

Consumer Protection Under The Trade Practices Act: A Time For Change

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The *Trade Practices Act* 1974 (Cth)¹ was introduced partly as a response to the need for a uniform system of legislation in regard to consumer protection and partly to fulfil the need for the protection of the consumer. It was intended to work in tandem with the system already in place as encapsulated in the Sale of Goods Acts enacted in each State and Territory. The aim of the TPA in relation to the consumer is twofold: to promote competition and at the same time protect consumers and some businesses from unfair practice.² These aims are codified under Part IVA and Part V of the TPA. However consumer protectionists argue that these aims have not been achieved; in particular their criticisms are directed at:

1. the uncertainty of who actually is a consumer under the Act;
2. the ambiguity of s 52 as to what actually constitutes 'misleading or deceptive' conduct; and
3. the injustice of the time constraints and the burden of proof placed on the plaintiff in the product liability provisions.

The problems within the legislation are particularly prevalent in ss 51, 52 and 53 and the provisions relating to product liability. The criticisms of the TPA highlight the weak position of the consumer, which in many cases bars potential plaintiffs from any avenue of redress. The TPA must be amended, terminology should be sufficiently defined to remove any ambiguity and consumers should be given more avenues of informal redress to ensure that product safety standards are maintained in Australia.

Before considering these issues it is first necessary to establish why a consumer needs to be protected at all.

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1 Hereinafter referred to as the TPA.

2 Duns J and Davison M, *Trade Practices and Consumer Protection: Cases and Materials*, Butterworths, Sydney, 1994, p 718.

Why does the consumer need protection?

The legislation in place prior to the enactment of the TPA was largely orientated towards the needs of the business sector. Legislation such as the Sale of Goods Acts arose from a time where equality of economic bargaining power was the norm. This can largely be attributed to the social, economic and political system at the time. The trade that took place was between members of small rural areas where most people were acquainted with each other, a system vastly different to that in existence today.

Trade now takes place on all levels, from between individuals to between individuals and corporations. The disparity in capital between such parties means that the consumer is often at a disadvantage. Furthermore consumers are by definition unequal with the providers of what they consume, as they are relying on another individual to provide necessary commodities.³ It is in light of these changes to the fabric of society that consumer protectionist movements have arisen. The rights which consumer protection law aims to protect may be summarised as:

1. The right to safety;
2. The right to honesty;
3. The right to fair agreements;
4. The right to know;
5. The right to choose;
6. The right to privacy;
7. The right to correct abuses;
8. The right to security of employment;
9. The right to be heard; and
10. The right to peace of mind.⁴

The challenge for the Government is to 'strike a balance between the social costs involved in consumer protection and the social benefits derived from it,'⁵ balancing the consumer on the one hand and the business community on the other. The TPA is an example of where the Government has attempted to effect this balance through legisla-

³ Id, at p 564.

⁴ Id, at p 565.

⁵ Committee to Review the Trade Practices Act, *Report to the Minister for Business and Consumer Affairs*, August 1976, paragraph 9.7.

tion. Of course there are critics on both sides but it is necessary to consider this balance when assessing whether the TPA achieved its aim to further protect the consumer.

Who is the consumer under the TPA?

The Trade Practices Review Committee recommended in 1976 that the definition of 'consumer' should be broadened to enable a large range of business transactions to come within its ambit.⁶ The Committee considered that the approach taken should incorporate reference to the price paid for the goods or services.⁷ The definition of 'consumer' under the TPA, however, is severely lacking; the consumer involved does not have to be the consumer within the statutory definition of s 4B. Neither does the consumer have to actually consume anything.⁸ The absence of any clear definition is of particular concern with regard to s 52, as the parties presently bringing actions under the provision are largely corporations rather than the individual consumer. As this uncertainty is not evident in any other of the provisions in the TPA, the question must be asked: was this really what the legislature intended?

Unconscionable Conduct: s 51AA and s 51AB

Part IVA of the TPA deals with unconscionable conduct in both commercial and consumer transactions. Section 51AB deals with consumer transactions, and s 51AA deals with commercial transactions.

The Act does not contain any definition of 'unconscionable conduct'. While it does list a number of factors a court should take into account, these are not exclusive; therefore recourse must be had to equitable doctrine in order to ascertain what conduct would constitute a breach of the provision. In the Explanatory Memorandum to the Amendment Bill the Attorney-General adopted the description given

6 Ibid.

7 Id, at paragraph 9.43.

8 Pengilly W, 'Section 52 of the Trade Practices Act a Plaintiff's New Exocet?' in *Australian Business Law Review*, Vol 1, 1987, (The Law Book Company Ltd, Sydney, 1988), p 256.

in *Commercial Bank of Australia v Amadio*⁹ where Deane J discussed the concept, saying:

‘unconscionable conduct looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity of good conscience that he should do so ... The common characteristic of such adverse circumstances seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.’

The major criticisms of the judge-made equitable doctrine of unconscionability involve the limited range of remedies available, the narrow focus of the disabilities routinely falling within it, and the failure to consider issues of ‘substantive’ as opposed to ‘procedural’ unconscionability.¹⁰ In answer to this criticism, the advantages of providing for unconscionability in statutory form are:

1. the wide range of remedies available;
2. the possibility of action commencing under the Trade Practices Commission; and
3. the educative and deterrent effect the legislation has in relation to the business sector.¹¹

Thus criticisms from the consumers perspective are very few. This can be attributed largely to the fact that the provision is based on the common law. Furthermore rather than limiting the power of the consumer through legislation, the consumer is placed in a more powerful position.

Misleading or Deceptive conduct under s 52

Section 52 of the TPA is the most litigated section of the Act. Section 52(1) of the TPA states:

‘A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or which is likely to mislead or deceive.’

The following elements need to be proved before a plaintiff may succeed in an action under s 52; (1) A corporation; (2) shall not; (3) in trade or commerce; (4) engage in conduct (5) that is misleading or

9 (1983) 151 CLR 447.

10 Deutch S, *Unfair Contracts*, (Lexington Books, Lexington, 1977).

11 Zumbo F, ‘Unconscionability Within a Commercial Setting: An Australian Perspective’, (1995) 3 *Trade Practices Law Journal* 183, p 184.

deceptive; (6) or likely to mislead or deceive. I will discuss each element in turn.

The TPA has limited its applicability to corporations for constitutional reasons, thus the provision is limited to conduct by a corporation. The words 'shall not' have the effect of prohibiting misleading and deceptive conduct. The terms 'in trade or commerce' are defined in s 4 of the Act.¹² However the definition is best illustrated by the case of *Re Ku-ring-gai Co-operative Building Society (No.12) Ltd*¹³ where the court held:

'The terms "trade" and "commerce" are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements.'

However the majority of litigation has dealt with the other two requirements.

Conduct which is misleading or deceptive

The Courts' approach to conduct which is misleading or deceptive may be summarised as follows:

1. It does not have to be directed at a particular individual:¹⁴ The test to be applied of whether a person has been affected or not is:

'the effect on a person, 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';¹⁵
2. Conduct is not limited to a corporation which has acted dishonestly or did not take reasonable care;¹⁶
3. A statement or prediction as to the future is not false or misleading merely because it is incorrect or the facts predicted did not occur;¹⁷
4. Silence may amount to a breach of s 52.¹⁸

12 Section 4 provides that 'trade or commerce', as defined within the Act, means 'trade or commerce within Australia or between Australia and places outside Australia.'

13 (1978) 36 FLR 134 at 167 per Bowen CJ.

14 *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181.

15 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

16 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

17 *Thompson v Mastwetouch T.V. Services Pty Ltd (No.1)* (1977) 29 FLR 270.

18 *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486.

The main criticism of the terms 'misleading or deceptive conduct' has been directed at the uncertainty of testing whether or not a corporation is in fact engaging in conduct which is misleading or deceptive. However in *Taco Company of Australia Inc v Taco Bell Pty Ltd*¹⁹ the court stated the following factors should be taken into account when determining misleading or deceptive conduct within the provision:

1. 'First identify the relevant section of the public likely to be affected by the conduct;
2. Secondly, consider the matter by reference to all who come within that section of the public, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, and men and women of various ages pursuing a variety of vocations;
3. Thirdly, inquire why any misconception may arise.
4. Finally, you can provide evidence that someone in the public has been misled, this is not essential but is persuasive.'²⁰

This test has been accepted and applied in *Leda Holdings Pty Ltd v Oraka Pty Ltd & Anor*²¹ and in *Trade Practices Commission v Optus Communications Pty Ltd & Anor*.²² An example of conduct which satisfies the test was provided in the latter case where Optus in late 1994 developed a plan to market a mobile phone package, known as 'Freestyle Plan'. The Trade Practices Commission alleged breach of s 52 by the representation that the Freestyle Plan allowed free local calls on weekends, when in fact calls from mobile phones to other mobile phones were not free. The representation that free weekend local calls of up to \$52 a month were allowed under the Freestyle Plan was accompanied by the qualification 'some exclusions apply'. In the 30-second television advertisement, this qualification appeared on screen for 4 seconds and in very small print in the accompanying newspaper advertisement. The advertisements did not specify that the 'free' calls only applied to calls from a mobile phone to a fixed phone. The court in applying the test held that Optus had contravened the Act.

19 (1982) 42 ALR 177.

20 Francey N, 'Section 52: its rationale, Justification and Deficiencies - and Some Suggestions for its Improvement,' (1997) 5(3) *Trade Practices Law Journal* 170.

21 (1997) ATPR 41-601.

22 (1996) ATPR 41-478.

'Or is likely to mislead or deceive'

This element makes it clear that the section is intended to apply without proof that the conduct has actually misled or deceived.²³ Thus in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*²⁴ at 234 Murphy J held that:

'The section applies whenever a corporation (or a person in the circumstances mentioned in s 6) in trade or commerce engages in misleading or deceptive conduct ... [c]onduct is deceptive or misleading if it has a capacity or tendency to mislead or deceive; intention to mislead or deceive is not required.'

The major problem with the section from the consumers point of view however concerns plaintiffs who are not able to bring an action. For example, those consumers without the finance to bring the action at all, or those consumers that do not bring the action due to the minor monetary amount involved in such an action.

Criticisms of s 52

Consumer protectionists argue that the problems with s 52 do not lie with those plaintiffs able to bring an action, but rather with those that cannot. Indeed, the overwhelming majority of cases under s 52 are brought by trade rivals.²⁵ The major problem is that often a consumer cannot afford to bring an action against a company and instead they must rely on the Australian Competition and Consumer Commission. Furthermore the type of conduct that could be prosecuted under this provision often does not involve large amounts of money and as such a plaintiff will not be interested in entering into an expensive process of litigation.²⁶

Finally, an action must be brought under s 52 within three years. This requirement has also been criticised as it may bar possible plaintiffs from action as they might not realise they have an action until

23 *Id.*, at p 172.

24 (1977-1978) 140 CLR 216.

25 Pengilley W, 'Section 52 of the Trade Practices Act A Plaintiff's New Exocet?' (1988) 15 *Australian Business Law Review*, 256.

26 This type of scenario is illustrated in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 where even if a consumer was misled and proceeded to eat at the two different restaurants under a false impression that they belonged to the same company, they would hardly have a claim or concern beyond perhaps disappointment or dissatisfaction.

after the stipulated time period. These types of problems lead to the conclusion that the provision is largely directed at the business community rather than the consumer. But the solution to the problem does not lie in removing it from the heading consumer protection as there are distinct advantages for the consumer within the section.

However s 52 does provide more comprehensive protection to the consumer through the removal of common law burdens under similar actions. For example, under an action for injurious falsehood in comparison to an action under s 52, it is not necessary to prove malice or that the damage was caused by the defendant's conduct. Alternatively under an action for deceit, compared to an action under s 52, they will not have to prove knowledge that the plaintiff acted on the defendant's misrepresentation, or that the representation is a matter of fact.

Another advantages lies in the replacement of the test of the reasonable man. In *Annand & Thompson Pty Ltd v Trade Practices Commission*²⁷ the court held the test to be applied was 'the effect on a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge ...' This lower standard is obviously more favourable to the plaintiff than the common law test as it incorporates a wider cross-section of the community. Thus while this section is not really being utilised by the individuals it sought to protect the advantages for the consumer do exist and as such it is better to have the protection in its limited form than not at all.

Section 53 of the TPA

Section 53 of the TPA provides:

'A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services -

(a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

(aa) falsely represent that services are of a particular standard, quality, value or grade...'

27 (1979) 25 ALR 91 at 102 per Frankei J.

Thus, s 53 addresses the problem of false or misleading statements made to the consumer. Unlike s 52 criminal liability may attach to this provision: thus the allegations must be proved beyond reasonable doubt.²⁸ In order to constitute a false representation words need not be spoken. In *Gardam v George Wills & Co Ltd*²⁹ a supplier of children's clothing sold children's nighties with a label reading 'styled to reduce fire danger.' In fact the garments did not conform with Australian safety standards, the label therefore constituted a false representation, and the company was held to be guilty of a breach of s 53.

The main problems in relation to s 53 stems from ambiguous wording in the provision. For example, the term 'new goods' is not defined in the legislation and this has led to problems with the courts' application of the legislation. This was illustrated in *Annard & Thompson Pty Ltd v Trade Practices Commission*³⁰ where the court held that the term 'new' in relation to motor vehicle could have any of the following meanings:

1. That the vehicle has not been previously sold by retail, that is, that it is not a second hand vehicle;
2. That the vehicle is a current and not a superseded model;
3. That the vehicle has not suffered significant deterioration or been used to any significant extent;
4. That the vehicle is of recent origin; or
5. That the vehicle is one which has suffered a measure of damage but this damage has been quite effectively repaired and the vehicle is otherwise new in every respect.

This case illustrates that it is difficult to prove a false or misleading representation has been made where the term could be applied to such a variety of situations.

Another problem relates to the extent to which the representation must be communicated before it would be held to have been made under the Act. In *Thompson v Riley McKay Pty Ltd*³¹ Deane J considered that:

'it is implicit in the ordinary use of the word "represent" that there be an intended representee to whom the representation is directed. The intended representee may be an identified person in a letter, or unidenti-

28 By virtue of s 79.

29 (1988) 82 ALR 415.

30 (1979) FLR 165.

31 [1980] ATPR 40-152.

fied person, as is commonly the case with a representation made in an advertisement to be disseminated by the mass media. ... The act of representing is complete once the subject is irrevocably set forth and disseminated upon the course which is intended to lead to the intended representee or representees.'

The problem such a wide definition of representation poses is best illustrated by considering the position of a manufacturer who places an advertisement on the local television station which is a false representation for the purposes of the Act. Is he then liable to a possible action by every person who sees the advertisement? The English decision of *R v Thomson Holidays Pty Ltd*³² suggests that he would indeed be liable. In that case the court held that a representation in a travel brochure was 'made' for the purposes of the English Act each time it was communicated to a person. If this case is to be followed in Australia the extent of liability businesses may be subject to is unclear; what is clear is that prices would be increased to insure against such a large burden.

Beyond the interpretation problems already mentioned other terms which also need to be defined in order to provide consistency and conformity within the law are 'standard', 'quality' and 'value'. On a wider scale, the consumer once again must tackle the burden of proof. If the plaintiff seeks to enforce the provision attaching criminal liability they must prove beyond reasonable doubt that the offence was committed. However, this is the same as the common law position in relation to any crime and thus the consumer has no ground for complaint. A balance must be maintained between consumer and business interests. The consequences of criminal liability do not favour an easier path for a potential plaintiff.

Unlike s 52, consumers do bring actions under s 53. For example in *Given v C V Holland (Holdings) Pty Ltd*³³, *Annand & Thompson Pty Ltd v Trade Practices Commission*³⁴ and in *Henderson v Pioneer Homes Pty Ltd*.³⁵ However, in seeking redress, the same problems of time constraints and the burden of proof also apply to any potential plaintiff in bringing an action for contravention of s 53.

32 [1974] 1 All ER 823.

33 (1977) ATPR 40-029.

34 (1979) FLR 165.

35 (1980) 29 ALR 597.

Product Liability

Another major amendment to the TPA was the introduction of the product liability provisions under Part VA in 1992. These were designed to protect the consumer from faulty or defective goods by imposing strict liability upon manufacturers. To succeed in an action under the section, the person who suffered the damage must prove that a corporation, in trade or commerce, supplied goods manufactured by it, containing a defect, and as a result a person suffered damage or loss of a kind recognised by the legislation.

The advantages of Part VA over competing provisions is that it is not necessary for the goods to have been purchased by a consumer, and the goods are not limited to those acquired for personal, domestic or household consumption.

The major criticisms of the provisions relating to product liability are in relation to the requirement of the burden of proof and the time constraints contained within the Act. These types of problems have led to plaintiffs being barred from any possible action: thus the section is not being utilised by those whom it was attempting to protect.

(i) The Burden of Proof

One of the biggest problems faced by a plaintiff when bringing an action under Part VA is obtaining sufficient evidence to establish that the product which is alleged to have caused loss was defective.³⁶ Under ss 75AD-75AG of the TPA the plaintiff is required to establish that the manufacturer supplied defective goods and as a result the plaintiff then suffered injury or loss. The main problem associated with this requirement is that Australian courts have demonstrated a reluctance to find that a *prima facie* case exists where the claimant cannot provide any direct evidence beyond the fact that the injury occurred.³⁷ Thus if a consumer contracted a severe rash as a result of wearing a jumper, unless he could prove that the jumper was the sole cause of the injury through medical reports and laboratory testing the courts are unwilling to conclude that the jumper was the cause of the injury.

36 Boas G, 'Part VA of the Trade Practices Act: A Failure to Adequately Reform Product Liability Law in Australia', (1992-94) 96 *Bond Law Review* 116.

37 *Id.*, at p 117.

This sort of problem ultimately relates back to the general types of problems surrounding consumers and in particular their lack of access to information. The type of corporation involved in s 52 is better suited to access such information due to its size and finances. The business community raises the argument that any increased burden on the manufacturer will only serve to raise prices and this is not in the public interest. However what is the public interest? The Government must ask the public whether they are willing to pay. If the burden of proof was shifted to the manufacturer, establishing a presumption that the company caused the injury, would this not increase the quality and testing of products before they are introduced onto the market?

(ii) Time Restrictions

Section 75AO(1) of the TPA provides that a potential plaintiff must bring an action within three years of the time which he or she became aware, or ought to have become aware, of the alleged loss, the existence of a defect in the goods and the identity of the manufacturer of the goods. Subsection 2 of s 75AO provides that an action under Part VA must be brought within ten years from the supply of goods by the manufacturer.

The effect of these sections is to arbitrarily preclude plaintiffs from bringing an action under Part VA where the claim involves a defective product which was first supplied more than ten years before the injury occurred or manifested itself. This is especially problematic in potential plaintiffs suffering from diseases which do not become apparent until at least ten years after the product has been supplied.³⁸ Moreover other statutes³⁹ have a time restriction of six or seven years. It must be asked why a provision with the direct purpose of protecting the consumer has such a strict time limitation period?

Removing such limitations would again promote more thorough testing of products. Taking into account those consumers who may develop diseases as a result of using the product, a six year time scale would ensure that action is available to a wider section of the public. Again this is a factor to be weighed against the possibility of increased costs due to the liability a manufacturer might incur.

³⁸ *Id.*, at p 128.

³⁹ For example those relating to tortious actions.

Other Suggestions for Change

Neil Francey suggests removing the words 'or is likely to mislead or deceive' from s 52 and replacing them with 'is, or is likely to be, misleading or deceptive' because this would ensure that the section would apply to conduct which is likely to mislead or deceive, as opposed to conduct which merely has a tendency to mislead or deceive.⁴⁰ However this reform is not likely to lead to any substantial remedy to the problems currently faced by consumers. What is needed is a uniform system of legislation whereby the consumer knows exactly what action is available to him or her and how he or she may pursue it. This again however, is unrealistic as it is not within the Commonwealth's powers to regulate conduct outside the realm of corporations. If the States were to agree it would further erode State powers leading to further problems unconnected with consumers as such. Perhaps a more realistic proposition was that adopted by the Trade Practices Act Review Committee in 1974 whereby States need to adopt legislation that mirrors the Commonwealth legislation. The advantage of such reform would be to render the law uniform and thus certain, while maintaining the States' carefully-guarded independence.

What is a more realistic improvement in light of the precarious balance between competing interests is the removal of the burden of proof in respect of the product liability provisions and the extension of time limits in every provision of the TPA to a more equitable six years in line with other legislation such as that regulating tortious acts.

Other possible changes could aim at extending the courts' discretion in deciding cases under the TPA to enable the court to award the remedy which it thinks is just. This would enable the provisions to be decided on a case by case basis with the advantage that a particularly disadvantaged consumer may be granted relief unavailable to a corporation.

In addition, informal avenues of redress should be expanded to give the consumer a wider choice as to which form of resolution they may pursue, and to ensure a wider ambit of society is protected under the TPA. While informal avenues of redress already exist (for example the Commonwealth Ombudsman), they are not widely publicised as a

40 Francey N, note 20 above, p 178.

means for solving disputes under the TPA. Furthermore these mechanisms should be extended to protect one of the fundamental aims of consumer protectionists, the right to choice.

Whatever form such a scheme may take, it should adhere to the following criteria to ensure that the protection of the consumer is the pivotal issue:

1. schemes should be inexpensive;
2. schemes should take into account the consumer's lack of experience, information and knowledge (at the most practical level this means giving thought to content and layout of forms and advice);
3. consumers should be able to choose freely which redress schemes to adopt;
4. redress schemes must provide a speedy and efficient result; and
5. redress schemes should be widely publicised through the Australian Competition and Consumer Commission and consumer interest groups.⁴¹

Conclusion

The TPA was aimed at protecting the consumer. While this has been largely achieved through s 51, the insertion of s 52 has done little more than provide an avenue for the resolution of business disputes. Criticism of s 53 is largely directed at the ambiguity of the terms used. This could easily be corrected by the inclusion of a more extensive definitions provision.

Due to the nature of the potential damage to the consumer, the main problem that needs to be addressed is product liability. Amendment of the product liability provisions needs to be made. In particular the removal of the time constraints, and the insertion of a provision shifting the burden of proof onto the manufacturer in order to enable consumers to utilise the provisions that were initiated to protect them.

⁴¹ It is interesting to note that such schemes have already been implemented in the United Kingdom. Furthermore the Director General of Fair Trading in a recent report entitled *Consumer Redress Mechanisms*, A Report by the Director General of Fair Trading into Systems for Resolving Consumer Complaints: November 1991, recommended that similar criteria be adopted into any future schemes approved.

The TPA has largely achieved its aim of protecting the consumer, but as with all legislation, the Government could not have foreseen how the courts and the public would utilise the provisions. In response the Government must continue to amend the legislation to adequately reflect changes in the community. Furthermore new bodies or schemes must be created to further the aims of consumer protectionists and to ensure that the consumer has a choice as to which form of redress he or she pursues.