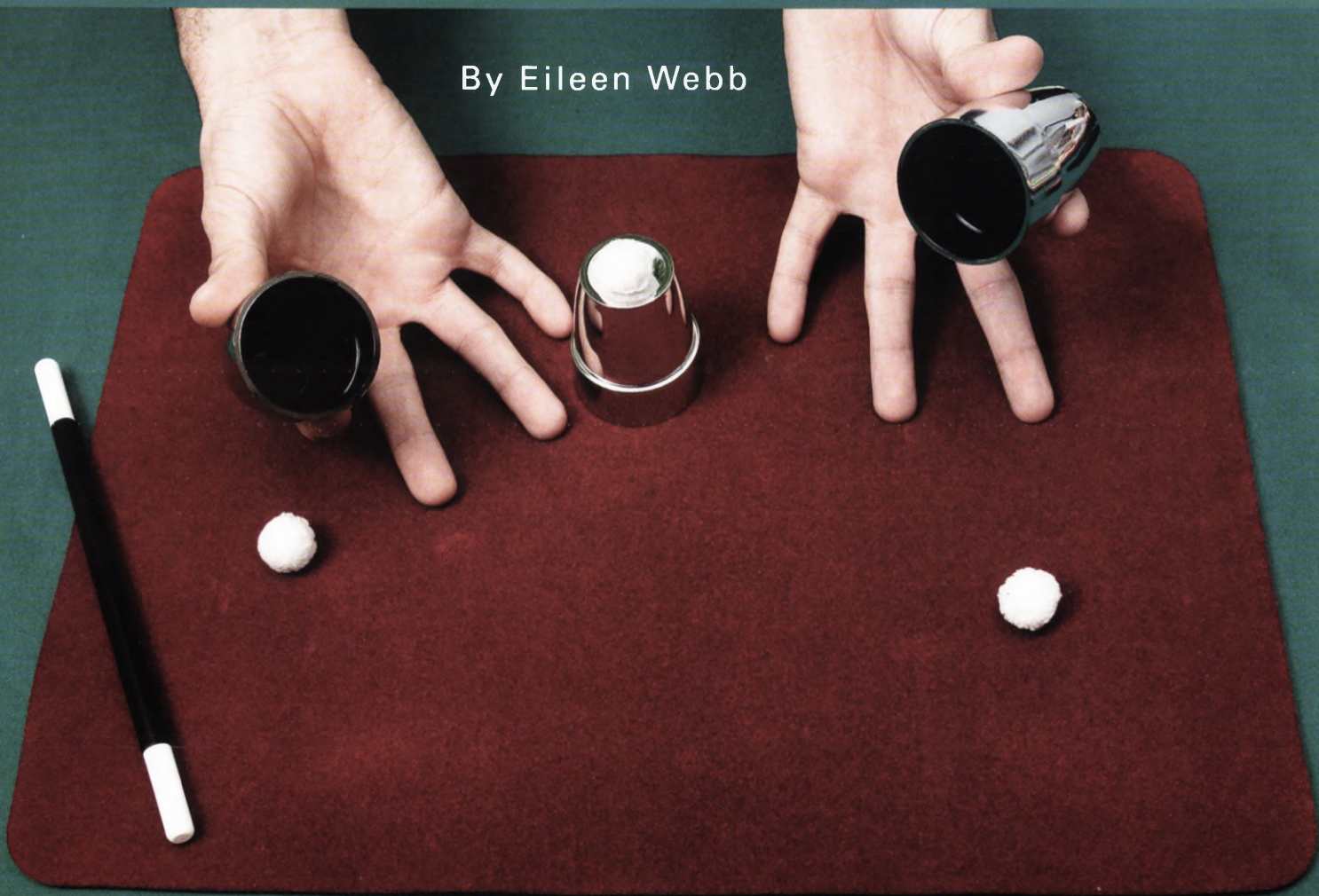


# MISLEADING or DECEPTIVE conduct

## The new s52, s18 ACL

By Eileen Webb



'The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels.'<sup>1</sup>

**T**he much-heralded arrival of the Australian Consumer Law (the ACL) has focused attention on the many and varied modifications to the consumer law and enforcement landscape.

Interestingly, with all the innovations in the new law competing for attention, it seems that s18 ACL, formerly s52 *Trade Practices Act* (TPA) has been somewhat forgotten in the excitement over the new and enhanced provisions.

The good news is that, for the most part, s18 replicates s52 and therefore most case authorities interpreting s52 will remain applicable. Some new remedies and enforcement powers are available, too, in circumstances involving misleading or deceptive conduct. Finally, the ACL impacts upon two provisions commonly discussed in the context of misleading or deceptive conduct: s51A, representations as to future matters; and s65A TPA in relation to information-providers, now ss4 and 19 ACL respectively.

This article will:

- examine the provisions of s18 ACL;
- highlight similarities and differences between s18 and s52;
- list the remedies and enforcement powers applicable to s18; and
- outline the differences between s51A and 65A TPA and the equivalent provisions: ss4 and 19 ACL.

### SECTION 52 – A REFRESHER

For those of us with short memories, s52 prohibited corporations in trade or commerce from engaging in conduct which is misleading or deceptive or likely to mislead or deceive. Since 1974, s52 has been one of the most commonly litigated provisions in Australian law; its impact has been considerable due to the breadth of the provision itself and its subsequent application to diverse areas of the law.

Section 52 has been described as ‘a comprehensive provision of wide impact’.<sup>2</sup> Despite its foundation in consumer protection law, the provision was utilised in diverse instances encompassing commercial and non-commercial matters and some government activities. Section 52 made significant inroads into, and in some cases eclipsed, areas traditionally governed by the common law.<sup>3</sup> Rather than creating liability in itself, s52 established a norm of conduct.<sup>4</sup> Conduct was only misleading or deceptive, or likely to mislead or deceive, if there was a nexus between such conduct and any actual or anticipated misconception or deception.<sup>5</sup> Non-compliance with s52 enabled an aggrieved party to seek civil, but not criminal, remedies under Part VI TPA.<sup>6</sup>

Ordinarily, the burden of proof was borne by the plaintiff; however, under an evidential provision – s51A – if a representation related to a future matter, such representation would be held to be misleading unless the person making the statement had reasonable grounds for making the representation.<sup>7</sup>

Despite the fact that s52 has so often been litigated, the provision remains a mystery in some respects. Also, it is limited in certain circumstances, and confusion reigns.

Therefore, it is perhaps unfortunate that, while some issues with s52 have been clarified or streamlined, others have not.

### SECTION 18 ACL (SCHEDULE 2 COMPETITION AND CONSUMER ACT 2010)

Before embarking on a discussion about s18, it is useful to place the provision in the context of the ACL. Section 18 appears in two places within the *Competition and Consumer Act 2010* (Cth) (CCA): Part XI as a law of the Commonwealth and in Part XIAA as an applied law of a state or territory.

#### The elements of s18

‘18 Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).<sup>8</sup>

For the most part, s52 has survived in its new incarnation, s18 ACL, relatively unscathed. Indeed, it has been noted that:

‘The effect of s18 remains unchanged and, accordingly, the existing jurisprudence on s52 and its State and Territory equivalents remains applicable under the ACL.’<sup>9</sup>

Nevertheless, of necessity, the provision has been altered to cater for the national approach. As noted, s18 of the ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct.

If we itemise the elements of s18(1), it can be seen that an applicant must establish several criteria.

#### 1. The respondent is a person

Section 52 prohibition was directed at ‘a corporation’, whereas in s18 the reference is to ‘a person’.

Section 52 was limited by constitutional factors, thus necessitating that misleading or deceptive conduct be engaged in by a corporation, subject to the possible extension to individuals through ss5 and 6(2), (3) and (4).<sup>10</sup> In circumstances where the requisite conduct was not engaged in by a corporation or, by extension, to an individual, s52 was unavailable to a plaintiff. An action was available, however, through the various state and territory Fair Trading Acts where the constitutional limitation did not apply and reference in the equivalent provisions was made to a ‘person’.

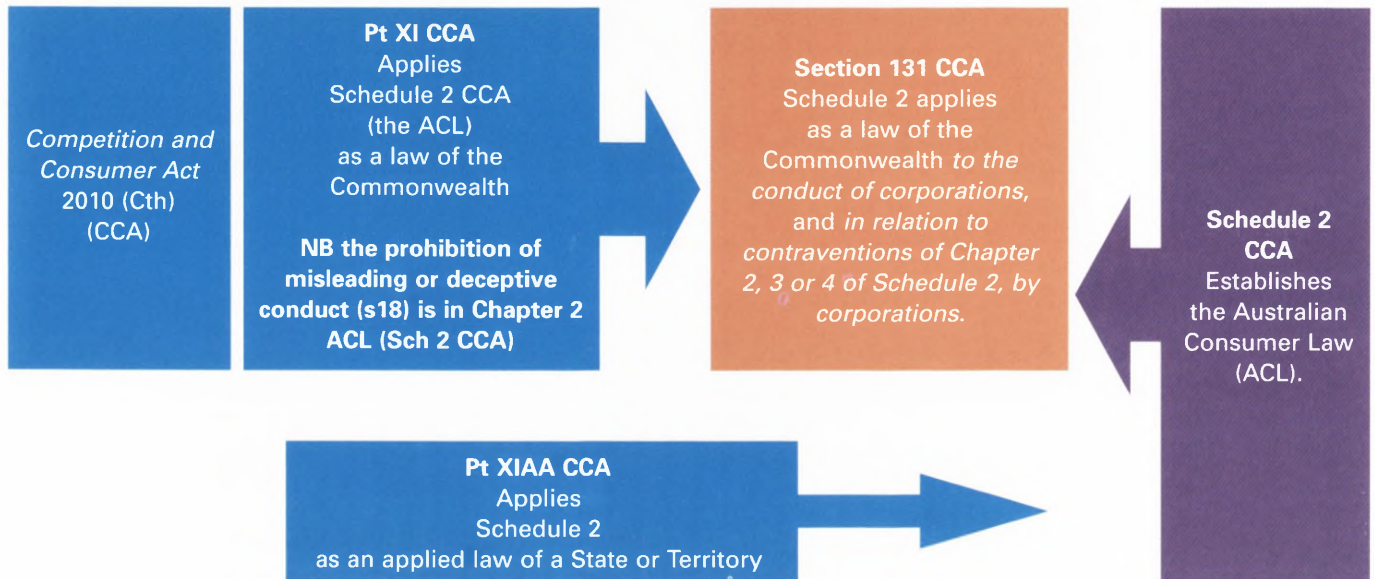
Now, as the ACL is a law of both the Commonwealth and of each state and territory, the provisions of the ACL apply to all persons, whether they are individual persons or bodies corporate.<sup>11</sup> Although ‘corporation’ is no longer explicitly referred to in s18, the provision clearly extends to such entities for two reasons: one straightforward and the other a little more complex. First, it has long been recognised that the term ‘person’ extends to corporate entities and this, of course, remains the case under the ACL.<sup>12</sup> The second requires some navigation around the legislation.<sup>13</sup> The Explanatory Memorandum, states at [3.9]:

‘The provisions of the ACL apply to all persons – whether >>

they are individual persons or bodies corporate – as it will be a law of both the Commonwealth and of each state and territory.’

The Explanatory Memorandum continues that s131 *Competition and Consumer Act 2010* (CCA) applies the ACL to the conduct of corporations. The mechanism by which the legislation can be applied to corporations, and for the purposes of s18 ACL, is illustrated in the following diagram:

Since 1974, s52 has been one of the most commonly litigated provisions in Australian law.



**2. The defendant’s activities are in trade or commerce**

‘Trade or commerce’ is defined in s2(1) ACL in terms of such activity taking place within Australia or between Australia and places outside Australia. This accords with the definition in s4(1) CCA. However, s2(1) continues that ‘trade or commerce’ also includes any business or professional activity (whether or not carried on for profit).<sup>14</sup>

In the TPA, the *scope* of ‘trade or commerce’ was not defined, although some authorities stated that the term was intended to cover the whole field in which trade or commerce is carried on.<sup>15</sup> Despite this conclusion, the presence of the word ‘in’ has served to restrain ‘trade or commerce’. As the relevant conduct had to take place ‘in’ trade or commerce, it was insufficient for conduct to be merely ‘in relation to’ activities in trade or commerce. The conduct had to be, in itself, an aspect or element of the activities or transactions which, of their nature, bore a trading or commercial character.<sup>16</sup> It would seem that previous authorities remain applicable, with the Explanatory Memorandum not providing any enlightenment regarding the differing definitions.<sup>17</sup>

**3. The defendant has engaged in conduct**

Section 4(2) TPA defined conduct, and stated that conduct was to be read as a reference to the doing of or the refusing to do any act.<sup>18</sup> ‘Conduct’ was recognised as having a wide ambit and was held not to be restrained by references to

contract or matters involving misrepresentation.<sup>19</sup>

Pursuant to s2(2) ACL, conduct is defined by reference to ‘engaging in conduct’. With the exception of some enhanced numbering, s2(2) replicates s4(2) TPA, so it would seem the case law authorities regarding that provision remain applicable.<sup>20</sup> Of particular interest is s2(2)(c), formerly s4(2)(c) TPA, which is crucial to the extension of s18 to matters involving silence and non-disclosure.<sup>21</sup> The term includes refraining (otherwise than inadvertently) from doing that act or making it known that that act will not be done.<sup>22</sup> This has been held to refer to a failure to act, for example non-disclosure, as well as proactive activity. Therefore, a failure to disclose – that is, remaining silent – could be regarded as engaging in conduct that is misleading or deceptive.<sup>23</sup>

**4. Such conduct is misleading or deceptive or likely to mislead or deceive**

*Absence of definition*

As was the case with the TPA, neither the terms ‘misleading’ nor ‘deceptive’ are defined individually or cumulatively in the ACL. However, the terms have been the subject of considerable judicial consideration and, in summary, it can be said that conduct will be misleading or deceptive if it induces or is capable of inducing error.<sup>24</sup> The extension to conduct which is ‘likely’ to mislead or deceive results in the ambit of s52 taking in conduct which ‘may’, ‘may be

expected to' or 'has the capacity or tendency to' mislead or deceive.<sup>25</sup> As a result, it is unnecessary to establish that anyone was actually misled or deceived by the conduct under consideration.<sup>26</sup> Such conduct must demonstrate a real, not remote, chance or possibility of a person being misled or deceived, even if it is less than 50 per cent.<sup>27</sup>

**How will misleading or deceptive conduct be identified for the purposes of s18 ACL?**

Given the breadth of s52, and the myriad of decided cases considering the provision since its inception, it is understandable that it can be challenging to weave through the volume of relevant material and make an assessment as to whether conduct is misleading or deceptive or likely to mislead or deceive. Nevertheless, this case law will remain relevant to a discussion of s18 ACL. It is therefore instructive to examine the processes utilised by the courts when pondering this issue.

Whether or not conduct amounts to a representation is a question of fact to be decided by considering what was said and done against the background of all surrounding circumstances.<sup>28</sup> In this respect, it is illustrative to examine the decision in *Taco Company of Australia Inc v Taco Bell Pty Ltd*.<sup>29</sup>

**The court's approach in Taco Bell**

In *Taco Company of Australia Inc v Taco Bell Pty Ltd*, Deane and Fitzgerald JJ identified four matters to consider when determining whether conduct was misleading or deceptive. Although the law has developed since the Taco Bell decision, these guidelines still provide a useful structure and are still utilised regularly by the courts.<sup>30</sup>

The approach can be summarised thus:

1. Identify the relevant section of the public;
2. Consider the effect of the alleged misleading or deceptive conduct on persons within that section of the public;
3. It is unnecessary to provide evidence of an actual erroneous conclusion; and
4. Ascertain whether the misconception been caused by conduct under consideration.

The first step involves the identification of the relevant section, or sections, of the public who would be likely to be misled or deceived by the conduct under consideration. This may extend to the public at large.<sup>31</sup> In some cases, members of a class can clearly be identified; for example, where a representation was made directly to a particular person.<sup>32</sup> The discussions in relation to identifying the relevant class and affected members of that class discussed in *Campomar Sociedad Limitada v Nike International*<sup>33</sup> would remain applicable under s18 ACL.<sup>34</sup>

The second step involves identifying the relevant section of the public. Decided cases have had cause to consider a diverse range of classes which can extend from one person, to a particular group of persons or to the public at large. Clearly, the public at large is an enormous category that will encompass a multiplicity of characteristics. Purchasers may fall into certain classes depending on the nature and price

The terms 'misleading' and 'deceptive' have been the subject of considerable judicial consideration: in summary, conduct will be misleading or deceptive if it induces or is capable of inducing error.

of goods they are purchasing – for example, luxury items rather than generic products<sup>35</sup> – and those seeking different types of investment advice.<sup>36</sup> Age, gender and/or personal preferences can define a class.<sup>37</sup> A class can be confined to a limited geographical area,<sup>38</sup> or extend Australia-wide.<sup>39</sup> Classes have been as small as one person travelling to a particular destination or passengers on a particular ocean liner.<sup>40</sup> On the other hand, a class of persons may extend to a group as large as 'motorists'<sup>41</sup> or to persons reading newspapers, listening to the radio and/or perusing the internet on certain days so as to be exposed to a 'get rich quick'-style scheme,<sup>42</sup> and, of course, the public at large.

The third factor in *Taco Bell* establishes that the determination of whether conduct is misleading or deceptive, or likely to mislead or deceive is made by the court through the application of an objective test.<sup>43</sup> While evidence that a person or persons has reached an erroneous conclusion is admissible – and may be persuasive – it does not itself conclusively establish that the conduct has the requisite character.<sup>44</sup>

The fourth factor deals with causation. The misconception must have been caused by the impugned conduct and not by error, confusion or erroneous assumption on the part of the representee. In *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd*,<sup>45</sup> Stephen J noted:

'...to determine whether there has been any contravention of s52(1) it is necessary to enquire why the misconception has arisen in the minds of others.'<sup>46</sup>

A useful example is provided by the facts in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*.<sup>47</sup> In that case, there were extensive similarities between an expensive brand of lounge suite and a cheaper brand. The manufacturer of the cheaper brand had clearly labelled the product but, in some cases, the labels had been removed. The manufacturer was not responsible for this. Gibbs CJ stated:

'If the label is removed by some person for whose acts the defendant is not responsible, and in consequence the purchaser is misled, the misleading effect will have been produced, not by the conduct of the defendant, but by the conduct of the person who removed the label.'<sup>48</sup>

Therefore, on a valuable product like a lounge suite, there would be an expectation that a reasonable consumer would >>

As with s52 TPA, only civil remedies are available for contraventions of s18 ACL, but the suite of enforcement powers and remedies is broader than that available formerly under s52.

refer to the label and, at that point, the manufacturer would become clear. The actual misconception was not caused by the manufacturer but by the removal of the label by person or persons unknown. Similarly, if the reason the plaintiff was misled was really through an erroneous assumption, confusion or the conduct was not relied upon, a breach of s2 will not be made out.

It would seem that the approach in *Taco Bell* remains the methodology of choice for the courts and there appears to be no reason why this will not remain the case with the introduction of s18.

### ENFORCEMENT AND REMEDIES

A contravention of the prohibition on misleading and deceptive conduct is subject to remedies including injunctions, damages and compensatory orders, as set out in Chapter 5 of the ACL. As was the case with s52 TPA, only civil remedies are available for contraventions of s18 ACL. Nevertheless, the suite of enforcement powers and remedies applicable to s18 ACL are broader than those available formerly under s52 TPA. The enforcement powers and remedies are:

- undertakings;
- substantiation notices;
- public warning notices;
- injunctions;
- damages;
- compensatory orders;
- redress for non-parties; and
- non-punitive orders.

### SECTION 4 ACL/SECTION 51A TPA: MISLEADING REPRESENTATIONS WITH RESPECT TO FUTURE MATTERS

It is important to consider briefly s4 ACL and its relationship with s18.<sup>49</sup>

Section 4 ACL replaces s51A TPA. As noted above, s51A TPA was an evidential provision, the effect of which was to render a representation made regarding a future matter to be misleading.<sup>50</sup> Although applicable generally to Part V, Division 1 and Part IVA TPA, s51A was utilised frequently in relation to matters raised under s52.<sup>51</sup>

Three issues of consternation had arisen under s51A:

1. Did s51A impose an evidentiary or legal/persuasive burden of proof on the defendant?<sup>52</sup>
2. Did satisfying the burden of proof under s51A constitute a substantive defence?
3. Did s51A have application to accessories?<sup>53</sup>

Section 4 ACL seeks to clarify some of the issues raised formerly in respect to s51A, thus ensuring that the new provision 'has the effect of facilitating the presentation of evidence to the court when a representation of a future matter is alleged to be misleading'.<sup>54</sup>

#### 1. Burden of proof

Section 51A(2) deemed a representation as to a future matter to be misleading, but judicial opinion differed as to the nature of the applicable burden of proof.<sup>55</sup> While several cases concluded that s51A involved a reversal of the persuasive burden of proof,<sup>56</sup> more recent authority leaned towards the evidential onus.<sup>57</sup> Section 4 now makes it clear that the provision places an evidentiary burden on a respondent who is alleged to have made a misleading representation as to a future matter.<sup>58</sup> This, of course, is a less onerous task for defendants and only requires evidence of reasonable grounds rather than *proof* thereof.<sup>59</sup>

#### 2. Substantive defence or mere evidential value?

Case authority and academic opinion had been divided as to whether s51A provided a substantive defence or whether it merely had evidential value.<sup>60</sup> In the case of a substantive defence, therefore, if the representor established that it had reasonable grounds for making the future representation, it would be freed from liability under both s51A and s52.<sup>61</sup> On the other hand, other cases and commentators concluded that s51A had evidentiary value only and did not operate as a complete defence.<sup>62</sup> The Explanatory Memorandum to the ACL states that s4 clarifies that satisfaction of the burden of proof does not constitute a substantive defence for a breach of s4.<sup>63</sup>

#### 3. Applicability to accessories

Decided cases had suggested that s51A has no application to accessories<sup>64</sup> and that the reference to reasonable grounds in s51A was applicable only to the corporate principal. To succeed in an action against an accessory, therefore, the applicant had to demonstrate that the alleged accessory had actual knowledge that the representation was made and it was misleading, or the corporation had no reasonable grounds for making it.<sup>65</sup> Section 4 clarifies this situation by stating that the provision is applicable to both primary contraveners and accessories.<sup>66</sup>

#### INFORMATION-PROVIDERS

Section 19 ACL will operate in the same way as ss65A(1) and (2) TPA and again the existing interpretation of the law remains applicable.

An information-provider is defined in s19(5) as a person who carries on a business of providing information. Without limiting s19(5), s19(6) states that 'information-provider' includes media organisations – for example, radio and

television stations, the ABC and SBS and newspaper and magazine publishers.<sup>67</sup>

At 160.2340, Miller summarises the net effect of these provisions:

‘The print and electronic media are thus information-providers.<sup>68</sup> A freelance journalist is an “information-provider”,<sup>69</sup> while the supplier of “cheque book journalism” is not.<sup>70</sup> An “information-provider” need not be a publisher, but has been held to include the Reserve Bank of Australia in its role as a supplier of information about a new series of bank notes.<sup>71</sup> The expression in some circumstances can include a private investigator making a report to the client, but the defence will not apply outside that context and hence did not apply to promotional statements about a private investigator’s autobiography.<sup>72</sup> While an author may be an information-provider, what is provided must be information, not fiction: hence a journalist describing factual experiences over a long career in an autobiography may be an information-provider, yet an author publishing material in the nature of fiction or fantasy is not.’<sup>73</sup>

Under the TPA, s65A operated to exempt the media from and other persons who engage in the business of providing information from the provisions of Division 1 of Part V.<sup>74</sup> This included, of course, s52. The intention of s65A was to exclude the application of the specified provisions of the Act to ordinary items of news and comment but to continue to subject the information-providers to those provisions in connection with any items directly promoting the supply of its own goods or services or the disposal of it of an interest in land.<sup>75</sup>

Similarly, s19 operates to exclude certain conduct on the part of information-providers from the ambit of s18. This is, however, subject to three exceptions. Section 18 ACL will not be applicable to publications by an information-provider where the information-provider made the publication in the course of carrying on a business of providing information or, in the case of a radio or television broadcaster, the publication was by radio or television broadcast by the information-provider.<sup>76</sup> The exception, again, does not apply to the listed advertisements and publications.<sup>77</sup>

The drafting in ss19(3) and (4) ensures that the interpretation of s65A in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd*<sup>78</sup> remains applicable.<sup>79</sup> Therefore, the provision will extend to publications made on behalf of, or pursuant to a contract, arrangement or understanding with a person who supplies goods or services, rather than for publications made in connection with relevant goods or services in relation to the information-provider. The Explanatory Memorandum notes that the exceptions have a wide application rather than a narrow one.<sup>80</sup>

**CONCLUSION**

For the most part, the introduction of s18 ACL should not cause too much consternation. The bulk of the authorities from s52 TPA remain applicable and the approach of the courts, with the exception of the necessity to come within

the definition of a ‘corporation’, will remain the same. The same comments are applicable to s19, formerly s65A TPA. On the other hand, the amendments to s51A, now s4 ACL, are far more significant – but in a positive way. Several issues of concern surrounding the section raised by courts and academic commentators appear to have been addressed. ■

**Notes:** **1** *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31 per French CJ and Kiefel J at [5]; *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167 at [129]. **2** *Brown & Anor v Jam Factory Pty Ltd* (1981) ATPR 40-213 per Fox J at 42, 928. **3** For example, the torts of passing off and negligence. See, generally, A Bruce, *Consumer Protection Law*, 2010 LexisNexis Australia, pp51-2. **4** *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) ATPR 41-269; *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [40]. **5** *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45. **6** Unlike most other provisions of Part V Division 1, s52 did not have an equivalent provision under Part VC which rendered an offending party liable for criminal penalties. **7** Section 51A, now s4 ACL. **8** Commentary to CCH, *Trade Practices, Consumer Law and Contract Law*, CCH Australia Limited. c2009 – North Ryde, NSW at 26-010 notes: ‘Whereas former s52(2) read that nothing in the succeeding provisions of the Division should be taken as limiting by implication the generality of subsection (1), the new s18(2) guards against any implication of conflict with provisions in Ch 3, Pt 3-1, which is about unfair practices. That is, s18(2) is designed to preserve the generality of subsection (1) and emphasises that the existence or nature of other more specific prohibitions about unfair practices does not limit the general application of s18(1). >>

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The bulk of authorities from s52 still apply; apart from the need to fall within the definition of a 'corporation', the courts' approach will remain the same.

This means the provisions may apply concurrently without limiting each other's operation.' **9** Attorney-General's Department, *The Australian Consumer Law – A guide to provisions*, Commonwealth of Australia 2011, p4. [http://www.consumerlaw.gov.au/content/the\\_acl/downloads/ACL\\_guide\\_to\\_provisions\\_November\\_2010.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_guide_to_provisions_November_2010.pdf) Similarly, para [3.11] Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Act* (No. 2) 2010 (Cth) notes s18 of the ACL replaces the repealed s52 of the TPA. The substance of the drafting of the prohibition has not been changed, other than changing the reference to 'a corporation' to 'a person'. Accordingly, the well-developed jurisprudence relating to s52 of the TPA is relevant to the interpretation or understanding of the meaning and application of s18 of the ACL. **10** Section 5 TPA provided the potential for extra-territorial operation.

**11** Explanatory Memorandum [80]. **12** *Houghton v Arms* (2006) CLR 553 at 563. **13** For a comprehensive explanation of the structure and interrelationship of the CCA and ACL, see Bruce, *Op cit*, Chapters 1, 2 and specifically in relation to s18 para [3.7].

**14** It is noteworthy that this definition differs from the definition of 'trade and commerce' in s4 CCA which accords with the TPA definition and thus does not make the reference to any business or professional activity. **15** *Larmer v Power Machinery Pty Limited* (1977) ATPR 40-021, 17, 313. **16** *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, ATPR 41-022 at 51, 363-51, 364. **17** See, generally, Miller at [1.S2.18.20] and Bruce at 3.9.

**18** Section 4(2)(a) TPA. **19** *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1988) 39 FCR 546 at 555 (Henjo), *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1999) ATPR 41-667 at 42, 506.

**20** Section 2(2): In this Schedule:

- (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:
  - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
  - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
  - (iii) the requiring of the giving of, or the giving of, a covenant; and
- (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:
  - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
  - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
- (iii) the requiring of the giving of, or the giving of, a covenant; and
- (c) a reference to refusing to do an act includes a reference to:
  - (i) refraining (otherwise than inadvertently) from doing that act; or
  - (ii) making it known that that act will not be done; and
- (d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.'

**21** *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 270 ALR 204. **22** Section 4(2)(c)(i). The provision also extended to the proposed conduct of *Aerospatiale Societ e Nationale Industrielle v Aerospatiale Helicopters Pty Ltd*

& Ors (1986) ATPR 40-700. **23** *Demagogue Pty Ltd v Ramensky* (1993) ATPR 41-203 and recently *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 270 ALR 204. See, too, Explanatory Memorandum [3.16]. **24** *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (Parkdale)* (1982) 149 CLR 191, Butcher at 49269. **25** *McWilliams Wines Pty Ltd v McDonald's System of Australia Pty Ltd (McWilliams)* (1980) ATPR 40-188 at 42,590. **26** *Parkdale, Butcher, Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* (2006) ATPR 42-106. **27** *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) ATPR 40-463. **28** *Taco Bell Pty Ltd v Taco Company of Australia Inc* (1982) ATPR 40-303 at 43,751 ('Taco Bell'), referred to in *Nike* at [85]. **29** (1982) ATPR 40-303 at 43,751; (1982) 42 ALR 177. **30** For example, the relevant extract was replicated in full in *Apotex Pty Ltd v Les Laboratoires Servier* (No. 2) (2008) ATPR 42-435 at 49, 206. **31** *Taco Bell* (1982) ATPR 40-303 referring to *Weitmann v Katies Ltd* (1977) 29 FLR 336, per Franki J at 339-40. **32** *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 212 ALR 357. **33** (2000) 169 ALR 677. **34** Bruce, *Op cit*, [3.33]. **35** *Hunters Products Pty Ltd v R & C Products Pty Ltd* (1987) 8 IPR 591; ATPR 40 -783. **36** *Chase Manhattan Overseas Corp v Chase Corp* (1986) ATPR 40-661; *Burswood Management Ltd & Ors v Burswood Casino View Hotel/Motel Pty Ltd & Ors* (1987) ATPR 40-824. **37** *Snoid & Ors v Handley & Ors* (1981) ATPR 40-219; *INXS v South Sea Bubble Co Pty Ltd* (1986) ATPR 40-667. **38** *Taco Bell, Motorcharge Pty Ltd v Motorcard Pty Ltd* (1982) ATPR 40-302; *Smith v State Bank of NSW Limited* (2001) ATPR 41-829. **39** *Merv Brown Pty Ltd v David Jones (Australia) Pty Ltd & Anor* (1987) ATPR 40-791, (1988) ATPR 40-858. **40** *Baxter v British Airways Ltd* (1988) 82 ALR 298, ATPR 40-877; cf *Baltic Shipping Co v Dillon (Mikhail Lermontov)* (1990) ATPR 40-992. **41** *Fraser v NRMA* (1995) ATPR 41-394. **42** *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363. **43** *Taco Bell; Annand & Thompson Pty Ltd v Trade Practices Commission* (1979) 25 ALR 91 per Franki J at 102. **44** *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87; *Australian Competition and Consumer Commission v Optell Pty Ltd* (1998) ATPR 41-640 at 41,081- 41,082, *ACCC v Emerald Ocean Distributors Pty Ltd* (2006) ATPR 42-096. **45** (1977-1978) 140 CLR 216. **46** See, generally, pp223-7. **47** (1982) 149 CLR 191. **48** At 200. **49** See, generally, in *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd* (No. 7) [2008] FCA 1364 at [96] Collier J noted: "Section 51A ...is a subset of s52." **50** Gillies refers to the provision as 'adjectival': P Gillies, 'Misrepresentations as to future matters – current issues in interpretation' (2009) 17 *TPLJ* 25, 25. **51** *Ting v Blanche* (1993) 118 ALR 543 at 552; *Phoenix Court Pty Ltd v Melbourne Central Pty Ltd* (1997) ATPR 46-179 at 54, 432; cf *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 513-14; *Fubilan Catering Services Limited v Compass Group (Australia) Pty Limited* 2007 FCA 1276; *University of Western Australia v Gray* (No. 20) 2008 FCA 498; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd* (No. 7) [2008] FCA 1364; *Quinlivan v Australian Competition & Consumer Commission* (2004) ATPR 42-010. **52** The evidential burden requires a party to adduce evidence which is 'capable of being left to the jury or court'; SB McNicol, D Mortimer; *Evidence*, 3rd Edition; 2005 LexisNexis Butterworths, Australia, 1.24 The litigant is obliged to produce sufficient evidence on a claim or defence to enable a judge to allow it to be presented to the fact finder in reaching the ultimate decision in the case: K Arensen, M Bargaric, *Rules of Evidence in Australia*, 2005, LexisNexis Butterworths, Australia para 2.1. 'On the other hand, the legal burden refers to the obligation of a litigant to ultimately persuade the fact finder that certain facts which are essential to establishing a claim or defence are true, or suffer the consequence of having the fact finder determine the claim or defence has not been proved.' K Arensen, M Bargaric, *Rules of Evidence in Australia*, 2005, LexisNexis Butterworths, Australia para 2.1. **53** A Freilich and E Webb, 'The 2009 review of Australian Consumer Law – An opportunity to reconsider and clarify the rationale and scope of s51A of the Trade Practices Act' (2009) *CCLJ* 7; P Gillies 'Misrepresentations as to future matters – current issues in interpretation' (2009) 17 *TPLJ* 25; Arlen Duke, 'Representations as to the Future under the Proposed Australian Consumer Law' (2009) *MULR* 17. **54** Explanatory Memorandum [32]. **55** The conclusions in the various cases have been

discussed recently by Allsop J in *Re McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2, (2008) ATPR 42-213. Refer, too, to articles by Pearce and Gillies (M Pearce, 'Accessorial liability for misleading or deceptive conduct, (2006) 80 ALJ 104; P Gillies, 'Misrepresentations as to future matters – current issues in interpretation' (2009) 17 TPLJ 25. **56** *Australian Competition and Consumer Commission v IMB Group Pty Ltd* (1999) ATPR 41-704 at [13]; *Blacker v National Australia Bank* [2000] FCA 681 at [83]; *ACCC v Kaye* [2004] FCA 1363 at [133]; *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2006] ATPR 42-096; *Lewarne v Momentum Productions Pty Ltd* [2007] FCA 1136. **57** For example, *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* [2002] FCA 1276. Although, recently in Allsop J in *Re McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2 per Allsop J and in *Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd* (No. 2) [2008] FCA 1480 (3 October 2008) at [98] it was noted that such decisions were 'wrong'. **58** Explanatory Memorandum [29]. **59** *Ibid.* **60** See, generally, Gillies, *Op cit*, at 30. **61** *Ting v Blanche* [1993] FCA 524; (1993) 118 ALR 543 at 552. *Quinlivan* FCAFC 175 at [6]. **62** *Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd* (No. 2) [2008] FCA 1480 at [44]; *ACN 070 037 599 P/L v Larvik P/L* [2008] QCA 416; *Hatt v Magro* [2007] ATPR 42-169. See, too, C Lockhart, *Misleading or deceptive conduct*, 2003, Butterworths para 4.23 at 4.23. **63** Explanatory Memorandum [30]. **64** *Hatt v Magro* [2007] ATPR 42-169; *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175; (2004) ATPR 42-010. See, generally, M Pearce, 'Accessorial liability for misleading or deceptive conduct' (2006) 80 ALJ 104. **65** *Hatt v Magro* [2007] ATPR 42-169, *Business & Professional Leasing Pty Ltd v Dannawi; BPL (NSW) Pty Ltd v Blue Robe Petroleum Pty Ltd; BPL (NSW) Pty Ltd v Macarounas* [2008] NSWSC 902 (5 September 2008), *JM Kelly (Project Builders) Pty Ltd v Toga Development No. 31 Pty*

*Ltd* [2008] QSC 311 (1 December 2008). Indeed, it was noted that where a breach of s52 was alleged against a corporation and there was also a claim also against an accessory: '...the plaintiff must prove against the accessory what it is not necessary to prove against the corporation – the absence of reasonable grounds for making the representation', *Hatt v Magro* [2007] ATPR 42-169 at 67 per Steytler J, *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* [2002] FCA 1276. *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175; (2004) ATPR 42-010 at [13]. **66** Explanatory Memorandum [31]. **67** *Ibid* [91]. **68** *Channel Seven Brisbane Pty Ltd v ACCC* (2008) 173 FCR 91. **69** *Bond v Barry* (2007) 73 IPR 490; [2007] ATPR 42-187; [2007] FCA 1484. **70** *Ibid.* **71** *Sykes v Reserve Bank of Australia* [1998] ATPR 41-608 at 40, 622-40, 623. **72** *Gianni Versace SpA v Monte* (2002) 119 FCR 349; [2002] ATPR (Digest) 46-218; [2002] FCA 190 at [125]-[126]. **73** *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 18 FCR 1; [1987] ATPR 40-816. **74** *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1985) 58 ALR 549; [1985] ATPR 40-538; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; [1984] ATPR 40-463; *Brabazon v Western Mail Ltd* (1985) 8 FCR 122; [1985] ATPR 40-549. **75** *Lovatt v Consolidated Magazines Pty Ltd* (1988) ATPR 40,903 at 49,727 per Wilcox J. **76** Explanatory Memorandum.[90]. **77** Again, the exemption does not apply to advertisements; a publication in connection with the supply (or promotion of the supply) of goods or services by the information-provider; or a publication in connection with the sale or grant (or promotion of the sale or grant) of an interest in land by the information-provider. Explanatory Memorandum [90]. **78** (2008) 173 FCR 91. **79** Explanatory Memorandum [92]. **80** *Ibid.*

**Eileen Webb** is associate professor in the Faculty of Law, University of Western Australia. EMAIL [eileen.webb@uwa.edu.au](mailto:eileen.webb@uwa.edu.au).

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