CONSUMER PROTECTION FOR BUSINESS INTERESTS: THE APPLICATION OF SECTION 52 TRADE PRACTICES ACT TO COMMERCIAL NEGOTIATIONS

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I. INTRODUCTION

Section 52(1) of the Trade Practices Act 1974 (Cth) which is located in Division 1 ("Unfair Practices") of Part V ("Consumer Protection") states in uncompromising terms that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive." It is a "comprehensive provision of wide impact"[1] which is expressed in "very general language"[2] and "cast in the widest terms"[3] to ensure its effectiveness as a 'catch-all' provision for conduct falling outside the specific prohibitions of Division 1. That section 52 has performed this role with distinction is beyond question: the reluctance of the courts to confine the ambit of section 52 has conferred on it a 'civil code-like' capacity for development. The most dramatic development has undoubtedly been the involvement of the business community as applicants rather than respondents in section 52 actions. To an extent not anticipated at the time of the introduction of the legislation, enforcement of the section has fallen to commercial interests. The business community's involvement in the enforcement of section 52 falls into three distinct categories:

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1 *Brown* v. *Jam Factory Pty Ltd* (1981) 53 FLR 340, 348 *per* Fox J.
2 *R.* v. *Credit Tribunal; ex parte General Motors Acceptance Corp. Aust.* (1977) 137 CLR 545, 561 *per* Mason J.
3 *Menhaden Pty Ltd* v. *Citibank N.A.* (1984) 55 ALR 709, 712 *per* Toohey J.

(a) The most obvious category is the archetypal consumer protection situation where goods or services are being promoted in a manner which is misleading or deceptive. A trader may seek injunctive relief to restrain a rival trader from falsely describing the attributes of his own product (for example *Colgate-Palmolive Pty Ltd* v. *Rexona Pty Ltd* [4] where "Colgate" was granted an interlocutory injunction to restrain "Rexona" from advertising unproven claims as to the plaque-inhibiting ability of an additive to its toothpaste) or disparaging the applicant's product (for example, *State Government Insurance Commission* v. *J.M. Insurance Pty Ltd* [5] where an interlocutory injunction was granted to restrain a competitor from making inaccurate comparisons in relation to the cost of car insurance). Although the applicant in such a case is clearly motivated by private interest, such actions are obviously consistent with the consumer protection objectives of Part V.

(b) The next phase in the enforcement of section 52 by commercial interests was the use of section 52 as an alternative to a passing off action. Although this use of the section was not anticipated at the time the legislation was enacted, it is a logical development. The trader is motivated by self-interest, but the public interest is also vindicated. As Mason J. stated in *Parkdale Custom Built Furniture Pty Ltd* v. *Puxu Pty Ltd,* "[t]he remedy to prevent deception of the public often has the incidental effect of protecting a competing trader's goodwill which would be also injured by that deception."[6]

(c) The most recent development is characterised by one party to a private commercial contract seeking a remedy under section 52 in respect of pre-contractual representations which prior to the Act would have been sought to be redressed, with little hope of success, in an action for breach of contract, deceit, or negligent misstatement. The section has become a valuable tool for dealing with commercial misrepresentation in situations where the applicant bears little resemblance to the traditional consumer.[7] For practical reasons (primarily the cost of Federal Court proceedings) it is not surprising that individual consumers have rarely brought actions for damages. What is surprising is the extent to which commercial interests have found section 52 an effective remedy. There was little indication at the time of the introduction of the legislation that the reach of the consumer protection provisions of Part V would be so extensive that commercial enterprises contracting at arm's length now look to section 52 rather than the traditional actions in contract and tort in seeking redress for pre-contractual misrepresentation.

4 (1981) 58 FLR 391.
5 (1984) ATPR 40-465.
6 (1982) 149 CLR 191, 202.
7 In *Sterling Industries Ltd* v. *N.I.M. Services Pty Ltd & Ors* (1986) ATPR 40-688 for example, the alleged misleading or deceptive conduct related to the sale of two taverns for a total of $2 850 000.

There can be little argument with the first two categories noted above. The business applicant is clearly motivated by private interest, but the public interest is also vindicated in situations where an individual consumer or the Trade Practices Commission has, for reasons of cost or priorities,[8] little interest in bringing an action. It is the third category which is addressed in this paper: the extent to which a privately negotiated contract between two commercial enterprises contracting at arm's length should be within the scope of section 52. The application of section 52 to such contracts is of fundamental significance to the conduct of business in Australia. The ramifications of subordinating the certainty of a negotiated written contract to the vagaries of the "misleading or deceptive" test are immense.

II. BEYOND CONSUMER PROTECTION: THE APPLICATION OF SECTION 52 TO COMMERCIAL NEGOTIATIONS

In *Hornsby Building Information Centre Pty Ltd* v. *Sydney Building Information Centre Ltd*[9] (hereinafter cited as *Hornsby*) Stephen J. stated that the operation of section 52 simply required the existence of three factors — "a 'corporation', its engagement in conduct answering the description of 'misleading or deceptive' and the occurrence of that conduct 'in trade or commerce'".[10] On this basis there are no limitations on section 52 other than those arising from the language itself.[11] It can nevertheless be argued that section 52 should be afforded an interpretation reflecting the consumer protection objectives of Part V and that it is therefore appropriate to limit its generality to conduct affecting consumer rather than commercial interests.

The argument for restricting the scope of section 52 has been argued most forcefully, and virtually in splendid isolation, by St John J. In *Westham Dredging Company Pty Ltd* v. *Woodside Petroleum Development Pty Ltd* [12] (hereinafter cited as *Westham*) St John J. held that the scope of section 52 was limited by the heading to the Part of the Act in which section 52 is situated. His Honour regarded the scope of section 52 to be unclear unless some regard was had to the mischief the Act sought to remedy and the headings to Part V. The case concerned a contract between Westham and Woodside pursuant to which the former agreed to dredge a harbour basin. An engineering report describing the geological structure of the harbour basin had been supplied and on the basis thereof Westham submitted its tender. However, because of inaccuracies in the report, Westham's costs of

8 The resources of the T.P.C. are finite and the priorities under which it operates are laid down in a document released in May 1986; *Restatement of Future Directions of T.P.C. Consumer Protection Work* (1986).

9 (1978) 140 CLR 216.

10 *Id.*, 223.

11 And, of course, any sections which expressly limit its scope (s.51A) or affects its operation (such as s.51A and s.65A). Unlike some of the more specific provisions of Division 1 which are expressly directed at "consumers" (*e.g.* s.57 and s.60), s.52 contains no such limitation.

12 (1983) 66 FLR 14.

performing the work far exceeded those anticipated. The company's action for damages alleging that the inaccuracies constituted misleading or deceptive conduct within section 52 was unsuccessful. Section 52 was limited in its application to conduct which misleads or deceives or is likely to mislead members of the public in their capacity as consumers of goods or services. In *Westham* the private nature of the transaction precluded the operation of section 52. St John J. adhered to this view in *H.W. Thompson Building Pty Ltd* v. *Allen Property Services Pty Ltd.*[13]

There was no suggestion of such a limitation in the cases dealing with misrepresentation in commercial negotiations prior to *Westham,* but although the correctness of this proposition was doubted in later cases[14] it was not fully argued or subjected to detailed judicial analysis for over twelve months when in *Lubidineuse* v. *Bevanere Pty Ltd* [15] (hereinafter cited as *Lubidineuse*), Wilcox J. was required to consider the respondent's argument that misleading or deceptive conduct in negotiations for the sale of a business was not conduct to which section 52 applied as the recipient of the conduct was not a consumer. The applicants alleged misleading or deceptive conduct through the misrepresentation by the vendor of a cosmetic clinic that the 'head girl' would remain as an employee to assist the applicants in establishing themselves in the business when they knew that she intended to resign almost immediately. In rejecting the argument that the scope of section 52 was limited by the heading to Part V, Wilcox J. expressly disapproved of this aspect of the judgment of St John J. in *Westham.* This limitation was "inconsistent with binding authority and ... should not be followed."[16] Wilcox J. therefore held that there was no implication in section 52(1) limiting the relevant conduct to conduct affecting a person properly to be described as a "consumer": "It is enough that the conduct of the corporation be misleading or deceptive and that it has occurred in trade or commerce."[17] This approach was confirmed by the Full Federal Court on appeal from Wilcox J. It was accepted with little discussion that "the operation of the unambiguous words of section 52 should not be given a confined meaning because of the heading to Part V".[18] With the exception of *Squibb and Sons Pty Ltd* v. *Tully Corporation Pty Ltd*[19] in which Gray J. simply accepted that it

13 (1983) 48 ALR 667.

14 In *Jet Corp. of Australia Pty Ltd* v. *Petres Ltd* (1983) 50 ALR 722 Northrop J. doubted the correctness of this proposition but in the context of the interlocutory nature of the proceedings did not decide the question. In note 3 *supra,* Toohey J. held that it was not an essential element of s.52 that a member of the public in the form of a consumer had been misled, but there was no discussion of *Westham.* In *O'Brien* v. *Smolonogov* (1983) 53 ALR 107, the Full Federal Court held that as the conduct under consideration in that case was not in trade or commerce, it was not necessary to deal with the submission based on *Westham.* In other cases concerning commercial misrepresentation, *Westham* does not appear to have been argued.

15 (1984) 55 ALR 273.

16 *Id.,* 289.

17 *Ibid.*

18 *Bevanere Pty Ltd* v. *Lubidineuse* (1985) 59 ALR 334, 341 *per* Morling, Neaves and Spender JJ.

19 (1986) ATPR 40-691.

has been "established that ... it is possible for one corporation to bring proceedings under the Act against another corporation in respect of misleading or deceptive conduct engaged in during private negotiations leading to a contract between the two corporations",[20] the issue has not been subjected to further judicial analysis.

There was little evidence of the potential of section 52 to apply to commercial negotiations at the time of its introduction. There was certainly no indication in the Attorney-General's second reading speech:

> [i]n consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor — meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.[21]

The original purpose of Part V was to provide protection for normal domestic consumer transactions, and this was reinforced by the definition of "consumer" in section 4(3) which was expressed in terms of "private use or consumption".[22] However, this definition was amended in 1977 in line with the recommendation of the Swanson Committee[23] that the definition should embrace the commercial transactions of small business. The Committee recommended a ceiling of $15 000 on transactions regarding goods or services other than those for personal domestic or household use or consumption in order to provide protection for a range of small business transactions,[24] and these recommendations were given effect to in the new section 4B definition enacted by the 1977 amendments.[25] The main effect of the extended definition of consumer was the correspondingly extended application of the protectionary terms implied in consumer transactions under Division 2 of Part V. The 1977 amendment was a logical extension of the consumer protection provisions: the traditional consumer and the small

20 *Id.*, 47,594.

21 Senator The Hon. L.K. Murphy, Q.C., Senate Parliamentary Debates, 30 July 1974, Hansard Vol.S.60, 540-541.

22 S.4(3) of the 1974 Act required the goods and services to be "for private use or consumption", with the qualifications, that in the case of goods, those acquired for re-supply were excluded, and in the case of "services", those acquired in the course of business were excluded. This suggested that consumer goods could include goods acquired in the course of a business.

23 The Swanson Committee Report, *Monopolisation, Price Discrimination, Merger and the Termination of Franchises: A Critique* (1976).

24 *Id.*, paras 9.38-9.45.

25 A consumer is a person buying goods or services up to the price of $15 000 or any greater amount which may be prescribed by regulation under the Act. There are two qualifications, namely, goods to be re-supplied, used or transformed are excluded, and goods or services over the prescribed amount are included if they are of a kind ordinarily acquired for personal, domestic or household use or consumption.

businessman share many common characteristics relating to their disadvantaged bargaining position.[26]

A further stage in the metamorphosis of Part V was mooted in the 1984 Green Paper[27] which proposed the raising of the monetary limit to $200 000 in order to restore the protection given by the Act, by virtue of the implied terms, to consumers and small business. This protection had been significantly eroded as a result of inflation.[28] It was not surprising that this proposal attracted the widespread criticism of the business community on the basis that in transactions of such substance the parties should be left to make their own agreement. It was also not surprising that the business lobby strongly opposed on the same grounds the proposal to introduce an unconscionability provision applying to commercial as well as consumer transactions. The business lobby was successful in relation to both proposals. The Trade Practices Revision Act 1986 adopted a $40 000 monetary limit in the definition of "consumer" and limited the unconscionability provision of section 52A to unconscionable conduct in relation to traditional consumer-type transactions (that is, those involving the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption).

What is surprising is that the strident criticism of the business community that was directed to the proposals to expand the definition of consumer and introduce an unconscionability provision of general application was not matched by similar concern being expressed as to the unrestrained scope of section 52. Section 52, as it is currently interpreted, has potentially greater implications for the business community than either of these proposals would have had.[29] In combination with the civil remedies available to a person who has suffered loss or damage by reason of the contravention of section 52, it in effect introduces a Misrepresentation Act, but without the control mechanism invariably incorporated in such legislation by which liability can be excluded subject to a test of reasonableness.[30] The common law can be

26 However, to a large extent the application of the implied terms to commercial transactions is frustrated by the effect of s.68A which was enacted to meet the problem of a commercial supplier's exposure to consequential loss flowing from the implied terms. S.68A permits suppliers of commercial goods and services to limit their liability to specific remedies of repair or replacement provided that it is "fair and reasonable" for the supplier to so limit his liability.

27 *The Trade Practices Act: Proposals for Change,* February 1984.

28 *Id.,* paras 5-7.

29 In so far as the unconscionability proposal is concerned, the United States experience with s.2.302 of the Uniform Commercial Code is that purely commercial transactions between commercial enterprises capable of protecting their own interests are only rarely at risk under the legislation (see S. Deutch, *Unfair Contracts* (1977) Ch.3). In so far as the expanded definition of consumer is concerned, the power provided by s.68A under which a commercial supplier can limit liability to repair or replacement where commercial goods or services are involved subject to this being "fair and reasonable", restricts the effect of the implied terms.

30 See for example s.3 of the Misrepresentation Act 1967 (U.K.); s.4 of the Contractual Remedies Act 1979 (N.Z.).

criticised for its inadequate treatment of commercial misrepresentation[31] but it can be questioned whether the accidental law reform approach of section 52 is an appropriate alternative. In the commercial context there are sound policy reasons in the demands of certainty and convenience for giving precedence to the written contract over the uncertain operation of section 52. The caution expressed by Gibbs C.J. in *Parkdale Custom Built Furniture Pty Ltd* v. *Puxu Pty Ltd* is appropriate in this context:

> [t]he words of s.52 have been said to be clear and unambiguous ... Nevertheless they are productive of considerable difficulty when it becomes necessary to apply them to the facts of particular cases. Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions.[32]

The compelling argument of the business lobby for restricting the definition of "consumer", and thus the application of the implied terms, is equally applicable to indiscriminate application of section 52: "... the Act will intrude into the area of commercial contracts, an area where parties are able to protect their own interests and are best left to make their own agreements".[33] It is equally surprising that the opportunity was not taken at the time of the 1986 amendments to resolve the question as to the scope of section 52.

Having regard to the significance of section 52 in commercial negotiations it is instructive to examine the arguments in favour of the current interpretation.

III. THE RELEVANCE OF THE HEADING "CONSUMER PROTECTION"

Section 13(1) of the Acts Interpretation Act 1901 (Cth) provides that "The headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed part of the Act". Although the heading "Consumer Protection" is clearly part of the Act, its relevance to the interpretation of section 52 is open to question. In *Hornsby*, Stephen J. adopted what was said by Latham C.J. in *Silk Bros Pty Ltd* v. *State Electricity Commission of Victoria:*[34]

> The headings in a statute or in Regulations can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision (see *In re Commercial Bank of Australia Ltd* (1893) 19 V.L.R. 333, at p. 375). 'But where the enacting words are clear and unambiguous, the title, or headings, must give way, and full effect must be given to the enactment' (*Bennett* v. *Minister for Public Works N.S.W.* (1908) 7 C.L.R. 372 at p. 383 per Isaacs J.).[35]

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31 Williams, "Misrepresentation in Commercial Transaction" in G.H.L. Fridman (ed.), *Studies in Canadian Business Law* (1971) 48, expressed hope that gaps "left by a rather ossified law of contracts might be filled by the relatively modern tort action for negligent misrepresentation. Not only is this action already extending within the framework set out in *Hedley Byrne* v. *Heller* but is also moving into new and developing situations of concern."

32 Note 6 *supra,* 197.

33 Submission of the Chamber of Manufacturers of New South Wales on the Green Paper Proposals.

34 (1943) 67 CLR 1.

35 *Id.,* 16.

In *Lubidineuse* Wilcox J. accepted that the heading could be used to determine the meaning of the words "misleading" and "deceptive". It was for this purpose that Mason J. had found the heading of assistance in *R. v. The Credit Tribunal; ex parte General Motors Acceptance Corporation:*

> '[m]isleading' is a word which is capable of expressing various shades of meaning, sometimes signifying that which is subjectively misleading and at other times that which is objectively misleading. Its meaning therefore is apt to be influenced, indeed decisively influenced, by the context in which it is found. Here the setting in which s.52(1) appears is shown by the headings 'Part V — Consumer Protection' and 'Division 1 — Unfair Practices'.[36]

However, Wilcox J. regarded as inappropriate the reliance by St John J. on this passage to justify using the heading to determine the scope of the section as distinct from the meaning of the words:

> Mason J. looked at the headings to the Part and the Division merely to obtain assistance as to the meaning, in s.52(1) of the word "misleading". The court was not concerned to consider, and did not consider, the question whether conduct referred to in s.52 was limited only to conduct involving a consumer.[37]

The main authority relied on by Wilcox J. and the Full Federal Court in rejecting any limitation on the scope of section 52 was the High Court decision in *Hornsby* and in particular the judgment of Stephen J. In *Hornsby* the High Court considered whether section 52 gave an action similar to that of passing off to restrain a rival competitor's use of a similar business name. It was argued that Part V was concerned with protecting consumers and that it was not possible to extend its operation to protect commercial interests. This argument was based on the assumption that the provisions of Part V were to be read down by reference to the heading "Consumer Protection". The High Court was unanimous in dissolving the interlocutory injunction granted by the Industrial Court, but for different reasons.[38] In so far as the relevance of the heading was concerned, the majority (Stephen, Jacobs and Murphy JJ.) favoured a construction which retained the literal generality of the section.[39]

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36 Note 2 *supra*, 561. The High Court considered, inter alia, whether a notice required under the Consumer Credit Act 1972 (S.A.) was "misleading" within the meaning of s.52(1).

37 Note 15 *supra*, 286-287.

38 Barwick C.J. (with whom Aickin J. agreed) held that an action akin to passing-off could not be founded on s.52. Stephen J. (with whom Jacobs J. agreed) held that while s.52 did prevent passing-off, there had not been a contravention of the section. Murphy J. took a similarly broad view of the scope of s.52 but held that the interlocutory injunction had been granted on the wrong principles.

39 In *Lubidineuse*, Wilcox J. stated in relation to *Hornsby* that "... each of their Honours rejected the submission that the heading to Part V supplies an implied limitation or qualification upon the ambit of s.52(1)" note 15 *supra*, 287. However, Barwick C.J. (with whom Aickin J. agreed) did not expressly reject this submission. In a short judgment his Honour stated inter alia that s.52 is concerned with conduct which is deceptive of the public in their capacity as consumers of goods and services but that for the purposes of s.52 consumers are not limited to the persons included in the definition of consumers. It is not clear to what extent the Chief Justice was influenced by the heading. The judgment is further complicated because after laying down these propositions, Barwick C.J. agrees with those of the reasons expressed by Stephen J. which support the conclusions reached, note 9 *supra*, 221. The Chief Justice's view of the relevance of the heading is therefore unclear.

Of the three judges in the majority on this point the only detailed discussion is by Stephen J. Jacobs J. simply agreed with Stephen J. and Murphy J. simply stated, without discussion, that "s.52 which is in Part V ... is not limited or qualified by the heading of the Part 'Consumer Protection'". Stephen J. adopted what was said by Latham C.J. in *Silk Bros Pty Ltd* v. *State Electricity Commission of Victoria* in the passage referred to above. His Honour did not regard it as appropriate that "the unambiguous words of s.52 should be given some unnaturally confined meaning because of the heading to Part V".[40]

> To subject the clear and quite general words of s.52 to some limitation derived from the heading to Part V is, I think, especially inappropriate in the case of this particular legislation. The Act is intricately drafted, some of its provisions being expressed in terms of broad generalities, as is s.52, others in elaborate detail. Each may be seen to take the precise form it does because of the particular work intended for it. That s.52(1) is intended to be a provision having a broad reach is made clear by the express provision in s.52(2) preserving its 'generality' from any limitation which might be thought to arise from the more specific provisions of succeeding sections. It is also significant that the quasi-definitions of 'consumer' in s.4(3) appear to have little application to most of the provisions of Division 1 of Part V; it is on Division 2 that they principally operate. To interpret the provisions of Division 1 in the light of the quasi-definitions, applied, through this heading, to the entire Part, will be to distort in numerous respects the otherwise clearly apparent legislative pattern manifest in Part V.[41]

St John J. was not persuaded by this passage to favour a construction of section 52(1) which retained its literal generality. His Honour had

> difficulty in understanding the reasoning of Stephen J. ... particularly the learned judge's comments on the relevance and nature of the definition of "consumer" in s.4(3) of the Act, ... and the irrelevance of the heading "Consumer Protection" in the interpretation of s.52.[42]

Reliance was placed on the passage from *Re Commercial Bank of Australia* cited by Latham C.J. in the *Silk Bros Case* adopted by Stephen J.: "... headings in a statute ... can be taken into consideration ... and may sometimes be of service in determining the scope of a provision ...".[43] St John J. held:

> [a]lthough the words of s.52 are "unambiguous", it appears to me that the scope of their application is left unclear unless some regard is had to the mischief sought to be remedied by the Act.[44]

Wilcox J. and the Full Federal Court in *Lubidineuse* had little hesitation in overruling St John J. The view expressed in *Westham* that the heading to Part V limits the relevant conduct to that affecting a person properly to be described as a "consumer" was inconsistent with binding authority. *Hornsby* not only failed to support such a limitation but was authority to the contrary.

In so far as St John J. suggests that the definition of "consumer" limits the meaning of the heading to Part V, and, in consequence, of section 52 it cannot be supported. Such a limitation would be unworkable — for example consumers are defined in terms only of "goods" and "services" — and was

40 Note 9 *supra*, 225.
41 *Id.*, 225-226.
42 Note 12 *supra*, 23.
43 *Re the Commercial Bank of Australia* (1893) 19 VLR 333, 375.
44 Note 12 *supra*, 23.

expressly rejected by Stephen J. in *Hornsby* as being subject to boundaries which would be both "obscure and intricate".[45] But despite the suggestion by Wilcox J. that St John J. was influenced by the heading in holding that section 52 was "concerned with the protection of consumers, as defined from time-to-time defined in the Act"[46] such a literal restriction was not strongly pressed by St John J. who was ultimately influenced by the "absolutely private nature of the negotiations leading to the contract" where no consumer whether in the broad sense or as defined is, or is likely to be, misled or deceived.[47] In suggesting this restriction on the scope of section 52, St John J. is on much stronger ground: the cases are littered with references to the purpose of section 52 being to protect "consumers" or "members of the public in their capacity as consumers". However, Wilcox J. was not deterred by the many such references scattered through the cases he relied on as authorities for not restricting the scope of section 52. The terms were simply "generic titles" for those intended to be protected under Part V:

> [t]he references to "consumers" and to "consuming public" in these passages are each merely a convenient general description of the persons intending to be protected under Pt.V in contrast to trade competitors who are more directly concerned with Pt.IV.[48]

Wilcox J. preferred to use the term "recipients" to describe those persons protected under section 52.

The references to "consumers" and the "consuming public" would nevertheless seem to indicate that although the scope of section 52 is not limited by the definition, it is restricted by some notion of consumer protection. Even Stephen J. in *Hornsby,* in the very judgment which was regarded by Wilcox J. as denying any role for the heading in interpreting section 52, makes the enigmatic comment that "[i]n my view this heading does not restrict the effect of s.52 in the manner contended for, although it does colour the meaning to be given to the sort of conduct against which the section is aimed".[49] This statement was made in the context of the contention that the heading was to be interpreted in the light of the specific definition of consumer. In rejecting this argument Stephen J. clearly does not reject the relevance of the heading altogether; indeed later in the judgment his Honour refers to the section being "exclusively concerned with consumer protection".[50] And Barwick C.J. (with whom Aicken J. agreed) expressly stated in the same case that "[s].52 is concerned with conduct which is

45 Note 9 *supra,* 225. The original definition of "consumer" in s.4(3) which was considered in *Hornsby* was expressed in terms of "private use or consumption", but there were differences appearing in the descriptions of consumers of goods and consumers of services which led Stephen J. to describe the definitions as "quasi-definitions". It was replaced in 1976 by s.4B: a person is a consumer if the goods or services acquired are priced below a prescribed amount. However, as there is still a difference between the definition of a consumer of goods and a consumer of services, the concern of Stephen J. as to delineating the objects of s.52's protection remains.

46 Note 15 *supra,* 286.

47 Note 12 *supra,* 25.

48 Note 15 *supra,* 288.

49 Note 9 *supra,* 223-224.

50 *Id.,* 227.

deceptive of members of the public in their capacity as consumers of goods or services" although "[f]or the purposes of s.52, consumers are not limited to the persons described in [the definition section]."[51] It is therefore only Murphy J. who categorically denies *any* limitation on section 52.

In *Parkdale Custom Built Furniture Pty Ltd* v. *Puxu Pty Ltd*,[52] Mason J. referred to *Hornsby* as authority for the following proposition:

> [t]he general words of s.52(1) should be widely interpreted without being read down by reference to the heading of Part V "Consumer Protection" or to the more specific succeeding sections.[53]

This statement was relied on by Wilcox J. in *Lubidineuse*. Taken in isolation it seems irreconcilable with the approach taken by St John J., but in context it is not compelling. The passage continues as follows:

> Although s.52(1) is intended to protect members of the public in their capacity as consumers of goods and services, competitors may seek an injunction to restrain breaches ... The remedy to prevent deception of the public often has the incidental effect of protecting a competing trader's goodwill which would be also injured by that deception.
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> Nevertheless, it is important to recall that s.52(1) is 'not concerned, as such, with any unfairness of competition in trade as between two traders' ... It is not directed exclusively or even primarily to situations of passing-off; it extends to any conduct that is likely to mislead or deceive as, for example, the making of negligent statements and false representations as to the quality of goods. *It is not enough that conduct damages a rival trader, it must mislead or deceive or be likely to mislead or deceive members of the public in their capacity as consumers.*[54]

The statement related to the question of who can bring an action under section 52 and not to the quality of conduct that contravenes section 52.

IV. THE RELEVANCE OF THE 'PASSING OFF' CASES

The fact that section 52 is located in a part of the Act headed "Consumer Protection" has not prevented the courts from applying section 52 in disputes to which no consumer is a party. The argument that reliance on section 52 is limited to consumers has not prevailed. It was established very early in the development of section 52 that the provisions of Part V are enforceable at the instance of a competitor as well as a consumer. In *World Series Cricket Pty Ltd* v. *Parish*,[55] the first case to consider the question of injunctive relief in 'passing off' type situations, the Federal Court held that because "any person" may seek an injunction to enforce the legislative prohibition (section 80(1)), it was possible for a trader injured by the competition of his trade rival to gain a remedy under the Act. Bowen C.J. noted that where the

51 *Id.*, 220. See also Franki J. in *United Telecasters Sydney Ltd* v. *Pan Hotels International Ltd* (1978) ATPR 40-085 who made a similar comment: "[t]he section is concerned with conduct which is deceptive to members of the public in their capacity as consumers ... but consumers are not limited to the persons described in s.4(3),". 17,833.

52 Note 6 *supra*.

53 *Id.*, 202.

54 *Ibid.* (Emphasis added)

55 (1977) 16 ALR 181.

application is brought in respect of a rival competitor's misleading or deceptive conduct, the application "though it vindicates or protects the private interests of the competitor, at the same time secures the public interest of consumer protection."[56] Similarly in *R.* v. *The Judges of the Federal Court of Australia; ex parte Pilkington A.C.I. (Operations) Pty Ltd* [57] Mason J. commented that the enforcement of the Part V provisions by trade rivals through injunctive relief not only enhances the protection they give to consumers but "constitutes the most effective sanction for that protection because the consumer who is misled or deceived in consequence of an unfair practice is unlikely to be a suitor for an injunction ...".[58]

In *Westham,* St John J. commented that on a narrow view of *Hornsby,* the ratio decidendi was simply that words descriptive of the nature of a business could not be misleading or deceptive within section 52. On this basis, all other expressions of opinion including the wider statements as to the scope of section 52 were obiter dicta. Although this is clearly too restrictive a view (and was so acknowledged by St John J.) the judgment of Stephen J. is clearly narrower than the judgments in *Lubidineuse* suggest. The comments as to the role of the heading were made in the context of a specific argument that the heading operates to confine section 52 so that it applies only to dealings with consumers as defined: "...since the Hornsby Centre does not trade with any such consumers, has no business relations with them, s.52 will not apply to it."[59] This argument was categorically rejected by Stephen J.:

> [i]t follows from what I have said that in my view the Sydney Centre is not to be excluded from recourse to relief under s.80 against contravention of s.52(1) because there are no private users of its services or because it has initiated these proceedings essentially for its own purposes in protection of its own interests and not those of consumers.[60]

Despite the apparent generality of the statements as to the impotency of the heading, this passage suggests that Stephen J. was confining his comments to the question of whether a trader can bring an action; reliance on section 52 is not limited to consumers whether as narrowly defined or otherwise. But, in so far as the quality of conduct that must be engaged in for section 52 to apply, Stephen J. carefully distinguished section 5 of the United States Federal Trade Commission Act (15 U.S.C. 45) on which section 52 is modelled on the basis that it is "not concerned, as such, with any unfairness in competition in trade as between two traders ... [and] is on the contrary exclusively concerned with consumer protection."[61]

In considering whether section 52 may be used to protect rights and interests traditionally enforced by recourse to a passing off action, the High Court in *Hornsby* was not faced with the issue of whether section 52 provides

56 *Id.*, 187.
57 (1978) 23 ALR 69.
58 *Id.*, 79.
59 Note 9 *supra*, 224. Entrance to the centre was free to members of the public and business dealings were conducted only with exhibitors.
60 *Id.*, 226.
61 *Id.*, 227.

a remedy in respect of misrepresentation in private negotiations between commercial interests. The issue of locus standi under section 80 is clearly separate and distinct from the issue of the quality of section 52 contraventions and the question as to whether section 52 necessarily requries a public element involving the interests of consumers.[62] This distinction was not recognised in *Lubidineuse.* In *Hornsby* and the other passing off cases referred to by Wilcox J., the conduct relied on was public and there was, therefore, the coincidence of public and private interest. As observed by Stephen J. in *Hornsby,*

> [t]he remedy in such a case will not, as in passing off, be founded upon any protection of the trader's goodwill but, being directed to preventing that very deception of the public which is injuring his goodwill, it will nevertheless be an effective remedy for that of which he complains.[63]

These cases clearly give the words "any other person" in section 80 an unrestricted meaning which allows a competitor to apply for an injunction[64] but the substantive provisions of Part V are nevertheless seen as being directed to the protection of the consuming public.[65]

V. DRAWING THE BOUNDARIES WITHIN WHICH SECTION 52 OPERATES

The question of whether section 52 applies to essentially private commercial transactions, with no public or consumer element, is one that can be authoritatively resolved only by the High Court. If the view of Wilcox J. is to prevail, the only limitation on the scope of section 52 is that the conduct be in trade or commerce — a qualification that has not imposed any significant limitation on the scope of the section.[66] If this view does not prevail, the

62 See on this point, K.E. Lindgren, "Availability of 'Consumer Protection Remedies' Under Trade Practices Act 1974 to Business Competitors" (1979) 7 *A Bus L Rev* 284.

63 Note 9 *supra,* 226.

64 Or to apply for damages under s.82; see Stephen J. in *Hornsby* at 226.

65 "Section 52 is concerned with conduct which is deceptive of members of the public in their capacity as consumers of goods or services. At the same time, because 'any person' may claim relief under s.80 for a contravention of s.52, it is possible for a trader injured by the competition of his trade rival to gain a remedy under the Trade Practices Act." *Dairy Vale Metro Co-operative Ltd* v. *Brownes Dairy Ltd* (1981) 54 FLR 243, 249, *per* Toohey J.

66 In *Wells* v. *John R. Lewis (International) Pty Ltd* (1975) 25 FLR 194, a Full Bench of the Australian Industrial Court adopted the following statement of A. Wynes, *Legislative, Executive and Judicial Power in Australia* (4th ed.) (1970), 226: "[Trade and commerce] extends to every negotiation contract trade and dealing between persons, which contemplates and causes such commerce, whether it relates to goods, persons or information." The sale of a capital item used for business purposes is caught; in *Lubidineuse* the Full Federal Court held that "the making of arrangements necessary to dispose of the clinic were part and parcel of the totality of the appellant's activities in trade or commerce", note 18 *supra.* If a transaction falls within the normal ambit of trade or commerce, the fact that the dealing was gratuitous or that the parties were not in a business relationship will be irrelevant, note 3 *supra.* However, "the mere use by a person not acting in the course of carrying on a business, of facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce", *O'Brien,* note 14 *supra,* 114. The suggestion by St John J. in *Westham* that a privately negotiated commercial contract may not be in "trade or commerce" if regularity is absent cannot be supported (see *Squibb,* note 19 *supra,* 47,594).

question becomes one of how section 52 is to be restricted. Although St John J. develops a convincing argument for limiting the scope of the broad and unambiguous language of section 52(1), by reference to the heading "Consumer Protection", his Honour is, with respect, less convincing in the parameters drawn to restrict the scope of the section. St John J. goes further than simply excluding the section from any application in "private" circumstances where no "consumer" (whether in the broad sense or as defined in the Act) is or is likely to be misled or deceived. A notion of business morality is introduced:

> [i]t appears to me that it is clear that, when looked at as a whole, the conduct in question must contain an element of unfairness when judged by a high standard of business morality... Although it is clear that an intention to mislead need not be proved, there must be a degree of unfairness when the transaction is looked at, including the relative bargaining positions of the parties in contractual situations ... The features of the facts alleged in this case which lead me to hold that s.52 is not breached are the absolutely private nature of the negotiations leading to the contract, the lack of any circumstances which could be described as "an unfair practice" according to good business morality and the lack of any allegation of fraud, negligence or deceit. An inaccurate report may be misleading, or likely to mislead, but the other elements required are lacking.[67]

The width of this statement, in particular the absence of authority for the "business morality" qualification and the reference to "fraud, negligence or deceit" which clearly conflicts with the well-established proposition that intention or state of mind is irrelevant to the question of whether a contravention of section 52 has occurred, has clearly contributed to its being virtually ignored in later cases.

Any restriction imposed on the scope of section 52 by virtue of the heading must obviously be formulated with reference to either "consumers" or the "public"; a misleading statement will not contravene section 52 unless it is made to members of the public or to individuals in their capacity as consumers.[68]

1. The "public" qualification

The frequently cited statement that section 52 is intended to protect "members of the public in their capacity as consumers"[69] has been relied on to support an argument that conduct which is directed at members of the

67 Note 12 *supra*, 25.

68 In *Glorie* v. *W.A. Chip & Pulp Co. Pty Ltd* (1981) 55 FLR 310, 341, Morling J. commented that "[g]iven that a misleading or deceptive statement is made by a corporation in trade or commerce, it is difficult to envisage that it is not caught by s.52(1) of the Act. Any statement made in trade or commerce will almost certainly be addressed, directly or indirectly, to the market place, i.e. to consumers of one class or another." However this statement, made obiter, does not resolve the problem of commercial negotiations. A representation made privately to an individual businessman is not, with respect, addressed to the marketplace. Similarly, in *Squibb*, note 19, *supra*, Gray J., in stating that private negotiations are within the scope of s.52, noted that the respondent was "attempting to sell to the applicant machines for resale to end-users." Although this statement was made in the context of whether the sale was in "trade or commerce" it suggests that a "public" nexus may be found in a private commercial contract if resale to end-users is contemplated as the offending statement may be repeated.

69 See notes 42-55 *supra*.

public but which is not deceptive of members of the public in their capacity as consumers is outside the scope of section 52. Not surprisingly this argument has not succeeded. In *Universal Telecasters(Queensland) Ltd* v. *Ainsworth Consolidated Industries Ltd* [70] the Full Federal Court held, in interlocutory proceedings, that an action under section 52 could be brought in respect of statements in a news telecast despite the fact that a television station sells neither goods nor services to the viewing public, but simply telecasts matter which is seen by the public.[71] The argument that section 52 does not prohibit conduct which is misleading or deceptive to the public as to matters relating to them in any other capacity than as consumers, was rejected. Burchett J. made a similar finding in *Industrial Equity Ltd* v. *North Broken Hill Holdings Ltd.*[72] There can be little argument with the application of section 52 in such cases. The fact that the commercial activity complained of does not involve the promotion of goods or services to members of the public is not compelling if the commercial activity is directed at a section of the public.

The "public" qualification — the concept of conduct being addressed directly or indirectly to the marketplace — was referred to by St John J. in *Westham* who pointed out that in *Hornsby* and the passing off cases, the conduct relied on was public:

> [t]hey involved an invitation to anyone who was prepared to buy or receive services. Not one was concerned with a privately negotiated contract where the offer to enter into negotiations to contract was not publicly made or indiscriminating as to who came forward.[73]

However, any suggestion that section 52 is applicable only where conduct can in some sense be said to be deceptive of the public or some section of it, cannot be supported. "Conduct" is widely defined in section 4(2) and there is clearly no justification for excluding pre-contractual misrepresentations made privately in the course of negotiations from the scope of section 52 simply on the basis that the misrepresentation was not made publicly. In *Menhaden Pty Ltd* v. *Citibank N.A.*[74] Toohey J. pointed out that although most cases decided in relation to section 52 have involved applications brought by a trade competitor of the respondent invoking section 52 by contending that members of the public had been deceived or were likely to have been deceived by advertising of the respondent, "... it does not follow

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70 (1983) ATPR 40-384.

71 See now s.65A which allows "prescribed information providers" exemption from the operation of s.52.

72 (1986) ATPR 40-682. The issue cannot be regarded as resolved by these cases; it was considered in the context of applications to strike out a statement of claim where the test is simply whether the claim is "so clearly untenable that it cannot possibly succeed", 47,512. Burchett J. referred to *Unity Corp. Ltd* v. *Industrial Equity Ltd* (unreported, 19 August 1985) in which unit holders in a unit trust were held to be in a sufficient sense consumers of the services offered by a company seeking appointment as manager of the trust. Franki J. stated that "a fairly broad interepretation has been given to s.52", but left open the question whether it was actually necessary that the applicants be consumers.

73 Note 12 *supra*, 28.

74 Note 3 *supra*.

that s.52 is confined to statements directed at the public or some identifiable section of it".[75] However, if the scope of section 52 is limited by some notion of "consumer protection", it does not follow that all pre-contractual misrepresentations made in private negotiations are actionable under section 52.

2. The "consumer" qualification

The main difficulty in restricting the scope of the section by reference to "consumer protection" is the difficulty of defining "consumer". The statutory definition is clearly inappropriate because the definition is restricted to consumers of goods and services. However a restriction framed in terms of consumers generally is even more vulnerable to the criticism of "boundaries ... both obscure and intricate" which Stephen J. in *Hornsby* directed at the statutory definition.[76] The comment attributed to John Morley that he could recognise them even if he could not describe them, is probably more applicable to consumers than elephants. The concept of personal use versus trade/business/professional use, is generally regarded as the distinguishing feature of a consumer contract, but the recognition that a range of business transactions entered into by small businesses are worthy of protection has made a monetary limit an important part of the Trade Practices Act definition.[77] In any event the definition could hardly be narrower than section 4B itself. *Westham* itself clearly illustrates the difficulty in formulating the appropriate mechanism to restrict section 52. The approach taken by St John J. was based on the assumption that "'protection' of consumers postulates some need for protection";[78] the concepts of bargaining power and unfairness were introduced to delimit the category. Support for a departure from the statutory definition may be found in the definition itself, which is stated to apply "unless the contrary intention appears", as it clearly does in section 52, which applies to conduct generally and not simply in relation to goods or services. Nevertheless, having regard to the obvious problem of defining "consumers" for the purposes of section 52, it is perhaps not surprising that later decisions have preferred an unrestrained interpretation of section 52. The approach of Wilcox J. may be justified on the basis that the public interest is best served by a general ban on misleading or deceptive conduct, whether or not the interests of individual consumers are directly affected or not. This was clearly the attitude of Ellicott J. in *Handley* v. *Snoid*:[79]

75 *Id.*, 713. This passage was adopted by the Full Federal Court in *Lubidmeuse*, note 18 *supra*. Toohey J. referred to a number of decisions in which conduct held to have been misleading or deceptive took the form of an oral or written representation made directly to the applicant.

76 Note 9 *supra*, 225.

77 See notes 21-28 *supra* and accompanying text.

78 Note 12 *supra*, 25-26.

79 (1981) ATPR 40-219 (on appeal, (1981) 54 FLR 202).

> [t]he general heading of Pt V is "Consumer Protection" but it should not be assumed from this that the protection of consumers is its only object. Section 52 is only one of a number of very broad provisions in the Act which are designed to preserve the freedom and fairness of competition in the marketplace. Part IV deals with restrictive trade practices ... These provisions are obviously designed to protect and benefit traders and consumers alike — likewise s.52. It is designed to protect the marketplace for both traders and consumers alike to ensure as far as practicable that only the truth will be disseminated about the goods and services available. Traders who are affected by false statements have as much interest in preventing their dissemination as consumers.[80]

However, such a proposition does not follow from the authorities cited to support such a development, and, in any event, constitutes reform of such magnitude that it would be reasonable to have expected the legislature to leave no doubt as to its extended application. It also rests uneasily with the unambiguous statement of Stephen J. in *Hornsby* that "section 52 ... is ... exclusively concerned with consumer protection".[81]

VI. CONCLUSION

In reviewing the extent to which the case law to 1979 resolved the question of whether the consumer protection remedies are available to business competitors, Professor Lindgren concluded that although:

> literally 'any person' will have locus standi under ss.80 and 82 ... there is an ill-defined limitation in the direction of 'public' or 'consumer' protection on the quality of conduct which he will need to prove in order to show a contravention of [section 52].[82]

The weight of authority since that review is clearly to the effect that it is not appropriate to impose any such limitation on the scope of section 52. The application of section 52 to misrepresentations in negotiations between business entities has provided the businessman with a significant measure of protection. The disadvantage of damages being assessed on the tortious rather than the contractual basis[83] is small in comparison to the width and flexibility of the statutory remedy in circumventing the limitations of the common law. However, despite the reluctance of the Federal Court to limit the scope of section 52, this issue is likely to continue to be a fertile source of doubt and controversy.

It is clear that Part V has an impact which goes beyond consumer protection, as that concept has traditionally been understood. Commercial transactions within the monetary ceiling are clearly within the scope of the comprehensive protection provided by Part V. However, the current interpretation of section 52 confers on the section a much wider sphere of influence. The comment has been made that it would be difficult to find "a

80 *Id.*, 42,972. *Handley* v. *Snoid* was a 'passing off' fact sitation. It has been argued above that such cases are not authoritative in relation to cases involving private negotiations.

81 Note 9 *supra*, 227. Stephen J. was contrasting the operation of s.52 and s.5 of the U.S. Federal Trade Commission Act (15 U.S.C. 45) which embraces within its scope both consumer protection ("unfair or deceptive acts or practices in commerce") as well as trader protection ("unfair methods of competition in commerce").

82 Note 62 *supra*, 288.

83 See the recent discussion of the High Court in *Gates* v. *City Mutual Life Assurance Society Ltd* (1986) 63 ALR 600.

more graphic recent example of "radical" law reform accomplished with such unusual economy of the draftsman's language".[84] The section was clearly intended to have a wide effect and the generous interpretation it has received does not come as any surprise. It is nevertheless true that several of the "windfalls" which private traders have received were "undoubtedly not intended nor contemplated at the time the Act was passed".[85] The treatment of commercial negotiations is one such windfall. It is not without significance that a decade of section 52 cases indicates a firm pattern of the Federal Court enlarging its own jurisdiction, and to pretend now that section 52 will be interpreted in a narrow sense is to fly strongly in the face of that pattern. Having regard to the advantages of Federal Court proceedings,[86] the expanding jurisdiction of that court is not of concern.[87] However, the "threaten[ed] ... demolition [of] much of the edifice that is the law of contract and [the construction] in its place [of] a notion of accountability for representations made by corporations in a commercial context"[88] without regard to the contractual obligations is an issue of profound importance. It can be questioned whether such a profound change in the parameters of commercial dealing should have been introduced through a questionable exercise in statutory interpretation.

In 1982, Lockhart J. commented in relation to Part V generally that "[m]uch of this territory is still unexplored."[89] Although much of that terrain has since been mapped by legislative amendment and judicial interpretation, Burchett J. has recently noted that "... the boundaries of the territory within which s.52 operates have not been finally drawn, and important questions of construction remain to be resolved."[90] The most significant uncharted area relating to the interpretation of section 52 is undoubtedly the application of the section for the private negotiations of commercial enterprises. The preponderance of case law clearly supports an unrestrained interpretation of section 52, but the issues have not been clearly articulated or fully argued and the authorities relied on in rejecting any limitation on the scope of section 52 are not conclusive. Nevertheless, until this matter is resolved by an authoritative decision of the High Court, the words of Mr Justice Douglas of the United States Supreme Court, citing Bismark, are appropriate: "[t]he most indifferent arguments are good when one has the majority of bayonets".[91]

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84 Maher, "An Overview of Section 52 of the Trade Practices Act" in P.H. Clarke (ed.), *Practical Uses of Section 52 of the Trade Practices Act* (1984), 1.

85 Ricketson, "Section 52 as an Industrial Property Remedy" in *id.*, 87.

86 Note 85 *supra*, 13, 14.

87 The significant jurisdictional changes as a consequence of the enactment of cross-vesting legislation by the Federal Parliament (Jurisdiction of Courts (Cross-vesting) Act 1987, Jurisdiction of Courts (Miscellaneous Amendments) Act 1987) do not affect the comments as to the scope of s.52.

88 Editorial comment, CCH *Australian Trade Practices Reporter*, 46,232.

89 *Hanimex Pty Ltd* v. *Kodak (Australasia) Pty Ltd* (1982) ATPR 40-287, 43,599.

90 *Industrial Equity*, note 72 *supra*, 47,520.

91 *Scales* v. *United States* 367 U.S. 203,275 (1961).