

5. Decision at trial

For the reasons set out above, the trial judge found the Reserve Bank to be under no liability to Mr Sykes either under the *Trade Practices Act* or at general law and Mr Sykes' claim was accordingly dismissed with costs. [*Sykes v The Reserve Bank of Australia* (1998) ATPR ¶ 41 – 608].

The Full Federal Court Decision on Appeal

The Full Federal Court allowed the appeal [*Sykes v Reserve Bank of Australia* (Heerey, Sundberg and Emmett JJ : ((1999) ATPR ¶ 41 – 699) 6 Nov 1998]. Justices Heerey and Sundberg, in separate judgments, were in the majority. Justice Emmett, though writing the major judgment reviewing the issues and the evidence, was in dissent. The relevant findings of the various judges are tabulated hereunder. The points made by each judge have a common theme but involve nuances which show some subtle differences of views.

Tabulation of the Reasoning of the Full Court Justices In *Sykes v Reserve Bank of Australia* on Appeal

EMMETT J. (Dissenting)	HEEREY J. (In majority)	SUNDBERG J. (In majority)
JUDGMENT:		
That the appeal be dismissed.	That the appeal be allowed.	That the appeal be allowed.
REASONING		
Further evaluation of the evidence and the Sykes Complaint		
Sykes alleged that the evidence could not support a conclusion that the experience and expertise available to the Bank in November - December 1990 constituted reasonable grounds upon which the "prediction" concerning Easter 1991 could have been based.	Agreed with the observations of Emmett J.(iv) (opposite)	Agreed with the observations of Emmett J. (v) (opposite)
<p>His Honour held that this evidence was not referred to by the trial judge and it was thus necessary to refer to it in some detail in his judgment on appeal. (His Honour did this but this detail (11 pages of his Honour's judgment) cannot be here set out.) In general terms a number of Reserve Bank internal documents, not referred to by the trial judge, were examined. These showed that, prior to November - December 1990, there was deep concern within the Reserve Bank as to design and production of the new banknotes. Further there had been no pre-release testing of the notes done at that time) (i)</p>		

EMMETT J. (Dissenting)	HEEREY J. (In majority)	SUNDBERG J. (In majority)
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Reasonable grounds

1. The problems relied upon by the Reserve Bank were not foreseeable when the Bank made its representations. However, the question is whether the Bank had reasonable grounds for its predictions. The real Sykes complaint was that the Bank had undertaken no production testing to determine whether the target dates were achievable in circumstances where the technology was new and difficulties had already been experienced. (ii)

2. One must have serious reservations as to whether the Bank's reasonableness onus was discharged. (iii) [However (see hereunder) his Honour found that the representations were not representations as to a future matter and, accordingly, it was not necessary for him to decide this question.]

1. (a) The Bank argued that the long delay in the release of the notes was because of delays it could not have anticipated. It is doubtful if this is the case in view of the failure of the Bank to carry out test production runs prior to making the relevant statements. (vi)

(b) Matters which occurred after the representations had occurred cannot be relied upon to establish reasonable grounds. (vii)

(c) The Bank was making statements about a highly technical production process wholly within its control. Outsiders such as Sykes had no access to information against which the reasonableness of the Bank's predictions might be assessed. Nor was any information, however, incomplete, proffered by the Bank. (viii)

2. The onus of establishing reasonable grounds for the representations had not been made out. (ix)

Agreed with the comments of Heerey J. (x) (opposite).

Was there a statement as to a future matter?

[Note: His honour is in dissent in relation to the ultimate conclusion on this issue - see his reasoning in 3 below]

1. The fact that a statement represented the Bank's present state of mind does not mean that it is not in

1. It is not correct to treat a representation as to an event or conduct relating to the future, be that a prediction or otherwise, as not being a representation as to a future matter merely because it implies a

1. A representation as to a future matter does not lose that status simply because the representor believes it to be true. (xix)

2. A representation can be qualified. But this does not mean that one can take

EMMETT J. (Dissenting)	HEEREY J. (In majority)	SUNDBERG J. (In majority)
<p>relation to a future matter. (xi)</p> <p>2. Different conclusions may apply as to whether a statement about a future matter is made by a person who will be responsible for the occurrence or non-occurrence of the event. If the maker of the statement is not responsible, the statement could only be construed as carrying with it a statement of the present intent of the maker of it. If the maker is responsible, a question arises as to whether the statement is a statement about a future matter or whether it is, fairly construed, only a statement of present intention or belief. (xii)</p> <p>3. On the wording of the statements, and in light of Mr Sykes' contacts with the Reserve Bank, the statements were only ones of present intentions of the Bank.</p> <p><i>"It is clear that (the Bank's statements) amounted to no more than (statements) by the Bank in December 1990 that it had an expectation that (new) Banknotes would be introduced ... some time after Easter 1991. It was not a prediction and was not a representation with respect to a future event. Accordingly, s.51A had no application."</i> (xiii)</p> <p>5. A representation as to an expectation carries with it an implied representation that the expectation is</p>	<p>representation as to the maker's present state of mind. (xv)</p> <p>2. In the present context, the representation was not one over which the representor had no control, such as a prediction by a developer of future takings of a shop in a shopping centre or where the grounds are expressly stated and an assessment of their reasonableness is left for evaluation by the representee. (xvi)</p> <p>3. There was necessarily an element of the Bank's present belief involved in the representation. This is necessarily implicit. However, Sykes was concerned with the date of issue, not the Bank's then state of mind. (xvii)</p> <p>4. In the circumstances, a representee would not be concerned with the Bank's state of mind. A representator may say "It is our present intention to carry out Project X though this may change". But the Bank did not suggest any qualification was to be made to repeated statements as to when it intended to produce and release the new notes. (xviii)</p>	<p>the last qualified statement and characterise it in isolation. There had been a prior series of unqualified statements as to the release date. (xx)</p> <p>3. The statement that new notes were expected to be released after Easter 1991 was a statement as to a future release date. (xxi)</p> <p>4. Statements as to the future must be taken in their context. A statement may be a statement as to the maker's belief rather than of the subject matter of the belief. For example, a statement "I expect it to rain on Friday" may be a statement of belief. But to so hold in the present case (and therefore to hold that there is no statement as to the subject matter of the belief) is to ignore the context and background. It would also ignore the issue of the fulfilment of the expectation. In the present case, the question of fulfilment was entirely within the Bank's control. In the case of a weather forecaster, this is not the case. (xxii)</p>

EMMETT J.
(Dissenting)
HEEREY J.
(In majority)
SUNDBERG J.
(In majority)

reasonably held.

Misleading or deceptive conduct would occur if the expectation was not, in fact, reasonably held.

However, the proof of this would be on the applicant (Sykes). It would not lie on the respondent (the Reserve Bank) to show that it truly reasonably held the relevant belief.

The evidence did not show that it did not have the relevant expectation. It is clear that the Bank believed that the first new notes would be introduced some time after August 1991. There was no suggestion that no such expectation was not held.

It was, therefore, not necessary to determine whether such an expectation was reasonably held. (xiv)

What constraints are applicable to future dates and times?

No comments made.

A statement made as to a future time means that future time or a reasonable time thereafter. A week or month after Easter 1991 would have been a reasonable time. Eighteen months was not. (xxiii)

There was no real difference between "after Easter" and "some time after Easter". In context, the Bank was saying that the launch would be "soon after Easter". (xxv)

Unreasonable reliance

No comments made.

It was argued that it was unreasonable for Sykes to rely on the representation by the Bank. The *Trade Practices Act* does not,

Held to the same effect as Heerey J. (xxvi) (see opposite)

EMMETT J.
(Dissenting)
HEEREY J.
(In majority)
SUNDBERG J.
(In majority)

however, erect any pre-condition that reliance must be "reasonable". Any such argument would be inconsistent with prior cases to the effect that contributory negligence is not a defence to a claim for damages under s 52. A defence exists if the representee is so careless that this breaks the chain of causation. However, this is far from the present case. Sykes had no involvement in the production of notes. The Bank was uniquely placed in relation to the issue date of the notes and it was not unreasonable for Sykes to rely on what the Bank said. (xxiv)

Was the Reserve Bank engaged in trade or commerce?

It was conceded by the Reserve Bank on the appeal that it was engaged in trade or commerce. Hence, the law in this regard was not argued. (xxvii)

Not argued (see opposite).

Not argued (see opposite).

Common law negligence

There was no common law negligence. The statements, accurately construed, were accurate statements of the Bank's then present expectation. There was thus no breach of a duty of care. (xxviii)

No comments made as found for Sykes on Trade Practices issue. Thus the common law negligence issue did not have to be decided.

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Notes

- (i) See generally (1999) ATPR at pp.42909-42919
- (ii) (1999) ATPR p.42918
- (iii) (1999) ATPR p.42918
- (iv) (1999) ATPR p.42902
- (v) (1999) ATPR p.42905
- (vi) (1999) ATPR p.42902
- (vii) (1999) ATPR p.42902
- (viii) (1999) ATPR p.42903
- (ix) (1999) ATPR p.42902
- (x) (1999) ATPR pp.42908
- (xi) (1999) ATPR, p42919
- (xii) (1999) ATPR p.42919
- (xiii) (1999) ATPR p.42903
- (xiv) (1999) ATPR p.42903
- (xv) (1999) ATPR p.42903
- (xvi) (1999) ATPR p.42903
- (xvii) (1999) ATPR p.42904
- (xviii) (1999) ATPR p.42903
- (xix) (1999) ATPR p.42907
- (xx) (1999) ATPR p.42906
- (xxi) (1999) ATPR p.42906
- (xxii) (1999) ATPR p.42908
- (xxiii) (1999) ATPR p.42904
- (xxiv) (1999) ATPR p.42904
- (xxv) (1999) ATPR pp.42905 to 42906
- (xxvi) (1999) ATPR p.42904
- (xxvii) (1999) ATPR p.42919
- (xxviii) (1999) ATPR p.42920

Damages

The case was remitted by the Full Federal Court to Justice Tamberlin for assessment of damages [*Sykes v Reserve Bank of Australia* (1999) ATPR ¶¶41-700 (6 June 1999)].

The arguments advanced

His Honour noted that before an applicant can claim damages, he or she must have acted in reliance on the misrepresentation. The damages claimable are those caused by the prejudice or disadvantage suffered by the applicant as a result of the applicant altering his or her position by reason of the inducement.

The arguments put by the respective parties were:

- Mr Sykes fundamentally claimed that he thought he would be first in the market and he lost this advantage. Once this market opportunity was lost, it was impossible to retrieve. On the question of reliance, Sykes pointed out that the equipment that he purchased was purchased

only in March 1991, a matter of weeks before the date of the anticipated launch. The fact that a substantial product was produced at this time indicated reliance.

- The Bank said, in response to the above, that Mr Sykes was so committed to the opportunities that he saw, that he would have acted as he did whatever the Bank had done. In short, the probabilities were, according to the Bank, that Mr Sykes, even if aware of potential delay, would not have acted differently in any way.

Principles of the decision

1. The Court held that Sykes relied upon the representations as to the May release date. Sykes' loss was that of a commercial opportunity to realise the potential profits to be made from an advantageous market position. This commercial opportunity loss was a real one.
2. Loss of commercial opportunity is compensable even if there may be a less than fifty per cent chance that the commercial advantage would be realised. [See *Commonwealth v Amann Australia Pty Ltd* (1991) 174 CLR 64].
3. Any monetary quantification of the Sykes' loss cannot be the subject of precise quantification and must be assessed on a broad general basis. A projection was made by Sykes over a seven year period but, said his Honour, any such estimate "travels into the role of speculation and a very substantial discount must be applied".
4. Mr Sykes submitted a figure of loss of profits and loss of goodwill of \$500,989. Mr Justice Tamberlin noted that the vagaries of this figure, their optimistic nature and their failure to take into account simple substitute products which could easily come onto the market within the seven year projected profit period. He concluded:

"Although I accept that there was a loss of commercial opportunity, I consider that given the time span of prediction and the range of possible adverse factors to the profitability of the undertaking, the prospects of achieving the suggested profits and build up in goodwill are grossly overstated in the applicant's evidence. Doing the best that I can, I think that it would be appropriate in the circumstances to allow the figure of 15 per cent of the estimate of \$550,898 as representing compensation for the loss arising from the loss of commercial opportunity (involved)."²

His Honour further noted that this estimate was nothing like a reliable figure. It was, he said, "a rough guide beset by great uncertainty".

² (1999) ATPR p.42926

Damages awarded

Damages were awarded in the sum of \$82,648.

Lessons from the Sykes Litigation

The litigation breaks important new ground.

Future matters

As to what is a “future matter” within s 51A of the *Trade Practices Act*, it is clear that the distinction frequently asserted between “a present expectation” and a statement as to a “future matter” is now regarded as a somewhat too subtle one. A statement is one as to a future matter notwithstanding the fact that it is also a presently held belief. Indeed, if a statement is made and is not, at the time of making, the presently held belief of the maker of the statement, this would, of itself, constitute misleading or deceptive conduct. A statement as to present expectation necessarily implies that there is a reasonable belief that such an expectation will eventuate (see, for example, the comments of Emmett J set out above on this point).

Reasonable grounds

The grounds on which a statement as to future events will be considered reasonable was a key issue in the case. The trial judge thought the Reserve Bank could justify the reasonableness of its actions because the Bank had not acted in any arbitrary or random way and that the production problems involved could not have been foreseen. On Appeal, however, this view was not accepted. The Full Federal Court was of the opinion that the Bank had not acted reasonably. It had, for example, done no test runs at the time it made the statement. The Court made a clear distinction between future matters that were solely within the control of the representor and matters which were outside the representor’s control. Sundberg J’s weather forecast example is a good example of the general point, both on the “reasonableness” question and on the question of statements as to the future generally. The “reasonableness” issue, his Honour said, must be taken in context. A party acting on a statement by another that “I expect it to rain on Friday” must know that the representor cannot control the weather. However, the responsibility for fulfilling a note issue of the Reserve Bank was one totally the Reserve Bank’s responsibility and a party

acting on such a statement is entitled to assume that all relevant tests had been carried out in order to achieve the represented result.

It is important to note the views of Justice Heerey that matters which occur after a representation as to the future is made cannot be relied upon to establish the reasonableness of the statement itself. In his Honour's view, the reasonableness of a statement must be evaluated at the time it is made. Subsequent events may establish why a statement as to the future did not, in fact, eventuate. Such subsequent events, however, are, in the writer's view, akin to the soldier, on offering an explanation as to the error of his ways in terms of what, in fact, occurred, meeting the standard superior officer's retort that: "That's an explanation, soldier, not an excuse".

The majority in the Full Federal Court clearly believed that a reasonableness test was predicated on the fact that, at the time the statement was made, all actions had been taken by the maker of the statement to ensure that the predicted result would, in fact, occur. In this regard, the Full Federal Court evaluated the issue from a different perspective to that of the trial judge and reached a different conclusion. It is obvious from the case that courts will now require a higher "duty of care" in relation to statements as to future matters than was previously thought by many to be the case. This "duty of care" does not now permit of the defence that unfortunate events intervened – at least not unless all matters within the control of the maker of the statement have been fully checked out as not inhibiting the represented result.

Qualifications made in statements as to the future

Clearly a statement as to the future can be appropriately qualified. Indeed, it seems to this writer that Justice Emmett thought that the Reserve Bank, in light of its contacts with Mr Sykes and statements made to him, had, in fact, made only general statements which were appropriately qualified and were thus not the nature of predictions. However, all other Justices thought that this was not the case. It seems to the writer that the case clearly holds that no qualification will be read into a statement purely because of the uncertainties involved by reason of the fact that "the future is the future". There must be express words of qualification. In the words of Heerey J. the representation, if it is to be a qualified one, must be to the effect of:

"It is our present intention to carry out Project X though this may change."³

The writer adds the caveat to his Honour's proposition that s 52 is

³ (1999) ATPR p.42903

fundamentally linked to the impression conveyed by conduct. Even by using his Honour's words of disclaimer, a representor may still incur liability if the impression created clearly is that, in fact, nothing will change. The only Judge in the Full Federal Court who touched on this general point was Sundberg J. His Honour noted that, in a series of statements, it is not appropriate to take any one statement in isolation. Thus a last qualified statement will not be exculpatory if there had been a series of prior unqualified statements to the opposite effect.

Unreasonable reliance and contributory negligence

The Full Federal Court re-affirmed that there is no contributory negligence doctrine applicable to s 52 conduct. A party is entitled to rely on statements made. There is no obligation on a party to check such statements and there is no reduction in liability or damages on the basis that a party either unreasonably relied upon a representation or unreasonably failed to check the veracity of the representation.

The difficulty in assessing damages

The case, interesting as it is for its discussion on the above issues of law, also demonstrates the difficulty of assessing damages in respect of lost opportunity. This will, it appears, always be a problem in cases of this kind. Justice Tamberlin largely resorted to a "guesstimate" of damages. Improbables such as quantification difficulties; assessment of the relevant time period involved; assessing the profitability of a commercial enterprise which was never, in fact, launched on the market; assessing the possibility of competitive new entry into the market; and assessing other unquantifiables necessarily leads the court into an evaluation which is highly speculative. Even if Mr. Sykes was too optimistic in the figures he put to the court, no doubt he was not greatly impressed to receive only 15 per cent of this figure by way of damages.