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Abstract

In this article, there is a critical analysis of the doctrine of misleading or deceptive conduct under s 52 of the Trade Practices Act 1974 (Cth) which is frequently relied upon for vitiation by guarantors or sureties who, as a result of such conduct on the part of the lender or credit provider, have given guarantees without adequate understanding or informed consent. It looks at how s 52 allows a party who is induced to enter into a contract of guarantee by misleading or deceptive conduct may be entitled to damages from the lender (the representor) in respect of any loss or damage incurred thereby. This statutory provision is basically derived from the common law and equitable doctrines developed by the courts. Section 52 allows for a greater range of remedies for guarantors than are available under the general law and may have a greater scope in terms of the situations to which they apply. Nevertheless, s 52, in its application, is subject to a number of limitations, and it is not yet settled that it offers that much advantage over the general law.

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THE SCOPE AND LIMITATIONS OF THE DOCTRINE OF MISLEADING OR DECEPTIVE CONDUCT IN THE CONTEXT OF GUARANTEES: SOME PERSPECTIVES AND UNCERTAINTIES

CHARLES Y C CHEW*

In this article, there is a critical analysis of the doctrine of misleading or deceptive conduct under s 52 of the Trade Practices Act 1974 (Cth) which is frequently relied upon for vitiation by guarantors or sureties who, as a result of such conduct on the part of the lender or credit provider, have given guarantees without adequate understanding or informed consent. It looks at how s 52 allows a party who is induced to enter into a contract of guarantee by misleading or deceptive conduct may be entitled to damages from the lender (the representor) in respect of any loss or damage incurred thereby. This statutory provision is basically derived from the common law and equitable doctrines developed by the courts. Section 52 allows for a greater range of remedies for guarantors than are available under the general law and may have a greater scope in terms of the situations to which they apply. Nevertheless, s 52, in its application, is subject to a number of limitations, and it is not yet settled that it offers that much advantage over the general law.

I INTRODUCTION

The doctrine of misleading and deceptive conduct is best exemplified by s 52 of the *Trade Practices Act 1974* (Cth) ('TPA') which provides that 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. This prohibition is very wide and extends to all forms of misleading or deceptive conduct and is not restricted to such conduct as would constitute misrepresentation at common law.¹ Section 52 is seen as being so

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important to consumers that it has been replicated in other Federal and State legislation. For example, in relation to ‘financial services’, misleading or deceptive conduct by a corporation is now prohibited by s 12 DA of the *Australian Securities and Investments Commission Act 1988* (Cth)² and a similar provision in the *Fair Trading Acts*.³

Section 52 establishes a general standard of conduct to determine commercial behaviour by catching (a) conduct by a ‘corporation’ or person, as extended by s 6, (b) in trade or commerce which is (c) misleading or deceptive or is likely to mislead or deceive. Once these three elements are present, any person such as a guarantor may bring an action against the corporation engaging in the misleading or deceptive conduct.

Section 52 has evolved into the most litigated section of the TPA⁴ and into a broad-ranging provision of general application in a wide array of commercial and contractual situations ‘to the point where it is now a factor to be considered in most fields of commercial activity’.⁵

Yet the section is brief and simple and the courts are at pains to emphasise that there is no need or warrant to search for other words to replace those used in the section itself. In *Rhone-Poulenc v UIM Chemical Services*,⁶ Lockhart J held that:⁷

¹ Peter Gillies, ‘Non-Disclosure: *Trade Practices Act*, s 52’ (2004) 78 *Australian Law Journal* 653, 654-655.

² Section 12 DA provides that a financial corporation ‘must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’. This provision was inserted in the *Australian Securities and Investments Commission Act 1988* (Cth) to give effect to a recommendation of the Wallis Report into Australia’s financial system that there should be a single body to regulate the financial industry so as to better promote market integrity and protect consumers. The *Trade Practices Act 1974* (Cth) was accordingly amended to include s 51 AF(1) which provides that Pt V of the *Trade Practices Act* shall not apply to the supply, or possible supply, of ‘services that are financial services’, ‘financial services’, defined in s 4(1) to have the same meaning as in Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 1989*. As a result, s 52 no longer applies to the supply, or possible supply of those services and the responsible agency is now the Australian Securities and Investments Commission (ASIC), rather than the Australian Competition and Consumer Commission.

³ See, for example, *Fair Trading Act 1992* (ACT) s 12(1); *Fair Trading Act 1987* (NSW) s 42(1); *Fair Trading Act 1989* (Qld) s 38(1); *Fair Trading Act 1987* (SA) s 56(1); *Fair Trading Act 1990* (Tas) s 14(1); *Fair Trading Act 1985* (Vic) s 11(1); *Fair Trading Act 1987* (WA) s 10(1).

⁴ Linda Willmott, Sharon Christiansen and Des Butler, *Contract Law* (2nd ed, 2005) 463-465.

⁵ R Miller, ‘From Acorn to Oak Tree: The Spreading Branches of s 52 of the Australian *Trade Practices Act 1974*’ (2005) 79 *Australian Law Journal* 43, 49. See *ACCC v Target Australia Pty Ltd* [2001] ATPR 41-840; *ACCC v Dell Computers Pty Ltd* [2002] ATPR 41-878; *W J Green & Co Pty Ltd v Wilden Pty Ltd* (unreported, Supreme Court, WA, Parker J, 24 April 1997); *O’Neill v Medical Benefits Fund of Australia Ltd* [2002] 122 FCR 455.

⁶ (1986) 12 FCR 447.

⁷ (1986) 12 FCR 504.

Section 52 should be interpreted according to the natural ordinary meaning of the language. Whether it has been contravened depends upon analysis of the conduct of the alleged contravener in light of all the relevant circumstances constituted by acts, omissions, statements or silence.

The above statement may require some amendment as a result of what the court said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*,⁸ namely, that the ‘heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests’.⁹

This article looks at how s 52 provides some advantages over the general law doctrines of misrepresentation in cases concerning third party guarantees. The application of s 52 makes it possible to minimise the necessity to resort to ingenious ways of categorising statements as representations of fact. It may also make it easier for guarantors to rely on predictions or promises made without reasonable grounds. The great advantage in the application of s 52 is the availability of a flexible range of remedies, especially the remedy for damages for guarantors who can show that they have suffered, or are likely to suffer loss or damage as a result of the conduct of the other party, the creditor. Nevertheless, in the crucial areas of disclosure and statements of opinion as to present matters, it is not yet clear whether s 52 provides any substantial advantages over the general law.

A The Meaning of ‘Misleading or Deceptive Conduct’

Section 52 creates a distinct type of purely statutory prohibition which is in some ways analogous to a tort and the diversity of actions successfully brought under the section reflects that it is expressed in general terms and is designed to have a broad reach.¹⁰ This should not obscure the fact that the provision (taken with the remedy provisions in Part VI of the TPA) operates independently of the common law, setting up a right which may be pursued in lieu of, or concurrently, with actions at general law, for example, actions in tort, for say deceit or negligent misstatement; or actions for rescission of, or breach of contract.

The section is not restricted in its operation to conduct which is actually misleading, but it must be capable of misleading the public at large, or an identifiable section of it.¹¹ The term ‘misleading’ whilst not defined in the Act has been interpreted as conduct which is inconsistent with the truth or which leads or is likely to lead the person to whom it is directed astray and into error or to cause that person to err.¹²

⁸ (1982) 149 CLR 191.

⁹ (1982) 149 CLR 199.

¹⁰ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, [92] (Lockhart J).

¹¹ *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303.

¹² *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1979) ATPR 40-135; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 69 ALR 83 [92] (Lockhart J); *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; 18 ALR 639; (1978) ATPR 40-067, 17,690.

The term ‘deceptive’ has been said to carry a connotation of craft or overreaching.¹³ Earlier court statements were to the effect that in order to infringe s 52 the conduct must convey a misrepresentation.¹⁴ However, whilst it will often be the case that the conduct giving rise to a claim under s 52 will be brought about by a representation, there is authority to suggest that a representation is not essential in order for s 52 to apply.¹⁵ Thus the better view now is that s 52 does not impose a requirement that the conduct constitutes a misrepresentation,¹⁶ and ‘it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitutes some form of representation’.¹⁷ Rather the issue should be to ask the question whether the impugned conduct, of its nature, constitutes misleading or deceptive conduct.¹⁸ It is clear that the matter is not yet settled.¹⁹

To establish a contravention of s 52, it is not necessary to show any intention to mislead or to deceive or to prove that the conduct actually misled someone.²⁰ Section 52 prohibits conduct having the stated result, regardless of fault or moral blameworthiness on the part of the actor.²¹ It is not essential that a person has actually been misled or deceived, provided that the conduct has a real capacity or tendency of doing so.²² Conduct is likely to mislead or deceive if there is a real, or not remote, chance or possibility of the conduct having that effect regardless of whether that chance is more or less than 50 per cent.²³ In a recent approach which expanded the ambit of s 52, the majority of the Federal Court contended in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia*²⁴ that the mere giving of a contractual warranty as to a presently existing state of affairs may, if false, amount to conduct considered to be misleading or deceptive.²⁵ It has also been held that a false representation that a party had the proper competence and skill to carry out a contract is likely to offend s 52.²⁶

¹³ *Puxu Pty Company Ltd v Parkdale Custom Built Furniture Pty Ltd* (1979) ATPR 40-135.

¹⁴ *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303; *Lego Australia Pty Ltd v Pauls (Merchants) Pty Ltd* (1982) 42 ALR 344; ATPR 40-308, 43,804-5.

¹⁵ *Bridge Stockbrokers Ltd v Bridges Stockbrokers Ltd* (1985) ATPR 40-502, 46,024; *Hunt Contracting Co Pty Ltd v Roebuck Resources NL* (1992) ATPR 41-193, 40,606.

¹⁶ *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940, 50,250.

¹⁷ *Henjo Investment Pty Ltd v Collins Marrickville*, (1988) 79 ALR 83, [92] (Lockhart J).

¹⁸ *Rhone -Poulenc Agrochimie S A v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477.

¹⁹ *Treloar v Ivory* (1991) ATPR 41-123, 52,817 (Ipp J).

²⁰ *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd* (1980) 33 ALR 349; 49 FLR 455; ATPR 40-188.

²¹ *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd* (1980) 33 ALR 349; 49 FLR 455; ATPR 40-188, 42,590 (Northrop J).

²² *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303.

²³ *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367; 42 FLR 331; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; 55 ALR 25; ATPR 40-463, 45,343; *Tomlinex Pty Ltd Candoura Pty Ltd* (1994) ATPR 41-302, 42,023; *Central Equity Limited v Central Corporation Pty Limited* (1995) ATPR 41-443, 40,998.

²⁴ (1993) 114 ALR 355; (1993) 42 FCR 470, 505.

²⁵ (1993) 42 FCR 470, 505. See also *Wright v TNT Management Pty Ltd* (1988) 15 NSWLR 679.

²⁶ *Comalco Aluminum Ltd v Mogul Freight Services Pty Ltd* (1993) ATPR (Digest), 46-106.

Section 52 has been the source of much creative thinking in the pursuit and defence of claims. This is not surprising because the concepts which the section employs are essentially simple. There is no doubt that the provision was aimed at ‘businessmen who resort to smart practices’.²⁷ It now looms over business relations and acts as a powerful factor in discouraging unfair dealings.

B Limitations

Section 52 is concerned with the conduct by ‘a corporation’ on the basis that the TPA relies for its constitutional validity mainly on the power of the Commonwealth to make laws with respect to ‘foreign corporations and trading or financial corporations formed within the limits of the Commonwealth’.²⁸ Nevertheless, ss 5 and 6 of the Act give these provisions an extended operation in some instances where other heads of federal legislative power can be relied upon. Thus, for example, any trader, whether incorporated or not, may be caught by the Act in respect of conduct occurring in inter-state trade or commerce.²⁹ It is important to note that not all conduct that is misleading or deceptive is conduct in trade or commerce, but only ‘conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character’.³⁰ The constitutional ‘restrictions’ were inserted there not to put limitations on Commonwealth legislative power but to put limitations on the scope of s 52.

Such limitations on s 52 were intended to make it clear that new standards of behaviour as laid down by the Act were to be imposed only on those who could be said in some sense to be acting in a business capacity rather than in a purely private capacity. It is mainly because of this that although s 52 has transformed the law of misrepresentation to such an extent that it has taken over much of the law in this area, it is not capable of completely supplanting the general law.³¹ It would, in this sense, be wrong to assume that ‘the judicial history of s 52 has been one of unalloyed expansion of its scope as the ingenuity of lawyers reveals new situations where it might arguably be pressed into service’.³²

²⁷ See W Pengilly ‘Section 52 of the *Trade Practices Act*: A Plaintiff’s New Exocet?’ (1987) 15 *Australian Business Law Review* 247. This article gives an account of the legislative history of s 52.

²⁸ Constitution, s 51(xx).

²⁹ It is important to note that in cases where the commercial activity of an unincorporated sole trader or partnership is not subject to the *Trade Practices Act* it will be subject to the fair trading legislation of the relevant state or territory. See J Carter and D J Harland, *Contract Law in Australia* (4th ed, 2002) [1101].

³⁰ *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603; (1990) ATPR 41-022, 51,364.

³¹ Carter and Harland, above n 29, 414-5.

³² D J Harland, ‘Misleading or Deceptive Conduct: the Breadth and Limitations of the Prohibition’ (1991) 4 *Journal of Contract Law* 107, 112. See *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603; (1990) ATPR 41-022, 51,364 which showed that s 52 is not capable of infinite expansion.

Because the scope of the TPA is limited for constitutional reasons, being drafted so as to apply to corporations engaged in trade and commerce, the States and the Territories have each passed acts which, inter alia, more or less reproduce the equivalents of s 52 and the associated remedy provisions in Part VI of the *Trade Practices Act* but apply them to ‘persons’ rather than corporations.³³ These acts each termed the *Fair Trading Act* may then be invoked against individuals, unincorporated businesses such as sole traders and partnerships. Thus between them, the Commonwealth and State and Territory acts provide a fairly comprehensive coverage of business practices impacting adversely on consumers.³⁴

C Silence as Misleading or Deceptive Conduct

An omission to mention a qualification, in the absence of which some absolute statement is rendered misleading is conduct which could be considered as misleading or deceptive.³⁵ Similarly, the failure to disclose a subsequent change after a statement has initially been made and which results in the statement being incorrect, can be regarded as misleading or deceptive.³⁶ In the same category are ‘silence per se’ cases which have non-disclosure by the defendant of a relevant fact-one which by definition will be adverse to the plaintiff, in a context where the defendant has done nothing to lead the plaintiff to suppose that the adverse fact does not exist.³⁷

An important issue is whether silence itself amounts to ‘conduct’ as defined in s 4 (2) of the TPA. This is an expansive definition which includes, inter alia, ‘refraining’ from doing an act.³⁸ Yet although the definition is sufficiently broad to include silence, it goes on to exclude from its ambit refraining from doing an act ‘inadvertently’.³⁹ In *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty*

³³ *Fair Trading Acts* ACT 1992 s 12; NSW: *Fair Trading Act* 1987 s 42; NT: *Consumer Affairs and Fair Trading Act* 1990 s 42; Qld: *Fair Trading Act* 1989 s 38; SA: *Fair Trading Act* 1987 s 56; Tas: *Fair Trading Act* 1990 s 14; Vic: *Fair Trading Act* 1985 s 11; WA: *Fair Trading Act* 1987 s 10.

³⁴ The state acts were passed in the following years: NSW 1987; Qld 1989; SA 1987; Tas 1990; Vic 1987; WA 1987; ACT 1992. The Northern Territory Act passed in 1990 is known as the *Consumer Affairs and Fair Trading Act*.

³⁵ *Rhone -Poulenc Agrochimie S A v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477; *Lyrytzis v Westpac Banking Corporation* (1994) ATPR 41-360; *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558, 43, 715.

³⁶ *Trade Practices Commission v Optus Communications Pty Ltd* (1996) ATPR 41-478; *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558, 43, 715; *Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd* (1997) ATPR (Digest), 46-177.

³⁷ Compare *Demagogue v Ramensky* (1992) 39 FCR 31, 32 which suggests that there is no such a thing as ‘mere silence’ because the significance of silence always fails to be considered in the context in which it occurs.

³⁸ *Forwood Products Pty Ltd v Gibbett* [2002] FCA 298.

³⁹ Thus for silence to come within the definition of ‘conduct’ here it must be intentional: *Edgar v Farrow Mortgage Services Pty Ltd* (1992) ATPR (Digest) 46-096, 53,375.

*Ltd*⁴⁰ this was interpreted to mean that the failure to disclose information has to be deliberate, so that should it be attributable to carelessness, or, perhaps, ignorance of the significance of the information involved, s 52 will not be infringed. Thus in *Johnson Tiles Pty Ltd v Esso Australia Ltd*⁴¹ the court in alluding to decisions in which some form of conduct accompanied the respondent's silence contended that 'in the case of an alleged non-disclosure it is not necessary to show that the contravener knew of the facts not disclosed'.⁴²

Silence may be relied upon in order to show a contravention of s 52 even when a duty to disclose is not imposed by common law or equity.⁴³ In *Kimberley NZI Finance Ltd v Torero Pty Ltd*,⁴⁴ French J although reluctant to postulate a general rule, held the view that silence could only be misleading or deceptive conduct if the circumstances gave rise to some reasonable expectation that if a relevant fact exists it would be disclosed.⁴⁵ The question of whether a reasonable expectation of disclosure exists is to be determined in light of all the circumstances of the case, independent of general law principles.⁴⁶

The courts have on occasions expressed scepticism towards the idea that silence by itself can ground s 52. For example, in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd*,⁴⁷ Lockhart J pointed out that 'it is difficult to conceive how mere silence by an alleged convener could be sufficient to attract the operation of s 52' unless the facts are such that silence was 'the critical matter upon which reliance is placed to establish misleading or deceptive conduct'. The decision, like others in this area, is hostile to the idea that silence by itself can be raised to the status of a misrepresentation by way of artificially characterising this silence as an implied misrepresentation.⁴⁸

Nevertheless, the impact of this development on the law of guarantees is that the lender may now have a statutory obligation under s 52 to disclose material facts in certain circumstances, in comparison to the duty arising under the general law

⁴⁰ (1986) 12 FCR 477.

⁴¹ (2001) ATPR 41-794.

⁴² (2001) ATPR 42-548.

⁴³ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 477; *Aliotta v Broadmeadows Bus Service Pty Ltd* (1988) 10 ATPR 40-873; *Western Australia v Bond Corp Holdings* (1991) ATPR 41-129.

⁴⁴ (1989) 11 ATPR 46-054.

⁴⁵ (1989) 11 ATPR 46-054, 53,195. This 'reasonable expectation of disclosure' is an adaptation of a test in common use in American Law. It is a reasonable test in many circumstances but its usefulness is limited in determining when the bank should disclose information about the customer's affairs. See G Taperall, R Vermeesch and D J Harland, *Trade Practices and Consumer Protection* (3rd ed 1983).

⁴⁶ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 477.

⁴⁷ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 504.

⁴⁸ See *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 which is consistent with this approach.

which is only to disclose unusual facts.⁴⁹ Such an approach has been criticised for its lack of precision and inability to provide vendors with adequate guidance as to their obligations under the TPA.⁵⁰

It is submitted that the examination of silence under the TPA is potentially wider in scope than the common law duty of disclosure. The decision in *Gregg v Tasmanian Trustees Ltd*⁵¹ demonstrates this well in the context of a third party mortgage. Here Mrs Gregg succeeded in having the contract set aside as there existed a reasonable expectation that she would have been informed that the document she was signing departed from the terms which had previously been agreed. Nevertheless, lenders may take comfort in the recent decision of the NSW Supreme Court in *Timms v Commonwealth Bank of Australia*.⁵² There Timms wrote a letter to the bank concerning a business he intended to purchase informing the latter that this business was extremely sound. In applying *Demagogue Pty Ltd v Ramensky*⁵³ the court argued that the bank's silence in responding to the letter did not constitute misleading or deceptive conduct, even though the bank did not believe in the soundness of the business.⁵⁴ The court adopted this approach because it undertook an assessment of the facts in the wider context of the contract negotiations.

II CRITICAL ANALYSIS OF THE APPLICATION OF SECTION 52 TO GUARANTEES

A Relevance to Guarantees

It must be pointed out, at the outset, that unlike similar legislation in some countries,⁵⁵ s 52 is not a general prohibition on unfair trading practices. Conduct may well be considered to be in some way unfair, but unless it can be said to involve some element of deception it will not contravene s 52.⁵⁶ Within this limitation, whether the conduct of the creditor in its dealings with the guarantor is misleading or deceptive, or likely to mislead or deceive, is still a question of fact to be determined in the context of evidence of the alleged conduct and the relevant surrounding facts and circumstances. The courts have observed that the overall

⁴⁹ See *AGC (Advances) Ltd v Breton Bay Land Ltd* (unreported, WA Supreme Court, 18 January 1991); *Crisp v Australia & New Zealand Banking Group Ltd* (1994) ATPR 41-294; *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) ATPR 40-950; *Ralik Pty Ltd v Commonwealth Bank of Australia* (unreported, Supreme Court, NSW, Cole J, 14 August 1990); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31. See also D Skapinker, 'Silence is Golden-Or Is It?' (1995) 69 *Australian Law Journal* 165.

⁵⁰ See P Tucker, 'The Reasonable Expectation Test for Misleading or Deceptive Conduct by Silence-Not a Case of Misplaced Reliance' (2001) 29 *Australian Business Law Review* 366.

⁵¹ (1992) 39 FCR 91.

⁵² [2004] NSWSC 76.

⁵³ (1992) 39 FCR 31; 110 ALR 608.

⁵⁴ (1992) 39 FCR 31; 110 ALR 608.

⁵⁵ See D J Harland, 'The Legal Concept of Unfairness and the Economic and Social Environment -fair Trade, Market Law and the Consumer Interest' in Belate (ed), *Unfair Advertising and Comparative Advertising* (1998) 15-52.

⁵⁶ See, for example, *Decor Corp Pty Ltd v Bowater-Scott Ltd* (1985) ATPR 40-587. See also in particular *Pacific Dunlop Ltd v Hogan* (1989) 87 ALR 14.

effect of the conduct is the major consideration. In *Parkdale Custom Built Furniture Pty Ltd v Puxu Ltd*⁵⁷ Gibbs CJ laid down a principle which is now well settled:⁵⁸

The conduct of the defendant must be viewed as a whole. It would be wrong to select some words or acts, which, alone, would be likely to mislead if those words or acts, when viewed in their context, were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words.

It is not necessary for the creditor to have any intention to mislead or deceive the guarantor or to have any dishonest belief regarding the accuracy of a statement made by the creditor to the guarantor. The only relevant consideration for the guarantor is whether the conduct was misleading or deceptive or likely to mislead or deceive.⁵⁹ Nevertheless, proof of intention to mislead has powerful evidentiary value and may be a determining factor in persuading a court that s 52 has been contravened.⁶⁰ A court may be more willing to find a breach of s 52 in circumstances where there was such an intention or where the conduct was particularly reckless.⁶¹ Intention may be relevant in the case of promises, predictions and opinions which may involve a consideration of the state of mind of the maker at the time the offending statement was made.⁶²

It is possible for s 52 to be contravened where there has been a representation in respect of the state of the borrower's business, as when it is said to be trading satisfactorily when in fact this is not the case.⁶³ Instances of the infringement of s 52 can also be seen in another context as, for example, where there is a claim that there will be a limit to the guarantor's liability when in fact the guarantor has to sign the mortgage securing unlimited amounts.⁶⁴

⁵⁷ (1982) 149 CLR 191.

⁵⁸ (1982) 149 CLR 199.

⁵⁹ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; 18 ALR 639; (1978) ATPR 40-067, 17,690.

⁶⁰ *Telmak Teleproducts (Aust) Pty Ltd v Coles Myer Ltd* (1989) 89 ALR 48; ATPR 40-966; *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348; 111 ALR 577.

⁶¹ *Krakowski v Eurolynx Properties Ltd* (1992) 65 ALR 302; ATPR 41-168.

⁶² *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 F CR 82; 55 ALR 25; ATPR 40-463. The proscription in respect of misleading and deceptive conduct applies equally to lenders in their dealings with both borrowers and guarantors. An example of this liability, in relation to borrowers can be seen in *Marks v GIO Australian Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333 where the creditor's promotional brochure or advertisement offers financial accommodation at a different interest from the rate in the loan documents. An action was brought against the defendant when it gave notice that the margin which was part of its mortgage rate was to be increased. The promotional literature for the loans stated that the margin was fixed for the period of the loan although the mortgage documentation contained a variation power.

⁶³ *National Australia Bank v Nobile* (1988) ATPR 40-856; *Western Australia v Wardley Australia Ltd* (1991) ATPR 41-131, 52,925.

⁶⁴ *Money v Westpac Banking Corp* (1988) ATPR 46-034.

A creditor can be guilty of misleading or deceptive conduct in relation to statements about the enforcement of a guarantee. In *Mailman v Challenge Bank Ltd*,⁶⁵ the court held that there was no breach of s 52 because the creditor, after default, was to exercise its power to enter into possession of the secured assets and to sell these assets before claiming any shortfall from the debtor as well as from the guarantors. Here the mortgagee was at liberty to enforce its securities and rights as it wishes.

Yet, it has been successfully argued in *Bank of New Zealand v Houlst*⁶⁶ that there was misleading or deceptive conduct when the creditor was able to give an assurance that the guarantee would not be relied on except in relation to moneys lent for a specific purpose.⁶⁷ It was also held that there was misleading and deceptive conduct where on the sale of the debtor's business, the guarantees would be released.⁶⁸ Despite the fact that such statements could be considered to be future promises, s12BB of the *Australian Securities and Investments Commission Act 1989* (Cth) imposes a liability in situations where there were no reasonable grounds for making the statements at the time they were made.⁶⁹

B *Silence as Misleading or Deceptive Conduct in the Context of Guarantees*

It is now established that silence or a failure to speak or non-disclosure may constitute misleading or deceptive conduct even though there would be no actionable misrepresentation at common law except under certain circumstances.⁷⁰ The existence of a duty of disclosure under the general law is still highly relevant in determining whether non-disclosure contravenes s 52. For example, silence may be actionable when there is a duty to correct what has already been said is incorrect,⁷¹ or where circumstances have changed,⁷² or where a failure to reveal some extra fact is misleading because what has been revealed is only half the truth.⁷³ In other circumstances, a failure to disclose facts will not be misleading unless the circumstances are such as to give rise to an anticipation that if a material fact were to exist it would be divulged.⁷⁴

⁶⁵ (1991) 5 BPR 11,721.

⁶⁶ (Unreported, Supreme Court, Old, 14 February, 1991).

⁶⁷ Ibid.

⁶⁸ *Australian Bridal Centre Pty Ltd v Dawes Corp* (1991) ASC 56-030.

⁶⁹ *MCP Muswellbrook Pty Ltd and Ors v Deutsche Bank (Asia) AG and Ors* (1988) 12 NSWLR 16; 80 ALR 53. Section 2BB of the *Australian Securities and Investments Commission Act 1989* (Cth) is a substantive provision and so does not operate retrospectively.

⁷⁰ See *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) ATPR 40-950; *Franich v Swannell* (1993) 10 WAR 459.

⁷¹ See *Dinyarrack Investments Pty Ltd v Amoco Australia Ltd* (1982) 45 ALR 214, 221 per Fisher J; *Bevanere Pty Ltd v Lubindineuse* (1985) 59 ALR 334; *Collier v Electrum Acceptance Pty Ltd* (1986) 66 ALR 613.

⁷² *Lee Gleeson Pty Ltd v Sterling Estates* (1991) 23 NSWLR 571.

⁷³ *Mikaelian v CSIRO* (1999) 163 ALR 172; *Colliers Jardine (NSW) Pty Ltd v Balog Investments Pty Ltd* [1996] ANZ Conv R 527.

⁷⁴ For some applications of this approach, see in particular, *Warner v Elders Rural Finance Ltd* (1993) ATPR 41-238; *Nagy v Masters Dairy Ltd* (1996) 150 ALR 273; *Leda Holdings Pty Ltd v Oraka Pty Ltd* (1998) ATPR 41-601.

Section 52 exists side by side with the general law categories where there is a positive duty to disclose information.⁷⁵ It is only in so far as a failure to speak or act would be misleading or deceptive can there be said to be a 'duty to disclose' under s 52. This occurs where the respondent has brought about a reasonable expectation in the other party that the respondent will warn, qualify or otherwise speak up, if the need arises.⁷⁶ The ambit of s 52 in relation to misrepresentation by silence is arguably wider than the common law and equity rules and, in any case, probably covers any misrepresentation that would be actionable under the old law.

Nevertheless, it is unlikely that silence, or an absence of disclosure, giving rise to a contravention of s 52, will be inferred simply from the relationship of the creditor and proposed guarantor. For example, in *Nobile v The National Australia Bank Limited* at first instance,⁷⁷ the guarantors attempted to rely on s 52. There were, however, no relevant statements or other conduct by the bank manager. This manager merely assumed that the guarantors knew what they were there to sign and had invited them to sign the document.

The court referred to the *Rhone-Poulenc*⁷⁸ case and said that silence, in the absence of a duty to speak, does not amount to conduct which is misleading or deceptive or likely to be so. It was considered that the only ground on which such a duty could be implied, in the specific facts of the case, was the duty of disclosure under the general law, founded on the principle in *Hamilton v Watson*.⁷⁹ On this basis, since there were no facts in *National Australia Bank v Nobile* which were 'not naturally to be expected' by the guarantors, the silence of the bank manager would not constitute misleading or deceptive conduct.⁸⁰

It should be stressed that it is possible that there are statements made in the course of the dealings between the parties which, although not in themselves misleading, might, in some circumstances, give rise to a misapprehension by the guarantor.⁸¹ In such a situation, there may be a duty to speak or disclose.⁸² In *Money v Westpac Banking Corporation*,⁸³ for example, the surety guaranteed the debts of his ex-wife's company and believed that he signed the mortgage on the understanding induced by the bank that advances to the company would be limited to \$35,000. The guarantor claimed that there was a failure on the part of the bank to disclose to

⁷⁵ See *Damagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 40 (Gummow J); *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543; *Effem Foods Pty Ltd trading as Uncle Ben's of Australia v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599.

⁷⁶ *Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd* (1997) 69 SASR 288, 298-9 per Doyle CJ; *Arbest Pty Ltd v State Bank of New South Wales Ltd* [1996] ATPR 41-481. (1987) ATPR 40-787.

⁷⁸ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 477.

⁷⁹ (1845) 12 Cl & Fin 109; 8 ER 1339.

⁸⁰ (1991) ATPR 41-131.

⁸¹ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services* (1986) 12 FCR 477.

⁸² *Kimberly NZI Finance Ltd v Torero Pty Ltd* (1989) 11 ATPR 46-054.

⁸³ (1988) ATPR 46-034.

him the unlimited nature of the guarantee which amounted to misleading and deceptive conduct in contravention of s 52.⁸⁴ French J summarised his findings as follows:⁸⁵

This was not a case where the innocent act of a corporation was given a false significance by circumstances arising entirely from the antecedent representations of a third party. Here, the Bank dealt with Mrs Money and indirectly with the applicant on a common assumption that the advances were to be limited to the extent conveyed by her. In the light of that common assumption the presentation of the mortgage for signature by the applicant carried with it the risk that he would be led into believing that the security to be provided was limited to \$35,000 and interest thereon. It was for that reason that the unqualified tender of the mortgage amounted to misleading and deceptive conduct as to its terms.

It was no answer to the characterisation of the bank's conduct in tendering the mortgage as misleading or deceptive to maintain that the terms of the mortgage were there for the applicant guarantor to read. The guarantor's entitlement to relief did not depend on any finding that the bank had taken reasonable care to look after his own interests. If it had not been for the bank's conduct in contravention of s 52, the applicant would not have signed the mortgage and in the circumstances, he had by reason of that conduct suffered and was likely to suffer loss or damage.⁸⁶

It is possible for a guarantor to rely on silence to show that there is misleading or deceptive conduct for the purposes of s 52 even if there is no duty to disclose being imposed by common law or equity.⁸⁷ In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*⁸⁸ the duty to disclose was put forward in the following terms:⁸⁹

unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that if some relevant fact exists it would be disclosed. Despite this, it has been pointed out that there is no useful purpose in seeking to analyse the circumstances in which the duty to disclose will arise.

From what has been said, the implications for the development of the law of guarantees are quite profound. For the first time the creditor has a statutory obligation to disclose material facts in certain circumstances, whereas the duty that evolved from the general law was to only disclose unusual facts.⁹⁰ In *Crisp v Australia & New Zealand Banking Group Ltd*,⁹¹ for example, it was held that it was

⁸⁴ (1988) ATPR 46-034, 53,106.

⁸⁵ (1988) ATPR 46-034, 53,107.

⁸⁶ (1988) ATPR 46-034, 53,107.

⁸⁷ *Aliotta v Broadmeadows Bus Services Pty Ltd* (1988) 10 ATPR 40-873; *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) 11 ATPR 46-054; *Kebwand Pty Ltd v National Australia Bank Ltd* (1989) 11 ATPR 40-950.

⁸⁸ (1988) 79 ALR 83.

⁸⁹ (1988) 79 ALR 95.

⁹⁰ *Hamilton v Watson*, (1845) 12 Cl & Fin 109; 8 ER 1339.

⁹¹ (1994) ATPR 41-294.

misleading or deceptive for the bank as mortgagee not to disclose to the applicant mortgagor that there was a dishonour (by the bank) of the borrower's cheques and the effect of the dishonour, resulting in the bank contravening s 52.⁹² This was so despite the fact that the conduct was not engaged in by the bank with the intention to mislead or deceive thus entitling the applicant to a statutory remedy conferred under s 87 of the TPA (and s 12 GM of the *Australian Securities and Investments Commission Act 1989* (Cth)).

In *Grubic v Commonwealth Bank of Australia*⁹³ a failure to disclose to the guarantor (whose liability was limited to a certain sum) the fact that a larger sum was to be lent to the debtor, was held not to be misleading or deceptive conduct because the guarantor had been given legal advice and did seek independent financial advice. In *Commonwealth Development Bank of Australia v Lawton*,⁹⁴ a failure to disclose the existence of a personal covenant in a mortgage was also considered not to constitute misleading or deceptive conduct.

The creditor's duty of confidentiality to its customer, being the borrower, is sometimes used to explain away its failure to disclose information to a guarantor.⁹⁵ There is no inconsistency between a duty to disclose to a guarantor and a duty of confidentiality to the borrower. In a situation where the creditor puts itself in a position in which these two duties conflict, the creditor can be held accountable for breach of both duties. The creditor's duty of confidentiality to the borrower should not be allowed to diminish its duty of disclosure to the guarantor. This is because it might still be reasonable for the guarantor to expect disclosure, even though the disclosure breaches the creditor's duty to the borrower. Such a problem can be easily avoided by the creditor obtaining the borrower's consent to the disclosure.

C Section 52 and Representations in the Context of Guarantees

On the whole, when considering the s 52 prohibition there should be less of a necessity for courts to have recourse to the categorising of statements of creditors (at times quite arbitrarily) when looking at the award of remedies for guarantors. Statements made by the creditor which are predictive or promissory in nature may infringe s 52. But opinions in respect of present matters may only constitute misleading or deceptive conduct if the representee can demonstrate that these opinions were not in fact held or that the representor did not have a basis for holding them. It is in this sense that it can be said that there is still a tendency for courts to categorise statements in terms of whether they are representations of fact.

⁹² Note also *Burt v ANZ Banking Group Ltd* (1994) ATPR (Digest) 46-123 and *ANZ Banking Group Ltd v Harvey* (1994) ATPR (Digest) 46-132, where the guarantors' claim failed.

⁹³ [1993] ATPR (Digest) 46-111.

⁹⁴ (Unreported, Supreme Court, Vic, Ashley J, 19 February 1998).

⁹⁵ See *Kabwand Pty Ltd v National Australia Bank* [1989] ATPR 40-950; *Brophy v NIAA Corp Ltd (in liq)* [1995] ATPR 41-399.

The above limitations can be seen in the decision of *National Australia Bank Limited v Noble*.⁹⁶ The guarantors relied on the statement of the bank manager that the borrower's company was trading satisfactorily when in fact it was not and succeeded on the basis of a contravention of s 52. The court considered the manager's statement to be one of fact when it could have been depicted as a statement of opinion as to present matters since the manager deliberately conveyed and did convey to the guarantors that the business of the borrower was doing satisfactorily and believed this to be the case. Nevertheless, because the guarantors were going to have some difficulty demonstrating that the bank manager did not in fact hold the opinion, or that there was no basis for him to do so, it was probably preferable to have interpreted it as a statement of fact.

Statements of opinions may constitute misleading or deceptive conduct only in the sense that the guarantor is in a position to show that those tendering such opinions did not hold them or, alternatively that there was no reasonable ground upon which they could have formed the opinions.⁹⁷ It is essential for the applicant to establish that there is a causal nexus between the misleading conduct and the execution of the contract. In *Sanrod Pty Ltd and Ors v Dainford Ltd*⁹⁸ the respondent agreed to sell to the applicant a unit 'off the plan'. The respondent's conduct conveyed a false impression when viewed in the context of the subject matter of the negotiations, and the applicant was induced to enter into the contract of guarantee. The applicant alleged that the respondent's conduct was misleading or deceptive and sought damages under s 82 of the Act and rescission of the contract under s 87.

Fitzgerald J in granting the application said:⁹⁹

It is essential to the applicant's claim that a nexus be established between the respondent's contravention of s 52(1) of the Act and the first applicant's execution of the contract and the payment of moneys thereunder and the second applicant's signature of the guarantee. ... For the purposes of both ss 82 and 87 of the Act, loss or damage must have been, or must likely be, suffered by the conduct constituting the respondent's contravention of, in this case, s 52(1).

In *Bridge Stockbrokers Ltd v Bridges*,¹⁰⁰ there was expressed the proposition that the prohibition in s 52 could be infringed by conduct which caused confusion or uncertainty and which did not 'constitute a misrepresentation in the sense in which the phrase is understood at this stage in the development of s 52'.¹⁰¹ Such a view was put on a more secure footing in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*¹⁰² where Lockhart J stated that whilst misleading or deceptive

⁹⁶ (1988) ATPR 40-856.

⁹⁷ See, for example, *Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG* (1988) 80 ALR 53.

⁹⁸ (1984) 54 ALR 179.

⁹⁹ (1984) 54 ALR 187.

¹⁰⁰ (1984) 4 FCR 460; 57 ALR 401.

¹⁰¹ (1984) 57 ALR 401, 414 (Smithers and Woodward JJ).

¹⁰² (1988) 79 ALR 83; ATPR 40-850.

conduct ‘generally consists of representations, whether express or by silence ... it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation’ and that ‘there is no need or warrant to search for other words to replace those used in the section itself’.¹⁰³ The test proposed is ‘whether the conduct is likely to mislead or deceive’.¹⁰⁴

Since *Henjo's* case there has been some criticism of the requirement of a representation in respect of the prohibition. In *B&W Cabs Ltd v Brisbane Pty Ltd*¹⁰⁵ Pincus J commented that the imposition of the representation requirement is a ‘gloss which has been placed on the statute’ such that ‘one should ask whether there has been a misrepresentation rather than simply apply the statutory language’.¹⁰⁶ The current law seems to be encapsulated by a statement in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*¹⁰⁷ thus:¹⁰⁸

Whilst s 52 speaks of ‘conduct’, many of the decided cases have dealt with that species of conduct which involves what at general law would be classified as ‘representations’ as to a present state of affairs. But it is necessary to keep steadily in mind when dealing with the statute that ‘representation’ is not co-extensive with ‘conduct’.

Despite what has been said, it has been observed that breach of s 52 is not likely to be established unless it can be said that the conduct in question amounts to a misrepresentation since it is only ‘where there is a misrepresentation (that) there will be conduct which is misleading or deceptive’.¹⁰⁹ Such a position is similar to that under the general law of misrepresentation which is confined to representations of fact, and the courts have little difficulty in overcoming this limitation in appropriate circumstances where guarantees are involved.

It has been asserted in *Clark Equipment Australia Ltd v Covcat Pty Ltd*¹¹⁰ which involved representations made as to the suitability of a machine, that a clause in a contract in which the guarantor claims that he or she has not relied on the prior statements or the misleading conduct will not prevent the contract from being set aside.¹¹¹ Thus any exclusion clause would not be effective in a contract of guarantee

¹⁰³ (1988) 79 ALR 83; ATPR 40-850, 49,155-6.

¹⁰⁴ (1988) 79 ALR 83; ATPR 40-850, 49,155-6.

¹⁰⁵ (1991) 21 IPR 563.

¹⁰⁶ See also *Famel Pty Ltd v Burswood Management Ltd* (1989) ATPR 40-962, 50,509 per French J; *State Government Insurance Corp v GIO (NSW)* (1991) 28 FCR 511, 562; 101 ALR 259, 311 per French J; *Arbest Pty Ltd v State Bank of NSW* [1996] ATPR 41-481.

¹⁰⁷ (1993) 42 FCR 470.

¹⁰⁸ (1993) 42 FCR 488 (Lockhart, Gummow JJ).

¹⁰⁹ *Trade Practices Commission v Telstra Corp Ltd* (1993) ATPR 41-256, 41,452 (Hill J).

¹¹⁰ (1987) 71 ALR 367.

¹¹¹ See *Petera Pty Ltd v EAJ Pty Ltd* (1987) ATPR 40-605 where it was said that ‘to permit such a clause to defeat such a claim would be to accept the possibility that a vendor might exacerbate

(as in other kinds of contracts) to exclude the liability of, say, a creditor for a contravention of s 52.¹¹² However, in some cases where there is a suitably drafted clause, there may be some evidentiary value in helping to establish that the plaintiff such as the guarantor did not in fact act in reliance on it, and therefore did not suffer loss as a result of the contravention.¹¹³ In situations where a representation is made which is misleading, a disclaimer may in principle dismiss the representation being misleading to the person to whom it is made, although the courts have shown some reluctance to allow such disclaimers to have this kind of effect.¹¹⁴

D No Requirement In Section 52 for Creditor's Conduct to Induce the Guarantee

There is no requirement in s 52 for the representee to prove that the representor's conduct induced the contract. Nevertheless, it has been established that no remedy can be given except in situations where there is such an inducement or reliance – involving representations being acted upon.¹¹⁵ This principle applies to guarantors who are relying for relief on the basis of their creditors' misleading or deceptive conduct where there is a 'need to prove inducement and reliance to establish nexus'.¹¹⁶

The onus of establishing that there was inducement when entering into the contract of guarantee is on the guarantor. The test or objective measure for determining whether or not inducement has been proved to exist is also similar to that for an action of deceit.¹¹⁷ This is characterised in *Jones v Acfold Investments Pty Ltd*¹¹⁸ as follows:¹¹⁹

[I]f a representation is proved which is of such a nature as to be likely to induce a representee to act upon it, the inference may be drawn, if the representee does act, that he has acted in reliance on the representation. But since the inference is one of fact it may be rebutted by other evidence which is inconsistent with the inference.

his deception, as by actively misleading a purchaser as to the existence or nature of such an exclusion, and thereby ensure that he would escape liability', 46,887 (Wilcox J).

¹¹² See *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, [92] (Lockhart, J).

¹¹³ *KeenMar Corp Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR (Digest) 46-048; *Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) ATPR 40-975.

¹¹⁴ *Hutchence v South Sea Bubble Co Pty Ltd* (1986) 64 ALR 330. See D Harland, 'Misleading and Deceptive Conduct: the Breadth and Limitations of the Prohibition' (1991) 4 *Journal of Contract Law* 107, 109.

¹¹⁵ *Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd* (1981) 36 ALR 23, 28-31 (Northrop J).

¹¹⁶ *Jones v Acfold Investments Pty Ltd* (1985) 6 FCR 512.

¹¹⁷ See, for example, *Holmes v Jones* (1907) 4 CLR 1692 at 1706 per O'Connor J; *Smith v Chadwick* (1884) 9 App Cas 187, 190 (Lord Selborne) and 195-196 (Lord Blackburn).

¹¹⁸ (1985) 6 FRC 512.

¹¹⁹ (1985) 6 FRC 523.

The above statement which formulates a standard of proof for establishing inducement was applied in *National Australia Bank Ltd v Nobile*.¹²⁰ There Neaves J pointed out that the representation made by the creditor was of a type which was likely to induce the guarantors to enter the guarantee. According to this reasoning, despite the fact that there was little evidence of reliance on the part of the guarantors, it was accepted that the guarantors had been induced by the representation to sign the guarantee.¹²¹

III REMEDIES FOR GUARANTORS

A guarantor who suffers loss or damage by reason of a creditor who contravenes s 52 may ask the court for a grant of injunction under s 80 of the *Trade Practices Act 1974 (Cth)*¹²² which may be 'in such terms as the court determines to be appropriate'.¹²³ Such an injunction could, for example, restrain a creditor from enforcing the benefit of a mortgage used to secure a loan.¹²⁴

The court under s 87 may make orders against a creditor who has engaged in misleading or deceptive conduct so as to compensate a guarantor who suffers loss or damage as a result. These orders include declaring the guarantee or any part of it void either *ab initio*¹²⁵ or from some interim time; varying the contract;¹²⁶ refusing enforcement;¹²⁷ directing the refund of money or the return of property;¹²⁸ and directing the payment of the amount of the loss or damage suffered.¹²⁹ All or any of these orders may be made if the court considers that they will either compensate the guarantor for loss or damage sustained or prevent or reduce any possible loss or damage.¹³⁰

¹²⁰ [1988] ATPR 40-856.

¹²¹ [1988] ATPR 249-49, 250.

¹²² Under the *Fair Trading Act 1987 (NSW)* s 65.

¹²³ *Trade Practices Act 1974 (Cth)* s 80 (1); *Fair Trading Act 1987 (NSW)* s 65 (1). The New Zealand Court of Appeal in *Wilkinson v ASB Bank Ltd* (1998) NZBLC 102 listed general observations whereby a guarantee can be set aside because of a creditor's actual or constructive notice of misrepresentation amounting to misleading and deceptive conduct. It also advocated the use of independent legal advice to the guarantor prior to signing as a potential way of mitigating the problems in this area of the law.

¹²⁴ See, for example, *Gregg v Tasmanian Trustees Ltd* (1997) ATPR 41-567.

¹²⁵ *Trade Practices Act 1974 (Cth)* s 87 (2)(a).

¹²⁶ *Trade Practices Act 1974 (Cth)* s 87 (2)(b).

¹²⁷ *Trade Practices Act 1974 (Cth)* s 87 (2)(ba).

¹²⁸ *Trade Practices Act 1974 (Cth)* s 87 (2)(c).

¹²⁹ *Trade Practices Act 1974 (Cth)* s 87 (2)(d).

¹³⁰ The measure of damages is taken to be in tort rather than in contract (*Hubbards Pty Ltd v Simpson Ltd* (1982) ATPR 40-295; *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) ATPR 40-376) provided that the causal link between the conduct complained of and the loss or damage suffered must be proved. There was in *James v ANZ* (1986) 64 ALR 347 an issue in respect of the jurisdiction of the Federal Court to award damages in regard to the three-year time limitation in s 82(2). There was not a similar time limitation on the court's power to order repayment of the amount of any loss or damage under s 87 (2)(d).

In terms of the TPA and the *Fair Trading Act*,¹³¹ it is important to show that loss or damage has been brought about by the relevant conduct. It is therefore essential for the guarantor, for example, to establish the amount of damages which can be attributed to the misleading conduct.¹³²

The ancillary relief available to guarantors includes rescission and restitution as set out in s 87(2).¹³³ When a party is seeking to rescind a contract, an immeasurable loss may have been suffered which is nevertheless the basis for wanting to rescind. 'Loss or damage' under s 87 does not necessarily mean financial loss. As an example, in *Demagogue Pty Ltd v Ramensky*¹³⁴ it was held that purchasers of a property were not worse off financially as a result of a failure to disclose that a road licence was necessary in order to gain access to the property. The court here argued that loss or damage could include non-pecuniary forms of disadvantage. What is crucial is that it is sufficient, for example, that the applicant for rescission, such as the guarantor, is bound to the contract induced by misleading or deceptive conduct.

It should be noted that the court is not restricted by the limitations under the general law to a party's right of rescission. However, in using its discretion the court will take into consideration the conduct of the parties after they had knowledge of the fact that the conduct under challenge was misleading or deceptive. Sections 87 and 75A, which provide rescission rights, do not require the guarantor who has been misled or who has been subjected to a breach of implied condition to have suffered loss or damage before rescission is available.¹³⁵

IV SUMMARY AND CONCLUSIONS

Section 52, within the limits of its operation has changed the law of misrepresentation. Its importance was recognised at the outset and it has generated many claims. It has also, in a more general sense, substantially transformed the face of the law of contract itself and the assumptions which underpin it.¹³⁶

¹³¹ *Trade Practices Act* 1974 (Cth) s 82; *Fair Trading Act* 1987 (NSW) s 68.

¹³² *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.

¹³³ In the landmark case of *Sent v Jet Corporation of Australia Pty Ltd* (1986) 60 ALJR 503 the High Court stressed the importance of the ancillary nature of orders under s 87, which confers no direct rights. Such orders can be made only where proceedings are brought under other provisions of Part VI of the *Trade Practices Act*, such as, say, s 82(1). Relief here includes declaring contracts and collateral agreements void in whole or in part; varying such contracts or agreements; refusing enforcement of all or any provisions of a contract, ordering the refund of money; and ordering payment of the amount or any loss or damage suffered. It is important to stress that relief under s 87 is available to anyone who has not been misled or deceived but who has incurred loss as a result of the misleading or deceptive conduct of the respondent. See also *Collier v Electrum Acceptance Pty Ltd* (1987) 69 ALR 355.

¹³⁴ (1992) 39 FCR 31.

¹³⁵ (1992) 39 FCR 31.

¹³⁶ J L Goldring, 'The *Trade Practices Act* 1974-1975 and the Law of Innocent Misrepresentation' (1976) 50 *Australian Law Journal* 126.

The case law in this area is now so far-reaching and extensive that it is difficult in this treatment to be comprehensive. Instead the elements and arguments relating to the application of s 52 including those concerning guarantees can be discussed with illustrations from the case law, concentrating principally on the leading (selected) cases. The section has created a duty, the full potential of which is still only being explored, and therefore not yet fully realised. It is independent of both contract and tort, and is capable of rendering obsolete much of the general common law in commercial transactions.¹³⁷

Section 52 would include misrepresentations and advice given negligently which did in fact mislead or deceive, even though the corporation might in all circumstances have behaved honestly and reasonably.¹³⁸ In terms of guarantees, it may also include statements and advice which are not made or given negligently if, in concert with other factors, its effect is to mislead or deceive the guarantor. The capacity of s 52 to apply to misrepresentation and negligent advice is considerably enhanced by s 51A which was intended to facilitate proof in misrepresentation cases involving representations as to future matters.¹³⁹ This provides that representations by a corporation as to future matters shall be taken to be misleading if the corporation does not have reasonable grounds for making the representations.¹⁴⁰ There is little in terms of guidance as to what is meant by reasonable grounds. The onus is on the corporation such as the creditor bank to demonstrate that it did have reasonable grounds for making the representations to the guarantor.¹⁴¹

Section 52 imposes a no-fault liability for misleading conduct which includes incorrect statements in commercial relations. It has, as alluded to earlier, very largely, but not quite, taken over the old law of misrepresentation. It only applies in 'trade or commerce' so that the common law and equity rules are still relevant in non-commercial transactions. The old law is still available in business dealings, though there are marked advantages in suing under s 52 or its *Fair Trading Act* equivalents. The old law is also still relevant from time to time because some of its

¹³⁷ It should be noted that the constitutional net has been closed around non corporate entities who engage in conduct that is misleading or deceptive by the Fair Trading legislation: *Fair Trading Act* 1985 Vic s 11; 1987 SA s 56; WA s 11; NSW s 42; 1989 Qld s 38.

¹³⁸ See *Yorke v Lucas* (1985) ALJR 776. See also *Greco & Anor v Bendigo Machinery Pty Ltd* (1985) ATPR 40-521.

¹³⁹ *Miba Pty Ltd v Nescor Industries Group Pty Ltd* (1996) ATPR 41-534 at 42,816 per Merkel J; *Ting v Blanche* (1993) 118 ALR 543, 552 (Hill J).

¹⁴⁰ See *Cummings v Lewis* (1993) ATPR (Digest) 46-103; *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) 37 IPR 599.

¹⁴¹ A court may find the overall probabilities to which the circumstances of a given case give rise, the background to it and the conduct of the parties prior to the relevant conversations as guides as to whether or not particular factors existed which would establish evidence or reasonable grounds: *Cummings v Lewis* (1993) ATPR (Digest) 46-103.

concepts are employed in the interpretation of misleading or deceptive conduct and the application of the associated remedies.¹⁴²

In terms of contracts of guarantee, s 52 provides some benefits or advantages over the general law doctrine of misrepresentation. Firstly, it diminishes the necessity to turn to the difficult classification of statements as representations of fact. Secondly, it is possible for s 52 to render it easier for guarantors to rely on predictions or promises made without reasonable grounds. Finally, the scope and variety of the remedies, especially in terms of damages for innocent misrepresentation, provides an important advantage. Yet in crucial areas concerning disclosure and statements of opinion in respect of present matters, it is not yet settled if s 52 confers any significant advantage in comparison with that conferred by the general law.

It must be stressed that the person misled, such as the guarantor, must not act in a wholly unreasonable way. If someone were to 'get the wrong end of the stick' because of an idiosyncratic interpretation of the other party's conduct or words, then there would be no liability.¹⁴³ On the other hand, if the person engaging in the conduct knew of the other's idiosyncrasy and exploited it, there would be liability both for misleading or deceptive conduct and probably unconscionable conduct as well.

Finally, there is one aspect of the conduct of the person such as a guarantor who is the victim of misleading conduct. This person does not have to take any care as a recipient of the misleading information. For example, there is no concept in respect of s 52 which is similar to contributory negligence. As is the situation under the old law, there is no obligation to check the statement or information, even though there is an opportunity to do so¹⁴⁴ or where doing so would have revealed the error.¹⁴⁵ All in all, this aspect of s 52 does not encourage people, especially commercial operators, to take care of their own interests. Such an inference has attracted dissatisfaction. For example, in *Squibb & Sons Pty Ltd v Tully Corp Pty Ltd*¹⁴⁶ Gray J made known his reservations thus:¹⁴⁷

... it is undesirable that a corporation with the resources to check claims made to it should be entitled to ignore those resources, and to treat s 52 as if it were an insurance policy for which no premium is paid. ...

¹⁴² See especially *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 in which the Full Court discusses the relationship between the old law on damages and rescission and ss 52, 82, and 87 of the *Trade Practices Act*.

¹⁴³ *Narhex Australia Pty Ltd v Sunspot Products Pty Ltd* (1990) ATPR 41-036; *Tobacco Institute of Australia v AFCO* (1993) ATPR 41-199, 40,793.

¹⁴⁴ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, [92] (Lockhart J); *Sutton v A J Thompson Pty Ltd* (1987) 73 ALR 233.

¹⁴⁵ *Dibble v Aldan Nominees Pty Ltd* (1986) 8 ATPR 40-693.

¹⁴⁶ (1986) ATPR 40-691.

¹⁴⁷ (1986) ATPR 40-691, 47, 594.