Limiting Section 52 of the Trade Practices Act: The Side-Wind Argument

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Section 52 appears in Part V of the Trade Practices Act 1974 (Cth), which is headed "Consumer Protection". Subsection 52(1) provides: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Writing extra-curially, Justice Robert French described the effect of this provision as follows:

> Resorting to florid metaphor, the dedicated legal modernist may depict the common law and its causes of action as primeval broadacres grazed by slow-growing sauropods. Upon this landscape the action for misleading or deceptive conduct falls as a kind of statutory comet threatening significant reductions in the species numbers of fraud, negligent misstatement, passing off, defamation, collateral warranty and contractual representation.[1]

The problem with comets is that they are somewhat indiscriminate in the destruction they cause — not only "slow-growing sauropods" but also well-adapted species may be extinguished in a comet's descent. Likewise with actions based upon section 52.[2] The generality of the wording used in the provision,[3] when coupled with the continuing refusal of a majority of the High Court to read down the words of the section in the light of the

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1. R S French "A Lawyer's Guide to Misleading or Deceptive Conduct" (1989) 63 ALJ 250.
2. Section 52 does not itself create a cause of action. However, contravention of it does give rise to causes of action under other provisions of the Trade Practices Act, eg injunctions (s 80), damages (s 82), other orders (s 87). See eg *Poseidon Ltd & Sellars v Adelaide Petroleum NL* (1994) 68 ALJR 313, 323-324.
3. Though expressly directed to corporations, the provision can be used against natural persons if they are persons "involved in a contravention" (s 75B) or where the TPA has an extended operation (s 6). Also, the provisions in the State Fair Trading Acts that mirror TPA s 52 are directed to all persons both natural and artificial. See eg Fair Trading Act 1987 (WA) s 10.

heading to Part V,[4] raises the spectre of the action for misleading or deceptive conduct rampaging through areas in which Parliament could not possibly have intended it to operate. Fortunately, however, this spectre has not materialised. Though the legislature has exhibited little inclination to impose limits on the ambit of section 52 based actions,[5] the courts have developed a useful mechanism for keeping these actions in check. This mechanism I shall refer to as "the side-wind argument". The argument itself and the uses to which it may be put are well illustrated by the three main cases in which it has been employed: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*,[6] *Concrete Constructions (NSW) Pty Ltd v Nelson*,[7] and *Webb Distributors (Aust) Pty Ltd v State of Victoria*.[8] In these cases, the argument was used to halt the march of section 52 into the areas of design law, industrial accidents and liquidations respectively.

DESIGN LAW

The side-wind argument had its beginnings in certain remarks of Brennan J in *Parkdale Custom Built Furniture v Puxu*. In that case, Puxu sued Parkdale alleging that the latter had engaged in misleading or deceptive conduct by making and selling a range of furniture that was of almost identical design to furniture manufactured and sold by Puxu. A majority of the High Court comprising Gibbs CJ, Mason and Brennan JJ (Murphy J dissenting)[9] held that the conduct alleged did not contravene TPA section 52(1). Brennan J adopted a line of reasoning rather different from his brethren. His Honour noted that the design of the furniture was not registered under the Designs Act 1906 (Cth), though such registration would have given Puxu a monopoly over the design. His Honour, after tracing the history of Commonwealth industrial property legislation back to the Statute of Monopolies 1623 (UK), divined from the Designs Act a legislative intent to permit the copying of unregistered designs. Since what Parkdale was alleged to have done was

4. See eg *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 Mason CJ, Deane, Dawson & Gaudron JJ, 601-602. Contra Brennan J, 605; Toohey J, 614; McHugh J, 618-624.
5. A notable exception is TPA s 65A which was introduced by the Statute Law (Miscellaneous Provisions) Act (No 2) 1984 (Cth) Sch 1 in order to discourage the use of TPA s 52 in the area of defamation where the publisher is a media organisation. See Mr Michael Duffy's Second Reading Speech in the House of Representatives (13 Sept 1984); and also *Australian Ocean Line Pty Ltd v WA Newspapers Ltd* (1985) 58 ALR 549 decided before s 65A; *Lovatt v Consolidated Magazines Pty Ltd* (1988) 10 ATPR 40-903 (discussion of effect of s 65A).
6. (1982) 149 CLR 191.
7. Supra n 4.
8. (1993) 11 ACSR 731.
9. The fifth member of the Court, Aickin J, died before judgment was delivered.

impliedly permitted by that Act, it could not amount to misleading or deceptive conduct. Section 52, his Honour held, "operates in a milieu of the external legal order".[10] He added:

> It would be surprising if section 52 of the Trade Practices Act were to alter the "careful balance" of the Patents Act 1952 and the Designs Act by a side-wind and, after four centuries, open the way to the creation of prescriptive monopolies for the manufacture of goods.[11]

None of the other members of the Court adopted Brennan J's reasoning; indeed, Mason J, as he then was, expressly disavowed it.[12]

INDUSTRIAL ACCIDENTS

The second significant case in the side-wind series is *Concrete Constructions v Nelson.* Grant Nelson was a worker employed by Concrete Constructions (NSW) Pty Ltd on a building site at Grosvenor Square in Sydney. His foreman allegedly gave him incorrect instructions as to how to remove a grating over an air-conditioning shaft on site, and as a result Mr Nelson fell to the bottom of the shaft, sustaining serious injuries. The accident took place on 28 July 1987. Unfortunately for Mr Nelson, the Workers' Compensation Act 1987 (NSW), which inter alia abolished the right of a worker to sue his or her employer at common law in respect of industrial accidents, had commenced operation on 30 June 1987.[13] In order to avoid its effect, Mr Nelson sued his employer for damages under TPA section 82, basing his claim upon a breach of section 52. It was argued that the instructions given by the foreman (for which his employer was responsible by virtue of TPA section 84) constituted misleading or deceptive conduct. The applicant succeeded at first instance[14] but, on appeal, the High Court was unanimously of the view that no contravention of section 52 had occurred. Their Honours however were divided on the reasons for this conclusion.

A minority comprising Brennan, McHugh and Toohey JJ, in the light of the "Consumer Protection" heading to Part V, were prepared to read section 52 as prohibiting only conduct that was misleading or deceptive of persons " in their capacity as consumers".[15] Since the foreman's instructions clearly did not fall into this category, Mr Nelson's claim must fail. However, the

10. (1982) 149 CLR 191, 225.
11. Id, 224.
12. Id, 205-207.
13. Modified common law rights were reintroduced retrospectively by the Workers' Compensation (Benefits) Amendment Act 1989 (NSW).
14. *Nelson v Concrete Constructions (NSW) Pty Ltd* (1989) 86 ALR 88.
15. (1990) 169 CLR 594, 605, 614 and 618-624 respectively. Toohey J was also prepared to hold that the instructions were not in any event "in trade or commerce": id, 614.

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

> The heading does not ... control the permissible scope of the substantive provisions of Pt V and cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions .... As a matter of language, section 52 prohibits a corporation from engaging in misleading or deceptive conduct "in trade or commerce" regardless of whether the conduct is misleading to, or deceptive of, a person in the capacity of a consumer. In these circumstances, it is not permissible to give to the heading of Pt V the effect of confining the general words of section 52 to cases involving the protection of consumers alone.[16]

The majority preferred to base their conclusion on the requirement contained in section 52 that the conduct complained of must be "in trade or commerce". Two meanings of that phrase were possible — one broad, one narrow. The broad meaning would encompass "conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business".[17] The narrow meaning would limit the section to "conduct which is in itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character".[18] The foreman's instructions would be covered by the broad but not the narrow meaning. In preferring the narrower of the two constructions, their Honours took into account the heading to Part V:

> Indeed, in the context of Pt V of the Act with its heading "Consumer Protection", it is plain that section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities.[19]

LIQUIDATIONS

The most recent application of the side-wind argument is found in the decision of the High Court in *Webb Distributors v Victoria.* The case arose out of the collapse in Victoria of the Pyramid, Geelong and Countrywide Building Societies, all of which were members of the Farrow Group. A liquidator was appointed to the Societies pursuant to the Companies Code (Vic), the provisions of which applied to the winding up of building societies.[20]

16. Id, 601-602.
17. Id, 602-603.
18. Id, 603.
19. Id, 603-604.
20. By virtue of the Building Societies Act 1986 (Vic) s 122.

The liquidator received thousands of complaints from the holders of "non-withdrawable investing shares" in the Societies that they had been duped by Society officers into subscribing for their shares by representations that subscribing for shares was the equivalent of making a deposit. Of course, such representations, if made, would have been untrue as a subscriber becomes a member of the Society whereas as depositor is a mere creditor. The complaining shareholders asserted that the conduct of the building societies amounted to the tort of deceit and a breach of TPA section 52, and hence that they should be treated by the liquidator as creditors to the extent of their claims. If this argument were upheld, the holders of the non-withdrawable investing shares would be able to participate equally with ordinary creditors in any distribution made by the liquidator. If their claim failed, they would receive nothing. This was because, as members, they could not receive back their investment until all creditors were paid, and the assets of the societies were insufficient to meet all liabilities to ordinary creditors. In these circumstances, the liquidator sought directions from the Supreme Court of Victoria, Vincent J holding that the non-withdrawable shareholders should be treated as creditors.[21] However, on appeal to the Full Court, Vincent J's decision was reversed.[22] A further appeal to the High Court failed.

Two long-established principles of company law, embodied in companies legislation for more than a century, stood in the way of the claim that the non-withdrawable shareholders should be treated as creditors:

- First, a shareholder cannot rescind a contract for the purchase of shares on the ground of fraud or misrepresentation after the commencement of the winding up of the company.[23]
- Second, a shareholder cannot recover damages for fraud or misrepresentation that induced the member to make a contract for the purchase of shares unless the contract is first rescinded.[24]

The combined effect of the two rules is that shareholders who have been tricked into taking up their shares cannot claim damages in respect thereof once the winding up has commenced. The underlying rationale is the protection of creditors — the capital of the company must be maintained. To permit recovery by shareholders in these circumstances is tantamount to a return of capital by the back door and would undermine the statutory priority given to creditors' claims in a winding up.

At all stages of the *Webb* case, only the second principle was attacked

21. *Re Pyramid Building Society (in liq)* (1992) 6 ACSR 405.
22. *Re Pyramid Building Society (in liq)*; *Victoria v Hodgson* (1992) 8 ACSR 33.
23. *Oakes v Turquand* (1878-79) LR 2 HL 325; *Tennent v City of Glasgow Bank* (1879) 4 AC 615.
24. *Houldsworth v City of Glasgow Bank* (1880) 5 AC 317.

— all parties accepted the correctness of the first principle. In the High Court, the majority comprising Mason CJ, Deane, Dawson and Toohey JJ (McHugh J dissenting) delivered a joint judgment in which they found that the *Houldsworth* principle was embodied in section 360 of the Companies Code (Vic) and had been a feature of companies legislation since the Companies Act 1862 (UK).[25] Hence the principle applied in the winding up of the three building societies in question — the end result being that the non-withdrawable shareholders were to be treated as members rather than creditors.

The case is important for present purposes because counsel for the non-withdrawable shareholders argued that, whatever may be the position with respect to common law claims by these shareholders, any claims under TPA section 52 must be taken to be unaffected by section 360 of the Companies Code (Vic). The majority rejected this argument and approved the following statement by Tadgell J in the Full Court:

> To hold otherwise would be to regard the Trade Practices Act as intending to overturn by implication a cardinal tenet of limited liability which has prevailed for 130 years. It would be surprising indeed if the Trade Practices Act had that intention or effect.[26]

The majority continued:

> Section 360(1)(k) of the Code does not, in terms, preclude an action under section 52 of the Trade Practices Act. It looks only to the situation of a competition between a member to whom a sum is due by the company and a creditor who is not a member. It provides that in such a case the sum due shall not be treated as a debt owed by the company. Clearly, the Trade Practices Act is not concerned to regulate the position as between members of a company and its creditors. Whether the actual decision in *Houldsworth* can stand against the provisions of the Trade Practices Act is a question which does not arise. As we said earlier in these reasons, the critical question in this appeal concerns the provisions of the Code .... The Trade Practices Act is unquestionably a piece of innovative legislation. But it is not to be seen as eliminating, by a side-wind, the detailed provisions established for more than a hundred years to govern the winding up of a company.[27]

CONCLUSIONS

Five major observations may be made about the side-wind argument, on the strength of the above cases. First, the argument is based on the presumed intention of the legislature — as the Parliamentary debates and

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25. The rule in *Houldsworth* has been abolished in the UK by the Companies Act 1985 s 111A but it remains embedded in the Corporations Law s 563A. See *Webb* supra n 8, 741.
26. *Webb* supra n 8, 742.
27. Id, 742-743.

the cases make plain, " consumer protection lies at the heart of the legislative purpose to be discerned in section 52".[28] Hence, in cases where an attempt is made by the applicant to bypass a well established body of law by recourse to section 52, and the availability of section 52 based remedies is largely irrelevant to the attainment of the goal of consumer protection, the side-wind argument may be successfully raised. In such cases the question posed is: did Parliament intend to render obsolete that well established body of law by the side-wind of section 52?

Secondly, the side-wind argument can be applied whether the well established body of law referred to above comprises Commonwealth legislation, State legislation or the common law. It should be emphasised that the side-wind argument is not at odds with normal inconsistency principles (ie, that Commonwealth statutes, etc prevail over their State counterparts;[29] statute prevails over the common law[30]). If the side-wind argument applies, there is no inconsistency — the Commonwealth Parliament is deemed not to have intended to disturb the well established body of law.

Thirdly, the side-wind argument may often indirectly achieve the same practical effect as the argument for reading down the words of section 52 in the light of the heading to Part V (which was, of course, rejected in the *Concrete Constructions* case).

Fourthly, the argument's potential area of operation is broad, if somewhat ill defined. Its recent adoption by a majority of the High Court may necessitate a re-appraisal of earlier section 52 cases decided without the benefit of side-wind submissions.[31]

In conclusion, it is the writer's view that the side-wind argument will play an increasingly significant role in keeping actions based on section 52 within reasonable bounds. Whilst the meaning to be attributed to any statutory provision must of course depend both on the words actually used and the context in which they appear, our literalist tradition inclines us to concentrate on the former at the expense of the latter. The side-wind argument provides a convenient mechanism for re-asserting the importance of context, and ultimately for ensuring that section 52 is interpreted in a manner that is consonant with Parliament's intention.

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28. *Concrete Constructions* supra n 4, 601 (the majority). See also Parliamentary Debates on the Trade Practices Bill – *Hansard* (Senate) Vol S60 540, 547 (Senator Murphy).
29. Constitution (Cth) s 109.
30. D C Pearce & R S Geddes *Statutory Interpretation in Australia* 3rd edn (Sydney: Butterworths, 1988) ¶ 5.11.
31. Eg *Famel Pty Ltd v Burswood Management Ltd* (1989) 15 ACLR 572 (s 52 applied to a prospectus); *Industrial Equity Ltd v North Broken Hill Holdings Ltd* (1986) 64ALR 293 (s 52 applied in the takeover context). Arguably s 52 should be excluded from the field of securities regulation — Parliament cannot have intended to blow into obscurity the specialist investor protection provisions of the companies legislation by the side-wind of s 52.