

2007

## Some observations on the regulation of misleading or deceptive conduct

Dan Svantesson

*Bond University*, dan\_svantesson@bond.edu.au

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

---

### Recommended Citation

Svantesson, Dan (2007) "Some observations on the regulation of misleading or deceptive conduct," *The National Legal Eagle*: Vol. 13: Iss. 1, Article 6.

Available at: <http://epublications.bond.edu.au/nle/vol13/iss1/6>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:epublications@bond). It has been accepted for inclusion in *The National Legal Eagle* by an authorized administrator of [ePublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

# Some Observations on the Regulation of Misleading or Deceptive Conduct

Assistant Professor  
Dan Svantesson  
Faculty of Law  
Bond University

This is an edited extract from Chapter 3 of Dan's new book, *Svantesson on the Law of Obligations* (Pearson SprintPrint, Sydney, 2007), printed here with kind permission of Pearson Education.

If one were to select the single most important statutory provision in Australian law, the choice would probably fall on s 52 of the *Trade Practices Act 1974* (Cth) (the TPA). Few, if any, other legislative provisions have as wide and far-reaching an application as that section.

This article aims to give an overview of the essential elements of s 52 of the TPA which provides in essence that '[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

## Overview

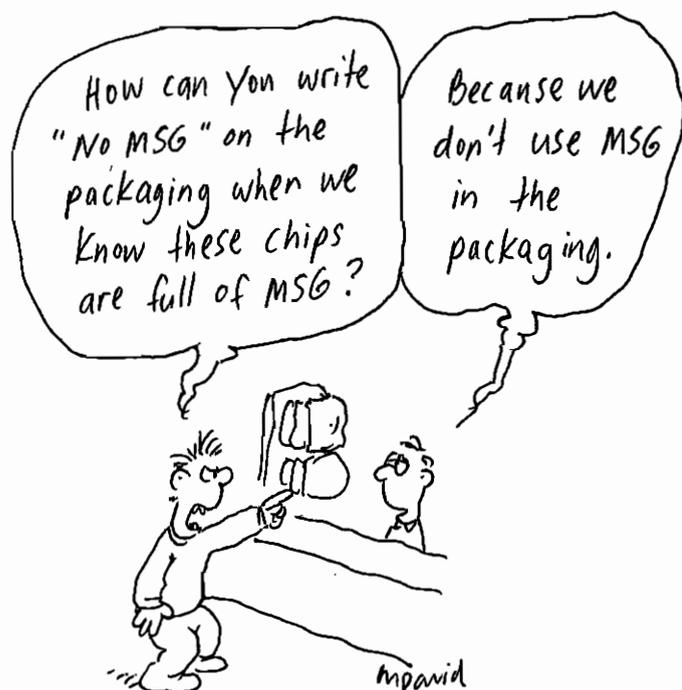
The terms used in s 52 require some explanation for the scope of the section to become clear. Thus, we need to examine what is meant by 'corporation'; 'in trade or commerce', 'engage in conduct' and 'misleading or deceptive or ... likely to mislead or deceive'.

The TPA's definition of corporation is based on the 'corporations power' in s 51(xx) of the Australian Constitution. Thus, s 4(1) of the TPA gives the following definition to the term: 'corporation means a body corporate that: (a) is a foreign corporation; (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed; (c) is incorporated in a Territory; or (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).'

Despite its plain reference to 'corporation', s 6 of the TPA extends the scope of application of s 52 to conduct engaged in by individuals, for example, where the misleading or deceptive conduct occurs via television, radio or internet communication.

As for the concept of 'in trade or commerce', it is well-established that conduct 'in trade or commerce' is limited to conduct that is in some way commercial in itself. Therefore, s 52 only limits conduct that is in itself commercial.

The reference to 'engage in conduct' is explained in s 4(2) of the TPA which makes clear that this term includes both doing and refusing to do any act – an extraordinarily broad wording. Further, as is indicated by the fact that s 52 covers



conduct that is 'likely to mislead or deceive', it is not even necessary that the conduct has had any effect on any other party. Thus, it would seem, for example, that where a corporation constructs a website containing misleading and deceptive statements, it is 'engaging in conduct' for the purpose of s 52 even before the stage at which the website is uploaded and made accessible.

## Scope of application

Although s 52 is located in Part V of the TPA which is headed 'Consumer Protection', the provision has also been applied outside the strict protection of consumers. The modern position is described in the High Court's majority judgment in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 as follows:

'It suffices, for present purposes, to say that we regard it as settled by earlier decisions that an action to restrain a contravention of s 52 can, in appropriate circumstances, be maintained by a person who is not a consumer ... and that we consider that, while the cases make plain that consumer protection lies at the heart of the legislative purpose to be discerned in s 52, the precise boundaries of the territory within which that section operates remain undetermined.'

Although McHugh J's dissenting judgment in this case asserted that the application of s 52 should be 'confined to conduct which affects or is apt to affect members of the public in their capacity as consumers', there is no such limitation and s 52 can be invoked in a very broad range of circumstances.

The exact scope of application of s 52 has varied over the years it has been in force. Presently the following limitations should be noted:

- **Financial services.** Misleading or deceptive conduct in relation to financial services falls outside the scope of the TPA. Such conduct is instead regulated by the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth).
- **Freedom of speech.** In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1993) ATPR 41-222, Hill J stated that '[t]here is nothing ... which suggests for a moment that a law prohibiting misleading or deceptive conduct could infringe any constitutional protection of free speech.' However, in recognition of the risks faced by the media, s 65A of the TPA was introduced which excludes so-called 'prescribed publications' by 'prescribed information providers' from the scope of s 52. Prescribed information provider 'means a person who carries on a business of providing information' and includes, but is not limited to, those who are licensed to do so, for example, under the *Broadcasting Services Act 1992* (Cth). Nevertheless, this protection is not afforded to the extent that a prescribed information provider uses its own publication to boost its own business: *Seven Network Ltd v News Interactive Pty Ltd* [2004] FCA 1047. Further, s 85(3) provides a defence for publishers of advertisements, where it is shown that the publisher is in the business of publishing or arranging for the publication of advertisements, and that it received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of Part V.

- **Intermediaries.** As French J made clear in *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415, where an intermediary simply passes on information, that party is not responsible under s 52 for that information, provided that it is made clear that they are not the source of the information and they disclaim belief in the truth or falsity of the information. However, French J also stated that '[w]hen ... a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation.'

The matter was the object of dispute in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, where a majority of the High Court held that:

'[I]t would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading. The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did no more than state a belief in the reliability of the sources.'

In his dissenting judgment, McHugh J outlined three types of situations in which an intermediary would not be liable for the information it passed on:

1. where the circumstances make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity and is merely passing on the information for what it is worth;
2. where the corporation, while believing the information, expressly or impliedly disclaims personal responsibility for what it conveys, for example, by disclaiming personal knowledge; and
3. where the corporation, while believing the information, ensures that its name is not used in association with the information.'

As noted above, McHugh J was in the minority in this case. Nevertheless, commentators have remarked that, in order to be 'safe', an intermediary may wish to use McHugh J's statement as guidance.<sup>1</sup>

## Misleading or deceptive, or likely to be

The terms 'misleading' and 'deceptive' are not defined in the TPA. However, drawing upon a range of cases we can form an understanding of the types of conduct these terms are meant to cover. In *Butcher v Lachlan Elder Realty Pty Ltd*, the High Court noted that "'conduct" in s 52 extends beyond "representations"'. One effect of this is that silence can be fitted more easily within what is termed 'conduct'. As noted by Samuels JA in *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84, 'Silence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive.'

In the context of s 32 of the *Consumer Protection Act 1969* (NSW), the court in *CRW Pty Ltd v Sneddon* (1972) SR (NSW) 17 explained that to 'mislead' is 'to lead into error', and held that a certain newspaper advertisement was capable of leading people to think that the transaction advertised was for a hire purchase or credit sale, rather than an outright sale. This test is widely accepted and could be said to constitute

the minimum requirement for conduct to be misleading. However, in further defining what type of conduct is misleading or deceptive, it must be noted that '[i]t is not sufficient if the conduct simply causes confusion or uncertainty': *Seven Network Ltd v News Interactive Pty Ltd*.

The definition of the term 'deceptive' has received a lesser degree of judicial attention. The reason for this is illustrated in Gibbs CJ's discussion in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 of the relationship between misleading conduct on the one hand and deceptive conduct on the other:

'Those words are on any view tautologous. One meaning which the words "mislead" and "deceive" share in common is "to lead into error". If the word "deceptive" in s 52 stood alone, it would be a question whether it was used ... with a connotation of craft or overreaching, but "misleading" carries no such flavour, and the use of that word appears to render "deceptive" redundant.'

In other words, since the requirement for conduct to be regarded as 'deceptive' is stricter than the requirement for conduct to be 'misleading', there is no real need to examine whether the relevant conduct meets the stricter test; as it is after all sufficient that it meets the lower test of being 'misleading' for the section to be applicable.

As to conduct 'likely to mislead or deceive', the word 'likely' has been said to refer to 'a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent': *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) ATPR 40-463. This should, however, not be seen as lowering the bar for what actually constitutes misleading or deceptive conduct. Indeed, one learned commentator has stated that '[t]he words "likely to mislead or deceive" add little to the section. At most they make clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone.'

When assessing whether or not certain conduct is misleading or deceptive, it is important to have regard to the circumstances of that conduct. For example, in discussing alleged misleading or deceptive publications on a website, Tamberlin J in *Seven Network Ltd v News Interactive Pty Ltd* stated that:

'In assessing what is conveyed by the web pages it is not appropriate to anticipate that every person viewing the site would take the time to analyse subtle merchandising or legal overtones or connotations, and the issue is largely one of transitory impression. If the material in question is continuously displayed and access to the site is frequent, as opposed to a one-off occurrence, then the impression will be reinforced.'

Similar reasoning can be applied in the context of, for example, television commercials, newspaper advertisements and tabloid headlines.

In this context, a few more observations need to be made. As Stephen J stated in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, '[N]othing in ... [s 52] suggests that a statement made which is literally true ... may not at the same time be misleading and deceptive.' Thus, for example, if a pub were to advertise that 'Britney Spears will be performing her greatest hits' on a particular night and a woman named Britney Spears, other than the well-known US pop singer, does in fact perform her greatest hits at the pub, the pub may very well be said to have engaged in misleading or

deceptive conduct even though in a strict sense the advertisement was true.

Further, as made clear through a range of cases, the fact that the true nature of misleading or deceptive conduct could have been revealed through proper inquiries, does not mean that such conduct cannot fall within the scope of s 52. On the other hand, s 82(1B) of the TPA now outlines how the level of damages that may be awarded to compensate the victim of misleading or deceptive conduct can be lowered where the plaintiff has failed to take reasonable care.

Stephen J also observed in the *Hornsby Building Information Centre* case that '[i]f the consequence is deception, that suffices to make the conduct deceptive'. Thus, there is no requirement in s 52 that the conduct is intended to be misleading or deceptive, 'but if there is an intention to mislead the court may more easily infer that the conduct was in fact misleading': *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* [2004] FCA 424.

## Taco Bell test

In *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303, the Federal Court outlined a four-step test of central relevance to the application of s 52:

**Step 1** – 'First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested.'

In identifying the relevant section (or sections) of the public, a court will have regard to factors relating to the targeted audience (such as age, gender and special interests), as well as factors relating to the party engaging in the conduct (such as extent of reputation), and factors relating to the object of the conduct (such as price).

**Step 2** – 'Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.'

The wide test expressed in step 2 of the *Taco Bell* approach has been limited somewhat by the High Court's decision in *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45, where it was held that a court ought to focus on the 'ordinary or reasonable members' of the section of the public identified in step 1, and has the right to decline to regard 'assumptions by persons whose reactions are extreme or fanciful' as controlling the application of s 52.

Despite this decision, recent cases make clear that the exact details of the type of person(s) within the relevant group that a court will have regard to is somewhat unsettled. In *ACCC v Cadbury Schweppes Pty Ltd* [2004] FCA 516, Gray J focused on a 'significant body of reasonable consumers'. In contrast, in *Seven Network Ltd v News Interactive Pty Ltd*, Tamberlin J applied the *Campomar Sociedad v Nike* test more stringently, holding that '[t]he test to be applied is what is the likely reaction to the representation by ordinary or reasonable members of the class to whom the representation is directed ... But such a viewer must be presumed to act reasonably.' In *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* [2004] FCA 424, Finkelstein J expressed the view that in light of *Campomar*

*Sociedad v Nike*, there is no need to establish that a significant number of members of the identified section would be misled or deceived. His Honour went on to say:

‘How then is one to identify and give characteristics to *Campomar Sociedad’s* hypothetical individual? Logic demands that if one is dealing with a diverse group then, for the purpose of determining whether particular conduct has the capacity to mislead, it is necessary to select a hypothetical individual from that section of the group which is most likely to be misled. If the court is satisfied that this hypothetical individual is likely to have been misled by that conduct, that would be sufficient.’

This latter approach rests on a logical foundation and represents the preferable option. At the same time, however, this should not be read as detracting from the limitations imposed by the High Court in *Campomar Sociedad v Nike*. Combining the High Court’s judgment in *Campomar Sociedad v Nike* with Finkelstein J’s logical reasoning in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*, the following proposition can be formulated: Once the court has established the relevant section of the public, the matter of whether the conduct in question is misleading or deceptive is to be considered by reference to whether a hypothetical individual from that group of the relevant section which is most likely to be misled, yet whose reactions to the relevant conduct are not extreme or fanciful, would be misled or deceived.

In fact Franki J took a similar approach in the *Taco Bell* case, noting that ‘all persons exposed to the conduct should be considered although conduct which is only likely to mislead or deceive an extraordinarily stupid person would not fall within s 52.’

**Step 3** – ‘Thirdly, evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. The Court must determine that question for itself. The test is objective.’

The types of conduct that may constitute ‘misleading or deceptive’ conduct have been discussed above. It should, however, be stressed that one important consequence of the court applying an objective test is that there is no requirement that somebody was in fact misled or deceived, and there is no need to show that actual damages are suffered from the misleading or deceptive conduct.

**Step 4** – ‘Finally, it is necessary to inquire why proven misconception has arisen ... The fundamental importance of this principle is that it is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent.’

This, the fourth and last step, is only of relevance in relation to situations where it has been proven that somebody has, in fact, been misled or deceived. It involves the evaluation of whether persons misled or deceived were misled or deceived due to the defendant’s conduct, or due to other factors. To use the words of Finkelstein J in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd*,

‘[T]here must be a “sufficient nexus” between the conduct and the error or misconception.’

## Common areas of use

Section 52 is frequently relied upon in a wide range of circumstances. However, two broad categories of application can be identified, the first of which involve instances where s 52 is being relied upon in relation to conduct that has misled or deceived, or may mislead or deceive, a section of the public or other identifiable group. This category can loosely be described as relating to ‘consumer protection’. The second broad category consists of instances where s 52 is being relied upon by a party alleging to have been specifically misled or deceived by another party, for example, in contractual negotiations. This category can loosely be described as relating to the protection of a private party’s own interests.

## Remedies

In contrast to many other sections of Part V of the TPA, s 52 does not create a cause of action as such. Rather, the effect of s 52 is to establish a norm of conduct. However, this by no means renders the section a ‘toothless tiger’. Where a corporation acts contrary to the norm of conduct established by s 52, other sections of the TPA prescribe remedies. More specifically, where a party has acted in breach of s 52, a court may order damages under s 82, grant injunctions under s 80, or give so-called ancillary orders under s 87.

## Concluding remarks

The discussion above has considered how one of the most important statutory provisions in Australian law – s 52 of the TPA – is interpreted and applied.

Not surprisingly, however, in *Butcher v Lachlan Elder Realty Pty Ltd*, the High Court noted that, as far as s 52 cases are concerned, ‘everything must depend on an appropriately detailed examination of the specific circumstances of the case.’ This means that, while guiding principles can be found in previously decided cases, and in the works of commentators, one must constantly be aware that each case arising under s 52 is likely to be unique and must be analysed as such.

## References

- W Pengilly, ‘Misleading or deceptive conduct considered by the High Court. Does *Butcher’s* case indicate a new judicial conservatism?’ (2005) 12 *Competition & Consumer Law Journal* 314.
- R Miller, *Miller’s Annotated Trade Practices Act 2006*, 27th ed (Lawbook Co, Sydney, 2006) 514.

### Consider and discuss:

*Section 52 of the TPA is a provision of wide application. What do you see as the ramifications of s 52 for current business practice?*