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# Legal notes

## Private actions

### **Campbell & Ors v Metway Leasing Limited & Ors**

*Unreported  
NSW Supreme Court  
McInerney J  
9 April 1997*

Section 60 of the Trade Practices Act states:

A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

To date, there is little judicial consideration of s. 60 or the equivalent provisions in the Fair Trading Acts.

In *Campbell v Metway Leasing Limited*, the plaintiffs brought an action in the NSW Supreme Court alleging undue harassment or coercion in contravention of s. 55 of the NSW Fair Trading Act. The claim was in connection with the payment of a debt owed by the plaintiffs to Metway. In the statement of claim the plaintiffs alleged, amongst other things, that the defendants had issued two bankruptcy notices where there were no debts due, diverted cheques, prevented the sale of the company, caused a police search to be carried out and verbally harassed the plaintiffs.

An application has now been made to cross-vest the matter in the Federal Court. However, in relation to the NSW Supreme Court proceedings, McInerney J, when deciding whether to allow the plaintiffs to amend their statement of claim, commented on the operation of s. 55.

### **Background**

The defendants sought to have the plaintiffs' statement of claim struck out. The plaintiffs conceded that the statement of claim did not disclose a reasonable cause of action and sought leave to amend the statement. Master Malpass concluded that the proposed amended pleading failed 'to allege all of the necessary ingredients of a cause of action founded upon a contravention of s. 55', and refused leave to amend and struck out the pleadings. The plaintiffs' appeal was heard by McInerney J.

### **Decision**

Section 55 of the NSW Fair Trading Act states:

A person shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

### *Undue harassment or coercion*

McInerney J observed that, unlike the tort of intimidation at common law, there is no requirement in s. 55 that the harassment or coercion involve a threat of an illegal act, whether criminal, tortious or contractual. The harassment or coercion is merely required to be 'undue'.

Although the institution of legal proceedings is not expressly excluded from s. 55, it cannot constitute 'undue' harassment or coercion unless it is 'vexatious, frivolous or an abuse of process'. Within these bounds, a party has 'a legitimate right of recourse to the Courts for the determination of their claim or grievance'.

In addition, McInerney J quoted a comment by the Master that the plaintiffs' allegations 'have the potential to be productive of a number of separate causes of action'. Each contravention causing loss or damage may give rise to an independent cause of action.

*In connection with the supply or possible supply of goods or services to a consumer*

McInerney J noted that it is essential that the undue harassment or coercion occurs 'in connection with the supply or possible supply of goods or services' to a 'consumer'.

McInerney J considered that the proposed amended pleadings failed to address these issues and that in fact, any amendment may be futile due to the 'very real problems facing the appellants concerning the definitions of "supply", "services" and "consumers"'.

However, his Honour concluded that he was not constrained to simply grant leave to amend in the terms proposed, and that 'a party should be permitted every opportunity to plead its claim appropriately to its "highwater mark" so as to permit determination of the real question between the parties'. Accordingly, the appeal was allowed and the applicants were granted liberty to amend the statement.

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### **Nescor Industries Group Pty Ltd & Ors v Miba Pty Ltd & Ors**

*Davies, Tamberlin and RD Nicholson JJ  
Federal Court of Australia  
17 December 1997*

*Misleading or deceptive conduct — whether judgment can be given upon a ground not precisely raised in the pleadings.*

At first instance Merkel J found a breach of s. 52 of the Trade Practices Act and s. 11 of the Victorian Fair Trading Act. Damages totalling \$225 000 were awarded to the applicant. The respondents appealed the decision alleging that the trial judge had founded his judgment upon conduct which was not precisely the conduct alleged in the statement of claim. The appellants further alleged they were denied a fair trial and suffered prejudice. The Full Court unanimously rejected the appeal.

### **Background**

Nescor was in the business of setting up owner-controlled franchises. Mr Nelson was a director of Nescor and wished to open a franchise in a particular shopping centre. The applicants, Miba Pty Ltd and its two directors, Mr and Mrs Vittouris, were interested in operating a franchise business. Mr Nelson spoke with the leasing executive of Northland Shopping Centre who stated that average food court operators achieved sales of \$10 000 a week. Mr Nelson made some investigations into the figures and then wrote a letter to the applicants saying, 'It is our understanding that the average Food Court operator in Northland achieves sales in the order of \$10 000/week'.

Other representations were also made to the applicants and on this basis they obtained finance and contracted with Nescor to take the franchise in the shopping centre. At no time did the business earn income anywhere near the projected figures and the business was eventually abandoned.

Litigation was commenced by the applicants alleging misleading and deceptive conduct. However, some of the pleadings were unsatisfactory. The case had been pleaded as if for a common law breach of warranty or a fraudulent misrepresentation not a statutory breach. The pleadings were not, however, amended by the applicants.

### **Judgment at first instance**

In dealing with the issue of pleadings, Merkel J at trial indicated to Counsel that it was open to the trial judge to find that a case of misleading and deceptive conduct was made out which was different to that which was pleaded. His Honour also indicated that the accuracy of the leasing manager's claim was a significant issue for the case.

In his decision, Merkel J found that the statement in the letter was misleading or deceptive or was likely to mislead or deceive because in fact the situation was far worse than had been presented to the applicants. His Honour found that the leasing executive at the shopping centre had seriously misled Mr Nelson and the applicants by discarding some

of the businesses with lower takings and giving an inflated average earnings figure. Mr Nelson and his company had then shown the requisite misconduct by passing on this information to the appellants without disclaiming any belief as to its truth or falsity. In doing so his Honour referred to *Yorke v Lucas* (1985) 158 CLR 661 where the High Court said at 666:

It is, of course, established that contravention of that section does not require an intent to mislead or deceive and even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197. That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to 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, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

Passing on essential information of this kind and holding themselves out to have expert skills in relation to food outlets led to the contravention in this case.

### Appeal

The Court found that the trial judge had approached the case in the correct way. One of the functions of pleadings is to state with clarity the case to be met and to afford procedural fairness to the opposing party. The Court held that should the pleadings proceed on a misapprehension of law the trial judge should clarify the approach and proceed accordingly. Furthermore, it was correct for a trial judge to look at the main allegation, look at what the letter to the applicants conveyed, and look at whether the statement in the letter was conduct which would breach the statutory provisions given the circumstances of the case.

In this case the trial judge had made it clear that another issue had been opened and that it should be addressed by the parties to the litigation. Having had the issue fully 'ventilated'

at trial, the Full Court was satisfied that the respondents suffered no prejudice or injustice to warrant upholding the appeal.

The Court also addressed submissions relating to the expiry of the limitation period. The submission was dismissed because no application for amendment was made and the proceedings had been commenced within the three year limitation period. Davies J noted that 'the ground on which his Honour based the judgment was simply a particular of the substantive allegation'.

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