

LIABILITY FOR UNCONSCIONABLE AND MISLEADING CONDUCT IN
COMMERCIAL DEALINGS: BALANCING COMMERCIAL MORALITY
AND INDIVIDUAL RESPONSIBILITY

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Introduction

Pursuant to Part IVA and section 52 of the *Trade Practices Act 1974* (Cth) corporations are prohibited from engaging in 'unconscionable' and 'misleading or deceptive' conduct. The statutory provisions are not limited to consumer transactions but extend to cover the pre-contractual and contractual relationships entered into between commercial parties themselves. In recent times, concerns have been raised that the provisions are causing widespread uncertainty among business persons, resulting in much complex and costly litigation.¹

This paper explores the rationale for including private commercial conduct within the scope of Part IVA and section 52, finding that the unifying theme of 'commercial morality' underpins judicial and legislative activity in this regard. It is not proposed to illustrate the application of the provisions with copious case examples, although the volume of decisions easily accommodates such an exercise, but rather to examine and evaluate commercial morality as the underlying purpose behind the extension of the prohibitions against unconscionable and misleading conduct to the commercial context. In this endeavour, criticisms of growing uncertainty in the law are assessed as are calls for commercial parties to be permitted to exclude liability under section 51AA and section 52, or at least to be entitled to offer the defence of 'contributory carelessness' on the part of an applicant.

1 See, eg: Baxt R, 'Reform of the Law of Unconscionable Conduct: Redressing the Balance or Undermining Legal Certainty' (1992) 3 JBFLP 84; and Lieberman D, 'Section 52 - Time for Legislative Intervention?', Paper submitted to the Law Council of Australia, 1994. Presumably such commentators are basing their concerns on section 52's notoriety as the most litigated provision in the *Trade Practices Act*.

Part IVA: Unconscionable Conduct

Since the High Court's decision in *Commercial Bank of Australia Ltd v Amadio*,² the principles governing unconscionability appear reasonably settled. In that case, an elderly Italian couple were persuaded by their son to give a mortgage guarantee in favour of his business. The couple believed that the guarantee was limited to a sum of \$50,000 for six months. In fact, it was unlimited in amount and duration. Following the failure of the son's business, the High Court held that it would be unconscionable for the bank to retain the benefit of the guarantee when it had reason to believe the Amadios were in a position of special disadvantage (they were elderly and spoke poor English), yet failed to provide or recommend the obtaining of clearly necessary advice and assistance.

In the course of his judgment, Mason J explained the nature of unconscionable conduct as follows:

... 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from special disability or is placed in some special situation of disadvantage.³

Essentially, the doctrine has three elements:

- (a) one party has a 'special disadvantage';
- (b) the stronger party knew or ought to have known of the weaker party's special disadvantage;⁴
- (c) the stronger party took unfair advantage of the weaker party's special disadvantage to obtain a benefit for him/herself.⁵

In *Blomley v Ryan*,⁶ it was held that a special disadvantage may be constituted by 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.⁷ However, *Amadio's* case indicates that the categories of special disadvantage are not

2 (1983) 151 CLR 447.

3 Ibid at 461.

4 In the absence of evidence proving direct knowledge of the special disadvantage by the stronger party, the test is whether the facts were such as would cause a reasonable person to question the other party's ability to determine what was in his/her own interests.

5 It is not sufficient to establish unconscionability that the potential exists for a stronger party to take advantage of a weaker party's special disadvantage; this must in fact have occurred.

6 (1956) 99 CLR 362. See, also, *Louth v Diprose* (1992) 175 CLR 621 in which emotional dependence was recognised as a special disadvantage.

7 (1956) 99 CLR 362 at 405, per Fullagar J.

closed; rather, it will be relevant to examine any circumstances affecting a party's ability 'to make a judgment as to his own best interests'.⁸

Section 51AB attempts to clarify the doctrine of unconscionability for the benefit of the business community by establishing a statutory norm for the control of unconscionable conduct in consumer transactions.⁹ Under section 51AB(2), the courts are specifically directed to consider a range of factors, which go beyond the types of special disadvantage identified in *Blomley* and *Amadio*, in evaluating whether a particular contract or particular conduct is unconscionable.¹⁰ The objective, as argued below, is to reduce uncertainty in the law:

To prescribe in legislative form, a set of criteria by which conduct or a contract can be judged to warrant the judicial granting of relief therefore reduces the uncertainty in the law rather than increasing it.¹¹

In effect, corporations are given notice that their dealings with consumers may be set aside for unconscionability and that the following criteria will be taken into account in assessing unconscionable conduct:¹²

- (a) the relative strength and bargaining positions of the corporation and the consumer;¹³
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;¹⁴
- (c) whether the consumer was able to understand the documents relating to the supply or possible supply of the goods or services;¹⁵
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on

8 (1983) 151 CLR 447 at 462, per Mason J. See, also, *Begbie v State Bank of New South Wales Ltd* (1994) ATPR 41-288 at 41,896 where Drummond J stated that the finding of a special disadvantage requires 'an objective comparison of the relative positions of the respective parties and of their ability to protect their own interests.'

9 See, generally, the guideline document 'Unconscionable Conduct in Consumer Transactions: A Guide to Section 51AB of the Trade Practices Act' issued by the Trade Practices Commission.

10 Although circumstances giving rise to unconscionability will usually fall within several of the paragraphs in section 51AB(2), unconscionability may still be established if the circumstances fall within one paragraph only or do not fall within any.

11 Goldring J, 'Certainty in Contracts - Unconscionability and the Trade Practices Act: The Effect of Section 52A' (1988) 11 Syd LR 514, at 535.

12 See section 51AB(2)(a)-(c). Pursuant to section 51AB(4), a court 'shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention'.

13 Disparity may arise if the consumer suffers from a physical, intellectual, or emotional disability, lack of education or financial hardship. Information asymmetry between the parties may also be relevant.

14 This paragraph will be relevant where the contract contains harsh terms.

15 Language problems and poor educational background are implied by this paragraph.

behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services;¹⁶ and

- (e) the amounts for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.¹⁷

A commercial party can bring an action only if the goods or services acquired fall within the requirements of section 51AB(5) and (6).¹⁸ Section 51AB(5) defines 'goods or services' to be 'goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption'.¹⁹ On its face, therefore, section 51AB would appear to be inapplicable to most commercial dealings.²⁰

However, the fact that the section is apparently confined to consumers has not prevented its application in cases involving commercial parties. Thus, in *George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd*,²¹ which involved a real estate agent's claim for unpaid commission, the dispute centred on a contract between two commercial parties.

Although the subject-matter of the contract was non-residential property described as a 'starter factoryette', Nathan J, of the Supreme Court of Victoria, was satisfied that the provision of the services of a real estate agent were services of a kind ordinarily acquired for personal, domestic or household use or consumption, so as to bring the matter within the ambit of section 51AB.

The contract was in the form of a standard sole agency agreement but a particular term had the effect of creating a general agency of indeterminate length. In addition, the term imposed a contingent liability on the vendor to pay commission for an indeterminate period following expiration of the agreement.

16 This paragraph takes account of high pressure sales techniques and situations where a party enters into a transaction as the result of the influence of a close relative.

17 This paragraph allows consideration of whether the consumer has made a bad bargain.

18 See, generally, Sneddon M, 'Unfair Conduct in the Taking of Guarantees and the Role of Independent Advice' (1990) 13 UNSWLJ 302, at 333-334.

19 The Explanatory Memorandum to the Trade Practices Amendment Bill 1985 (Cth) states that it was envisaged that section 51AB would at least cover conduct of the kind discussed in *Amadio's* case.

20 However, in the context of Part V of the Act, the phrase 'ordinarily acquired for personal, domestic or household use or consumption' has been read widely to include transactions between corporations involving goods or services of a type which households might also acquire. Thus, in *Carpet Call Pty Ltd v Chan* (1987) ATPR (Digest) 46-025, the sale of domestic-grade carpet to a nightclub fell within the definition of a consumer transaction on the basis that carpet is a product ordinarily acquired for household or domestic use.

21 (1991) ATPR 41-104.

Nathan J concluded that the term was unconscionable. His Honour found that it was 'submerged in fine print'²² and that it was unconscionable 'to embed in a pro forma contract, a term inconsistent with its stated purpose'.²³ His Honour further found that it was 'an ingredient of the unconscionability'²⁴ that there was a contingent liability to pay commission for an indeterminate period.

The case is noteworthy for Nathan J's preparedness to find a special disadvantage in circumstances which, with respect, appear to disclose nothing more than two well-matched commercial negotiators. Nevertheless, his Honour took the view that the business manager of the defendant company, a woman described as 'a competent commercial person',²⁵ had placed herself in an unequal bargaining position vis-a-vis the plaintiff company (Collings) by relying on its representatives to be utterly frank and honest, a situation of which the plaintiff was fully aware.²⁶ When the business manager incorrectly stated the effect of the relevant term she was assured by the plaintiff's representatives that she was correct and 'became even less equal as a bargainer with Collings'.²⁷

Perhaps the decision in *Collings* is simply cause for reflection on this general warning:

In the real world where a claim is made that another commercial enterprise's deliberately tough bargaining has gone too far it will not always be an easy task to locate the line which separates the permissible from the impermissible.²⁸

Reflecting continuing legislative concern with levels of commercial morality in the business community, the notion of unconscionable conduct has been extended, under the *Trade Practices Act*, from consumer transactions to more traditional business relationships.²⁹ Section 51AA provides that 'A corporation must not, in trade or commerce, engage in

22 Ibid at 52,622.

23 Ibid.

24 Ibid at 52,623.

25 Ibid at 52,624.

26 With all due respect to Nathan J, one is forced to speculate as to whether the business manager's gender may have had some effect on the decision.

27 (1991) ATPR 41-104 at 52,624.

28 Goldring J and Maher L, 'What is Unconscionability?' (1994) 1 CCLJ 230, at 245.

29 See, generally, *Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, Unconscionable Conduct and the Trade Practices Act: Possible Extension to Cover Commercial Transactions*, 1991. At pp vi-vii of the Executive Summary of the Report, the Commission concluded: 'It would be economically justifiable and consistent with the objectives of the *Trade Practices Act* to regulate unconscionable conduct in commercial transactions.' The Commission's argument was that regulation would lessen or remove the market distortion of unconscionable transactions arising from the tendency of such transactions to distort the free movement of resources to their most valuable and efficient use.

conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.³⁰

The expression 'the unwritten law' refers to the equitable doctrine of unconscionable conduct. Thus, the effect of section 51AA, which is limited to conduct not already caught by section 51AB,³¹ is that the whole body of principles developed by the courts in relation to unconscionability now applies, by virtue of the *Trade Practices Act*,³² to corporations in their private commercial activities.

Opponents of the extension of statutory unconscionability to commercial situations feared a dramatic increase in case law and a consequential reduction in the certainty of commercial contracts.³³ However, it would appear that such fears in relation to section 51AA are unfounded since the finding of a special disadvantage is likely to be satisfied only in limited cases and the possible impact on commercial dealings will be correspondingly reduced.³⁴ As the Attorney-General's second reading speech acknowledged:

Unconscionable conduct is more likely to have a role in commercial cases where there is a unconscionable economic pressure rather than in cases of the taking advantage of an attribute personal to one of the parties ... But the need for such pressure to constitute a 'special disability' will inhibit many commercial complainants, upset at the imposition of harsh terms, yet unable to satisfy the rigorous test of *Amadio*.³⁵

Conversely, the restricted operation of section 51AA has led other commentators³⁶ to argue that it is time to give business people the same broad statutory protection against unconscionable conduct as is provided to consumers under section 51AB, since there are many instances where a business person is in a similar position to that of a consumer.³⁷ Interestingly, Senator Schacht, the Minister for Small Business, recently

30 See, generally, the guideline document 'Unconscionable Conduct in Commercial Dealings: A Guide to Section 51AA of the Trade Practices Act' issued by the Trade Practices Commission.

31 See section 51AA(2).

32 As a consequence, representative action by the Trade Practices Commission is possible and a range of remedies under the *Trade Practices Act* is available. These remedies include orders for contracts to be set aside or varied in whole or in part, money to be repaid or compensation to be paid: see subsection 87(1A) and (2). Proceedings must be instituted within two years of the date on which the cause of action accrues: see section 87(1CA).

33 See, further, Healey D, 'Unconscionable Conduct in Commercial Dealings' (1993) 1 TPLJ 169, at 182.

34 In support of this view, see: Finlay A, 'Part IVA of the Trade Practices Act - Its Application to Business Dealings' (1993) 3 AJCL 38, at 48; Taperell G, 'Unconscionable Conduct and Small Business: Possible Extension of Section 52A of the Trade Practices Act 1974' (1990) 18 ABLR 370, at 386; and Zumbo F, 'Unconscionability and Commercial Transactions: Exploring the Need for Further Reform Under the Trade Practices Act' (1994) 22 ABLR 323, at 342-344.

35 Duffy M, *House of Representatives Weekly Hansard*, 3 November 1992, 2408.

36 See, eg, Zumbo F, 'The Doctrine of Unconscionability: An Enigma?' (1995) 3 CCL 5, at 12.

37 Indeed, the definition of 'consumer' in section 4B is a legislative acknowledgment of this fact.

announced the Federal Government's intention to extend the statutory regime for unconscionable conduct to situations where a commercial relationship exists between two businesses and where one of the two parties enjoys significant bargaining power.³⁸

Section 52: Misleading or Deceptive Conduct

Section 52(1) is uncompromising in its terms: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.'³⁹ From a legalistic perspective, the section does not create a cause of action but rather establishes a norm of conduct. However, contravention does give rise to causes of action under other provisions of the *Trade Practices Act*, for example, injunctions (section 80), damages (section 82) and a range of other orders (section 87).

The legislative intention at the time of section 52's enactment was to protect consumers from unfair practices, as the Attorney-General's second reading speech indicates:

In 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.⁴⁰

However, the weight of judicial authority over the last 21 years is clearly to the effect that it is not appropriate to impose limitations on the scope of section 52 other than those arising from the language of the section itself. Thus in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*,⁴¹ the High Court held that the interpretation of section 52 was not to be limited by its appearance in Part V of the Act which is headed 'Consumer Protection'.

Hornsby involved an action, based on section 52 but similar to that in passing-off, to restrain the appellant from using a similar business name. The appellant's argument was that the *Trade Practices Act* was concerned

38 'Trade Practices Reform to Protect Small Business', *The Australian*, 22 September 1995, 6.

39 Section 52 is assisted by section 51A which provides that representations as to future matters are deemed to be misleading or deceptive if, at the time they were made, they were not based on reasonable grounds.

40 Murphy L, *Senate Parliamentary Debates*, (1974) Vol. 60, 540-541.

41 (1978) 140 CLR 216.

with protecting consumers and that it was not possible to extend the operation of the Act to protect commercial interests. Provisions of Part V, it was argued, were to be read down by reference to the heading 'Consumer Protection'.⁴²

While the heading to Part V might support the appellant's case for reading down section 52, there was also the unambiguous generality of the wording of section 52 to consider. In the result, the majority of the High Court⁴³ favoured a broad literal reading of the section unrestricted by any implied prohibition of subject-matter. Stephen J, with whom Jacobs J expressly concurred and Murphy J was in general agreement, adopted the view that the heading to a statutory provision can only be used to resolve ambiguity in the actual words of the provision, which was not the situation in relation to section 52. His Honour stated:

I do not regard it as appropriate that the unambiguous words of section 52 should be read given some unnaturally confined meaning because of the heading to Part V.⁴⁴

In dissent, Barwick CJ, with whom Aickin J agreed, stated that section 52 is concerned with conduct which is deceptive of the public in their capacity as consumers of goods or services and is not concerned with the protection of the reputation or goodwill of trade competitors.

Despite the High Court's pronouncement in *Hornsby*, St John J, in *Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd*,⁴⁵ held that the scope of section 52 was limited by the heading to Part V. His Honour regarded the ambit of the section to be unclear unless some regard was had to the mischief the *Trade Practices Act* sought to remedy and the heading to Part V.

The anomalous decision in *Westham* was subsequently overruled by the Full Federal Court in *Bevanere Pty Ltd v Lubidineuse*⁴⁶ on the basis that St John J's views were inconsistent with the binding authority provided by the High Court in *Hornsby*. Morling, Neaves and Spender JJ accepted that 'the operation of the unambiguous words of section 52 should not be given a confined meaning because of the heading to Part V'.⁴⁷

42 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.' The principles of statutory interpretation permit the consideration of such intrinsic material to resolve ambiguity.

43 Stephen, Jacobs and Murphy JJ.

44 (1978) 140 CLR 216 at 225.

45 (1983) ATPR 40-338.

46 (1985) ATPR 40-565.

47 *Ibid* at 46,570.

More recently, the question again arose for consideration by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*.⁴⁸ There, Nelson, a worker employed on a building site in Sydney, suffered serious injuries when he fell to the bottom of an air-conditioning shaft after allegedly being given incorrect instructions by his foreman as to how to remove the grate at the shaft's entry point. Nelson sought to argue that the instructions given by the foreman constituted misleading or deceptive conduct in breach of section 52.

The High Court was unanimously of the view that no contravention of section 52 had occurred. However, their Honours were divided as to the reasons for this conclusion.

Brennan, McHugh and Toohey JJ, in the minority, were prepared to read section 52, in light of the 'Consumer Protection' heading to Part V, as prohibiting only conduct that was misleading or deceptive of persons 'in their capacity as consumers'.⁴⁹ On this basis, Nelson's claim must accordingly fail.

However, the majority of the Court, comprising Mason CJ, Deane, Dawson and Gaudron JJ, rejected this reasoning. In a joint judgment, their Honours held:

The heading does not ... control the permissible scope of the substantive provisions of Part V and cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions ... As a matter of language, section 52 prohibits a corporation from engaging in misleading or deceptive conduct 'in trade or commerce' regardless of whether the conduct is misleading to, or deceptive of, a person in the capacity of a consumer. In these circumstances, it is not permissible to give to the heading of Part V the effect of confining the general words of section 52 to cases involving the protection of consumers alone.⁵⁰

In dismissing Nelson's action, the majority focused on the requirement that the conduct complained of must be 'in trade or commerce'. Their Honours adopted a narrow meaning of the phrase, limiting the section to 'conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.⁵¹ The conduct in question was not of this character, being an internal communication by one employee to another in the course of their ordinary activities. Their Honours explained:

48 (1990) 169 CLR 594.

49 Ibid at 605, per Brennan J; 614, per McHugh J; 618, per Toohey J. (Toohey J was also prepared to hold that the instructions were not 'in trade or commerce'.)

50 Ibid at 601-602.

51 Ibid at 603.

Indeed, in the context of Part V of the Act with its heading 'Consumer Protection', it is plain that section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business.⁵²

However, with respect, it appears somewhat paradoxical that the majority were prepared to take account of the heading to Part V in reaching this particular conclusion.

Although a defendant must be engaged in trade or commerce to be liable under section 52, this limitation only minimally curtails the wide scope of the provision.⁵³ In general, an expansive view of the section prevails. As the Full Federal Court observed in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*,⁵⁴ section 52 is to be given a broad construction and the boundaries of its operation are yet to be determined. Moreover, a court should not be inhibited from giving the words their proper construction even if that were to result in liabilities and remedies different from the general law.⁵⁵

It is clear, therefore, that the generality of the wording used in section 52, coupled with the continuing refusal of the courts to read down those words in accordance with the heading to Part V, has given the section an impact far beyond consumer protection as traditionally understood.⁵⁶ Justice French, writing extra-judicially, has commented:

The elasticity and potential scope of misleading and deceptive conduct take it well beyond the boundaries of what many would think of a consumer protection law.⁵⁷

While consumer protection has been achieved, it has also had significant ramifications upon business dealings. Generally speaking, relevant cases may be classified as falling into three broad categories:⁵⁸

- (1) use of section 52 in typical consumer protection situations where goods or services are being promoted in a manner which is misleading or deceptive;⁵⁹

52 Ibid at 603-604.

53 See, further, Pengilley W, 'Unconscionable and Misleading Conduct: How the Trade Practices Act is Used and the Duty to Advise' (1992) 8 QUTLJ 35, at 41.

54 (1993) ATPR 41-269.

55 Ibid at 41,645, per Lockhart and Gummow JJ.

56 According to Pengilley, 'The impact of section 52 is so wide that it cannot be ignored in virtually any commercial or litigation advice': Pengilley W, 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?' (1987) 15 ABLR 247, at 249.

57 French R, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 ALJ 250, at 251.

58 Terry A, 'Consumer Protection for Business Interests: The Application of Section 52 Trade Practices Act to Commercial Negotiations' (1987) 10 UNSWLJ 260, at 261.

- (2) use of section 52 as an alternative to actions in passing-off;⁶⁰ and
- (3) use of section 52 by parties to private commercial contracts seeking remedies in respect of pre-contractual representations.⁶¹

Within the last category, commercial interests have found section 52 an extremely effective remedy.⁶² Although some commentators have expressed surprise at this result,⁶³ it is compatible with the pro-competition purpose at the heart of the *Trade Practices Act*.⁶⁴ Indeed, Ellicott J recognised as much in *Handley v Snoid*.⁶⁵

... the general heading of Part 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 section 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.⁶⁶

However, as *Handley v Snoid* essentially involved a passing-off fact situation (category 2 above), it has been recognised that the decision may not be relevant to cases involving private commercial contracts (category 3 above).⁶⁷ However, it is submitted here that Ellicott J's insightful comments encapsulate the fundamental economic objective of section 52 and are applicable to all categories of conduct within its domain. To the extent that all conduct falling under section 52 must be 'in trade or commerce' (whether

59 See, eg, *Siddons Pty Ltd v Stanley Works Pty Ltd* (1991) ATPR 41-111.

60 See, eg, *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303.

61 See, eg, *Neilsen v Hempston Holdings Pty Ltd* (1986) ATPR 40-686.

62 In personal observations on future directions in Australian law, Chief Justice Mason, as he then was, remarked: '... it is becoming apparent that the availability of new remedies provided by statute is making traditional common law and equitable remedies less important than they formerly were ... Section 52 of the *Trade Practices Act* 1974 (Cth) [for example], which provides a statutory cause of action sounding in damages in respect of misleading and deceptive conduct, has reduced the importance of actions for breach of warranty, fraudulent misrepresentation and negligence in those cases to which the statute applies.' See Mason A, 'Changing the Law in a Changing Society' (1993) 67 ALJ 568, at 568.

63 See, eg, Terry, above n 58, at 261.

64 Of course, in *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177, the High Court acknowledged that competition by its very nature is ruthless and produces winners and losers. In seeking to promote competition, therefore, the fundamental purpose of the *Trade Practices Act* is to ensure a level playing field where firms are encouraged to compete vigorously, but on their merits. Through its prohibition of misleading or deceptive conduct, which necessarily encourages 'genuine' competition, section 52 is essentially pro-competition.

65 (1981) ATPR 40-219.

66 *Ibid* at 42,972.

67 Terry, above n 58, at 276 (n 80).

involving consumer or commercial transactions), such conduct necessarily affects the competitive environment prevailing in the marketplace, even if only indirectly.⁶⁸ One commentator has expressed the argument as follows:

... although the part of the Act in which section 52 appears was designed for the protection of consumers against unfair trading practices, the legislature has taken the view that this policy will be best effectuated by means of a general ban on misleading conduct in the marketplace, whether or not the interests of any individual consumer are directly affected in any particular case.⁶⁹

To sum up: over the past 21 years, attempts to impose limits on section 52 by reference to the Part V heading 'Consumer Protection' have not prevailed, 'although it is fair to say that the question whether such limits do exist may still be open.'⁷⁰ Given the narrow margin in *Nelson's* case,⁷¹ it would be premature at this stage to say the debate is over, particularly in light of recent changes to the composition of the High Court. Nevertheless, in support of the current expansive view of section 52, it may be argued that the extension of the provision to private business dealings accords with the pro-competitive objective of the *Trade Practices Act*. Moreover, this interpretation reflects the courts' increasing concern with commercial morality by subjecting business persons to the standard of conduct prescribed in section 52.⁷²

Contributory Carelessness

The courts have made it clear that in order for a claim for damages to succeed as a result of a breach of section 52, there must be reliance by the applicant on the alleged misleading conduct. At the same time, however, the courts have been willing to excuse applicants for not taking appropriate steps to protect their own interests. That is to say, carelessness does not appear to be recognised as a defence to a claim under section 52. In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*,⁷³ Lockhart J summed up the position thus:

... [the] decisions support the view that recovery under section 52 is founded by the applicant's actual reliance upon the misleading or deceptive conduct of the respondent although that conduct was not the only factor in the applicant's decision to enter a particular agreement, and although the

68 '[N]o other provision has a greater day-to-day influence in the marketplace': Terry A., 'Misleading or Deceptive Conduct in Commercial Negotiations' (1988) 16 ABLR 189, at 189.

69 Harland D, 'Misleading or Deceptive Conduct: The Breadth and Limitations of the Prohibition' (1991) 4 JCL 107, at 116.

70 French, above n 57, at 251.

71 Three judges in favour of a consumer limitation, four against.

72 '[T]o pretend now that section 52 will be interpreted in a narrow sense is to fly strongly in the face of that [expansive] pattern': Terry, above n 58, at 277.

73 (1989) ATPR 40-968.

applicant did not seek to verify the representations or did so inadequately and so failed to discover their falsity.⁷⁴

To date, the requirement for reliance has proved the most effective way of limiting the application of section 52. Examples abound of instances where it has not been accepted on the evidence that alleged misleading representations induced the applicant to enter the contract:⁷⁵ when experienced parties negotiated over a long period;⁷⁶ when the applicant made his/her own enquiries;⁷⁷ when it was clear that the applicant would not have acted differently even if the true facts had been fully disclosed;⁷⁸ when legal advice was received as to the rights and obligations assumed under the contract;⁷⁹ when the misrepresentation was corrected prior to execution of the contract;⁸⁰ or when no particular significance was placed on the conduct under complaint.⁸¹

Similarly, there is some judicial support for the view that a suitably drafted exclusion or acknowledgment clause, generally ineffective in excluding liability for contraventions of section 52, may be of evidentiary value in helping to establish that the particular plaintiff did not act in reliance on, and consequently did not suffer loss as a result of, the impugned conduct.⁸² In other words, the disclaimer must break the chain of causation between the misleading conduct and the claimed loss.

As a separate issue to reliance, it is submitted that, in order to achieve equitable outcomes under section 52, consideration should be given to the circumstances in which it would be appropriate for a respondent to claim contributory carelessness on the part of the applicant (in a way analogous to a claim for contributory negligence)⁸³ where part of the loss or damage flowing from the respondent's misleading conduct can be fairly attributed to the applicant's own carelessness.⁸⁴ Indeed, there is existing authority for the proposition that where the degree of carelessness of an applicant is extreme, his/her loss may be held to be the consequence of his/her own actions, not of the breach of section 52 committed by the respondent.⁸⁵

74 Ibid at 49,154, per Lockhart J (with whom Burchett and Foster JJ concurred).

75 Terry, above n 68, at 201-202.

76 See, eg, *Pappas v Soulac Pty Ltd* (1983) ATPR 40-411.

77 Ibid.

78 See, eg, *Capelvenere v Omega Developments Corp Pty Ltd* (1983) ATPR 40-386.

79 See, eg, *HW Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) ATPR 40-371.

80 See, eg, *NT Aquatics Pty Ltd v Cianiup Pty Ltd* (1986) ATPR 40-740.

81 See, eg, *Commonwealth Bank of Australia v Mehta* (1991) ATPR 41-103.

82 See *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre* (1989) ATPR (Digest) 46-048 and *Waltip Pty Ltd v Capalaba Park Shopping Centre* (1989) ATPR 40-975.

83 See, further: Campbell J, 'Contribution, Contributory Negligence and Section 52 of the Trade Practices Act - Part II' (1993) 67 ALJ 177, at 188; and Heydon J, 'The Relevance of the Victim's Level of Care in Misleading and Deceptive Conduct Actions' (1995) 2 CCLJ 230, at pp 238-243.

84 See, generally: Campbell, above n 83, at 187-190; French, above n 57, at 264-265; Heydon, above n 83, at 233-237; and Terry, above n 68, at 193-195.

85 *Argy v Blunt and Lane Cove Real Estate Pty Ltd* (1990) ATPR 41-105.

Judicial support for the view that those relying on section 52 should bear some responsibility for their own carelessness (through the apportionment of liability) is to be found in the judgment of Gibbs CJ in *Parkdale Custom Built Furniture v Puxu Pty Ltd*,⁸⁶ where his Honour opined:

The heavy burdens which the section creates cannot have been intended for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will of course depend on all the circumstances.⁸⁷

However, despite Gibbs CJ's view that the 'reasonable person' provides the benchmark for assessing conduct under section 52, the overwhelming weight of authority is in favour of a less stringent test.⁸⁸ In judging the capacity of conduct to mislead or deceive, the approach is to assess the effect of the conduct on all who come within the relevant section of the public (that is, the group potentially exposed to the conduct), 'including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated.'⁸⁹ Representative of this group is the ordinary person - not the reasonable person - who is 'not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid.'⁹⁰ In the words of one commentator, the standard is 'depressingly low'.⁹¹

Thus, in assessing contributory carelessness, it is not relevant to ask what a reasonable person would have done, in the circumstances of a particular case, to protect their own interests but, rather, what an ordinary person would have done.⁹² Nevertheless, in appropriate cases, contributory carelessness provides a fair and flexible means of ameliorating the application of section 52 to private commercial transactions.⁹³

In *Squibb & Sons Pty Ltd v Tully Corp. Pty Ltd*,⁹⁴ for example, the applicant company alleged, *inter alia*, that the respondent importer had

86 (1982) 149 CLR 191.

87 Ibid at 199

88 See, generally, Heydon, above n 83, at 230-235.

89 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303 at 43,752, per Deane and Fitzgerald JJ.

90 *Annand and Thompson Pty Ltd v Trade Practices Commission* (1979) ATPR 40-116 at 18,272, per Franki J.

91 Terry, above n 68, at 191.

92 In the context of commercial transactions, the standard will generally be lifted to that of the 'ordinary' business person.

93 See, eg, *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd* (1988) ATPR 40-854.

94 (1986) ATPR 40-691.

falsely represented that certain machines used for predicting conception in animals could also be used for gender selection. In dismissing that aspect of the section 52 claim, Gray J held that the applicant - a 'large corporation with abundant resources, ... considerable experience in the marketing of a wide range of products and access to a considerable body of knowledge'⁹⁵ - could easily have 'taken some action to verify or state the accuracy of the claims made to it'⁹⁶ had it bothered to do so. His Honour also made these very pertinent remarks:

It must be remembered that the *Trade Practices Act 1974* makes available claims for damages against a corporation which engages in misleading or deceptive conduct, even where that corporation acts innocently. In those circumstances, it is undesirable that a corporation with the resources to check claims made to it should be entitled to ignore those resources, and to treat section 52 as if it were an insurance policy for which no premium is paid ... The *Trade Practices Act 1974* should not be used to encourage companies in such positions to refuse to check any information given to them, on the basis that they can afterwards sue if such information turns out to have been misleading or deceptive ...⁹⁷

However, some two weeks after the decision in *Squibb*, Pincus J, in *Neilsen v Hempston Holdings Pty Ltd*,⁹⁸ rejected a submission that the applicant was disentitled to relief because of his failure to make proper inquiry before purchasing a motel whose profitability had been misrepresented to him. His Honour was unimpressed with the vendor's argument that no cause of action could be made out because an ordinary purchaser, when entering into such a large transaction, would be expected to examine the primary accounting records rather than rely solely on the summary presented by the vendor.

The rejection of a defence of contributory carelessness was subsequently endorsed by the Full Federal Court in *Sutton v AJ Thompson Pty Ltd*⁹⁹ in the following terms:

... there is nothing in the principles cited, or in any other authority which has been brought to our attention, to suggest that a person who has been misled when entering into a contract, by false representations of a type which were likely to produce that result and in fact did so, can be deprived of his remedy because of his failure to check the accuracy of those representations.¹⁰⁰

95 Ibid at 47,595.

96 Ibid.

97 Ibid at 47,594.

98 (1986) ATPR 40-686.

99 (1987) ATPR 40-789.

100 Ibid at 48,607, per Forster, Woodward and Wilcox JJ.

Since the concept of contributory carelessness continues to be consistently rejected by the courts,¹⁰¹ it is submitted that legislative intervention is now required. Contributory carelessness, although not denying a breach of section 52, should be a factor taken into account in assessing statutory relief under section 82 or section 87.¹⁰² Consequently, the *Trade Practices Act* should be amended to provide that where an applicant suffers loss or damage partly as a result of his/her own carelessness, and partly as a result of the misleading or deceptive conduct of the respondent, the damages recoverable shall be reduced in proportion to the applicant's share of responsibility for the loss or damage.

In contrast, it is irrelevant and inappropriate to speak of a defence of contributory carelessness in connection with unconscionable conduct. In that context, the concept of 'special disadvantage' represents a disability borne by the weaker party to a transaction through no fault or carelessness of his/her own. The doctrine of unconscionability, in its equitable and statutory forms, exists to protect absolutely the exploitation of a weaker party's special disadvantage.

Certainty versus Commercial Morality

Lord Jessell MR's comments in *Printing and Numerical Registering Co v Sampson*¹⁰³ represent the traditional view that contracts freely entered into should be upheld with virtual impunity:

... one thing which ... public policy requires is that men of full age and competent understanding shall have the utmost liberty contracting and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.¹⁰⁴

This theory is firmly embedded in the English common law.¹⁰⁵ In Australia, however, the courts and the legislature have declined to place paramount importance on the absolute certainty of contract, accepting that there are notions of justice or fairness of equal or higher value.¹⁰⁶ While certainty and predictability are valuable attributes of a legal system,¹⁰⁷

101 See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) ATPR 40-968 and *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043.

102 See, further, Terry, above n 68, at 204.

103 (1875) LR 19 Eq 462.

104 Ibid at 465.

105 England has no statutory equivalents of ss 51AA and 52 of the *Trade Practices Act 1974* (Cth) and its judges display an unyielding commitment to the principle of certainty of contract. See, eg, *Multiservice Book Binding Ltd v Marden* [1979] Ch 84.

106 Goldring, above n 11, at 514.

107 Chief Justice Mason, as he then was, commenting extra-judicially, expressed the following view: 'As we are neither an industrial power or a maritime nation, certainty of contract is not as all-consuming to us as it is to [other nations].' See Mason, above n 62, at 573.

Australian law takes the view that they should not be used as an excuse for unscrupulous behaviour.¹⁰⁸

*Commercial Bank of Australia Ltd v Amadio*¹⁰⁹ and *Northside Developments Pty Ltd v Registrar-General*,¹¹⁰ in which Mason CJ expressly promoted the concept of 'commercial morality',¹¹¹ reflect a growing concern by judges with moral issues in evaluating the behaviour of parties, whether they be involved in consumer or commercial transactions.¹¹² According to Horrigan, this is an important trend in judicial reasoning today, discernible across a range of commercial situations.¹¹³

Similarly, from a legislative perspective, it can be argued that provisions such as section 52 of the *Trade Practices Act* establish 'minimum absolute standards of commercial probity'.¹¹⁴

While commercial morality is a desirable judicial and legislative goal, it inevitably conflicts with certainty of contract. Thus, insofar as the enactment and judicial interpretation of ss 51AA, 51AB and 52 of the *Trade Practices Act* reflect notions of commercial morality, they may well create a degree of uncertainty in the business community. However, this is simply part and parcel of the principle that unconscionable and misleading conduct is to be condemned. As one commentator has explained:

It is little wonder that the growing importance of the [*Trade Practices Act*], as a whole, is creating commercial uncertainty along with a commensurate level of judicial activity, when the entire focus of the law is directed more towards enforcing a different set of norms of conduct or moral constraints vis-a-vis the consumer and parties in an inferior bargaining position, as opposed to the familiar 'hands-off' approach of the

108 See, further, Zumbo, above n 36, at 5.

109 (1983) 151 CLR 447.

110 (1990) 170 CLR 146.

111 Ibid at 164-165. The case concerned the common law 'indoor management rule' which seeks to provide protection to outsiders transacting with companies.

112 See, further, Baxt, above n 1, at 92 (n 45). Finn takes the view that this jurisprudential development reflects 'an emerging tendency to formulate some range of doctrines, not in terms of distinct, limited and discrete rules of behaviour, but as generalised standards of conduct which in a controlled way are instance-specific in their application.' See Finn P, 'Commerce, the Common Law and Morality' (1989) 17 MULR 87, at 90.

113 In Horrigan's opinion, the 'judicial landscape [is] littered with High Court judgments ... extolling the virtues of ... open-ended unifying principles (like 'commercial morality', [and] unconscionability ...).' See Horrigan B, 'Third Party Securities - Theory, Law and Practice' in Greig J and Horrigan B (eds), *Enforcing Securities*, Sydney, Law Book Co Ltd, 1994, 251.

114 French, above n 57, at 251. The concept of commercial morality would appear to be fundamental to the operation of section 52. Thus, eg, in *Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd* (1983) ATPR 40-338 at 44,070, St John J held that in assessing conduct under section 52 the court was required to look for 'circumstances which could be described as 'an unfair practice' according to good business morality'. In a similar vein, Pengilly has referred to 'the new 'disclosures' morality which section 52 mandates': Pengilly W, 'Non-Disclosure in Agency Agreements' (1995) 9 APLB 209, at 213.

general law to notions of justice and fairness in arm's length commercial relationships.¹¹⁵

Conclusion

To the extent that the High Court is presently laying the foundation for a general principle of commercial morality, the continued application of Part IVA and section 52 of the *Trade Practices Act* to commercial transactions represents a vital flagstone. In these circumstances, attempts to argue that commercial parties should be permitted to contract out of liability for contraventions of these provisions are unlikely to meet with judicial or legislative approval.

Even if exclusion of liability was permissible under statute, it is likely that the courts would actively develop common law principles to limit or defeat their effect. For example, exclusion clauses could be struck down by relying on such factors as subject-matter of the transaction, respective bargaining strength of the parties and absence of independent legal advice.¹¹⁶

Exclusion of liability under the *Trade Practices Act* would effectively contradict notions of commercial morality. However, the promotion of individual responsibility, via the availability of contributory carelessness as a defence to claims based on section 52, fits comfortably within the current jurisprudential paradigm. By the same reasoning, a defence of contributory carelessness to an action for unconscionable conduct would be inappropriate.

In actions for misleading or deceptive conduct, there is no logical reason why applicants who fail to take 'ordinary' care of their own interests should be entitled to claim the full amount of their loss. Accordingly, this option should be pursued by way of legislative amendment to the *Trade Practices Act*.

115 Clough D, 'Misleading and Deceptive Silence: Section 52, Confidentiality and the General Law' (1994) 2 TPLJ 76, at 83.

116 Compare section 4 of the *Contractual Remedies Act* 1979 (NZ).