

# REPRESENTATIONS AS TO THE FUTURE UNDER THE PROPOSED AUSTRALIAN CONSUMER LAW

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*[Australia will soon enter a new era of consumer protection regulation when a single national consumer law is introduced. This law will enhance consumer protection and reduce regulatory complexity. The national laws will be based on the current provisions in the Trade Practices Act 1974 (Cth), although these provisions will be amended to reflect best practice in state and territory consumer laws. This article develops an argument that on this basis there is a need to amend the provision in the TPA that facilitates proof in cases involving representations as to future matters.]*

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## I INTRODUCTION

Based largely on the recommendations of the Productivity Commission,<sup>1</sup> the Council of Australian Governments agreed in October 2008 to implement a new consumer policy framework, comprising a single national consumer law (to be called the ‘Australian Consumer Law’),<sup>2</sup> and to streamline enforcement arrangements.<sup>3</sup> The Australian Consumer Law will include provisions that prohibit misleading conduct, regulate unfair contract terms and include a new national legislative and regulatory regime for product safety. New powers will be given to the Australian Competition and Consumer Commission (‘ACCC’), including the ability to seek civil pecuniary penalties for breach of the consumer protection provisions,<sup>4</sup> disqualification orders, infringement notices and substantiation notices. The ACCC will also be given the power to seek redress for consumers, even where those consumers are not party to a particular legal action.<sup>5</sup>

The Australian Consumer Law will be implemented as part of an application law scheme.<sup>6</sup> Under the application law scheme, the federal government will act as the lead legislator. It will amend the *Trade Practices Act 1974* (Cth) (‘TPA’) and add a schedule version of the consumer protection provisions. The states and territories will repeal their current consumer protection statutes and introduce legislation applying the schedule version in their own jurisdictions.<sup>7</sup>

The Australian Consumer Law will be based on the existing consumer protection provisions of the *TPA* (which will most likely be renamed the *Competition and Consumer Act*).<sup>8</sup> Where it is generally agreed that the current provisions of the *TPA* are inadequate, the *TPA* will be modified or augmented based on best practice in state and territory consumer laws.<sup>9</sup>

The way in which representations as to the future (such as statements about what a person will do in the future, predictions and promises) are treated under the Australian Consumer Law will have a significant impact on the extent to which the legislation prohibits various forms of misleading conduct. The *TPA*

<sup>1</sup> Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>>.

<sup>2</sup> See Standing Committee of Officials of Consumer Affairs, Parliament of Australia, *An Australian Consumer Law: Fair Markets — Confident Consumers* (2009) 9–10 <<http://www.treasury.gov.au/contentitem.asp?ContentID=1484&NavID=037>> (‘*Australian Consumer Law Report*’).

<sup>3</sup> Council of Australian Governments, *Communique* (2 October 2008) 2 <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-10-02/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm)>.

<sup>4</sup> Note that civil pecuniary penalties will not be imposed against a party solely on the basis that they have breached the general prohibition against misleading or deceptive conduct contained in *TPA* s 52: *Australian Consumer Law Report*, above n 2, 46; see also at ch 7.

<sup>5</sup> For a detailed discussion of the proposed national law, see *Australian Consumer Law Report*, above n 2.

<sup>6</sup> *Ibid* 9.

<sup>7</sup> The Australian Consumer Law will be implemented in the same way as the *Competition Code* (*TPA* pt XI A, which mirrors pt IV): *ibid* 10 fn 16.

<sup>8</sup> *Australian Consumer Law Report*, above n 2, 23.

<sup>9</sup> *Ibid* 17, 59. This is based on the recommendations of the Productivity Commission: Productivity Commission, above n 1, vol I, 62–3 (recommendation 4.1); see also at vol II, 62.

presently includes an evidentiary provision that facilitates proof in misrepresentation cases. Section 51A provides as follows:

#### 51A Interpretation

- (1) For the purposes of [Part V Division 1], where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a 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 grounds for making the representation.
- (3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

The various state and territory fair trading statutes contain similar evidentiary provisions (which, together with s 51A, will be referred to as ‘Facilitating Provisions’).<sup>10</sup> However, these provisions are not uniformly worded. Indeed, the recent decision of the Full Court of the Federal Court of Australia in *McGrath v Australian Naturalcare Products Pty Ltd* (*McGrath*) suggests that the provisions contained in the *TPA* and the fair trading legislation in the Australian Capital Territory, South Australia and Tasmania are of less assistance to those seeking to prove that a representation as to the future was misleading than the provisions contained in the fair trading legislation of the other states and territory.<sup>11</sup>

The differences between the *TPA* provision and the provisions contained in some state and territory fair trading legislation do not appear to have been recognised by those involved in overseeing the design and introduction of the Australian Consumer Law. The information and consultation paper released by the Standing Committee of Officials of Consumer Affairs on 17 February 2009 sought opinions about whether the scope of s 51A should be ‘extended to include presumptions in relation to “false”, “misleading” or “deceptive” representations’ and whether the provision should be ‘amended to further clarify’ how it operates in the context of accessory liability claims.<sup>12</sup> However, the paper did not

<sup>10</sup> *TPA* s 51A applies to the civil provisions in *TPA* pt V div 1 (*TPA* s 75AZB applies to the criminal provisions in *TPA* pt VC div 2). The corresponding provisions for civil proceedings in the state and territory statutes are: *Fair Trading Act 1992* (ACT) s 11; *Fair Trading Act 1987* (NSW) s 41; *Consumer Affairs and Fair Trading Act 1990* (NT) s 41; *Fair Trading Act 1989* (Qld) s 37; *Fair Trading Act 1987* (SA) s 54; *Fair Trading Act 1990* (Tas) s 11; *Fair Trading Act 1999* (Vic) s 4; *Fair Trading Act 1987* (WA) s 9. These provisions do not establish a norm of conduct applicable to those who make representations as to the future. Rather, they facilitate proof in cases involving misrepresentations about future matters brought under the various provisions that prohibit misleading practices.

<sup>11</sup> (2008) 165 FCR 230, 283 (Allsop J).

<sup>12</sup> *Australian Consumer Law Report*, above n 2, 84.

discuss the nature of the onus cast by s 51A(2) on the representor, nor seek opinions as to any onus that should be cast.<sup>13</sup> This is most likely because a report prepared for the Productivity Commission that summarised material differences between the substantive provisions contained in Commonwealth, state and territory consumer laws stated that ‘[e]very jurisdiction has a provision reversing the onus of proof for future matters. Each of these is drafted in substantially similar terms.’<sup>14</sup> Although this statement was consistent with almost all of the case law decided at the time this report was published, the *McGrath* decision has revealed that, despite being ‘substantially similar’, the provisions in the fair trading legislation in New South Wales, Victoria, the Northern Territory, Queensland and Western Australia operate differently to *TPA* s 51A.<sup>15</sup>

Although there are other problems with the operation of s 51A (including uncertainty as to how the provision operates in the context of accessorial liability claims<sup>16</sup> and whether it creates a substantive defence or is merely of evidential significance),<sup>17</sup> this article focuses on the nature of the onus cast on the representor by s 51A(2). It develops an argument that there is a need to amend s 51A(2) to ensure that the proposed Australian Consumer Law provides adequate protection against misleading representations as to future matters. Part II of the article outlines the difficulties associated with proving that a representation as to the future is misleading which necessitated the introduction of the Facilitating Provisions. Part III explains when the Facilitating Provisions will apply. It also outlines how the Facilitating Provisions affect the analysis of representations as to the future. Part IV reviews the cases that have considered the operation of s 51A(2) of the *TPA*. In early cases, s 51A(2) was interpreted as imposing the legal burden of establishing reasonable grounds on the representor. This interpretation has recently been challenged by two judges in *McGrath*.<sup>18</sup> An analysis of the provision’s enactment history suggests that the interpretation given to s 51A(2) in the early cases, whilst preferable from a policy perspective, is incorrect. Part V of the article then develops an argument that the *TPA* should be amended to ensure that misleading representations about future matters are appropriately regulated under the new Australian Consumer Law by putting the legal burden of proving reasonable grounds on the representor.

<sup>13</sup> See *ibid* 83–4. Interestingly, at 84 (emphasis added), the paper refers to an evidentiary onus in this regard: ‘a similar *evidentiary* presumption is not available in relation to representations that are “false” or “deceptive”’.

<sup>14</sup> Stephen Coronos and Sharon Christensen, ‘Comparison of Generic Consumer Protection Legislation’ (Consultancy Report, Faculty of Law, Queensland University of Technology, 4 September 2007) 75 <<http://www.pc.gov.au/projects/inquiry/consumer/consultancyreports/consumerprotectionlegislation>>.

<sup>15</sup> *McGrath* (2008) 165 FCR 230, 283 (Allsop J).

<sup>16</sup> See Peter Gillies, ‘Misrepresentations as to Future Matters — Current Issues in Interpretation’ (2009) 17 *Trade Practices Law Journal* 25, 32–4; *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [43]–[45] (*‘Universal Sports’*). See also below n 77 and accompanying text.

<sup>17</sup> See Peter Gillies, ‘Representations as to the Future: Section 51A of the *Trade Practices Act 1974* — Plaintiff’s Sword or Defendant’s Shield?’ (2005) 7 *University of Notre Dame Australia Law Review* 99, 101–4; Gillies, ‘Misrepresentations as to Future Matters’, above n 16, 30–2.

<sup>18</sup> (2008) 165 FCR 230, 242 (Emmett J), 283 (Allsop J).

## II DIFFICULTIES ASSOCIATED WITH PROVING THAT REPRESENTATIONS AS TO THE FUTURE ARE MISLEADING

### *A Approach at Common Law*

Statements as to the future cannot, at the time they are made, have the character of being true or false. As MacKenna J, reading the judgment for the England and Wales Court of Appeal, stated in *R v Sunair Holidays Ltd* ('*Sunair Holidays*')

A statement that a fact exists now, or that it existed in the past, is either true or false at the time when the statement is made. But that is not the case with a promise or a prediction about the future. A prediction may come true or it may not. A promise to do something in the future may be kept or it may be broken. But neither the prediction nor the promise can be said to have been true or false at the time when it was made.<sup>19</sup>

For this reason, common law claims of misrepresentation or deceit based on representations as to the future are determined by deriving implied statements of past or current fact from the statement as to the future and determining whether those implied statements were false.<sup>20</sup> As the Court noted in *Sunair Holidays*:

The person who makes the promise may be implying that his present intention is to keep it or that he has at present the power to perform it. The person who makes the forecast may be implying that he now believes that his prediction will come true or that he has the means of bringing it to pass.<sup>21</sup>

### *B Approach under the TPA Prior to the Introduction of Section 51A*

Division 1 of part V of the *TPA* (and the various state and territory fair trading statutes) contains several provisions that prohibit the making of misleading representations, the most notorious of which is the general prohibition against misleading or deceptive conduct.<sup>22</sup> Despite the broad scope of these provisions, those claiming that they were misled by statements about future matters (such as misleading promises or predictions) experienced difficulties establishing that such statements contravened the *TPA*. This is because judges hearing misleading conduct cases prior to the enactment of the Facilitating Provisions applied the

<sup>19</sup> [1973] 2 All ER 1233, 1236 (MacKenna J for Stephenson LJ, Thesiger and MacKenna JJ).

<sup>20</sup> In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483, Bowen LJ made the following oft-quoted comment:

the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

See also *Smith v Land & House Property Corporation* (1884) 28 Ch D 7, 15 (Bowen LJ); *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, 688 (McHugh JA).

<sup>21</sup> [1973] 2 All ER 1233, 1236 (MacKenna J for Stephenson LJ, Thesiger and MacKenna JJ).

<sup>22</sup> *TPA* s 52; *Fair Trading Act 1992* (ACT) s 12; *Fair Trading Act 1987* (NSW) s 42; *Consumer Affairs and Fair Trading Act 1990* (NT) s 42; *Fair Trading Act 1989* (Qld) s 38; *Fair Trading Act 1987* (SA) s 56; *Fair Trading Act 1990* (Tas) s 14; *Fair Trading Act 1999* (Vic) s 9; *Fair Trading Act 1987* (WA) s 10.

same principles that had been adopted at common law to determine misrepresentation and deceit claims.<sup>23</sup> As a result, a representation as to the future would only constitute misleading or deceptive conduct (or breach one of the more specific prohibitions against false or misleading representations) if it encompassed an implied representation of existing or past fact that could be shown to be false.<sup>24</sup> This generally required the representee to prove that, at the time the representation was made, the representor did not intend or was not able to honour a promise they had made, or did not genuinely believe or have the means to bring about a prediction they had made.<sup>25</sup> Section 51A was introduced in 1986 to overcome difficulties associated with proving that statements about future matters (such as promises or predictions) were false or misleading.

### III THE FACILITATING PROVISIONS

#### *A When Will the Facilitating Provisions Operate?*

The Facilitating Provisions have no application unless the representor has made a representation as to a future matter. Examples of such representations include statements about what a person will do in the future, promises and predictions. As noted above, a representation as to an event or conduct in the future will often imply a representation as to the representor's present state of mind. In *Ting v Blanche*, Hill J held that:

it is not ... correct to treat a representation as to an event or conduct in the future ... as not being a representation with respect to a future matter merely because it implies a representation as to the maker's present state of mind.<sup>26</sup>

It was held in some early cases interpreting s 51A that, where a representation expresses a belief about future events, this may not constitute a representation as to the future. In *Jacques v Cut Price Deli Pty Ltd* Spender J held that, where a person *expressly* represents that they *believed* that something would occur in the future, the representation is about 'that person's present state of mind and s 51A has no application.'<sup>27</sup> In *Miba Pty Ltd v Nescor Industries Group Pty Ltd* ('*Miba*'), Merkel J held that a statement about the capacity of a food outlet to

<sup>23</sup> See, eg, *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347, 372 (Toohey J). See also *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487, 495 (Franki J); *Bill Acceptance Corporation Ltd v GWA Ltd* (1983) 50 ALR 242, 246–7, 250 (Lockhart J); *Stack v Coast Securities No 9 Pty Ltd* (1983) 46 ALR 451, 456 (Fitzgerald J); *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ).

<sup>24</sup> *Hatt v Magro* (2007) 34 WAR 256, 267 (Steytler P).

<sup>25</sup> See, eg, *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J); *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487, 495 (Franki J); *Bill Acceptance Corporation Ltd v GWA Ltd* (1983) 50 ALR 242, 250 (Lockhart J); *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347, 372 (Toohey J).

<sup>26</sup> (1993) 118 ALR 543, 553.

<sup>27</sup> [1993] ATPR (Digest) ¶46-102, 53 436. In *Ting v Blanche* (1993) 118 ALR 543, 553, Hill J declined to reach a view as to whether express representations as to the representor's present state of mind concerning a future matter could nevertheless be viewed as a representation as to a future matter.

achieve sales based on projections was properly characterised as a statement as to present belief.<sup>28</sup> His Honour reached this conclusion because the statement in which the representation was contained referred to the representor's 'belief' that the projected sales would be achieved and stated the grounds for the sales projections.<sup>29</sup> Similarly, in his dissenting judgment in *Sykes v Reserve Bank of Australia* ('*Sykes*'), Emmett J held that a statement by the Reserve Bank of Australia that 'plastic notes are *expected* to be introduced ... from sometime after Easter 1991'<sup>30</sup> did not contain a representation as to a future matter.<sup>31</sup> Emmett J held that the statement contained a representation as to the bank's present expectation, not a prediction about a future matter.<sup>32</sup>

The fact that the common law made statements containing predictions or promises actionable by implying representations of current fact from those statements might explain the tendency in the early cases to find that representations involving the representor's present state of mind were not with respect to future matters. However, there is no reason why implied statements of current fact cannot relate to a future matter. For example, a person may impliedly represent that they currently believe they will honour a promise to do something in the future. Can it not be said that this representation nevertheless relates to the future? This possibility was picked up by Heerey J in *Sykes*. Heerey J held that the representation was with respect to a future matter because '[t]he release of the notes was a "matter", and it was something which was going to happen, or not happen, in the future.'<sup>33</sup> Heerey J distinguished the case before him from *Miba* on the basis that the Bank did not expressly specify the grounds for its expectation.<sup>34</sup>

In *Digi-Tech (Australia) Ltd v Brand*,<sup>35</sup> the Court of Appeal of New South Wales took things one step further and stated that it disagreed with the approach adopted in *Miba*. The Court overruled the trial judge's finding that representations made by the respondent were not representations as to the future because they were explicitly expressed to be a statement of belief and were accompanied by a statement of the grounds upon which the belief was based.<sup>36</sup> Furthermore, the Court expressly noted that, whilst 'the expression of a belief involves the expression of [the representor's present] state of mind', a person's state of mind can relate to future matters.<sup>37</sup> The Court then referred to Hill J's observation in *Ting v Blanche* that the words 'with respect to' in s 51A(1) are 'words of the

<sup>28</sup> (1996) 141 ALR 525, 533–4.

<sup>29</sup> *Ibid.*

<sup>30</sup> (1998) 88 FCR 511, 527 (emphasis added).

<sup>31</sup> *Ibid* 535–6.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* 515. Sundberg J also held that the representation in question was with respect to a future matter: at 519.

<sup>34</sup> *Ibid* 515.

<sup>35</sup> (2004) 62 IPR 184.

<sup>36</sup> *Ibid* 203–6 (Sheller, Ipp and McColl JJA).

<sup>37</sup> *Ibid* 204.

widest possible scope' and only require there to be some connection between the representation and 'a future matter'.<sup>38</sup>

*B Common Attribute: Representation as to the Future Is Misleading unless Based on Reasonable Grounds*

Having identified when the Facilitating Provisions will operate, it is now necessary to consider their effect. Subsection (1) of the Facilitating Provisions in the *TPA* and all the state and territory fair trading statutes provides that a representation as to the future shall be taken to be misleading unless the representor had reasonable grounds for making the representation.<sup>39</sup> The representee is therefore relieved of the requirement to prove that the representation was misleading. Instead, 'the breach inquiry ... is focused on the degree of care taken'.<sup>40</sup> As a result of the introduction of the Facilitating Provisions, the inquiry as to whether a representation as to the future is misleading is no longer limited to considering whether implied representations of past or present fact are false,<sup>41</sup> although it is still open to the applicant to argue that representations as to the future are misleading in this way.<sup>42</sup>

In *Futuretronics International Pty Ltd v Gadzhis*, Ormiston J agreed that a promise to do something in the future may be misleading if, at the time of making the promise, the promisor did not intend to perform the promise or had no capacity or ability to perform it.<sup>43</sup> Ormiston J then noted that

<sup>38</sup> *Ibid*, quoting *Ting v Blanche* (1993) 118 ALR 543, 553 (Hill J). Hill J's comments were based on Dickson J's comments in the Canadian decision of *Nowegijick v The Queen* [1983] 1 SCR 29, 39 (Dickson J for the Court), which had already been adopted with approval by Toohey J in *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513, 533.

<sup>39</sup> *TPA* ss 51A(1) (which applies to the civil provisions in pt V div 1), 75AZB(1) (which applies to the criminal provisions in pt VC div 2); *Fair Trading Act 1992* (ACT) s 11(1); *Fair Trading Act 1987* (NSW) s 41(1); *Consumer Affairs and Fair Trading Act 1990* (NT) s 41(1); *Fair Trading Act 1989* (Qld) s 37(1); *Fair Trading Act 1987* (SA) s 54(1); *Fair Trading Act 1990* (Tas) s 11(1); *Fair Trading Act 1999* (Vic) s 4(1); *Fair Trading Act 1987* (WA) s 9(1). Note that the *TPA* provision (like the other prohibitions in the *TPA*) applies to corporations, while the state and territory provisions (like the other prohibitions in the state and territory statutes) apply to persons.

<sup>40</sup> Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (2<sup>nd</sup> ed, 2003) 114.

<sup>41</sup> In fact, some have argued that the inquiry should never have been limited in this way. For example, in *Adelaide Petroleum NL v Poseidon Ltd* (1988) ATPR ¶40-901, 49 699, French J stated that:

To the extent that the exclusion of 'mere' unfulfilled promises or predictions from the scope of s 52 rests upon the absence of a statement of past or existing fact it may be suspect. And in so far as that limiting requirement derives from the common law, it may yet be shown to be an unjustifiable gloss on the words of the statute.

See also D W Greig and J L R Davis, *The Law of Contract* (1987) 813–15; Justice R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250, 259–60.

<sup>42</sup> It has been suggested that, where the representor had reasonable grounds for making the representation as to the future, the representation is not to be treated as misleading. Ormiston J made obiter comments to this effect in *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 240. However, s 51A does not provide for this conclusion in its terms: see Lockhart, above n 40, 112–13. See also Gillies, 'Representations as to the Future', above n 17, 102–4; Gillies, 'Misrepresentations as to Future Matters', above n 16, 30–2.

<sup>43</sup> [1992] 2 VR 217, 239–40.



by reason of ... s 51A ... the inquiry is apparently broader for one must *also* inquire whether at the relevant time the promisor had reasonable grounds for making any implicit representation (where relevant) that he intended in the future to perform his contractual promise ...<sup>44</sup>

Steytler P (Wheeler JA agreeing) recently made a similar observation in *Hatt v Magro*, noting that s 51A ‘was intended to provide an additional avenue by which an applicant might prove that conduct involving a representation with respect to a future matter was misleading or likely to mislead.’<sup>45</sup>

The addition of the Facilitating Provisions therefore introduced an additional way to prove that a representation as to the future was misleading. The representation will be deemed to be misleading if it was made without reasonable grounds. Furthermore, as the Facilitating Provisions focus attention on the existence of reasonable grounds, evidence of genuine belief in the representation will no longer negate a finding that the representation was misleading if there were no reasonable grounds for that belief.<sup>46</sup>

### *C Substantial Difference: When Will the Representor Be Deemed Not to Have Had Reasonable Grounds?*

Subsection (2) of the Facilitating Provisions in the *TPA* and all the state and territory fair trading statutes further assists the representee. The representor is deemed not to have had reasonable grounds in certain circumstances. However, these deeming provisions are worded differently in different jurisdictions. Furthermore, the *McGrath* decision suggests that the different wordings produce substantively different outcomes.

The fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia expressly provides that the onus of establishing reasonable grounds for making a representation about a future matter is on the representor in both civil and criminal cases.<sup>47</sup> Thus, in these jurisdictions, it is clear that where a representation as to the future is made the representor bears the legal onus of proving reasonable grounds.<sup>48</sup> If this onus is not discharged, the representor will be deemed not to have had reasonable grounds and, in turn, their representation will be taken to be misleading.

The situation is less clear under the *TPA* and the fair trading legislation in the Australian Capital Territory, South Australia and Tasmania. This legislation provides that the representor is deemed not to have had reasonable grounds for making the representation ‘unless [the representor] adduces evidence to the

<sup>44</sup> *Ibid* 239 (emphasis added).

<sup>45</sup> (2007) 34 WAR 256, 270 (Steytler P); see also at 277 (Wheeler JA).

<sup>46</sup> *Cummings v Lewis* (1993) 41 FCR 559, 565 (Sheppard and Neaves JJ).

<sup>47</sup> *Fair Trading Act 1987* (NSW) s 41(2); *Consumer Affairs and Fair Trading Act 1990* (NT) s 41(2); *Fair Trading Act 1989* (Qld) s 37(2); *Fair Trading Act 1999* (Vic) s 4(2); *Fair Trading Act 1987* (WA) s 9(2).

<sup>48</sup> See, eg, *Lewarne v Momentum Productions Pty Ltd* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007) [82] (‘*Lewarne*’).

contrary'.<sup>49</sup> These words do not, in terms, place the legal onus of proving reasonable grounds on the representor. The interpretation that has been given to sub-s (2) in the *TPA* and in the fair trading legislation in the Australian Capital Territory, South Australia and Tasmania is discussed in the following Part of this article.

#### IV THE ONUS CAST BY SECTION 51A(2)

Contrary views have been expressed about the effect of s 51A(2). On one view, a party who has made a representation about a future matter will only avoid the deeming effect if they are able to establish, on the balance of probabilities, that they had reasonable grounds for making the representation.<sup>50</sup> This view favours the representee. If the representor is unable to discharge this burden, the representor will be deemed not to have had reasonable grounds for making the representation and, as a result of s 51A(1), the representation will be taken to be misleading. On the other view, the deeming provision does not have the effect of placing the legal burden of proving reasonable grounds on the representor. Rather, provided the representor adduces some evidence that they had reasonable grounds for making the representation, the deeming provision will not operate.<sup>51</sup> In order for the representee to rely on the Facilitating Provision to establish that the representation was misleading, they will need to establish, on the balance of probabilities, that the representor lacked reasonable grounds for making the representation. This Part of the article provides a review of the cases that have considered the operation of s 51A(2) and its enactment history.

##### A Early Case Law

In early cases, it was held that the effect of s 51A was to place on the representor the burden of proving that they had reasonable grounds for making a representation as to the future. For example, in *Adelaide Petroleum NL v Poseidon Ltd*, French J held that '[t]he burden of establishing the existence of reasonable grounds is on the party making the representation.'<sup>52</sup> In *Wheeler Grace & Pierucci Pty Ltd v Wright*, Lee J had to determine whether s 51A should have retrospective effect.<sup>53</sup> His Honour decided that it should not, on the basis that the section 'had a substantive effect upon the rights of the parties to

<sup>49</sup> *TPA* ss 51A(2) (which applies to the civil provisions in *TPA* pt V div 1), 75AZB(2) (which applies to the criminal provisions in *TPA* pt VC div 2). The state and territory legislation has slightly different wording — it is directed to persons not corporations: see, eg, *Fair Trading Act 1992* (ACT) s 11(2); *Fair Trading Act 1987* (SA) s 54(2); *Fair Trading Act 1990* (Tas) s 11(2).

<sup>50</sup> This view has been adopted in many cases: see, eg, *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J); *Lewarne* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007) [82]. For a review of the relevant authorities, see *McGrath* (2008) 165 FCR 230, 277–83 (Allsop J).

<sup>51</sup> This view was advanced by Emmett J in *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [46] and accepted by Allsop J in *McGrath* (2008) 165 FCR 230, 283.

<sup>52</sup> [1988] ATPR ¶40-901, 49 700.

<sup>53</sup> (1989) 16 IPR 189.

litigation<sup>54</sup> because it reversed the onus of proof and required the representor to establish that they had reasonable grounds for making the representation.<sup>55</sup>

It was not until 1990, four years after s 51A was introduced, that an alternative interpretation of s 51A(2) was first considered. In *Kellcove Pty Ltd v Australian Motor Industries Ltd* ('*Kellcove*'), a case also concerned with the possible retrospective application of s 51A, Woodward J noted that s 51A(2) 'does not, in terms, reverse the onus of proof'.<sup>56</sup> However, his Honour also noted, without providing reasons, that 'it could be argued that [the subsection] has that effect.'<sup>57</sup> Woodward J did not explore this issue further since it was not fully argued before him and because he was of the opinion that the representor was able to establish that it had reasonable grounds for making the representations in question.<sup>58</sup>

Woodward J's observation about the terms of s 51A(2) went largely unnoticed.<sup>59</sup> In the decade that followed *Kellcove*, the courts continued to construe s 51A(2) as placing the burden of proof on the representor to establish that they had reasonable grounds for making the representation. For example in *Ting v Blanche*, a case commonly cited in support of the proposition that s 51A(2) places the legal onus of proving reasonable grounds on the representor, Hill J stated:

What s 51A does, in a practical sense, in cases where it applies, is to cast the burden of proof upon the respondent corporation who has made a representation about a future matter to show that in making that representation it had reasonable grounds for so doing.<sup>60</sup>

### B Increased Attention Paid to Wording of Section 51A(2)

Earlier this decade, judges began paying increased attention to the wording used in s 51A(2). In *Blacker v National Australia Bank Ltd*, Katz J noted that, 'in spite of its reference merely to the adducing of certain evidence by the [representor] corporation',<sup>61</sup> it has been accepted in the cases<sup>62</sup> that the effect of the subsection is to impose on the representor the burden of proving that they had reasonable grounds for making the representation. Katz J did not explore the

<sup>54</sup> *Ibid* 205.

<sup>55</sup> *Ibid* 206. See also *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, 690 (McHugh JA).

<sup>56</sup> (Unreported, Federal Court of Australia, Woodward J, 6 July 1990) 97.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> In fact, this aspect of the decision has only been referred to in one subsequent case and even then only in passing: see *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* (2003) 60 IPR 296, 333–4 (Dowsett J) ('*Danoz Direct*').

<sup>60</sup> (1993) 118 ALR 543, 552. See also *Phoenix Court Pty Ltd v Melbourne Central Pty Ltd* [1997] ATPR (Digest) ¶46-179, 54 432 (Goldberg J) ('*Phoenix Court*'); *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] ATPR ¶41-704, 43 021 (Drummond J).

<sup>61</sup> [2000] FCA 681 (Unreported, Katz J, 25 May 2000) [83].

<sup>62</sup> *Ibid*, citing *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J); *Phoenix Court* [1997] ATPR (Digest) ¶46-179; 54 432 (Goldberg J); *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] ATPR ¶41-704, 43 021 (Drummond J).

issue further because the representor did not argue for a different construction of s 51A(2).<sup>63</sup>

The fact that s 51A(2) does not expressly state that the representor bears the onus of establishing reasonable grounds was directly brought to the New South Wales Court of Appeal's attention in *City of Botany Bay Council v Jazabas Pty Ltd* ('Jazabas').<sup>64</sup> Jazabas alleged that the Council had provided it with information that was misleading or deceptive in breach of ss 52 and 53A<sup>65</sup> of the *TPA*. It also made a claim under the corresponding provisions (ss 42 and 45) of the *Fair Trading Act 1987* (NSW) ('*NSW FTA*'). Jazabas sought to rely on s 51A of the *TPA* and the equivalent provision in the *NSW FTA* (s 41) to establish that the representations in question were misleading. Like s 51A(1) of the *TPA*, s 41(1) of the *NSW FTA* provides that a representation as to the future will be taken to be misleading if the representor did not have reasonable grounds for making the representation. However, as noted above, s 41(2) of the *NSW FTA* expressly provides that the onus of establishing reasonable grounds for making a representation about a future matter is on the representor. Given the different wording used in s 51A(2) it is not clear that the *TPA* provides for the same outcome. However, Mason P (Beazley JA agreeing) ultimately concluded that:

Despite the language of s 51A(2) of the *Trade Practices Act*, which refers merely to the adducing of evidence [of reasonable grounds], the effect of s 51A(2) is ... to impose on the representor the burden of persuading the trier of fact that there were reasonable grounds for making the representations ...<sup>66</sup>

Given that s 51A(2) of the *TPA* and s 41(2) of the *NSW FTA* are worded differently (and that s 41(2) uses the language in which s 51A was originally framed before the Bill proposing its introduction was amended),<sup>67</sup> it is unfortunate that Mason P did not justify his assertion that the two subsections have the same effect.

### C Universal Sports

*Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* ('*Universal Sports*') was the first case in which serious attention was paid to the possibility that s 51A(2) does not place the legal burden of

<sup>63</sup> *Blacker v National Bank of Australia Ltd* [2000] FCA 681 (Unreported, Katz J, 25 May 2000) [83].

<sup>64</sup> [2001] ATPR (Digest) ¶46-210.

<sup>65</sup> *TPA* s 53A deals with false representations and other misleading or offensive conduct in relation to land. As it is contained in *TPA* pt V div 1, s 51A can be relied upon to establish breach.

<sup>66</sup> *Jazabas* [2001] ATPR (Digest) ¶46-210, 52 315 (Mason P); see also at 52 313 (Beazley JA). In support, Mason P cited *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J), and *Blacker v National Australia Bank Ltd* [2000] FCA 681 (Unreported, Katz J, 25 May 2000) [83]. This approach is consistent with Cooper J's observation in *Cummings v Lewis* (1993) 41 FCR 559, 571, that 'ss 41 and 42 of the *Fair Trading Act* [1987 (NSW)] are effectively the same as the provisions of, respectively, ss 51A and 52 of the *Trade Practices Act 1974* (Cth); the latter applying to corporations, the former to persons.'

<sup>67</sup> See below nn 118–20 and accompanying text.

proving reasonable grounds on the representor.<sup>68</sup> This case involved an allegation that, in breach of ss 52 and 54<sup>69</sup> of the *TPA*, Universal Sports had made false representations in connection with the promotion of a golfing competition it was organising. Universal Sports consented to orders that it had breached the *TPA*. However, the ACCC continued the proceeding against Mr Kotowicz, Universal Sports' Chief Executive, on the basis that he was 'knowingly concerned and a party to' Universal Sports' contravention of the *TPA*.<sup>70</sup>

In order for Mr Kotowicz to be liable, the ACCC was first required to prove that Universal Sports had breached the *TPA*.<sup>71</sup> A question arose as to whether s 51A could be relied on to assist in establishing a breach of s 52. Because of the consent orders, Universal Sports was no longer a party to the proceeding and, therefore, it was no longer possible for it to place evidence before the Court.<sup>72</sup> Emmett J noted different views about how s 51A(2) operated in such circumstances.<sup>73</sup> On one view, the deeming effect of s 51A(2) can only be displaced by evidence adduced by the corporation which made the impugned representation.<sup>74</sup> If this interpretation prevailed, this would create an irrebuttable presumption that Universal Sports did not have reasonable grounds for making the representation (and, in turn, that its conduct was to be taken to be misleading pursuant to s 51A(1)).<sup>75</sup> Another possible construction would allow Mr Kotowicz to rebut the presumption by leading evidence that Universal Sports had reasonable grounds for making the representations it made, although Emmett J noted that this 'is not what the section says'.<sup>76</sup> Finally, it is possible that the deeming effect of s 51A applies only as against a principal offender; this was the interpretation preferred by Emmett J.<sup>77</sup>

<sup>68</sup> [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002).

<sup>69</sup> *TPA* s 54 provides that:

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

<sup>70</sup> *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [1]–[2].

<sup>71</sup> An applicant may sue a person involved in a contravention without proceeding against the primary party: *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6, 9 (French J). However, it will first be necessary to establish that there has been a breach of the *TPA* by a primary party because a claim can only be made under s 82 if there has been a contravention of one of the provisions specified in that section.

<sup>72</sup> *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [43].

<sup>73</sup> *Ibid* [43]–[44].

<sup>74</sup> *Ibid* [43].

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* [44]. Cf *King v GIO Australia Holdings Ltd* (2001) 184 ALR 98, 110–11, where Moore J stated that, 'if the word "it" in s 51A(2) is treated as a reference to a person or body on whom s 51A might operate to deem a corporation's conduct misleading', the deeming effect of s 51A(2) could be avoided provided the person involved in the contravention led evidence that established the primary offender had reasonable grounds for making the relevant representations.

<sup>77</sup> *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [45]. Kenny J, in *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004) [37], cited *Universal Sports* in support of her conclusion that the

In addition, Emmett J went on to note that:

Another question concerning the effect of s 51A(2) is whether the provision does no more than require a corporation to go into evidence. That is to say, it does not ultimately reverse the onus but simply provides that the deeming takes effect *unless* the corporation adduces some evidence to the contrary. Once such evidence is adduced, it is for the Court to make a judgment, on the balance of probabilities, having regard to all the evidence, as to whether the corporation had reasonable grounds for making the representation. If an applicant elects to adduce no evidence as to that question, then the only evidence before the Court would be that adduced by the corporation. Whether that is adequate to establish that the corporation had reasonable grounds for making the representations is a matter for the Court. However, once the corporation has adduced some evidence, there is no deeming arising from s 51A(2).<sup>78</sup>

Emmett J ultimately dismissed the claim on the basis that Mr Kotowicz did not have a level of knowledge necessary to make him liable as an accessory.<sup>79</sup> However, his Honour stated that had the question of contravention of s 52 arisen he would have decided it without any reference to the deeming effect of s 51A even though both the ACCC and Mr Kotowicz adduced evidence as to whether Universal Sports had reasonable grounds.<sup>80</sup> Thus, his Honour's observation that the deeming effect of s 51A(2) is avoided where the representor adduces evidence of reasonable grounds is obiter.

#### D Approach Adopted in Cases after Universal Sports

Emmett J's interpretation of s 51A(2) in *Universal Sports* was referred to in several subsequent cases. In *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* ('*Danoz Direct*'), Dowsett J noted that s 51A(2) 'places an onus upon the representor at least to lead evidence of [reasonable] grounds.'<sup>81</sup> Dowsett J then referred to the Explanatory Memorandum accompanying the Bill that introduced s 51A, which 'stated that the intention underlying the enactment of s 51A was to place the onus of establishing reasonable grounds upon the relevant representor.'<sup>82</sup> Dowsett J lends limited support to the interpretation given to s 51A(2) by Emmett J in *Universal Sports*. He notes that although Emmett J's interpretation is inconsistent with the Explanatory Memorandum<sup>83</sup> it 'accurately reflects the wording of s 51A.'<sup>84</sup> However, Dowsett J also noted that '[m]ost ... authorities suggest that the effect of s 51A is

ACCC could not rely on s 51A in the claims against an accessory where it was not proceeding with its claim against the primary offender.

<sup>78</sup> *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [46] (emphasis in original).

<sup>79</sup> *Ibid* [64], [70], [82], [86]–[87].

<sup>80</sup> *Ibid* [47].

<sup>81</sup> (2003) 60 IPR 296, 316.

<sup>82</sup> *Ibid* 333, citing Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) 21.

<sup>83</sup> However, the Explanatory Memorandum to which Dowsett J referred concerned the version of s 51A(2) originally proposed by the Trade Practices Revision Bill 1986 (Cth), which expressly provided for a reversal of the onus of proof: Trade Practices Revision Bill 1986 (Cth) cl 21.

<sup>84</sup> *Danoz Direct* (2003) 60 IPR 296, 333.

to place the ultimate burden of proof of reasonable grounds upon the representor.<sup>85</sup> Unfortunately, Dowsett J's decision did not advance the issue because his Honour did not need to choose between the competing constructions of s 51A(2). This is because he concluded that Danoz Direct had failed to lead evidence that demonstrated that it had reasonable grounds for many of the representations as to the future that it had made.<sup>86</sup> Therefore, on either construction of s 51A(2), Danoz Direct's representations would be deemed to be misleading. Dowsett J gave no indication as to which interpretation of s 51A(2) he would have adopted had this not been the case.

Emmett J's suggested interpretation of s 51A(2) was dealt with more directly in *Australian Competition and Consumer Commission v Kaye*.<sup>87</sup> In this case, Kenny J rejected a submission based on *Universal Sports* that s 51A(2) did not place the burden of proving reasonable grounds on the representor.<sup>88</sup> In support of this conclusion, Kenny J referred to Dowsett J's observation in *Danoz Direct* that most authorities indicate that the effect of s 51A is to place the ultimate burden of proof of reasonable grounds upon the defendant.<sup>89</sup> Nicholson J adopted a similar approach in *ACCC v Emerald Ocean Distributors Pty Ltd* and decided to 'follow the weight of ... authority, at least until the issue is authoritatively decided otherwise.'<sup>90</sup>

A submission, based on Emmett J's comments in *Universal Sports*, that the representor did not bear the legal onus of proving reasonable grounds was also rejected in *Downey v Carlson Hotels Asia Pacific Pty Ltd* ('*Carlson Hotels*').<sup>91</sup> The representor submitted that, once it put evidence forward as to the existence of reasonable grounds, the deeming effect of s 51A(2) would only apply if the representee was able to establish, on the balance of probabilities, that reasonable grounds for making the representation did not exist at the time the representation was made.<sup>92</sup> Keane JA (Williams JA and Atkinson J agreeing) rejected the submission for two reasons. First, Emmett J's comments were obiter and the submission was 'against the trend of established authority.'<sup>93</sup> Secondly, Keane JA thought that Emmett J's observations in *Universal Sports* did not in fact support the representor's submission. His Honour stated that he did 'not read the reasons of Emmett J to go so far as to suggest that the burden shifts back to a

<sup>85</sup> Ibid 334.

<sup>86</sup> Ibid 335–8.

<sup>87</sup> [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004).

<sup>88</sup> Ibid [133].

<sup>89</sup> Ibid. Although, interestingly, Kenny J stated that Dowsett J observed that 'most of the authorities indicate that the effect of s 51A is to place the *evidentiary* burden of reasonable grounds on the representor' (emphasis added). However, it seems that Kenny J was not using the phrase 'evidentiary burden' in the same way as the Senate Standing Committee for the Scrutiny of Bills (which used it to indicate that the representor simply had to lead evidence, not discharge the onus of proof). See below n 162 and accompanying text.

<sup>90</sup> [2006] ATPR ¶42-096, 44 737.

<sup>91</sup> [2005] QCA 199 (Unreported, Williams, Keane JJA and Atkinson J, 10 June 2005).

<sup>92</sup> Ibid [126] (Keane JA).

<sup>93</sup> Ibid [127]; see also at [1] (Williams JA), [145] (Atkinson J). In support, Keane JA cited *Danoz Direct* (2003) 60 IPR 296, 333–4 (Dowsett J); *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004) [133].

representee once evidence has been adduced by the representor.<sup>94</sup> Rather, Keane JA gave Emmett J's comments a narrow interpretation, holding that they simply 'advanc[e] the common sense proposition that, when a representor does adduce evidence attesting to reasonable grounds, it will be a matter for the court to determine if that evidence does establish reasonable grounds' before the deeming provision will cease to operate.<sup>95</sup> Keane JA appeared to be implicitly suggesting that Emmett J's comments could be reconciled with an interpretation of s 51A(2) that places the burden of proving reasonable grounds on the representor. With respect, this seems inconsistent with Emmett J's final comment that 'once the corporation has adduced *some* evidence, there is no deeming arising from s 51A(2).'<sup>96</sup>

In the relatively recent case of *Lewarne v Momentum Productions Pty Ltd* ('*Lewarne*'), Stone J was 'not inclined to accept [Emmett J's] interpretation of s 51A(2).'<sup>97</sup> However, unlike the judges in the cases discussed above, her Honour did not simply rest her conclusion on the weight of authority in which it had been held that the representor bears the onus of proof. Rather, her Honour focused on the meaning of the phrase 'evidence to the contrary' in s 51A(2). Stone J stated:

I would read the phrase 'evidence to the contrary' as meaning evidence adduced by the person making the representation that, to the satisfaction of the Court, establishes that there were reasonable grounds for making the representation. In other words, I interpret the subsection as providing that the person making the representation can only avoid the deeming provision by establishing on the usual balance of probabilities that there were reasonable grounds for making the representation.<sup>98</sup>

Stone J's reasoning expressly rejects the interpretation Emmett J gave to s 51A(2). However, in *Fubilan Catering Services Ltd v Compass Group (Australia) Pty Ltd* ('*Fubilan*'),<sup>99</sup> a decision handed down just two days after *Lewarne*, French J reached the opposite conclusion. French J acknowledged that there are authorities which say that s 51A(2) casts a burden of proof on the representor.<sup>100</sup> However, his Honour lent his support to the interpretation of s 51A(2) advocated by Emmett J in *Universal Sports* and held that s 51A(2)

certainly casts the 'evidential burden' on the respondent in the sense of an obligation to adduce evidence on the issue of whether there were reasonable grounds for making the representation. It does not impose on the representor the legal or persuasive burden to prove that it had reasonable grounds for mak-

<sup>94</sup> *Carlson Hotels* [2005] QCA 199 (Unreported, Williams, Keane JJA and Atkinson J, 10 June 2005) [128].

<sup>95</sup> *Ibid* [127].

<sup>96</sup> *Universal Sports* [2002] FCA 1276 (Unreported, Emmett J, 23 October 2002) [46] (emphasis added).

<sup>97</sup> [2007] FCA 1136 (Unreported, Stone J, 7 August 2007) [82].

<sup>98</sup> *Ibid*.

<sup>99</sup> [2007] FCA 1205 (Unreported, French J, 9 August 2007).

<sup>100</sup> *Ibid* [545], citing *Ting v Blanche* (1993) 118 ALR 543; *Phoenix Court* [1997] ATPR (Digest) ¶46-179, 54 432 (Goldberg J).



ing the representations alleged. As Emmett J said of s 51A in *Universal Sports* the section does not reverse the onus of proof when it applies. It merely requires the alleged representor to ‘adduce evidence to the contrary’.<sup>101</sup>

French J did not refer to the interpretation given to the phrase ‘evidence to the contrary’ by Stone J in *Lewarne*, although by accepting the interpretation given to s 51A(2) by Emmett J in *Universal Sports* he implicitly dismissed the interpretation of the phrase adopted by her Honour.

#### E McGrath

Given that contrary interpretations were given to s 51A(2) in *Lewarne* and *Fubilan*, the thorough consideration of the intended operation of s 51A(2) by the Full Federal Court in *McGrath* was timely.

Australian Naturalcare Products Pty Ltd (‘ANP’) and Pan Pharmaceuticals Ltd (‘Pan’) entered into a manufacturing agreement in April 2002. The object of this agreement was to specify which of the parties was responsible for ensuring that certain tasks were performed in accordance with the *Australian Code of Good Manufacturing Practice for Therapeutic Goods — Medicinal Products* (‘Code’).<sup>102</sup> When the Therapeutic Goods Administration (‘TGA’) suspended Pan’s licence in April 2003, following an investigation triggered by consumers’ adverse reactions to one of Pan’s products,<sup>103</sup> Pan was unable to supply ANP. As ANP sourced most of its stock from Pan, it suffered considerable business losses. ANP lodged a proof of debt.<sup>104</sup> Pan’s liquidators (McGrath) only allowed ANP amounts in relation to the goods recalled and the orders accepted but not supplied.<sup>105</sup> ANP claimed, inter alia, that further loss had been suffered as a result of misleading or deceptive conduct engaged in by Pan that led ANP to believe it would not experience difficulty obtaining supplies from Pan.

In support of its *TPA* claim, ANP relied on two representations. First, ANP claimed that Pan represented that it would comply with the *Code* (the ‘quality assurance representation’). Pan was said to have made this representation by entering into the manufacturing agreement in April 2002. Secondly, ANP claimed that Pan represented that it would continue to be in a position to be able to supply all or most of ANP’s requirements (the ‘supply representation’). This representation was said to have been made by Pan’s Chief Executive Officer when he gave various assurances to ANP that Pan was compliant with the *Code* and that it was ready and willing to continue to supply ANP in the quantities it customarily acquired.<sup>106</sup> These assurances were given in 1995, 1996 and 1999. Pan admitted that it was not compliant with the *Code* between 1 May 2002 and

<sup>101</sup> *Fubilan* [2007] FCA 1205 (Unreported, French J, 9 August 2007) [545].

<sup>102</sup> *McGrath* (2008) 165 FCR 230, 237 (Emmett J), citing Therapeutic Goods Administration, Department of Community Services and Health (Cth), *Australian Code of Good Manufacturing Practice for Therapeutic Goods — Medicinal Products* (5<sup>th</sup> ed, 1990).

<sup>103</sup> *McGrath* (2008) 165 FCR 230, 238.

<sup>104</sup> *Ibid* 233.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid* 237.

28 April 2003.<sup>107</sup> However, it argued that this did not establish that it was not compliant when these assurances were made or that it did not have reasonable grounds for representing that it would be in a position to continue to supply ANP. Pan adduced evidence concerning audits of its operations conducted by the TGA between 1995 and April 2002 and stressed that, following all of the various audits conducted during this time, its licence remained on foot.<sup>108</sup>

At trial, Gyles J inferred from the serious nature of the breaches of the *Code* uncovered in April 2003 that Pan was in serious breach of the *Code* throughout all of 2002.<sup>109</sup> Gyles J held that both the quality assurance representation and the supply representation were misleading because Pan had not established that it had reasonable grounds for making them.<sup>110</sup>

On appeal, Gyles J's finding that the supply representation was misleading was rejected by all three judges.<sup>111</sup> However, Gyles J's finding that the quality assurance representation was misleading was upheld by a majority (Allsop and Stone JJ, Emmett J dissenting).<sup>112</sup> Although they disagreed in outcome, Emmett and Allsop JJ agreed that s 51A(2) of the *TPA* did not place the legal onus of proof with respect to reasonable grounds on Pan.

Emmett J repeated the opinion he expressed in *Universal Sports* about the effect of s 51A(2):

Under s 51A(2), the maker of the representation with respect to any future matter is to be deemed not to have had reasonable grounds for making the representation unless it adduces evidence to the contrary. However, if evidence is adduced by a representor to the effect that the representor had reasonable grounds for making the representation, the deeming provision will not operate. Where the representor adduces such evidence, it is then a matter for the Court to determine, on the balance of probabilities in the ordinary way, whether or not the representor had reasonable grounds for making the representation.<sup>113</sup>

Emmett J concluded that the evidence Pan put before the Court established, on the balance of probabilities, that Pan had reasonable grounds for making the supply representation.<sup>114</sup> Thus even if, contrary to Emmett J's interpretation of s 51A(2), Pan bore the onus of proving reasonable grounds, this onus had been discharged. Emmett J's observations about the operation of s 51A(2) were, however, integral to his finding that the quality assurance representation was not misleading. Pan adduced evidence that it was audited on 30 April 2002 and that on 28 June 2002 it was issued with a further licence. Emmett J was prepared to infer from this evidence that the audit on 30 April 2002 disclosed no serious failure to comply with the *Code*. This, according to Emmett J, was evidence

<sup>107</sup> Ibid 240.

<sup>108</sup> Ibid 242.

<sup>109</sup> *Re Pan Pharmaceuticals Ltd (in liq); Australian Naturalcare Products Pty Ltd v McGrath* (2006) 237 ALR 389, 415.

<sup>110</sup> Ibid 415–16.

<sup>111</sup> *McGrath* (2008) 165 FCR 230, 242–3 (Emmett J), 247 (Stone J), 291 (Allsop J).

<sup>112</sup> Ibid 247 (Stone J), 292 (Allsop J); see also at 243 (Emmett J).

<sup>113</sup> Ibid 242.

<sup>114</sup> Ibid 242–3.

adduced by Pan that went to the question of whether Pan had reasonable grounds for representing in April 2002 that it would comply with the *Code*.<sup>115</sup> As a result, no presumption arose in favour of ANP under s 51A and ANP therefore bore the onus of establishing, on the balance of probabilities, that Pan did not have reasonable grounds for making the quality assurance representation. Emmett J held that ANP had failed to discharge this onus and, as a result, Pan's representation was not to be taken to be misleading.<sup>116</sup> His Honour then held that Pan did in fact have reasonable grounds for making the representations and that, as a result, the quality assurance representation was not misleading.<sup>117</sup>

Allsop J considered the appropriate construction of s 51A(2) in considerable detail. His Honour began by noting that, in the form originally proposed, s 51A(2) expressly stated that the onus of establishing reasonable grounds for making the representation rested with the representor.<sup>118</sup> However, owing to concerns about the appropriateness of placing the onus of proof on those facing criminal charges,<sup>119</sup> the wording of s 51A(2) was ultimately changed to its current form before the Bill proposing its introduction was passed.<sup>120</sup> Allsop J then referred to comments made by Senator Janine Haines (who proposed the change in the Senate) that, as a result of the amended wording, s 51A(2) only places an evidential onus on the defendant corporation and that s 51A(2) does not absolutely reverse the onus of proof.<sup>121</sup>

Allsop J considered the interpretation that had been given to s 51A(2) in earlier cases. He noted that in a number of decisions s 51A(2) has been held to effect a reversal of the onus of proof.<sup>122</sup> His Honour then referred to Emmett J's judgment in *Universal Sports* and noted that in several cases following *Universal*

<sup>115</sup> *Ibid* 243.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid* 274–6. Section 51A was introduced into Parliament by Trade Practices Revision Bill 1986 (Cth) cl 21.

<sup>119</sup> See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventeenth Report of 1985* (1985) 163, 166–7. When s 51A was introduced, *TPA* pt V div 1 included criminal offence provisions.

<sup>120</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1986, 2989 (Lionel Bowen, Attorney-General); Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) sch ('Schedule of Amendments Made by the Senate') item 2.

<sup>121</sup> *McGrath* (2008) 165 FCR 230, 277. See Commonwealth, *Parliamentary Debates*, Senate, 17 April 1986, 1863 (Janine Haines).

<sup>122</sup> *McGrath* (2008) 165 FCR 230, 277–8, citing *Adelaide Petroleum NL v Poseidon Ltd* (1988) ATPR ¶40-901, 49 700 (French J); *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) 16 IP 189, 205 (Lee J); *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J); *Miba* (1996) 141 ALR 525; *Phoenix Court* [1997] ATPR (Digest) ¶46-179; *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] ATPR ¶41-704, 43 021 (Drummond J); *Blacker v National Australia Bank Ltd* [2000] FCA 681 (Unreported, Katz J, 25 May 2000) [83]; *Jazabas* [2001] ATPR (Digest) ¶46-210, 52 315 (Mason P); *Concrete Constructions Group Ltd v Litevale Pty Ltd* (2002) 170 FLR 290, 344 (Mason P); *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004) [133]; *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2006] ATPR ¶42-096; *Lewarne* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007).

*Sports* the interpretation given to s 51A(2) by Emmett J was not adopted.<sup>123</sup> Allsop J paid close attention to *Jazabas* and *Carlson Hotels*, two intermediate appellate decisions which had dealt with the issue. Allsop J stated that in *Jazabas* Mason P (with whom Beazley JA agreed) did not deal with the extent to which s 51A(2) reverses the onus of proof. Rather, he believed Mason P dealt only ‘with the time of the assessment of the existence of reasonable grounds’.<sup>124</sup> With respect, this is incorrect. As noted above, Mason P stated that:

Despite the language of s 51A(2) of the *Trade Practices Act*, which refers merely to the adducing of evidence, the effect of s 51A(2) is ... to impose on the representor the burden of persuading the trier of fact that there were reasonable grounds for making the representations ...<sup>125</sup>

Allsop J then attempted to reconcile Keane JA’s comments in *Carlson Hotels* with the interpretation given to s 51A(2) by Emmett J in *Universal Sports*. Allsop J contended that Keane JA did not in fact conclude that s 51A(2) places the onus of proving reasonable grounds on the representor. Rather, according to Allsop J, Keane JA agreed with Emmett J that, ‘[i]f evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary ... If it is, the deeming provision will cease to operate.’<sup>126</sup> However, it must be remembered that Keane JA rejected, on the basis of ‘the trend of established authority’, a submission based on *Universal Sports* that once the representor led evidence the burden shifted back to the representee.<sup>127</sup> This suggests that Keane JA disagreed with Emmett J’s interpretation of s 51A(2) and that Keane JA was simply acknowledging that the court must reach a conclusion as to the existence of reasonable grounds.<sup>128</sup> Allsop J himself acknowledged this possibility, noting that:

If it be thought, contrary to my reading of Keane JA’s reasons, that his Honour’s reference to ... ‘established authority’ was a conclusion that s 51A(2) effected a reversal of the legal and persuasive onus of proof, I would be driven to the respectful view that his Honour was plainly wrong ...<sup>129</sup>

<sup>123</sup> *McGrath* (2008) 165 FCR 230, 278–9, discussing *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004) [130]–[133]; *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* (2006) ATPR ¶42-096, 44 737 (Nicholson J); *Lewarne* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007) [82].

<sup>124</sup> *McGrath* (2008) 165 FCR 230, 281.

<sup>125</sup> *Jazabas* [2001] ATPR (Digest) ¶46-210, 52 315 (citations omitted).

<sup>126</sup> *McGrath* (2008) 165 FCR 230, 283.

<sup>127</sup> *Carlson Hotels* [2005] QCA 199 (Unreported, Williams, Keane JJA and Atkinson J, 10 June 2005) [126]–[128].

<sup>128</sup> In *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2006] ATPR ¶42-096, 44 718 (citations omitted), Nicholson J interpreted Emmett J’s comments in *Universal Sports* to simply mean that the court must form a judgment on ‘the issue of whether the corporation in fact had reasonable grounds for making the representations’. However, Nicholson J also expressly stated that the effect of s 51A(2) is ‘to cast the burden of proof on the [representor] corporation to show that it had reasonable grounds for making the representation’.

<sup>129</sup> *McGrath* (2008) 165 FCR 230, 283 (citations omitted).

Allsop J also stated that, to the extent that earlier trial decisions<sup>130</sup> ‘say, or may be taken as saying, that the legal or persuasive onus of proof is shifted to the representor by s 51A(2), they are wrong.’<sup>131</sup>

Allsop J supported his conclusion by noting that if the legal or persuasive onus were to rest on the representor as a result of s 51A(2) this would, contrary to the intention of the Commonwealth Parliament, apply in both civil cases and criminal prosecutions under ss 53 and 79 of the *TPA*.<sup>132</sup> However, this is no longer true.<sup>133</sup> Although s 51A can be used to facilitate proof in s 53 cases, s 53 no longer imposes criminal liability.<sup>134</sup> Rather, since 2001 criminal liability for the various forms of conduct prohibited under s 53 is imposed by s 75AZC, which mirrors s 53 and is contained in part VC of the *TPA* (which also contains other criminal provisions).<sup>135</sup> Furthermore, s 51A does not apply to prosecutions brought pursuant to s 79.<sup>136</sup> Therefore, concerns that s 51A will reverse the onus of proof in criminal proceedings provide no additional support for interpreting s 51A(2) as merely requiring the representor to adduce evidence.

Having decided that s 51A(2) does not effect a reversal of the onus of proof, Allsop J then explained how he believed s 51A(2) to operate:

If evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary ... If it is, the deeming provision will cease to operate. ... [I]f evidence ‘to the contrary’ is adduced by the representor, and if the representee itself adduces evidence tending to the lack of reasonable grounds, the matter might be equally poised. ... Section 51A(2) does not, in my view, mean that in those circumstances the representor has not met an onus. The section does not cast the legal or persuasive onus, in such a case, on the representor. Its terms do not say so. The enactment history makes clear that the terms were deliberately chosen not to say so.<sup>137</sup>

<sup>130</sup> Allsop J listed the following decisions: *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] ATPR ¶41-704; *Blacker v National Australia Bank Ltd* [2000] FCA 681 (Unreported, Katz J, 25 May 2000); *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 (Unreported, Kenny J, 22 October 2004); *Lewarne* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007); *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2006] ATPR ¶42-096.

<sup>131</sup> *McGrath* (2008) 165 FCR 230, 283.

<sup>132</sup> *Ibid* 283–4. When *TPA* s 51A was introduced in 1986, pt V div 1 did contain criminal provisions.

<sup>133</sup> *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth) sch 1 item 260.

<sup>134</sup> Prior to 15 December 2001, *TPA* s 79(1) provided that fines could be imposed on those who breached the provisions of pt V (except for ss 52, 65Q, 65R and 65F(9)). However, s 79(1) was repealed and replaced by *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth) sch 1 item 260, amending *TPA* ss 79(1)–(1B). In its current form, s 79(1) provides that those involved in a breach of any of the provisions of pt VC are taken to have contravened the *TPA* and are punishable accordingly.

<sup>135</sup> Section 75AZC and a range of other criminal offences were added to the *TPA* in 2001 by *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth) sch 1 item 257.

<sup>136</sup> *TPA* s 51A applies only to *TPA* pt V div 1 and ss 51AB–51AC.

<sup>137</sup> *McGrath* (2008) 165 FCR 230, 283.

Applying his interpretation of s 51A(2) to the facts at hand, Allsop J concluded that the supply representation was not misleading. Evidence led by Pan about audits that had been completed during the period when the supply representation was made was ‘evidence to the contrary’ and, in turn, the deeming effect of s 51A(2) no longer operated. As ANP adduced no evidence on the issue, it could not be concluded that the supply representation was made without reasonable grounds.<sup>138</sup> With respect to the quality assurance representation, Allsop J held that Pan’s evidence that audits up to and including the audit conducted on 30 April 2002 resulted in Pan continuing to hold a licence constituted ‘evidence to the contrary’ sufficient to negate the deeming effect of s 51A(2).<sup>139</sup> However, ‘the evidence as a whole’ (including evidence led by ANP about audits conducted in 2003) ‘proved that Pan was in serious breach of the *Code* during 2002.’<sup>140</sup> Allsop J held that this was sufficient to prove that Pan did not have reasonable grounds for making the quality assurance representation in April 2002.<sup>141</sup> The quality assurance representation was therefore held to be misleading.

Stone J, who less than six months earlier in *Lewarne* had rejected Emmett J’s suggestion in *Universal Sports* that s 51A(2) did not reverse the onus of proof, did not reach a final conclusion about the operation of s 51A(2). Her Honour noted:

At least one aspect of the effect of the [sic] s 51A(2) appears to be uncontroversial, namely that a representor who adduces no evidence to support a defence of reasonable grounds is deemed to have made a misleading representation. ...

There is, however, disagreement as to the effect of the section where the representor adduces *some* (relevant) evidence that there were reasonable grounds for making the representation. This raises the question of what is evidence ‘to the contrary’. Among the issues thrown up by this question is whether it is evidence which, taken by itself, is sufficient *to establish* reasonable grounds or merely *to raise* the question. ...

[W]hen the section was introduced there were different views as to the desirability of imposing the persuasive rather than the evidentiary burden of proof on the representor. ... I am not entirely persuaded that a clear intention of the legislature can be discerned.<sup>142</sup>

With respect to the supply representation, Stone J held that ‘on any view of s 51A(2)’ Pan had rebutted the statutory presumption.<sup>143</sup> Thus, the supply representation was not misleading. Stone J also held that ‘even on the view most favourable to the appellants’ (namely, that they simply had to adduce evidence of reasonable grounds) the trial judge’s conclusion that the quality assurance

<sup>138</sup> Ibid 291.

<sup>139</sup> Ibid 292.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid 247 (emphasis in original).

<sup>143</sup> Ibid.

representation was misleading was correct.<sup>144</sup> As the correct interpretation of s 51A(2) was not the subject of full argument, and because the outcome of this case did not depend upon the view taken of s 51A(2), Stone J concluded that this was not the appropriate case in which to resolve the difference of opinion about the appropriate construction of s 51A(2).<sup>145</sup>

McGrath sought leave to appeal to the High Court of Australia. Although it was acknowledged that there is ambiguity about the proper construction of s 51A(2), McGrath's leave application was ultimately rejected.<sup>146</sup> As the uncertainty about the operation of s 51A(2) was resolved in the manner most favourable to Pan, and because the correct interpretation of s 51A(2) was not the subject of full argument, the High Court believed this was not the appropriate case in which 'to resolve the latent controversy about the application and meaning of section 51A(2)'.<sup>147</sup>

#### F Approach Adopted in Cases after McGrath

With one exception, the interpretation given to s 51A(2) by Allsop and Emmett JJ in *McGrath* has been followed in subsequent cases. In *Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd [No 2]*, Flick J held that '[t]he construction given to s 51A(2) by Emmett and Allsop JJ in *McGrath*, it is respectfully considered, should now be applied.'<sup>148</sup> In *Australian Securities and Investments Commission v Cyclone Magnetic Engines Inc*,<sup>149</sup> Martin J stated that he was persuaded by Allsop J's analysis in *McGrath*. In *Ackers v Austcorp International Ltd*, Rares J stated that, where the alleged representor adduces evidence of reasonable grounds, s 51A(1) does not operate and the ultimate onus is thrown back onto the applicant to 'make good a claim that there were no reasonable grounds for making the representation'.<sup>150</sup> Buchanan J also endorsed Emmett and Allsop JJ's interpretation of s 51A(2) in *Skiving Pty Ltd v Trust Co of Australia Ltd*.<sup>151</sup>

The only decision delivered after *McGrath* in which Allsop and Emmett JJ's approach has not been accepted is *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd [No 7]*.<sup>152</sup> Collier J noted Emmett J's suggestion in *Universal Sports* that s 51A(2) does not place the onus of proving reasonable grounds on the representor. However, on the basis of the 'weight of authority',<sup>153</sup> her Honour

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid* 247–8.

<sup>146</sup> *McGrath v Australian Naturalcare Products Pty Ltd* [2008] HCATrans 235 (13 June 2008) 702–4 (Kirby J).

<sup>147</sup> *Ibid* 692–3.

<sup>148</sup> [2008] FCA 1480 (Unreported, Flick J, 3 October 2008) [99].

<sup>149</sup> (2009) 224 FLR 50, 102.

<sup>150</sup> [2009] FCA 432 (Unreported, Rares J, 1 May 2009) [355].

<sup>151</sup> (2009) 255 ALR 339, 343.

<sup>152</sup> [2008] FCA 1364 (Unreported, Collier J, 5 September 2008).

<sup>153</sup> *Ibid* [277], citing *Lewarne* [2007] FCA 1136 (Unreported, Stone J, 7 August 2007) [82]; *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J); *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 205–6 (Heerey J), 215 (Cooper J); *Sykes* (1998) 88 FCR 511, 513–14 (Heerey J); *Adelaide*

held that the onus is on the representor to establish that they had reasonable grounds for making representations as to future conduct.<sup>154</sup> It is important to note that, despite referring to the *McGrath* case in another context,<sup>155</sup> Collier J did not refer to the discussion in *McGrath* about whether s 51A(2) reverses the onus of proof. Her Honour, therefore, did not expressly disagree with the approach adopted by Emmett and Allsop JJ in *McGrath*.

### G Enactment History

Section 51A(2)'s enactment history suggests that Emmett and Allsop JJ's interpretation of the subsection is correct. The introduction of s 51A was originally proposed by cl 21 of the Trade Practices Amendment Bill 1985 (Cth) ('1985 Amendment Bill'). In the form originally proposed by the 1985 Amendment Bill, s 51A(2) provided as follows:

The onus of establishing that a corporation had reasonable grounds for making a representation referred to in sub-section (1) is on the corporation.<sup>156</sup>

The Explanatory Memorandum accompanying the 1985 Amendment Bill therefore stated that '[t]he onus is on the corporation to establish on the balance of probabilities that it had reasonable grounds' for making the representation.<sup>157</sup>

The Commonwealth Senate Standing Committee for the Scrutiny of Bills expressed concerns about s 51A(2) in the form outlined above. In 1985, criminal prosecutions could be brought against a party that contravened many of the provisions in division 1 of part V of the *TPA* (to which s 51A applies).<sup>158</sup> The Senate Committee felt that it would be inappropriate to place the onus of proof on defendant corporations in criminal proceedings.<sup>159</sup> Rather, such defendants should merely be required to bear an evidential onus, that is, the onus of adducing evidence of the existence of reasonable grounds. In the criminal context, the Senate Committee thought it appropriate that the burden of proving absence of reasonable grounds remain with the prosecution.<sup>160</sup>

The 1985 Amendment Bill was never passed. However, cl 21 of the Trade Practices Revision Bill 1986 (Cth) ('1986 Revision Bill') was exactly the same

*Petroleum NL v Poseidon Ltd* [1988] ATPR ¶40-901, 49 700 (French J); *Phoenix Court* [1997] ATPR (Digest) ¶46-179.

<sup>154</sup> *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd [No 7]* [2008] FCA 1364 (Unreported, Collier J, 5 September 2008) [278]. In *ACN 070 037 599 Pty Ltd v Larvik Pty Ltd* [2008] QCA 416 (Unreported, McMurdo P, White AJA and McMeekin J, 19 December 2008) [109] fn 89, McMeekin J noted that '[w]hilst the matter was not argued ... there is debate as to whether there is a persuasive onus placed on the [representee]'.

<sup>155</sup> *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd [No 7]* [2008] FCA 1364 (Unreported, Collier J, 5 September 2008) [97].

<sup>156</sup> Trade Practices Amendment Bill 1985 (Cth) cl 21. Clause 21 became cl 20 when the Bill was read a third time.

<sup>157</sup> Explanatory Memorandum, Trade Practices Amendment Bill 1985 (Cth) 20.

<sup>158</sup> Before s 79(1) was repealed and replaced by *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth) sch 1 item 260, it created criminal offences in relation to the provisions contained in pt V with the exception of ss 52, 65Q, 65R and 65F(9).

<sup>159</sup> Senate Standing Committee for the Scrutiny of Bills, above n 119, 166-7.

<sup>160</sup> *Ibid.*



as cl 21 of the 1985 Amendment Bill. The explanation of cl 21 in the Explanatory Memorandum accompanying the 1986 Revision Bill was also the same as that contained in the Explanatory Memorandum accompanying the 1985 Amendment Bill.<sup>161</sup> When the 1986 Revision Bill came before the Senate, a new s 51A(2) was proposed in terms identical to those in which s 51A(2) is currently expressed. Senator Haines, who proposed the change, stated that the change was designed to overcome the concerns expressed by the Senate Committee and to ensure that s 51A(2) only places an evidential onus on the defendant corporation, rather than reversing absolutely the onus of proof.<sup>162</sup> When the 1986 Revision Bill was returned to the House of Representatives, the Attorney-General stated that the amendment to s 51A(2)

places an evidential burden on the defendant to adduce that it had reasonable grounds for making its prediction. This amendment arose as a result of the concern of the Senate Standing Committee for the Scrutiny of Bills. Whilst the Government would prefer that the proposed section be not altered, it considers that this amendment does not derogate significantly from the protection sought.<sup>163</sup>

In *McGrath*, Allsop J noted that:

This immediate enactment history ... does temper any assumption that Parliament intended s 51A(2) simply to reverse the onus of proof, without regard for the specific words used by it for the effect of the provision on the onus of proof.<sup>164</sup>

There seems to be much merit in Allsop J's observation. A provision that expressly places the onus of establishing reasonable grounds on the corporation that made a representation with respect to any future matter was replaced with one that simply requires the representor to adduce evidence of reasonable grounds to avoid being deemed not to have had reasonable grounds for making the representation. Thus it seems that, although s 51A(2) in its original form was intended to place the burden of proof of establishing reasonable grounds on those making representations as to the future, the subsection was amended so that those making such representations need only adduce evidence of reasonable grounds to avoid the deeming effect of the subsection.<sup>165</sup>

## V SHOULD SECTION 51A BE AMENDED?

In Part IV, a conclusion was reached that the interpretation given to s 51A(2) by Emmett and Allsop JJ in *McGrath* is correct. Thus, provided a person who has made a representation as to the future leads evidence that they had

<sup>161</sup> Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) 20–1; Explanatory Memorandum, Trade Practices Amendment Bill 1985 (Cth) 19–20.

<sup>162</sup> Commonwealth, *Parliamentary Debates*, Senate, 17 April 1986, 1863 (Janine Haines).

<sup>163</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1986, 2989 (Lionel Bowen, Attorney-General).

<sup>164</sup> (2008) 165 FCR 230, 277.

<sup>165</sup> Gillies, 'Misrepresentations as to Future Matters', above n 16, 29–30, explains what the representor must do to discharge the evidential burden.

reasonable grounds for making that representation, the representation will not be taken to be misleading unless the representee is able to establish, on the balance of probabilities, that the representor did not have reasonable grounds for making the representation.

It is submitted that in the proposed Australian Consumer Law s 51A(2) should be amended to overcome the existing uncertainty as to whether a representor bears the legal burden of proving reasonable grounds or is simply required to lead evidence that goes to this issue to avoid having their representation deemed not to have had reasonable grounds. The provision should be amended so that it explicitly imposes the legal or persuasive burden of proving the existence of reasonable grounds on a person who makes a representation as to the future.

Section 51A(2) should take the same form as the Facilitating Provisions in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia.<sup>166</sup> Such an amendment is consistent with the aim of modifying the existing consumer protection provisions in the *TPA* based on best practice in state and territory consumer laws and will ensure the effective operation of the Australian Consumer Law.

#### *A Amendment Would Accord with the Motivation for Introducing Section 51A*

Section 51A was introduced in recognition of the fact that ‘circumstances surrounding [future] representations are often matters within the knowledge of the person or corporation making the representation’.<sup>167</sup> Just as representees experienced difficulties proving that the representor did not intend or was not able to honour their promise, or did not genuinely believe in a prediction they made, representees are also likely to experience difficulties proving that the representor did not have reasonable grounds for making a representation the representor has made as to the future. Although these difficulties would be overcome to some extent by the discovery process, the representor is likely to be in the best position to present to the court evidence as to the existence of reasonable grounds. This is because the representor will know the factors that they took into account before making the representation in question. Amending s 51A(2) so that the onus of establishing reasonable grounds is placed on the representor will increase the effectiveness of the Australian Consumer Law by overcoming difficulties faced by those seeking to establish that a representation as to the future is misleading.

<sup>166</sup> See *NSW FTA* s 41; *Consumer Affairs and Fair Trading Act 1990* (NT) s 41; *Fair Trading Act 1989* (Qld) s 37; *Fair Trading Act 1999* (Vic) s 4; *Fair Trading Act 1987* (WA) s 9. *TPA* s 51A would of course refer to corporations, although the schedule version of the provision would, like the provisions in the states and territories listed, refer to persons.

<sup>167</sup> Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) 20.

B *Amendment Would Reinstate the Interpretation Adopted in the Bulk of the Case Law*

The proposed amendment would reinstate what many believed to be the law before the true nature of s 51A(2) was revealed in cases such as *Universal Sports* and *McGrath*. As the discussion in Part IV demonstrates, in most cases prior to *McGrath* it had been held that s 51A(2) placed the legal burden of proof on the representor. The logic of imposing the legal burden of proof on the representor was not questioned in these cases. Furthermore, there are no examples in these cases of the reversal of the onus of proof causing unfairness to the representor. After all, the proposed amendment will not affect a representor who had reasonable grounds for making a representation as to the future.

C *The 2001 Amendments Remove the Concerns that Prompted the Rewording of Section 51A(2)*

As noted earlier, the key reason s 51A(2) is expressed in its current form is the Senate Committee's concern that it was inappropriate in criminal matters to impose liability on a corporation that is unable to prove, on the balance of probabilities, that it had reasonable grounds for making a representation as to a future matter.<sup>168</sup> This concern arose because in 1986, when s 51A was introduced into the *TPA*, division 1 of part V of the *TPA* (to which s 51A applied) contained both criminal and civil prohibitions.<sup>169</sup>

As a result of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth), part VC creates a separate criminal consumer protection regime within the *TPA* which replicates most of the prohibitions contained in division 1 of part V (although some have been redrafted to clearly identify any fault elements applicable to the offence). Furthermore, 'criminal liability will no longer lie for breach of the provisions contained in Part V', except for certain regulatory offences remaining in division 1A of part V.<sup>170</sup> Section 51A, therefore, no longer has any application in criminal matters. As s 51A now only applies to civil proceedings, the policy concerns that resulted in s 51A(2) being drafted to impose an evidential rather than a legal or persuasive onus on the representor have dissipated.<sup>171</sup> As noted above, the government at the time s 51A was introduced would have preferred that s 51A(2) expressly impose the legal burden of establishing reasonable grounds on the representor.<sup>172</sup> It reluctantly agreed to reword s 51A(2) because of the concerns of the Senate

<sup>168</sup> Senate Standing Committee for the Scrutiny of Bills, above n 119, 166–7.

<sup>169</sup> See above nn 132–6.

<sup>170</sup> Explanatory Memorandum, Treasury Legislation Amendment (Application of Criminal Code) Bill 2000 (Cth) 44.

<sup>171</sup> Although the author acknowledges that some may object to the proposed amendment on the basis that the ACCC will be able to seek civil penalties for contraventions of many of the prohibitions against misleading representations: see above nn 4–5 and accompanying text.

<sup>172</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1986, 2989 (Lionel Bowen, Attorney-General).

Committee.<sup>173</sup> The fact that these concerns no longer exist provides further support for amending s 51A so that it can operate as was originally intended.

An equivalent provision, s 75AZB, which is expressed in almost identical terms to s 51A,<sup>174</sup> applies for the purposes of the criminal offence provisions in part VC. This provision should not be amended as it would be inappropriate to impose the burden of proving reasonable grounds on the defendant in a criminal trial. To date, the operation of s 75AZB has not been judicially considered. The Explanatory Memorandum accompanying the Bill that introduced part VC states that s 75AZB 'reverses the onus of proof in relation to representations about future matters.'<sup>175</sup> This statement, which reflects the interpretation of s 51A prevailing at the time when part VC was introduced into the *TPA*, is inconsistent with the wording of the provision and the judgments of Allsop and Emmett JJ in *McGrath*. If s 51A(2) were amended so that the burden of proof is expressly placed on the representor, it would be clearer that the words used in s 75AZB were intended to have a different effect, namely, to impose an evidential rather than a legal burden on the representor.

If the amendments to s 51A proposed at the beginning of this Part were made, a representor in a civil case who has allegedly made a misleading representation as to the future would be deemed liable unless they could establish reasonable grounds for making the representation in question. In contrast, a representor facing criminal charges would only bear an evidentiary onus to adduce some evidence that could establish reasonable grounds for making the representation, ensuring that the prosecution bears the ultimate burden of proof.<sup>176</sup> It is submitted that this approach strikes the appropriate balance between the need to overcome the difficulties facing those seeking to establish that representations as to the future are misleading and the need to provide adequate protection to representors in criminal cases.

## VI CONCLUSION

Currently, s 51A(1) of the *TPA* provides that a representation as to the future is taken to be misleading unless the representor had reasonable grounds for making it. Furthermore, s 51A(2) provides that the representor is deemed not to have had reasonable grounds unless it adduces evidence to the contrary. For a long time, s 51A(2) was interpreted as imposing the legal or persuasive burden of proving reasonable grounds on the representor (an outcome that is expressly provided for

<sup>173</sup> *Ibid.*

<sup>174</sup> *TPA* s 75AZB(1) refers to representations 'about a future matter' rather than representations 'with respect to any future matter' as in s 51A. Likewise, *TPA* s 75AZB(2) provides that a 'corporation is taken not to have had reasonable grounds for making the representation, unless it adduces evidence to the contrary', which differs slightly from the wording in s 51A(2) where it states that the corporation will be 'deemed not to have had reasonable grounds' unless it adduces evidence to the contrary.

<sup>175</sup> Explanatory Memorandum, Treasury Legislation Amendment (Application of Criminal Code) Bill 2000 (Cth) 37.

<sup>176</sup> This would change the law in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia, where the representor currently bears the onus of establishing reasonable grounds in criminal as well as civil cases: see above n 47 and accompanying text.

in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia). However, the recent *McGrath* decision suggests that the representor can escape the deeming effect of s 51A(2) merely by leading evidence that it had reasonable grounds.

To ensure that the proposed Australian Consumer Law provides effective protection against misleading representations that relate to the future, s 51A(2) should be amended so that it explicitly imposes the legal or persuasive burden of proving reasonable grounds on the representor. Section 51A(2) should take the same form as the Facilitating Provisions in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia. Such an amendment would accord with the motivation for introducing s 51A and reinstate the interpretation given to s 51A(2) in the bulk of the case law prior to *McGrath*. Furthermore, it is consistent with the aim of modifying the existing consumer protection provisions in the *TPA* based on best practice in state and territory consumer laws.