

INSTITUTE OF PUBLIC AFFAIRS

SEMINAR - 22 May 2003

THE LAST FRONTIER

MAKING INDUSTRIAL RELATIONS SUBJECT TO THE TRADE PRACTICES ACT

EXISTING OPPORTUNITIES

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1. In the *First Report of the Royal Commission into the Building and Construction Industry*, dated 23 February 2003, the honourable TRH Cole QC deals with the likely application of the **Trade Practices Act** 1974 to relations in the workplace with particular reference to the building and construction industry.¹
2. The notes that follow are a brief summary of the way in which some of the complex provisions of that legislation may apply to industrial relations between employers and employees, contractors and sub-contractors. These notes do not claim to cover all applications of the **Trade Practices Act** to such relations. Further, many of the court cases relating to industrial relations in which the **Trade Practices Act** has been relevant are often technical and turn on fine points of statutory construction thrown up by the circumstances. It would defeat the

¹ See Vol.9 Ch 17. I shall refer generally to the Royal Commission as the Cole Royal Commission. See also Vol.10 Ch.10 dealing with Labour Hire and also Discussion Paper Thirteen, October 2002 which, although largely reproduced in Ch.17, contains in some parts a fuller discussion of some of the practices in the industry that may be in conflict with the **Trade Practices Act**. The ACCC Submissions to the Royal Commission, dated 30 July 2002 is exhibit 961 and is also identified as document 059.0082.0993.0007.

purpose of these notes to descend into that detail.

3. Trade practices and industrial relations legislation are part only of the mosaic of legislation, both Commonwealth and State, whose function is to promote and sustain what is described as the Australian market economy or free market. A free market economy is sometimes described as the economic system that recognises the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector.
4. The objects of the two pieces of legislation potentially are in conflict. The objects of the **Trade Practices Act** are designed to promote economic efficiency through competition, fair-trading and consumer protection.² To further those objects it outlaws collusion between competing businesses.³ The objects of the **Workplace Relations Act 1996**⁴ promote, or at least tolerate, labour organisation by trade unions and employees acting in concert. Strikes and other industrial action are lawful for limited purposes, primarily in relation to the negotiation of certified agreements and Australian workplace agreements.⁵
5. There has been a tacit assumption by legislatures in Australia, New Zealand, Canada, the United Kingdom and the United States that labour markets generally should be treated differently from markets for goods and non-labour services.⁶ In

² See s.2. Its purpose is not the economic well-being of competitors but the protection of the interests of consumers. As a consequence the private interests of particular persons or corporations are not protected. Competition damages competitors. If it is sufficiently serious, competition may eliminate a competitor: see **Queensland Wire Industry Pty Ltd v Broken Hill Pty Co. Ltd** (1989) 167 CLR 177 at 191; **Melway Publishing Pty Ltd v Robert Hicks Pty Ltd** (2001) 205 CLR 1 at [17]; **Boral Besser Masonry Ltd v Australian Competition and Consumer Commission** [2003] HCA 5; 195 ALR 609 at [87], [164].

³ See ss.45 (contracts arrangements or understandings that restrict dealings or affect competition), s.45A (contracts etc in relation to prices), s.45B(covenants affecting competition), s.45C (covenants in relation to prices), s.46 (misuse of market power), s.47 (exclusive dealing) and s.50 (mergers).

⁴ See s.3 **Workplace Relations Act**.

⁵ See ss.170MI – 170NC in relation to certified agreements and ss.170WB – 170WG in relation to AWAs.

⁶ See generally M Sexton “Trade Unions and Trade Practices” (1977) 5 ABLR 204; B Creighton “Secondary Boycotts Under Attack – The Australian Experience” (1981) 44 MLR 489. The definition of “services in s.4(1) of the **Trade Practices Act** excludes the performance of work by an employee under a contract of service. See also the exemption in s.51(2)(a) which is dealt with below.

its 1999 **Review of Sections 51(2) and 51(3) of the Trade Practices Act**, the National Competition Council established under that legislation⁷ observed that there was an inherent policy conflict between competition law, which largely serves to prevent economic entities from acting as cartels, and groups of employees and employers collectively pursuing their industrial interests. They referred to an American text book on the United States antitrust laws⁸ to make their point:⁹

“Perhaps the clearest illustration of this conflict is the standardization of wages – at a uniformly higher level – that labor unions seek to achieve. Before the rise of labour unions, when individual laborers sold their services to employers, because of the unevenness of bargaining power, employers could play employees off against one another, driving down the wages that were paid. By agreeing collectively to withhold their services, organized labor can enhance its bargaining power and raise the wage level. Even today, one of the greatest concerns of organized labor is competition on wage levels from nonunion labor. On the other hand, the heart of antitrust policy is that suppliers of an input should not be allowed to exercise oligopoly power over the prices of the goods and services they sell, and thus competition among suppliers is mandated.”

6. Section 51 of the **Trade Practices Act** is the Australian provision that exempts conduct by employees and their trade unions from most of the provisions of that legislation. That exemption does not necessarily exclude liability at common law for breach of any relevant contract of employment or liability for tort action such as interfering with contracts, conspiracy and intimidation. Further, the exemption is intended to operate alongside the provisions of the **Workplace Relations Act** which permits industrial action only in the limited circumstances referred in para 4 above.

⁷ See s.29A.

⁸ See E W Kinter, *Exemptions for Labour Union Activities and Associated Employer – Employee Relations* in E W Kinter, JP Bauer and WP Kratzke, **Treatise on the Antitrust Laws of the United States**, 1989, Anderson Publishing, Cincinnati at p.286.

⁹ See the **Review** at p. 27.

The main exemption is in s.51(2)(a).¹⁰ It exempts PtIV of the **Act**¹¹ conduct that relates to the remuneration, conditions of employment, hours of work or working conditions of employees. Its practical effect is to remove from the reach of PtIV agreements and arrangements between employers and employees that relate to employment conditions.¹² The National Competition Council recommended that the exemption in the **Trade Practices Act** be retained.¹³ Effectively that is also the recommendation of the Cole Royal Commission.¹⁴

7. The provisions of Pt IV to which s.51(2)(a) applies are: ss.45, contracts, arrangements or understandings that restrict dealings or affect competition; s.45A, contracts etc in relation to prices; s.45B, covenants affecting competition; s.45C covenants in relation to prices; s.46, misuse of market power; s.47 exclusive dealings and s.50, merger provisions.

8. The Cole Royal Commission reported that in several states there were overarching industry agreements which had been negotiated to form a template for the contents of enterprise bargaining agreements that were then subsequently adopted on individual building and construction sites. Often they were made by industry organisations, representing head contractors, with either that organisation or a group of contractors negotiating with trade unions. The agreements were negotiated with the expectation that they would be adopted on major building

¹⁰ Section 51 deals with other exemptions. For example, Commonwealth or state legislation may specifically authorise conduct which otherwise would be covered by the **Trade Practices Act**. Strict compliance with the exemption in s.51(1) is required. Victorian legislation was passed in reliance on that legislation permitting restrictive agreements relating to the sale of tickets at the National Tennis Centre in Melbourne: see **Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust** (1990) 22 FCR 495. More relevantly here, see s.310A of the **Industrial Relations Act** 1996 (NSW) which exempts contract determinations made under that legislation covering taxi cabs and other transport operators who are independent contractors.

¹¹ Except for ss.45D, 45DA, 45DB, 45E, 45EA or 48. Most of those exemptions deal with secondary boycotts and will be dealt with below. Section 48 prohibits resale price maintenance.

¹² See **Adamson v NSW Rugby League Ltd** (1991) 27 FCR 535 at 550 – 551 and on appeal (1991) 31 FCR 242 at 263.

¹³ See the **Review** p.4,71.

¹⁴ See Vol.9 Ch.17 of the **Royal Commission Report** p.112, para 45 of which states that its retention raised complex issues of competition law and has implications for industry beyond the building and construction industry, and is best dealt with by those responsible for overseeing the **Trade Practices Act**.

sites.¹⁵

Section 45

9. Section 45 prohibits the inclusion in any contract arrangement or understanding of a provision that is likely to have anti-competitive effect. The Cole Royal Commission suggested that one possible effect of the industry agreements in Victoria, Queensland and Tasmania may be to restrict or limit competition between major contractors about the terms on which they will engage sub-contractors and the terms upon which sub-contractors will engage sub-sub-contractors. It was suggested that they may substantially affect competition in contravention of s.45 although it was conceded that they may attract the exemption contained in s.51(2)(a) because they dealt with many features commonly found in contracts of service including wages, fares, travelling allowances, superannuation and redundancy contributions and income protection, insurance and other allowances.
10. The Cole Royal Commission warned that if industry participants make an agreement that breaches the **Act** subsequent action taken to persuade or coerce sub-contractors to sign it will be giving effect to the agreement and also in breach of s.45(2).¹⁶
11. The s.51(1)(a) exemption does not extend to arrangements between corporations and independent contractors. They are generally in a commercial rather than an employer – employee relationship. Although agreements between sub-contractors may be subject to the anti-competitive provisions of the **Trade Practices Act**,¹⁷

¹⁵ See **Royal Commission Report** Vol.9, Ch.17, para 71, pp.120 et seq.

¹⁶ See **Royal Commission Report** Vol.9, Ch.17, para 78.

¹⁷ See **Gallagher v Pioneer Concrete (NSW) Pty Ltd** (1993) 113 ALR 159 where owner-drivers in the concrete cartage business were found to be in breach of s.45 in agreeing among themselves to restrict the

there is considerable doubt that they apply to agreements and arrangements between head contractors and sub-contractors under which sub-contractors are required to employ their workforces on common terms and conditions.¹⁸

Section 45D

12. Secondary boycotts are a common industrial tactic. In its simplest form it consists of a refusal by workers who are not employed by a target employer to handle or use goods or services which emanate from or are destined for that target.¹⁹ Very considerable pressure can be brought to bear upon target employers through action directed against their suppliers or customers. It also has attraction for the boycotters because it can be imposed without any great hardship to themselves.
13. Sections 45D, 45DA and 45DB are intended to stop attacks on targets through an intermediary. Section 45D declares secondary boycotts illegal if they are engaged in for the purpose of causing substantial loss. Section 45DA deals with secondary boycotts which are engaged in for the purpose of causing substantial lessening of competition in any market and s.45DB deals with boycotts directed against the movement of goods to and from Australia.²⁰
14. Although the AIRC is able to conciliate (but not arbitrate) where a federally registered trade union is involved in a secondary boycott, there is no requirement for a specified period of conciliation before proceedings may be commenced for

number of trucks which could enter the business and in rostering trucks to give effect to an equalisation scheme.

¹⁸ There has long been uncertainty about whether s.45 is concerned solely with what is sometimes described as “horizontal conduct”, or whether that section also applies to “vertical conduct”, for example, to dealings between a supplier and acquirer: see the cases referred to in **Jones v ACCC** [2002] FCA 1054 at [60] et seq. The view that has so far prevailed is that there is little scope for the operation of s.45 in relation to vertical conduct. On the other hand, in that case Weinberg J pointed out at [61] that s.47 (exclusive dealings) and s.48 (resale price maintenance) are concerned with vertical conduct and have no application to horizontal conduct.

¹⁹ A boycott may also have a wider meaning. See **Devenish v Jewel Food Stores Pty Ltd** (1991) 172 CLR 32 at 42-43, 51, 52 and the discussion in the journal articles referred to in fn. 6 above.

²⁰ There are many cases in which these provisions have been relied upon and they are discussed in **Miller’s Annotated Trade Practices Act 1974**, 24th ed, 2003, pp.269 et seq.

s.45D relief.²¹

15. In its submissions to the Cole Royal Commission the Australian Competition and Consumer Commission reported that it had successfully instituted s.45D proceedings against unions in the building and construction industry for secondary boycott conduct.²² In the first case members of the Transport Workers Union refused to allow certain smaller transport companies to enter the yards of major transport companies and members of that union refused to load and unload the smaller companies' vehicles at those yards. In the second case, proceedings were instituted against the Construction, Forestry, Mining and Energy Union for conduct against a supplier of transportable buildings, which had not entered an enterprise bargaining agreement under the **Workplace Relations Act**. The ACCC's case was that the union had hindered or prevented operators of cranes from supplying their services to unload transportable building at a building site.²³ Each case was resolved by consent in the Federal Court which made declaratory and injunctive orders as well as ordering both unions to implement trade practices compliance programs. The court also ordered that the CFMEU pay compensation.

16. In those cases the persons engaging in the boycott conduct were not employees of the target company and could not rely upon a defence provided by s.45DD which permits conduct the dominant purpose of which is substantially related to the remuneration, conditions of employment, working hours or working conditions of employees engaged in that conduct.²⁴

17. However, simultaneous action by members of the same trade union but employed by different employers will not be caught by s.45D where it can be demonstrated that the employees of each employer had that purpose. In **Australasian Meat**

²¹ See ss.156-163 **Workplace Relations Act**, ss.80AA and 80AB **Trade Practices Act**.

²² See ACCC Submissions to the Royal Commission referred to in fn 1 above.

²³ See also the summary in (1998) 6 TPLJo 110.

²⁴ The section also provides a defence where the conduct is related to environmental or consumer protection.

- Industries Employees Union v Meat and Allied Trades Federation of Australia**²⁵ there were simultaneous strikes by employees of several meat processing companies at the request of their common union which prevented their employers from trading. A full court of the Federal Court accepted that the evidence did not establish that the employees of the different companies were acting in concert although within each company those employees were acting in concert with one another in engaging in strike action. Further, the full court accepted that the dominant purpose for the conduct of each group of striking employees was substantially related to their remuneration and conditions of employment.
18. The importance of properly establishing each element necessary to obtain relief in s.45D proceedings is emphasised in proceedings taken some years ago by Farrar (Australia) Pty Ltd against the National Union of Workers. That litigation also emphasises the importance of not commencing proceedings in circumstances where the court might exercise its discretion against the granting of relief.
 19. In the first case brought by that company²⁶ the Federal Court refused to grant an injunction to the company to restrain its former employees and the NUW from picketing its premises during an industrial dispute. The court refused relief because at that time the Industrial Relations Commission of NSW was hearing proceedings for the enforcement of dispute orders made by it under the NSW legislation. The court held that it was undesirable to have two sets of orders made in different courts based upon the same conduct. In the exercise of its discretion the court refused to grant an interlocutory injunction. It refused to grant an interlocutory injunction.
 20. Five days later the company had the proceedings relisted before the Federal Court following a decision by a full bench of the NSW commission that the dispute

²⁵ (1991) 32 FCR 318.

²⁶ See *Farrar (Australia) Pty Ltd v National Union of Workers' NSW Branch (No.1)* [1997] ATPR 45-583.

orders should be set aside.²⁷ In the subsequent Federal Court proceedings²⁸ the court refused relief because of the lack of evidence of losses sustained or likely to be sustained by the company.

Section 45E

21. Section 45E of the **Trade Practices Act** is intended to operate in support of ss.45D, 45DA and 45DB. The latter sections are intended to stop attacks on targets through an intermediary. A problem arises when the intermediary foresees that it is to be used as a means to attack the target and, in order to avoid trouble, it arrives at an understanding with those aiming at the target. That understanding is contrary to s.45E. Section 45EA prohibits persons giving effect to provisions that contravene s.45E.

22. Section 45E is complex and has rarely been used. It applies in two situations, the first concerning the position of a supplier and the second the position of a customer.²⁹ Its operation may be illustrated by reference to a hypothetical example dealing with a customer, a contractor, who has had a practice of doing work for a head contractor. Assume that the head contractor has been accustomed to use the contractor to provide the plumbing work in buildings that it constructs. The contractor has had few dealings with any relevant trade union and it is not a party to any enterprise agreement. Assume that there is an industry award covering its employees. Assume that a trade union decides that it wants an enterprise agreement with the contractor but the contractor is not willing to make one. To bring pressure to bear on the contractor the union threatens the head contractor that it will boycott it if it continues to deal with the contractor for so long as the contractor is not a party to an enterprise agreement with the union. The head contractor then agrees with the trade union that it will only do business

²⁷ See the summary of both proceedings in (1998) 6 TPLJo 110.

²⁸ See **Farrar (Australia) Pty Ltd v National Union of Workers' NSW Branch (No.2)** [1997] ATPR 41-584.

²⁹ Examples of the operation of the section in both situations are given in **Miller's Annotated Trade Practice Act 1974**, 24th ed, 2003 at pp.285 et seq.

- thereafter with sub-contractors who make agreements with the union to pay the sub-contractor's employees remuneration acceptable to the union. The agreement now made by the contractor with the union limiting the persons with whom it will do business puts pressure upon the sub-contractor to make an enterprise agreement with the union or otherwise risk not being able to deal with the head contractor.
23. In that example, s.45E prohibits the head contractor from making an arrangement with a trade union for the purpose of hindering or preventing the head contractor continuing to deal with a sub-contractor with whom it has been accustomed to deal. The arrangement will have that purpose where it is intended to prevent the head contractor continuing to deal with its sub-contractor unless that sub-contractor makes an enterprise agreement with the trade union. Section 45EA prohibits the contractor giving effect to that arrangement. Section 80 permits the Federal Court to grant an injunction against persons contravening ss.45E and 45EA and also against persons aiding or procuring the contravention. The power is wide enough to permit injunctions against both the head contractor and the trade union and its offices who have procured the arrangement.
24. **Gibbins v Australasian Meat Industry Employees' Union**³⁰ is an interesting illustration of the operation of both s.45D and s.45E.³¹ The Meat Industry Union was opposed to the delivery of live sheep to the Middle East. It established a picket line at Portland Harbour in Victoria intended to prevent delivery of sheep to ships exporting them from Australia. A number of carriers crossed the picket line and delivered their sheep to a ship. Those same carriers were accustomed also to deliver sheep to the Thomas Borthwicks' abattoir at Portland. To enforce their picket the union declared black those carriers. The union instructed its members at the abattoir not to unload the sheep for slaughter.

³⁰ (1986) 12 FCR 450.

³¹ The proceedings were brought before the enactment of the present ss.45D and 45E. However, the present provisions will apply to the facts in that case.

25. Borthwicks commenced s.45D proceedings against the union in the Federal Court. Thereafter there was a conciliation conference in the AIRC attended by representatives of Borthwicks and the union. The carriers were not told about the conference and did not attend it. Borthwicks compromised its s.45D proceedings on terms that it would not accept delivery of sheep at its abattoir from banned carriers. That compromise was approved by the commission.
26. The carriers then commenced s.45E proceedings against both the union and Borthwicks and various defences were raised including a defence that the agreement reached by conciliation in the AIRC was sanctioned by the **Conciliation and Arbitration Act 1904** and therefore permitted Borthwicks to act in accordance with the compromise and refuse to accept delivery from banned carriers. The court dismissed that defence saying that it could hardly bind the carriers who were not parties to it.³² The compromise contravened s.45E because it had the purpose of preventing Borthwicks from acquiring from the carriers stock delivered to the abattoir by them.

Sections 51AA, 51AB and 51AC

27. Sections 51AA, 51AB and 51AC of the **Trade Practices Act** prohibit unconscionable conduct. However, s.51AA deals with unconscionable conduct of the kind in respect of which courts of equity give relief, typically denying enforcement or setting aside transactions. It is not sufficient for such a transaction to be regarded by the court as unfair. Something more is required. Usually one of the parties must be at a special disadvantage. The basis for relief requires that that party be taken advantage of in the transaction. Sometimes it has been said that the party must have been victimised.³³ It is also distinct from undue influence where

³² See at 461.

³³ See **Bridgewater v Leahy** (1998) 194 CLR 457 at [76]. See also **ACCC v CG Berbatis Holdings Pty Ltd** (2000) 96 FCR 491. Cf **GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd** (2001) 117 FCR 23 at [115] – [116].

- pressure has been applied by a stronger party to a weaker party.³⁴
28. Section 51AB deals with unconscionable conduct towards consumers.
29. Section 51AC is not limited by specific equitable doctrines of the kind just mentioned. It prohibits unconscionable conduct in the supply or acquisition of goods or services in small business transactions which now involve the supply or acquisition for a price not exceeding \$3 million.³⁵
30. Section 51AC is the provision most likely to have relevance to small contractors and sub-contractors who complain that they have suffered from unconscionable conduct by a head contractor. The Cole Royal Commission suggested that its most obvious application may be in relation to the withholding of payments due to a sub-contractor.³⁶ For conduct to be unconscionable and prohibited by s.51AC there must be serious misconduct. Something clearly unfair or unreasonable must be demonstrated. The conduct must be irreconcilable with what is right or reasonable.³⁷ The provision is relatively new and its scope has not been more explored. One of the matters that the court may take into account is the requirements of any applicable industry code.³⁸ The Cole Royal Commission has recommended that a code be prescribed under the Act for the labour hire industry.³⁹ If a code is prescribed contraventions will be enforceable in s.51AC proceedings.

Sections 52 and 53B

31. The consumer protection provisions in Div.1 of PtV contain, first, a general prohibition against misleading or deceptive conduct in trade or commerce (s.52)

³⁴ See **Bridgewater** at [74] – [75].

³⁵ See s.51AC(9), (10).

³⁶ See **Royal Commission Report** Vol.9, Ch.17, p.124, para 105.

³⁷ See **Hurley v McDonald's Australia Ltd** [2000] ATPR 41-741 at [22] and **Francis v South Sydney District Rugby League Football Club Ltd** [2002] FCA 1306 at [300].

³⁸ See s.51AC(3)(g)(h).

³⁹ See **Royal Commission Report** Vol.9, Ch.17, p 126, para 113.

and, secondly, a long list of prohibitions of more specific practices.⁴⁰ A breach of any of the specific prohibited practices can result in a fine of up to \$200,000 in the case of a corporation and \$40,000 in the case of an individual.⁴¹ In addition, an injunction may be granted,⁴² a disclosure order may be made,⁴³ damages may be awarded⁴⁴ or remedial orders made.⁴⁵ In relation to a breach of s.52, no fine can be imposed⁴⁶ but all of the other remedies referred to are available.

32. Only one of the specific practices needs to be mentioned. Section 53B prohibits misleading conduct in relation to the making of offers of employment. It is confined to offers made prior to employment.
33. The most important of the provisions, s.52, establishes a norm of conduct. Failure to observe it may result in the consequences previously mentioned. It has an important limitation, the scope of which has not been fully explored by the courts. Its application in circumstances commonly experienced in employment relationships is affected by that limitation. Section 52(1) states:

“A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

The requirement that the conduct be in trade or commerce is usually not met when the relationship is one of employment.

34. The leading case on the meaning of the phrase “in trade or commerce” is the decision of the High Court in **Concrete Constructions (NSW) Pty Ltd v**

⁴⁰ See the analysis of those provisions in any of the text books dealing with the **Trade Practices Act**. This commentary has benefited from **Miller’s Annotated Trade Practices Act 1974**, 24th ed, 2003, at pp.399 et seq. Each of the states and territories have enacted **Fair Trading Acts** (or the equivalent) containing consumer protection provisions that correspond to the provisions of Div.1 of PtV and applying them to persons other than corporations. For example, s.9 of the **Fair Trading Act 1999** (Victoria) is in similar terms to s.52 of the **Trade Practices Act**.

⁴¹ See s.79.

⁴² See s.80.

⁴³ See s.80A.

⁴⁴ See s.82.

⁴⁵ See s.87.

⁴⁶ See s.79(1).

- Nelson.**⁴⁷ It was a claim for damages for personal injuries suffered by a construction worker during the course of his employment with a construction company. A foreman of that company told him to remove certain grates from entry points to air conditioning shafts. He was told that each was secured by bolts. In his application to the court the worker said that that statement was untrue. Whilst the worker was removing one of the grates it gave way, causing him to fall and suffer serious injury. He claimed damages against his employer upon the basis that the foreman’s untrue statement constituted conduct which was misleading or deceptive or likely to mislead or deceive, contrary to s.52. A preliminary question was argued, namely, whether the conduct had occurred “in trade or commerce”. The High Court held unanimously that they were not, but they divided upon the reasons. Four separate judgments were delivered, a joint judgment by Mason CJ, Deane, Dawson and Gaudron JJ, and separate judgments by each of Brennan J, Toohey J and McHugh J.
35. Although the justices who delivered separate judgments expressed themselves differently, all of them would have confined the words “in trade or commerce” to conduct of a corporation in its dealings with a consumer. Each was of the view that the employee was not a consumer of goods or services supplied by Concrete Constructions. That view however was a minority view.
36. The majority of the court would not have so confined the words.⁴⁸ They concluded that the phrase “in trade or commerce” referred “only to conduct which is in itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character”.⁴⁹ They explained the implications of that conclusion in the following way:

“What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions

⁴⁷ (1990) 169 CLR 594.

⁴⁸ See at 601 – 602.

⁴⁹ See at 604.

which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character. The point can be made [in the following way]. The driving of a truck for the delivery of goods to a consumer and the construction of a building for another pursuant to a building contract are, no doubt, trade or commerce in so far as the relationship between supplier and actual or potential customer or between builder and building owner is concerned. That being so, to drive a truck with a competitor's name upon it in order to mislead the customer or to conceal a defect in a building for the purpose of deceiving the building owner may well constitute misleading or deceptive conduct 'in trade or commerce' for the purposes of s. 52. On the other hand, the mere driving of a truck or construction of a building is not, without more, trade or commerce and to engage in conduct in the course of those activities which is divorced from any relevant actual or potential trading or commercial relationship or dealing will not, of itself, constitute conduct 'in trade or commerce' for the purposes of that section. That being so, the giving of a misleading hand signal by the driver of one of its trucks is not, in the relevant sense, conduct by a corporation 'in trade or commerce'. Nor, without more, is a misleading statement by one of a building company's own employees to another employee in the course of their ordinary activities. The position might well be different if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee."

37. After that decision a judge of the Federal Court was prepared to allow a case to continue where it had been alleged that there had been misleading or deceptive statements made by a corporation to an employee during the course of the renegotiation of the employee's contract of employment. In **Barto v GPR Management Services Pty Ltd**⁵⁰ the employee, who was the applicant, claimed that he was told that his employment would continue "for many years to come", but shortly after was dismissed without reasonable cause or without reasonable notice. Before the case came to trial the respondent, his former employer, moved to have the claim struck out because it claimed that such a statement was not made "in trade or commerce" as required by s.52. Wilcox J said⁵¹ that there might be an issue at the trial about whether the employee had relied upon that statement, but that was irrelevant in the proceedings before him to have the statement of claim struck out. Before a court will strike out a claim before trial it must be satisfied that it is untenable. Courts are not easily persuaded to deny an

⁵⁰ (1991) 33 FCR 389.

⁵¹ at 390.

applicant an opportunity of having a case fully heard at trial.

38. In his judgment, after discussing **Concrete Constructions**, Wilcox J said:⁵²

"... the conduct of a corporation in the course of negotiations for the employment of senior staff is conduct potentially falling within s 52. It is true that an employment contract does not directly produce income, but the making of such a contract is part of the total activities in trade or commerce of the corporation. Critically, it is intrinsically commercial conduct. It is directed to the creation of a contractual relationship."

On that basis the judge was prepared to allow the case to go to trial.

39. That decision has been relied upon in subsequent cases to support the application of s.52 to misleading statements or other conduct in employment relations.⁵³ However, in **Martin v Tasmania Development and Resources**,⁵⁴ a wrongful dismissal case went to trial with one of the issues being whether the employer had engaged in misleading or deceptive conduct in trade or commerce contrary to s.52. The misleading or deceptive conduct was said to be a statement made by the employer when dismissing the employee, namely, that the operational requirements of the employer made his further employment unnecessary. The dismissed employee challenged the truthfulness of that statement and said that it was misleading or deceptive because it did not state the real reason for his dismissal. Heerey J in the Federal Court disagreed with Wilcox J's analysis in **Barto** of the possible scope of the phrase "in trade or commerce". He referred to

⁵² At 344.

⁵³ For example, in **O'Neill v Medical Benefits Fund of Australia** [2001] FMCA 61 an applicant relied upon misleading representation made by his employer before he took up employment. The magistrate held that that constituted a breach of s.52. Although the applicant's counsel referred to **Barto** and **Concrete Construction**, and was clearly aware of the issue about whether the statements had been made in trade or commerce, that aspect of the claim does not appear to have been challenged by the respondent's counsel and was not referred to by the magistrate in his decision: see at [97]. The case went on appeal but no mention was made of that issue: see **O'Neill v Medical Benefits Fund of Australia** [2002] FCAFC 188. Although the Full Court of the Federal Court held that the applicant was entitled to damages the decision cannot be authority in supporting the application of s.52 of pre-contract negotiations because it was not asked to consider whether the statement was in trade or commerce. In **Finance Sector Union of Australia v Commonwealth Bank of Australia** [2003] FCA 435 the Federal Court was prepared to permit an issue to go trial in reliance upon alleged misleading conduct within the meaning of s.52. However, at [10] Merkel J recognised that whether the conduct occurred in trade or commerce was a problem that would have to be overcome at the trial.

⁵⁴ [1999] FCA 593; 163 ALR 79.

Concrete Constructions and said:⁵⁵

“The majority in that case clearly rejected the wider construction of "in trade or commerce", which would extend to virtually any activity of a corporation. It is true that a building company could not earn income unless it had workers who received instructions from foremen. But that was not enough to bring the alleged misrepresentation within the concept of "trade or commerce". Similarly, [Tasmania Development and Resources] could not carry out its activities of promoting Tasmanian trade and development (which activities themselves I assume for present purposes to be in trade or commerce) unless it engaged staff. Nevertheless such engagements and the necessary associated incidental negotiations, however necessary, are not in themselves of a trading or commercial nature. They are internal affairs of [Tasmania Development and Resources].”

40. More recently a claim that a film production company had engaged in misleading and deceptive conduct in recruiting two young girls who participated in a film survived a strike-out application. The applicants claimed that the film director of the documentary “Cunnamulla” had told the parents of the applicants that he wished to interview them (then aged 13 and 15 years respectively) without their parents being present about their views on whether there was racism in the town and not about any other matter. It was claimed that when he interviewed the girls he spoke to them about their sexual activities. That interview featured in the film. In the strike-out application the issue was whether the statements had been made “in trade or commerce”. The primary judge ordered that the statement of claim be struck out. On appeal the full court of the Federal Court, by majority, held that the application raised an arguable issue that should be allowed to go to trial.⁵⁶

41. In the full court Finn and Jacobson JJ said⁵⁷:

“The impugned representations are not to be characterised as having been made in trade or commerce simply because they were made in the course of the respondents making of a documentary film. For them to have that character they had to be made in dealings with the applicants and their respective parents in the course of an activity which, of its nature, bears a trading or commercial character.”

42. They continued that it was proper to infer that:

⁵⁵ At [77].

⁵⁶ See *Hearne v O'Rourke* [2003] FCAFC 78.

⁵⁷ At [8].

“[10] ... the activity which the corporation was undertaking when [the representations were made to the parents of the applicants] was the identification of prospective participants in the projected documentary who would provide the material that was likely to be used by the [corporation] in the documentary they wished to make. There could be no documentary unless appropriate interviews were secured. Securing such interviews, in our view, could properly be said to be central to the trading or commercial activity in which the second respondent was engaged in producing a film for profit. Correspondingly, the conduct engaged in by the [film director] for that purpose could itself be found to be in trade or commerce.

and concluded:⁵⁸

“[12]... The applicants were not being asked to enter a commercial or, for that matter, an employment relationship with the respondents. Nonetheless, we consider it to be reasonably arguable that they were being asked to enter into a relationship which, for the respondents, actually effectuated part of their commercial purpose.

13 We acknowledge that there is an apparent curiosity in our conclusion though it is one countenanced by the majority judgment in *Concrete Constructions*. The activity in question may be able to be characterised as bearing a trading or commercial character although the particular dealing which carries the activity into effect and in which the impugned conduct occurs does not itself give rise to a commercial relationship.”

43. The dissenting judge, Dowsett J, agreed with the primary Judge, Kiefel J, and said:⁵⁹

“Whether one addresses the statements allegedly made by the [film director] prior to the interviews, his alleged intentions or his conduct in interviewing the applicants, it is difficult to conclude that any of these matters constituted conduct in trade or commerce. A request that a person appear in a documentary film or discuss aspects of his or her life to further research for such a film does not seem to have any commercial aspect. To interview such a person goes no further. Of course, negotiations for such involvement might acquire a commercial aspect. The potential interviewee might seek a financial incentive, or such an incentive might be offered. Whether or not that would be sufficient for the purposes of s 52 might depend upon cases such as *Barto* ,,, and *Tasmania Development and Resources* ... However that is not the present position.”

44. The reasoning of the majority does not sit comfortably with the reasoning of Heerey J in **Tasmania Development and Resources**. Eventually a full court of the Federal Court or the High Court will need to determine whether

⁵⁸ At [12].

⁵⁹ At [38].

misrepresentations of the kind considered in **O’Neil**⁶⁰ or **Hearne**⁶¹ were made in trade or commerce.

Section 60

45. Section 60 of the **Trade Practices Act** prohibits corporations from using physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer. It does not include the performance of work by an employee under a contract of service.⁶² A consumer includes a person who acquires services if, and only if, the price did not exceed the prescribed amount which is now \$40,000.⁶³ In **ACCC v Maritime Union of Australia**⁶⁴ the Federal Court held that two union pickets preventing the supply of hold cleaning services by contractor companies who employed union members breached s.60. The pickets were an attempt to allow shore based labour to clean the ships’ hold prior to taking on their next cargo, rather than having this done by the ships’ crews. The relevant members of the crew declined to cross the picket line because they were afraid to do so. The court held that the picket lines were formed to prevent access to vessels for the purpose of allowing their departure and that the picket lines were capable of engendering fear in the minds of the mooring gangs and thus prevented the ships from departing. That conduct amounted to coercion and thus prevented the ships from departing. That conduct amounted to coercion for the purposes of s.60.

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⁶⁰ See fn 53 above.

⁶¹ See fn 55 above.

⁶² See the exclusion in the definition of “services” in s.4(1) referred to in fn 6 above.

⁶³ See s.4B(1)(b)(i).

⁶⁴ (2001) 114 FCR 472. There does not appear to have been any issue in the case about whether the MUA was a corporation within the meaning of the **Trade Practices Act**. Arguably it is: see **Rowe v Transport Workers’ Union of Australia** (1998) 90 FCR 95 at 105. However, in that case s.6(3)(b) of the **Trade Practices Act** seems to have applied to the conduct of the MUA. That provision treats a reference to a corporation in s.60 as including a reference to a person not being a corporation.