This text is written by Debra Wilson and Lindsay Trotman, Lecturer in Business Law and Associate Professor of Business Law respectively at Massey University, New Zealand.

The text covers misleading or deceptive conduct under s 9 of the New Zealand *Fair Trading Act* and related procedures and remedies, drawing also on comparative Australian court decisions.

In utilising the text, it is important to remember that it is a New Zealand text. It is, however, also of considerable benefit to Australian users because it reviews a vast amount of Australian authority and exposes the Australian reader to akin New Zealand law (in relation to which there is, sadly, not a great deal of Australian knowledge or citation). That the principles of Australian and New Zealand law in relation to misleading or deceptive conduct are akin, and in many cases, identical, is not surprising. We each have a common legal heritage, and the *Closer Economic Relations Treaty* of 1982 imposes a general commitment on each country to harmonise the principles of commercial law with those of the other, a commitment which New Zealand substantially implemented in the *Fair Trading Act* of 1986 (but which, sadly, Australia does not seem to take very seriously when it amends its commercial legislation). The result of this is that a significant amount of the text of the New Zealand *Fair Trading Act* is taken verbatim from the predecessor provisions of the Australian *Trade Practices Act* and that Australian decisions feature heavily and are highly relevant and persuasive in New Zealand. As the authors point out, however, Australian cases are a guide only and ought not to be adopted without an examination of the effect this might have on New Zealand law. No doubt it will still be the case, in each country, as in *Mills v United Building Society*¹ in New Zealand, that one judge (Sinclair J in the High Court of New Zealand) will decide the relevant issue by extensive reference to cases in the other jurisdiction (in this case Australian cases) whilst another judge (Casey J delivering the judgment in the Court of Appeal) will decide the case by reference to broad principles without any such reference, being of the belief that ‘the simple language of s 9 in three lines is clear and unambiguous’. A favourable precedent in one country can never guarantee a win in the other though it certainly helps.

From the point of view of a New Zealand user of the text, the work is admirable. To this trans-Tasman observer, the authors seem to have unearthed a mass of cases seemingly unreported which will be useful New Zealand references. The text is also highly useful to Australian readers. However, the caveat has to be lodged that the text does not cover, nor does it purport to cover, all aspects of Australian law, much of which was amended, for example, in 2004 in relation to the so called ‘insurance’ remedies (*Trade Practices Act* pt VIA) and personal injury compensation (*TPA* pt VIB) provisions but which amendments have not been carried forward into New Zealand law, possibly because of the different kiwi compensation arrangements and possibly because of non-agreement to such amendments as a matter of principle.

¹ [1988] 2 NZLR 392.
The text is 282 pages and in addition it has a Table of Contents, a case index, a Statutory Comparative Table of provisions (NZ, Australia and Australian States and Territories) relating to misleading or deceptive conduct, and a Subject Matter Index.

The text is set out in THREE PARTS. PART ONE has 5 chapters. They respectively are entitled:

- ‘In trade’;
- Misleading or deceptive conduct;
- Non-disclosure or silence;
- Opinion, advice and mandatory statements;
- Predictions, promises and post-contractual conduct.

PART TWO (4 chapters) covers ‘Procedure and Defences’. PART THREE (5 chapters) covers ‘Remedies’. Each chapter is itemised under separate specific topic headings. The treatment is clear and logical. I imagine it covers all that a New Zealander would want to know on the topic of misleading or deceptive conduct under the *Fair Trading Act*. From the viewpoint of an Australian reader, the text serves as an excellent commentary on the relevant Australian cases, relevant New Zealand akin authority is discussed in context and comparisons to Australian cases and conclusions from such comparisons appropriately drawn. It is a scholarly work and fulfils a need for an authoritative reference text linking decisions on each side of the Tasman.

As this commentary is written for an Australian publication, I think it appropriate to comment on some caveats which should be issued to the Australian reader. This is in no way to derogate from the worth of the text to a New Zealand reader. Nor, indeed, is it to derogate from the worth of the text as a comparative work. However, the caveats must, nonetheless, be stated lest they be overlooked by the Australian reader when using the text as a reference.

The utility of the work to the Australian reader would, I believe, have been increased if, at some central point, perhaps in an Appendix, the various differences between Australian and New Zealand Law had been briefly stated. This would be a valuable ready reference point. Admittedly, the authors have set out a comparative index of sections and reproduced the major sections of all the Australian Commonwealth, State and Territory comparative legislation. However, in some respects, true comparisons are not made and, even when made, can be missed because they are noted in parts of the text perhaps overlooked.

To illustrate the point, I refer to s 51A of the Australian *Trade Practices Act* dealing with statements as to future matters made without reasonable grounds for doing so. Statements so made are deemed misleading in Australia. New Zealand has no comparative statutory provision. The comparative statutory Table has no reference to the provision. The table of comparative sections does not refer to the provision. To be fair, however, the matter is dealt with in the text at p 124 under ‘Predictions’ and referenced in the Index. The point is thus covered albeit it may be overlooked if only the comparative Tables are referred to or if only the text under the heading ‘Actionability as misleading or deceptive conduct’ is read. Other differences can, however, be more easily overlooked. The provisions of Part VIA of the Australian *Trade Practices Act* dealing with indemnities between parties, which differ significantly from their New Zealand counterpart provisions, are referred to nowhere other than at footnote 118 on page 124 and can be easily missed. Sometimes a complete comparison between Australian and New Zealand
law does not occur because of differing legislation outside the Fair Trading Act. In New Zealand, the Contractual Remedies Act 1979 covers various issues of non-disclosure in a contractual context. In Australia, there is no such legislation at the Federal level and only some States and Territories (e.g. South Australia and the ACT) have akin provisions. This means that the Australian equivalent of s 9 of the New Zealand Fair Trading Act has a greatly expanded role in Australia compared with its New Zealand counterpart when misleading context occurs in a contractual sense. Much Australian misleading conduct case law is aimed to cover what is covered statutorily by the Contractual Remedies Act in New Zealand.

One of the very interesting aspects of the text lies in the way that significant problems on one side of the Tasman are so easily solved on the other. The Australian High Court, for example, concluded in Henville v Walker and I & L Securities v HTW Valuers (Brisbane) Pty Ltd that damages could not be reduced to take account of contributory negligence. This has always seemed to me to be a somewhat artificial view and one out of step with contemporary principles of tort law damages assessment. In New Zealand, the much more common sense approach seems to have been adopted when Cooke P said in Goldsboro v Walker that ‘power to award the full amount of the loss or damage should naturally carry implicit power to award part of the full amount’.

On the other hand, the High Court of New Zealand in Cox & Coxon Ltd v Leipst, seems artificially to have limited damages to prevent recovery under s 9 for loss of profits caused by the relevant misleading conduct. The Australian High Court in Henville v Walker expressly referred to the New Zealand decision in Cox but declined to follow it on the basis that all losses directly attributable to the contravention of the Act should be recoverable. The text suggests that damages claims should be all encompassing subject to assessments of causation, contributory negligence and failure to mitigate and that Cox should be re-examined in line with Australian precedent. This is especially logical given that damages for misleading conduct have been said not to be based on common law concepts but to indemnify a wronged party for all losses suffered.

The above two examples (Goldsboro and Henville) are discussed in detail in the text. I have covered them here simply to show that the text is thorough in its research, that there are major trans-Tasman differences on some quite basic principles, that each country can learn from the other and that there are good grounds for greater trans-Tasman consideration in our respective judicial evaluations. If governments were serious about trans-Tasman uniformity of commercial laws, it is issues like these which could also occupy more of governmental agendas.

All in all, I found this to be a well researched, clearly written and thoroughly useful book for readers on each side of the Tasman. Readers studying the Australian law on misleading or deceptive conduct must, however, run an Australian ‘noter up’ to ensure that they have the full Australian law as the text does not cover every comparative provision. The main irritation I had is the usual one which I have in reading New Zealand/Australian comparative works. This is references in the text to the term ‘High Court’ without giving such body a country of origin. This means that one is consistently searching footnotes to see if the Court is the Australian or the New Zealand High Court, it being of importance to

4 [1993] 1 NZLR 394.
know both what country one is in and the hierarchy of the Court involved. I think it good literature style in trans-Tasman commentaries always to insert the words ‘New Zealand’ or ‘Australian’ before ‘High Court’ wherever appearing, even if this blows out the text by a few pages.

However, if this is my major irritation, then it is obvious that I do not have too much about which to complain. Perhaps, even by expressing this irritation, I am merely following the U.K. television series and becoming an addition to the band of ‘Grumpy Old Men’.

Those interested in misleading or deceptive conduct should regard this text as a ‘must’ for their library. I commend it highly.

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