Case and Comment

Concrete Constructions (NSW) Pty Ltd v Nelson: New Limits on Section 52 of the *Trade Practices Act*[*]

Since its enactment, s52 of the *Trade Practices Act* 1974 (Cth) has been a fertile area for both lawyers and litigants with its breadth and generality allowing remedies to be obtained in increasingly novel and diverse areas. It is not surprising therefore that there now has been some attempt made to define the boundaries within which the section operates. In *Concrete Constructions (NSW) Pty Limited v Nelson*,[1] the High Court of Australia made it clear that s52 does not apply to representations made by an employer to an employee in the course of his or her employment. However, in reaching this conclusion, the Court undertook an examination of the beneficiaries of the section and the requirement that the conduct must be "in trade or commerce" that may have ramifications far beyond the mere adjudication of Mr Nelson's claim. Of particular note in this regard is the position adopted by the majority judges, Mason CJ, Deane, Dawson and Gaudron JJ, in requiring that a specific trading or commercial character attach to the conduct which is the subject of the action. If this approach is adopted there is a genuine risk that the law will not achieve its aim of being "one step behind business men who resort to smart practices",[2] because many of these so-called "smart practices" may not fulfil this requirement, particularly in the area of promotional activity.

The proceedings before the High Court arose out of an accident on a construction site at Grosvenor Square, Sydney. The appellant company employed the respondent to perform duties which included removing grates positioned at the entry points of air-conditioning shafts. It was alleged that the respondent was informed by the appellant's foreman that these grates were secured by three bolts on either side. This information was incorrect in respect of one of the grates. The respondent was acting in the course of his duties when that grate gave way causing him to fall to the bottom of an air-conditioning shaft. As a result, he suffered serious injuries.

The respondent brought an action against the construction company under s52 of the *Trade Practices Act* alleging that it had engaged in conduct "in trade or commerce" which was "misleading or deceptive" or "likely to mislead or deceive" and seeking damages pursuant to s82 of the Act. The matter came before the Federal Court to determine the question of whether "the facts pleaded and particularised in the Statement of Claim give rise to a cause of action under the *Trade Practices Act* 1974". At first instance, the question

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* The author wishes to thank Mr A J Black, Solicitor, Mallesons Stephen Jaques (Sydney), for his helpful comments on an earlier draft of this note. Responsibility for any errors remains with the author.

1 (1990) 64 ALJR 293.

2 Mr Enderby (Minister for Manufacturing Industry), Parliamentary Debates (Hansard) House of Representatives, 16 July 1974, p232. See Pengilley, W, "Section 52 of the Trade Practices Act: A Plaintiffs New Exocet?" (August 1987) *Australian Business LR* 247.

was answered in the affirmative[3] by Einfeld J. It was from that decision that Concrete Constructions appealed to the High Court.

The decision of the Full Court of the High Court of Australia was handed down on 3 May 1990 and consists of four judgments which reflect, at least, two substantially different approaches to the construction of s52. The High Court characterised the question which it had to consider as whether s52 applies to representations made by an employer to an employee concerning matters within the course of activities which constitute the latter's employment.[4] The Court was unanimous in its decision that the circumstances of the case as pleaded by the respondent did not give rise to a cause of action under s52. It is the divergent reasoning in the decisions which provides the most interesting aspect of *Concrete Constructions*. Two clear trends of analysis are discernible in the judgments. The first is reflected in the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ which focuses upon the breadth of the definition of the phrase "in trade or commerce" for the purposes of the section and finds in it a hitherto unnoticed qualification. The second approach is apparent, although to varying degrees, in the judgments of Brennan J, Toohey J and McHugh J and emphasises the consumer protection aspect of s52. Both analyses purport to be the product of statutory construction of s52.

Judgment of Mason CJ, Deane, Dawson and Gaudron JJ

The joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ provides the more unexpected approach to s52. The judgment commences on the basis that although there is a considerable volume of authority on s52, the "actual decision in none of those cases is, however, either directly applicable to the circumstances of the present case or decisive of the question whether s52's prohibition of misleading or deceptive conduct extends to the internal affairs of the corporation or to purely internal communications between employees of a corporation in the course of their employment".[5] Their Honours do regard a number of points as being settled by the earlier decisions:[6]

(a) an action to restrain a contravention of s52 can, in appropriate circumstances, be maintained by a person who is not a consumer;

(b) consumer protection lies at the heart of the legislative purpose in s52.

However their Honours suggest that "the precise boundaries" of the territory within which the section operates "remain undetermined".[7]

In attempting to determine those boundaries the majority judgment turns to the use to which the heading "Consumer Protection" at the commencement of Part V of the Act may be put. That heading is part of the Act itself, *Acts Interpretation Act* 1901 (Cth) s13, and "constitutes part of the context within which the substantive provisions of Pt V must be construed".[8] On the basis of

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3 (1989) 86 ALR 88.

4 *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 64 ALJR 293. There is some difference between the formulations of this question in the judgments, but in substance they are very similar: per Mason CJ, Deane, Dawson and Gaudron JJ, at 294; per Toohey J at 297; per McHugh J at 300.

5 Id at 294.

6 Ibid.

7 Ibid.

earlier authority[9] their Honours hold that the heading could not be used to impose a constricted meaning on the words of the substantive provisions and therefore conclude that in "these circumstances, it is not permissible to give the heading of Pt V the effect of confining the general words of s52 to cases involving the protection of consumers alone".[10]

The reason given for this interpretation, which is clearly at odds with the interpretation adopted by the other three justices,[11] is that to interpret s52 otherwise would be to convert a general prohibition of misleading or deceptive conduct by a corporation in trade or commerce into

> . . . a discriminatory requirement that a corporate supplier of goods or services should observe standards in its dealings with a corporate consumer which the consumer itself was left free to disregard. That being so, the general words of s52 must be construed as applying evenhandedly to corporations involved in a transaction or dealing with one another 'in trade and commerce'.[12]

The assumption that s52 is not limited to cases involving the protection of consumers appears to be an extremely expansive interpretation of the area in which s52 may operate, and arguably goes far beyond the authority upon which it was sought to rely. The majority relies upon the statement of Mason J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*[13] that the "general words of s52 should be widely interpreted without being read down by reference to the heading of Pt V 'CONSUMER PROTECTION' or the more specific succeeding sections", but apparently disregard his statement in the following paragraph that it "is not enough that conduct damages a rival trader; it must mislead or deceive or be likely to mislead or deceive members of the public in their capacity as consumers".[14]

Thus the first half of the majority's construction of s52 is wider than was previously envisaged. However the same cannot be said of the second, and, arguably more significant, tier of their interpretation, the construction of the phrase "in trade or commerce". Their Honours concede that, as a matter of language, the prohibition in s52 can be "construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business".[15] The alternative then proposed is that s52 may be seen as "referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character".[16] The conclusion drawn by the majority is that, in the light of the context in which the section is found, s52 is directed at the conduct of corporations

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8 Ibid.
9 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 215 per Stephen J at 225; *Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd* (1982) 149 CLR 191.
10 Above n1 at 294.
11 Id per Brennan J at 296, per Toohey J at 299; McHugh J at 301.
12 Id at 294.
13 (1982) 149 CLR 191 at 202.
14 Above n1 at 294.
15 Id at 295.
16 Ibid.

towards persons with whom they have or may have dealings "in the course of those activities or transactions which, of their nature, bear a trading or commercial character".[17]

Their Honours then observe that this formulation "of course" includes promotional activities.

There are a number of observations which may be made concerning the way in which the majority has analysed the activity to which s52 is directed. Firstly, the formulations of that activity presented as alternatives seem to ignore an analysis which may be the "middle road" and is discernible in a number of recent decisions on s52, most notably those decisions concerning pre-employment negotiations. In *Finucane v New South Wales Egg Corporation*[18] the New South Wales Egg Corporation, which was engaged in the business of egg distribution, part of which involved approval of potential purchasers of "egg runs", was sued under s52 when a restructuring of the operation deprived the plaintiff of substantially the entire benefit of his recently purchased "egg run". In holding that the facts were within the ambit of s52, Lockhart J pointed out that in a case of this kind the issue may be whether "the degree of connection" between the negotiations and the course of business "is such as to bring the negotiations within the ambit of conduct in trade and commerce".[19] The clear implication is that although the particular activities in question may not bear a trading or commercial character in isolation, there must be a sufficient "link" with the overall trading or commercial conduct of the corporation to bring it within the ambit of the section.

The second point which arises from the decision that s52 is directed to activities "which, of their nature, bear a trading or commercial character" is that no obvious rationale is provided for the inclusion of promotional activities in the prohibition, as not all such activities will necessarily bear that character.

This problem is illustrated in the judgment of McHugh J. As his Honour points out, much of the conduct which affects the market place "cannot properly be described as being of a trading or commercial character"[20]and he cites as an example of this type of activity statements concerning the environment, political issues, industrial practices, women and ethnic groups or other social or political concerns which may in reality bear a direct relationship to a consumer's decision to enter into a relationship with a particular corporation, but would not satisfy the test required by the majority. McHugh J therefore concludes that such an interpretation "must result in a reduction of protection for consumers".[21]

It is easy to sympathise with the primary intention apparent in the majority's judgment — that is, to avoid the imposition "by a sidewind, an overlay of Commonwealth law upon every field of legislative control into

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17 Ibid.
18 (1988) 80 ALR 486. See also *Wright v TNT Management Pty Limited* (1989) 15 NSWLR 679 and *Patrick v Steel Mains Pty Ltd* (1987) 77 ALR 133.
19 Id at 504.
20 Id at 302.
21 Ibid.

which a corporation might stray.[22] More specifically, the majority may have sought as a matter of social policy, to ensure that Mr Nelson's attempt to avoid the quantum restrictions of Workers Compensation legislation did not succeed. However the majority's reasoning is ultimately restrictive in the coverage it offers to the most obvious beneficiaries of s52, consumers, and to a significant extent reinterprets the thrust of previous jurisprudence concerning s52.

Traditionally s52 has been directed to giving relief in the context of the formation of intentional relationships, where there is some inequality of information even where that information could be readily ascertained.[23] These relationships are intentional in the sense that both the parties and the basic scope of their relationship are the product of design on the part of (at least) the corporation, as in the giving of advice,[24] sale of consumer items,[25] sale of land or a business[26] or a contract of employment[27] This analysis is supported by the writers of *Consumer Protection Law in Australia*,[28] who see in *O'Brien v Smolonogov*[29] a tendency to regulate business activities in such a way as to provide a more equitable balance in the relationship between consumers and persons conducting business.

This focus is made explicit in the recent decision of *Vipal Kumar Mehta and Ranjana Mehta v Commonwealth Bank of Australia*.[30] This case arose out of the problems that have been associated in recent years with offshore loans in foreign currencies. Dr Mehta had been keen to enjoy the benefits of such a loan and after discussions with another bank borrowed in Swiss Francs from the defendant.

Ultimately he was left considerably exposed by devaluation of the Australian dollar and in an action for misleading or deceptive conduct "relied on the bank's failure to tell the whole story".[31] Rogers J had "no hesitation" in accepting that if the bank had told Dr Mehta the full facts the borrowing would not have been undertaken:

> Nobody in his right mind, after being told that the possible loss was unlimited, that the necessary implementation of safeguards would be limited in their effect and would require continuous attention, which the bank refused to provide, would contemplate making the borrowing. Attractive as the borrowing may have been, the attraction could not survive a full and complete explanation.[32]

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22 Id at 295.
23 *Henjo Investments Pty Limited v Collins Marrickville Pty Limited* (1998) 79 ALR 83.
24 *Hornsby Building Information Centre Pty Limited v Sydney Building Information Centre Limited* (1978) 140 CLR 215.
25 *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1982) 149 CLR 191.
26 *O'Brien v Smolonogov* (1983) 53 ALR 107; *Henjo Investments Pty Limited v Collins Marrickville Pty Limited* (1988) 79 ALR 83; *Bevanere Pty Limited v Lubidinevse* (1985) 59 ALR 334.
27 *Patrick v Steel Mains Pty Limited* (1987) 77 ALR 133; *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486.
28 Goldring, J, Maher, L and McKeough, J, *Consumer Protection Law in Australia* (1987) 259.
29 (1983) 53 ALR 107 per Fox, Sheppard and Beaumont JJ at 112.
30 27 June 1990, Supreme Court of NSW, Rogers J, no50023 of 1989, unreported.
31 Id at 57.
32 Ibid. On this issue see W Pengilley, "Misleading or Deceptive Conduct and Financial

If the analysis that s52 is concerned with the formation of intentional relationships were adopted, the majority in *Concrete Constructions* would not need to have resort to the restrictive aspect of the second tier of their test for conduct "in trade or commerce". The claim by Mr Nelson did not go to the formation of a relationship. The other concern of the majority, illustrated by possible claims under s52 by persons injured on the roads by a negligent driver employed by a corporation,[33] are not on any construction the result of an intentional relationship in the sense outlined above.

Judgments of Brennan, Toohey and McHugh JJ

The judgments of the other three members of the High Court are substantially at odds with the decision of the majority on both of the main issues highlighted by the majority's reasoning.

Toohey J and McHugh J, in separate judgments (with both of which Brennan J agreed) use the headings to Part V of the *Trade Practices Act* 1974 to establish that the scope of the protection offered by s52 is limited, there being "dicta which set s52(1) within a framework of consumer protection".[34] Consequently "the proper conclusion to be drawn from the enactment of those headings is that the object of s52 was, and remains, the protection of consumers and not other persons".[35]

It is submitted that this is the correct construction of s52 in the light of the headings. By contrast having found that the section was not in fact so limited to consumers, the majority was forced to find some basis for their restrictive interpretation of "in trade or commerce", and they did so on the basis of "the context provided by other features of the Act".[36] There does not seem to be any indication of why, if the headings do not restrict the beneficiaries of the provision, whom they appear, initially at least, to name explicitly, they do determine the range of activities to be excluded by the requirement that the conduct giving rise to the claim be "in trade or commerce". It is submitted that, in this respect the analysis of the minority judgments is to be preferred.

The attitude of the minority to the requirement "in trade or commerce" is not so clear. McHugh J limits his decision to holding that the representation made to Mr Nelson was not made to him in any way "which affected him in his capacity as a consumer",[37] with the consequence, that the Statement of Claim disclosed no cause of action. Brennan J came to the same conclusion, but made the additional statement that "to give 'in trade or commerce' its ordinary meaning does not render the qualification otiose".[38] (The qualification to which His Honour is referring is the qualifying phrase; ie that the conduct occur in trade or commerce.)

There is more discussion of the phrase "in trade or commerce" in the decision of Toohey J who considers that s52(1) is "aimed at conduct in which

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Institutions" (1989) 1 *Bond LR* 157.

33 Above n1 at 295.
34 Id per Toohey J at 298.
35 Id per McHugh J at 301, also Brennan J at 296.
36 Id at 295.
37 Id at 304.
38 Id at 297.

a corporation engages when that conduct takes place in a situation which fairly answers the description 'in trade or commerce'".[39] He concludes that the expression "as part of trade or commerce" comes close to what was intended.[40] His Honour does not, in reaching this conclusion, rely on the headings to the section.

Implications of the Different Approaches of the Majority and the Minority

The differences between the approaches adopted by the judges in the High Court are of more than academic interest. This may be illustrated by examining previous decisions in the light of the decision in *Concrete Constructions.*

If, for instance, the facts of *ESSO Petroleum Limited v Commissioner of Customs and Excise*[41] had given rise to an action under s52(1) there may be a clear divergence in outcome between the reasoning of the majority and the minority.

The tokens used by ESSO were held by the House of Lords to be of negligible intrinsic value, and their purpose was entirely promotional. It is very hard to see that an action arising out of these facts could ever be maintained as a result of the majority test established in this case. The tokens are within trade and commerce in a general sense and, given the English public's love of football and a similar predilection in Australia, it is easy to envisage that such a campaign could be successful and possibly misleading. However the giving of such "valueless" incentives to purchase is not of itself of a trading or commercial character. By contrast the minority analyses would focus upon the impact of the promotional activities on the public as consumers, an impact which could be not inconsiderable. If that were the capacity in which the misleading or deceptive conduct affected them, such conduct could sustain an action under s52. The reduction in the scope of the section's operation imposed by the majority's requirement is clear.

The position in *Esso Petroleum* may be contrasted with *Hospital Contribution Fund of Australia Limited v Switzerland Australia Health Fund Pty Limited.*[42] In that case in the course of comparative advertising both health insurance funds made claims concerning the degree of cover available under their respective policies. Wilcox J held that s52 did apply to the claims made in the advertising campaigns ("Health Australia won't reduce your hospital cover after 14 days. All the other major funds will!"; and "So, with HCF, you'll continue to get the best value health care — and much more besides") and granted injunctions restraining the advertising of both parties under s80 of the *Trade Practices Act* 1974.

The difference between an advertising campaign which goes directly to the nature of the goods or services involved and one merely intended to enhance a product's general popularity is clear. However, whether any line is

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39 Id at 300.
40 Ibid.
41 [1976] 1 All ER 117.
42 (1987) ATPR 40-830.

to be drawn between the two for the purposes of s52 is not so evident if the inclusion of promotional activities in the prohibition is to be influenced by the majority's specific requirement that the activities caught by the section "of their nature, bear a trading or commercial character". It may well be that promotional activities which are not related in a direct sense to the activities of the corporation are not within the scope of the section. It is submitted that, as discussed above, this would constitute an undesirable reduction in the protection available to consumers.

A problem also emerges with *Finucane v New South Wales Egg Corporation*. The extract from the judgment of Lockhart J quoted above[43] clearly implies that the negotiations in that case did not satisfy the requirement of bearing a trading or commercial character in isolation and therefore may not satisfy the majority's requirement for coming within s52.

The case may also create some problems for the minority approach as a potential employee is not a consumer in a traditional sense. However, given that neither the *Trade Practices Act* 1974 nor any of the cases provide a definition of consumer, and that parties negotiating contracts have been seen to be within the ambit of s52 previously,[44] it is submitted that there is no reason why this type of intended relationship would not be protected. Indeed the disparity of information approach would support this outcome.[45] It is important to note, however, that s52 again has wide operation if triggered by inequality alone. After all, Mr Nelson knew less than the foreman. Therefore both an intended relationship and inequality are required to trigger the protection of s52.

Concrete Constructions provides one of the first conscious attempts by the High Court to constrict the scope of s52 of the *Trade Practices Act* 1974 in the light of its wide application to extremely diverse fact situations. Unfortunately there was no unanimity in the High Court as to how this objective was to be achieved. On balance, however, it appears that the minority analyses are more compelling.

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43 Above n19.

44 *Henjo Investments Pty Limited v Collins Marrickville Pty Limited* (1988) 79 ALR 83.

45 By contrast it would be less easy to apply this analysis to cases such as *Reil Corporation Limited v Bankers Trust Australia Limited* (23 March 1990, Fed Crt, Foster J, no 61442 of 1988, unreported). It requires a very extended view of the term "consumer" to justify the application of s52 to a statement made by an adviser to a company in the course of takeover negotiations as to the likely prospective recommendations of an auditor. The claim was not sustained on the facts. It was not dismissed on the basis that such a situation is not covered by s52 as, arguably, ought to have been done.