Employment related claims arising from a contravention of s52 and s53B of the *Trade Practices Act*

A seminar jointly convened by the Law Society of South Australia and the Law Council of Australia Industrial Law Committee

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1. When an employment relationship sours and an employee is looking for compensation there are a number of remedies that can be considered. Unfair dismissal proceedings may be available[1] for some employees, but provide remedies limited to reinstatement or a maximum of six months' wages. Proceedings for breach of contract can be considered, however damages for wrongful dismissal are usually limited to wages for the period required to give notice pursuant to the contract on the principle that the employer is entitled to perform the contract in the manner least disadvantageous to the employer[2]. Breach of contract claims do not assist where the loss flows not from a term of a contract, but from a representation that was relied upon to induce the employee to enter into the contract. Neither unfair dismissal nor breach of contract are likely to be a suitable basis to make a claim where the employee has brought the contract to an end. For these, and other reasons, employment lawyers look for other remedies to seek compensation. One of these is the *Trade Practices Act 1974* (Cth) ("the TPA"), and in particular ss52 and 53B.

[1] Part 3-2 of the *Fair Work Act 2009*.
[2] *Withers v General Theatre Corp Limited* [1933] 2 KB 536 at 549-552.

2. A recent example of the use of s52 of the TPA are the proceedings bought by Ms Fraser-Kirk against David Jones Limited and others in which she claims very significant damages arising from alleged sexual harassment by the then Managing Director, Mr McInnes. The Statement of Claim pleads that representations were made to Ms Fraser-Kirk before commencing employment and during employment, and that representations were made about her after employment, all of which were misleading. In respect of those made before and during employment, it is said that she relied upon them to accept first temporary employment, and then permanent employment. She pleads that she resigned her employment with Optus to take up employment with David Jones in reliance on the first misrepresentations, and continued in employment as a consequence of the second set of representations. She pleads loss as a result of the representations including for: offence, humiliation, distress and anxiety; loss of opportunity for promotion and advancement in her chosen career; damage to personal and professional reputation; and medical expenses. Since she is apparently still employed by David Jones the claim does not include a sum for lost wages.

3. Sections 80, 82 and 87 of the TPA provide broad powers to remedy the consequence of any breach of ss52 and 53B. There are, however, a number of significant hurdles that limit the potential for the TPA to be an ex-employee's cornucopia.

Sections 52 and 53B

4. Section 52 of the TPA is well known to practitioners, being one the most litigated sections in a well litigated Act. It is in the following terms:

> *52 Misleading or deceptive conduct*
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> *(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
>
> *(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).*
>
> *Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).*

5. Section 53B is its lesser-known relation, making specific provision in respect of offers of employment made before employment commences. It is in the following terms:

53B Misleading conduct in relation to employment

A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

In trade or commerce

6. A claim under s52 can only be brought in respect of conduct made "*in trade and commerce*". In a section which provides otherwise an extremely broad right, that expression has been identified as one which provides words of limitation. Not every act of a corporation which trades is an act *in* trade or commerce. This limitation can have particular effect in respect of employment situations.

Concrete Constructions (NSW) Pty Ltd v Nelson[3]

7. Prior to the High Court decision in *Concrete Constructions* plaintiff firms considered s52 as a potential way to get around limitations under state law in respect of rights of workers injured at work.

8. The case involved a construction worker who alleged that a foreman had made a misleading statement to him by asserting that the grates on certain air-conditioning shafts were all secured by bolts. He alleged that he had relied upon the untrue statement when removing the grates. One of the grates which was not properly secured gave way causing him to fall and suffer serious injuries.

9. Mason CJ, Deane, Dawson and Gaudron JJ[4] held that s52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage for the purposes of its overall trading or commercial business.

[3] (1990) 169 CLR 594.
[4] At 603-605.

> *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 seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.*

10. Their Honours went on to note that whilst driving a truck to deliver product is clearly part of a corporation's trading or commercial business, a misleading hand signal by the driver is not conduct "*in*" trade or commerce. For the same reasons, "*an internal communication by one employee to another employee in the course of their ordinary activities in and about the construction of a building*" is not conduct "*in*" trade or commerce.

Prior to Concrete Constructions

11. Prior to the High Court decision in C*oncrete Constructions* a line of authority had started to develop to the effect that representations made in respect of offers of employment are statements made "*in*" trade or commerce.

12. In *Patrick v Steel Mains Pty Limited*[5] Wilcox J accepted that misleading and deceptive conduct in the course of negotiations over contracts of employment was actionable under s52. The case involved a company that offered existing employees a position in a new location. The four applicant employees claimed that they had accepted the offers of employment in reliance on representations that they would have "*a long term and permanent position*" at the new plant. The following year the new plant closed and the employees were retrenched.

13. Wilcox J considered first whether representations that had been made to the employees as to the positions at the new plant were actionable under s52. He held[6]:

> *I see no reason in principle to exclude cases such as this from the operation of s52. In negotiating with employees, or prospective employees, about future employment a trading company acts 'in trade or commerce'.*
>
> . . .

[5] (1987) 22 IR 81.
[6] (1987) 22 IR 81 at 83.9-84.

> *A statement made in negotiations about employment is, in my opinion, capable of being conduct, in trade or commerce, that is misleading or deceptive or is likely to mislead or deceive.*

14. Wilcox J nevertheless dismissed the applications. He found that the statements that were made by the company were not misleading and deceptive at the time they were made. He held that the decision to close the plant was made later, following a failure to obtain work orders. There was no evidence that at the time the representations were made the company was aware of a potential likelihood that the plant might close.

15. The approach of Wilcox J to s52 was approved in other single judge decisions prior to the decision in *Concrete Constructions*, including *Orison Pty Limited v Strategic Minerals Corporation NL*[7]; *Finucane v New South Wales Egg Corporation*[8]; *Merman Pty Limited v Cockburn Cement Limited*[9].

16. A decision of note in that regard is the dissenting decision of McHugh JA in *Wright v TNT Management Australia Pty Limited (t/as Comet Overnight Transport)*[10]. The case was in some respects a precursor of *Concrete Constructions*. A person employed to assist in the unloading of semitrailers was injured as a consequence of what was alleged to be an unsafe system of work. The worker alleged that a necessary incident of being employed was a representation that the work would be conducted in a safe manner and that representation was misleading and deceptive contrary to s52. The majority, Mahoney and Clarke JJA, held that the mere employment of a person did not give rise to a misrepresentation. McHugh JA, in his dissenting judgment, considered the decisions referred to earlier in this paper, including *Patrick v Steel Mains* and *Finucane* and held:

> *No doubt as Lockhart J observed in* Finucane *it may be that not everything done by a corporation that is engaged in trade or commence is done 'in trade or commerce'. But everything done for the purpose of carrying out its trading or commercial activities is in my opinion done as part of a corporation's trade or commerce. The employment of staff for the purpose of carrying out its trading and commercial activities is in my opinion near the centre of a corporation's trade and commerce.*

[7] (1987) 77 ALR 141 at 157-158.
[8] (1988) 80 ALR 486 at 507-508.
[9] (1988) 84 ALR 521 at 530-531.
[10] (1989) 15 NSWLR 679 at 694.

Post Concrete Constructions

17. Since the High Court decision in *Concrete Constructions* there have been divergent views expressed as to whether representations made in respect of conditions of employment are representations which are actionable pursuant to s52.

18. The first, and it would appear more popular, line of authority commences with the decision of Wilcox J in *Barto v GPR Management Services Pty Limited*[11]. The case involved a claim that *during* employment the employer had made representations concerning a promotion to the position of General Manager. The representation was that the company would like him to continue "*for many years to come*". As it transpired his employment was terminated approximately three months after he accepted the offer to take the role of General Manager. The applicant alleged that the representations were untrue and were made without any intention or expectation that they would be carried into effect.

19. Wilcox J considered the decision in *Concrete Constructions*. He identified some difficulty in discerning precisely what the majority in that case would regard as being "*in trade or commerce*". He noted that it is easy to understand the policy reasons underlying *Concrete Constructions*. "*A contrary result would have led to s52 being used as a vehicle for the recovery of personal injury damages in a large number of industrial and motor accident cases; even cases where there respondent was not negligent.*"

20. Wilcox J noted that a case involving representations made in the course of negotiations for the variation of a contract is different to communications made when conveying routine information, such as a truck driver's hand signal or a foreman's statement about bolt-fixing. On the other hand, he said, the information was "*internal*", in the sense that the recipient was a person already employed. Wilcox J concluded that:

> *The conduct of a corporation in the course of negotiations for the employment of senior staff is conduct potentially falling within s52. 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 an intrinsically commercial conduct. It is directed to the creation of a contractual relationship.*

[11] (1991) 33 FCR 389 at 395.

21. It should be noted that the decision was in the context of a strike-out application. While his Honour expressed the view that such conduct is capable of falling within s52, he needed only to say that it could not be said, without an investigation of the facts, that the proposition is so clearly untenable as to justify striking out the pleading.

22. This first line of authority, to the effect that representations made in respect of the negotiations of contracts of employment are actionable, has found favour in a number of single-Judge decisions which are summarised later in this paper. They include: *McCormick v Riverwood International Australia Pty Limited*[12]*; Stoelwinder v Southern Healthcare Network*[13]*;* and *Walker v Solomon Smith Barney Securities Pty Limited*[14]. In the last of those cases Kenny J summarised the authorities (including the second line of authority set out below) before concluding[15] that "*misleading and deceptive conduct in the course of negotiations for employment may support a cause of action under s52.*" That aspect of her Honour's decision was not the subject of appeal: *Walker v Citigroup Global Markets Australia Pty Limited*[16].

23. The second line of authority post *Concrete Constructions*, commenced with the decision in *Mulcahy v Hydro-Electric Commission*[17]. The case was brought by former employees of the Hydro-Electric Commission who alleged that their employer had failed to provide information to them regarding a right to contribute to a Retirement Benefits Fund Scheme, and as a consequence they had failed to obtain significant benefits provided by that scheme. Amongst other grounds, the statement of claim alleged representations by conduct and silence which led the applicants to believe they were not entitled to contribute to the Fund, contrary to s52. Heerey J noted the decision of *Concrete Constructions* and held:

> *In the present case the relationship between the Hydro and each of the applicants was that of employer and employee. There were no trade or commercial dealings between them in the relevant sense. I am bound by* [Concrete Constructions] *to reject this part of the applicants' claim*[18].

24. Heerey J continued this line of authority in *Martin v Tasmania Development and Resources*[19]. Mr Martin was employed in the position of Manager Trade Development.

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[12] (1999) 167 ALR 689.
[13] (2000) 97 IR 76.
[14] (2000) 140 IR 433.
[15] (2003) 140 IR 433 at [185].
[16] (2006) 233 ALR 687.
[17] (1998) 85 FCR 170.
[18] (1998) 85 FCR 170 at 213B.
[19] (1999) 89 IR 98.

His contract contained a term entitling the employer to terminate the agreement on grounds based on the "*operational requirements*" of the employer by giving one month's notice. About 18 months after he commenced employment he was told, without prior notice, that the Chief Executive had decided to terminate his contract of employment operative immediately. The reason given was "*for operational reasons*". Mr Martin alleged that the termination was not for "*operational requirements*" and the statement made to him was misleading. He claimed that the misleading statement made by the Chief Executive provided the basis for the dismissal, which in turn caused him loss.

25. Heerey J held, after referring to *Concrete Constructions*, that the conduct complained of was not "*in trade or commerce*". Heerey J respectfully disagreed with the decision of Wilcox J in *Barto*. He held that the engagement of staff and the "*necessary associated incidental negotiations*" are not in themselves of a trading or commercial nature. Rather that they are internal affairs of the employer[20].

26. In *Hearn v O'Rourke*[21] Kiefel J, in an obiter comment, preferred the approach of Heerey J in *Martin* over that of Wilcox J in *Barto*. *Hearn* was a case brought by two children, aged 13 and 15, who had been interviewed by the respondent for the purposes of a documentary about life in the town that they resided in. The interviewer had sought consent from the parents of the children by making representations as to the nature of the questions that would be asked. It was alleged that the interviewer had in fact asked the children questions about their sexual activities, contrary to the representations that had been made to the parents. Kiefel J held that while the conduct occurred in connection with the respondent's commercial activity of making films, that did not mean that the statements were themselves "*in trade or commerce*". Her Honour found that the representations did not bear "*a commercial character*". The claim was struck out. At [13] her Honour noted the different approaches in *Barto* and *Martin* and, in an obiter statement, held that the conduct of a corporation which occurs in the course of negotiations with a prospective employee in respect of that person's employment contract is "*without more*" not trade or commercial activity.

[20] (1999) 89 IR 98 at [76]-[77].
[21] (2002) 193 ALR 264.

Whether representations are sufficiently clear to found a claim under s52

27. A case which examines the nature and quality of the representations sufficient to base a claim under s52 is *Roberts v HongKongBank of Australia Limited*[22]. Prior to commencing employment Mr Roberts had been told that if he took up employment with the Bank the prospects of his security and advancement were considerable. He was told by a particular manager, Mr Tomkins, that he "*would look after him*". Lockhart J held as follows[23]:

> *I do not accept that statements of this general kind could be translated into an inducement that Mr Roberts would be able to remain in the Bank's employ for the rest of his life or until he reached 60 in 1998. In short, I think Mr Tomkins engaged in some degree of puffing to obtain the services of Mr Roberts for the Bank (not then formed); but in my opinion they do not constitute promises of sufficient clarity and certainty to have contractual significance or to constitute representations which could found misleading or deceptive conduct under s52 of the Act.*
>
> *Speaking generally, representations, to have contractual force or to fall within s52, must be clear and unambiguous or at least not so vague as to be illusory: see* Legion v Hateley *(1983) 152 CLR 406 at 435-6;* Bio-Technology Australia Pty Limited v Pace *(1988) 15 NSWLR 150 at 135-7, 144, 151-156.*

28. A case which considered an allegation that an offer of "*permanent*" employment was misleading is *West v TWG Services Limited*[24]. Gray J was considering an application for leave to serve the originating process on the respondent outside Australia. That caused Gray J to consider whether there was material before him to satisfy him that there was a *prima facie* case for the relief being sought. In respect of the claim brought under the *Trade Practices Act*, the originating process alleged that it has been represented to the applicant that he "*could stay as the Australian based CEO of the Australian business for as long as [the company] did business in Australia.*" The allegation was based upon a communication that his assignment to Australia was "*permanent*". Gray J held that permanent employment is not be taken literally, and a contract for ongoing employment does not amount to representation that his employment could not be terminated on reasonable notice. In respect of that aspect of the case Gray J held[25]:

[22] (1993) FCA 195.
[23] At [22]-[23].
[24] (2009) 189 IR 97.
[25] At [34].

> *A contract for ongoing employment that does not specify a fixed term or provide for termination is taken to contain an implied term that it is terminable upon reasonable notice. When representations were being made to the applicant about ongoing employment, they could not have conveyed to him anything greater than the proposition that he would continue to be assigned to Australia, to manage the respondent's business there, without any further fixed limit to the assignment, but on the basis that the assignment could be terminated upon reasonable notice. Indeed, as will be seen, elsewhere in the amended statement of claim, the applicant alleges that his contract of assignment was subject to just such a term. He also alleges that the permanent employment about which representations were being made to him was regarded by the respondent as lasting no longer than the applicant would wish it to last. The applicant cannot have relied on any of the representations about permanent assignment to Australia on any basis other than that such assignment would be terminable on reasonable notice. For these reasons, I am of the view that the applicant has not made out a prima facie case in respect of his claim for damages on the basis of misleading and deceptive conduct. If the evidence remains as it is after a trial, the applicant would fail in his attempt to demonstrate that he relied on some literal construction of the representations made to him and that he suffered detriment in so doing.*

29. On the other hand, *O'Neill v Medical Benefits Fund of Australia Limited*[26] is a case where relatively general representations as to ongoing security of employment *were* found to be actionable: see further below.

Representations made during employment

30. Even if representations concerning terms and conditions of an offer of employment are *in* trade or commerce, different considerations arise in respect of communications concerning rights or conduct after the contract has been made. It is to be noted that the decisions of Heerey J in *Mulcahy* and *Martin* involved such situations. There have been two notable cases where such representations have been found to be actionable.

31. *McCormick v Riverwood International Australia Pty Limited*[27] concerned a claim made by an employee that he was entitled to a redundancy payment from a company that had sold its business to a second company. The company defended the claim on the basis that he had been offered a suitable alternative position which he had rejected. The employee asserted that no such position had been offered, but that even if it had

[26] (2002) 122 FCR 455.
[27] (1999) 167 ALR 689.

there had been misrepresentation by silence at a meeting which had discussed the alternative employment – namely, he had not been told that if he rejected the alternative position he would disentitle himself to a redundancy payment. Weinberg J considered the authorities including the decision of Heerey J in *Martin* and *Mulcahy*. Weinberg J was able to distinguish those cases on the facts, finding that the communications were very different from the "*internal communications*" which were in issue in *Concrete Constructions*.

> *The conduct occurred in the context of a commercial transaction - the sale of a business to a purchaser with a right to a 'second option' on recruitment of [the company's] employees, and with an obligation to afford any such transferring employee no less favourable terms and conditions than that they had previously enjoyed. Such conduct bears little resemblance for the type of conduct which the majority in* Concrete Constructions *regarded as falling outside the ambit of the expression 'in trade or commerce', such as the giving of a misleading hand signal by the driver of a corporation's trucks*[28].

32. Weinberg J went on to find that the conduct in question concerned negotiations in respect of terms and conditions of employment, being conduct recognised as being "*in trade or commerce*" in *Barto*[29].

33. The case of *Walker v Solomon Smith Barney Securities Pty Limited*[30] is a second case where representations made after the contract was concluded were found to be actionable under s52. It is also a case that demonstrates how a claim under s52 can provide significant compensation that might not otherwise be available following the termination of a contract. The case involved unusual circumstances. Mr Walker was employed by a bank and was approached by a head hunter to work for a second bank. Following a series of negotiations he was offered and signed a contract of employment. No fixed start date was agreed. His employer was offering voluntary redundancies and the understanding was that he would start with the second bank as soon as the redundancy process had completed. Key to the situation from the employee's point of view was that no word of his position with the second bank would be become publically known before his redundancy was finalised. During the intervening period the prospective employer was taken over by another bank. Mr Walker asked whether the change in ownership altered the circumstances and a representation was made that it did not. Kenny J ultimately found that representation to be misleading. Relying upon that representation Mr Walker declined to apply for

[28] (1999) 167 ALR 689 at [28].
[29] (1999) 167 ALR 689 at [30].
[30] (2000) 140 IR 433.

vacant positions within his employer and accepted redundancy. Prior to commencing employment with the new employer, however, the new employer stated it could no longer offer him a position. Mr Walker claimed damages flowing from misrepresentations, including the lost opportunity to continue to be employed by his employer, and the lost opportunity to be employed by the new employer.

34. Mr Walker also brought a claim for breach of contract. The contract contained two relevant clauses. The first permitted the termination of a contract without cause on one month's notice. The second promised that Mr Walker would be given the title of "*Director of Research*" at the completion of his first year and that his remuneration would be increased at that time. Mr Walker argued that the right to terminate the contract on notice was subject to the specific clause entitling him to continue to be employed at least until the end of 1998 when his promotion was to commence.

35. Kenny J held that the representation made in early 1998 to the effect that the change of ownership did not alter the situation misled Mr Walker and caused him to suffer loss. In a second decision, *Walker v Citigroup Global Markets Pty Limited*[31] Kenny J assessed the losses. Kenny J had held that as a matter of contract a binding contract had been made, but one that was terminable on one month's notice. Accordingly, damages for breach of contract were limited to one month's remuneration (a common feature in many contracts of employment). Kenny J went on to assess the losses arising from the misrepresentations. Her Honour considered the opportunities that had been lost as a result of the misrepresentations, including the lost opportunity to successfully apply for a position with the first employer and avoid redundancy. Her Honour assessed his lost earnings over a period of five and half years in that regard, which was then discounted, as well as the opportunity that he would be made redundant (as occurred) resulting in lost opportunities with a combined value of about $1.1m which, after deducting amounts he had received in mitigation, resulted in an order of about $700,000.

36. On appeal, *Walker v Citigroup Global Markets Australia Pty Limited*[32] the Full Court took a different view about the contract. The Court held that the specific term detailing the obligation to promote Mr Walker at the end of 1998 ousted the effect of the term permitting termination on notice such that the Bank had breached the contract by seeking to exercise the right to terminate on notice. The Full Court further

[31] (2005) 226 ALR 114.
[32] (2006) 233 ALR 687.

held that the damages that flowed from that breach included not only lost remuneration up until the end of 1998, but also the lost opportunity to continue to be successfully employed (which he could claim since, unlike the usual situation in a dismissal, he could establish that but for the decision not to have him start work there was no reason why he would not have continued in employment for some years). Damages were assessed taking into account an assumption of four years of employment less an amount of 25% for contingencies which resulted in a total loss of about $2.3m, less an amount by way of mitigation. Since damages were assessed on that basis it was not necessary to take into account the redundancy payment that he had received. Given that approach to contractual loss, the Full Court did not need to consider losses flowing from the breach of the *Trade Practices Act* for economic loss, since to do so would be to double-count that loss.

37. The Full Court did, however, consider the adequacy of an award for damage to reputation and career prospects and for distress and vexation arising from the breach of the *Trade Practices Act*. The Full Court noted uncontested evidence of significant long term effects on Mr Walker's business reputation and personal life. The Full Court increased the award for general consequential damages from $5000 to $100,000.

Section 51A

38. An issue that often arises in s52 proceedings in respect of representations being made at the time of negotiations for a new contract is a defence that the statements made were not misleading merely because they wrongly predicted a future event.

39. As noted above, representations as to future employment being "*secure*" are not actionable merely because the employment ended after a short time. As Wilcox J held in *Patrick v Steel Mains,* such representations may well have been believed to be true at the time they were made on reasonable grounds.

40. Section 51A applies to representations made by a corporation in respect of future matters. The section has the effect of causing such representations to be taken to be misleading unless the corporation adduces evidence to the contrary. Section 51A is in the following terms:

51A Interpretation

(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

41. To gain the benefit of s51A an applicant must plead it: *O'Neill v Medical Benefits Fund of Australia Limited*[33].

Section 53B

42. Section 53B has no application in respect of conduct after employment has commenced.

43. Given the continued uncertainty as to whether s52 applies to representations made in respect of a new contract of employment, it makes sense to always plead a breach of s53B in respect of misleading statements made in the course of such negotiations. If, however, s52 applies to such representations, then it would appear that s53B does not add anything to such a proceeding.

44. Section 53B appears to be primarily aimed at conduct by corporations which advertise positions in a manner that could mislead a number of persons, rather than conduct directed to a misrepresentation in respect of particular offer of employment.

45. There are very few authorities where s53B has been relied upon. One is *ACCC v Zanok Technologies Pty Limited*[34]. There the respondent was found to have offered

[33] (2002) 122 FCR 455.

paid employment opportunities in the IT sector to those who undertook a training course. The company also advertised that scholarships were available. The statements were misleading in that there was no employment provided and the scholarships did not exist.

Damages

46. The *Trade Practices Act* provides broad powers to remedy a breach. They include damages pursuant to s82. Damages are usually assessed on a reliance basis, as for torts[35] that is, an amount of damages intended to return the victim as far as possible to the position they would have been in but for the misrepresentation.

47. One example of this approach from the employment context is the decision of Kenny J in *Walker,* set out above.

48. A further example is the Full Court decision in *O'Neill v Medical Benefits Fund of Australia Limited*[36]. At first instance a Federal Magistrate had found that Mr O'Neill had been recruited through a headhunting agency and induced to give up long-term secure employment with his former employer on the basis of representations that the employment with MBF would be at least as secure as his current employment. Mr O'Neill had raised the issue of security of employment before accepting an offer and had been told that the new position was one *"for the long haul"*. Mr O'Neill was made redundant two years after joining MBF. The Federal Magistrate held that the respondent had little regard as to whether the representations were true or not and was simply concerned to recruit Mr O'Neill from a competitor. The Federal Magistrate, however, declined to order any damages on the basis that Mr O'Neill had obtained alternative employment and he was unable to assess that there had been loss flowing from the misrepresentation.

49. The Full Court was not asked to consider whether the misrepresentations relied upon were capable of founding a claim under s52. Rather, the case focused on whether the

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[34] (2009) FCA 1124.
[35] *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1; *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494.
[36] (2002) 122 FCR 455.

representations as to future matters were ones that MBF had failed to show it had reasonable grounds to make such that, pursuant to s51A, the representations should be taken to have been misleading. A second issue was whether Mr O'Neill had relied upon the representations in deciding to take up the position. On appeal, the Full Court found that MBF had failed to demonstrate that the representations were made on reasonable grounds, and further that Mr O'Neill had relied upon the representations in deciding to give up secure employment to take up the position with MBF.

50. In respect of compensation, the Full Court found that the Federal Magistrate had erred in failing to assess damages. The Court found that the loss was able to be quantified, stating that one way to do so:

> *Would be to ascertain the difference (if any) between the salary he would have been earning in employment with [his first employer] and the income he then received in the position with MBF and in the employment he entered or might enter after being made redundant by MBF. The damages would be the difference over the period it was likely Mr O'Neill would have stayed in employment with [the first employer].*[37]

51. Another employment case where the question of assessment of damages was a significant issue was the decision of the Supreme Court of Western Australia, Blaxell J, in *Magro v Freemantle Football Club Limited*[38]. Mr Magro had been for some years an assistant coach with the Collingwood Football Club when he was approached to take on the same role at the Freemantle Football Club. Blaxell J held that representations had been made that the employment would be for a period of not less than three years. The respondents asserted that Mr Magro had been employed on a verbal contract terminable on notice and denied that the representations had been made. Blaxell J, having found the representations to have been made, and having further found that they were knowingly misleading, then turned to the question of assessment of damages. Blaxell J took into account evidence led from a number of former players and coaches and held that but for the termination it was probable that he would have had continued a coaching career for perhaps 10 years, with a prospect of becoming a senior coach. Blaxell J then determined, by reference to evidence as to the average salary of assistant coaches, the amount that Mr Magro would have earned over 10 years as an assistant coach. He then added a further amount for the possibility that he would have become a senior coach. He then reduced the damages

[37] (2002) 122 FCR 455 at [29].
[38] (2005) 142 IR 445.

by a third to take into account contingencies and noted that the amount would also need to be further reduced by the sum of the income that Mr Magro had earned in the same period. The final compensation figure is not revealed by the decision, but clearly had the potential to be significantly more than what would have otherwise been awarded pursuant to the contract terminable on reasonable notice.

52. In addition to orders for damages, the Court has power pursuant to s87 to make other orders to "*prevent or reduce the loss or damage*". Such orders can include a declaration that a particular contract is void, or to vary such contract or refuse to enforce it. It has been suggested that this power could be used to vary a contract to include a term that reflects a representation made[39].

Conclusion

53. The High Court in *Concrete Constructions* held in 1990 that s52 did not extend to misleading statements made in "*internal communications*" between employees. Since that time there has been divergent views expressed at a Federal Court level as to whether s52 extends to communications made in respect of terms and conditions of employment. The better view appears to be that it would apply to statements made in the context of negotiating a new contract of employment, including (it would appear) in respect of current employees taking up a new position.

54. It is less clear that s52 would apply to misleading statements made during employment as to the way in which a company may exercise rights it might have under a contract. Hence, one could not be confident that misrepresentations made in the context of a termination of employment would be actionable under s52.

55. A significantly limiting factor is the need to establish that representations as to future matters (eg the employment is 'secure') were misleading when made. Section 51A assists in that respect, but if a corporation can establish that it had a reasonable basis to make the representation at the time then it is unlikely that a claim would succeed merely because the subject of the representation did not in fact eventuate. Hence,

[39] Kirby J (in dissent) in *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494 at [148].

claims based upon representations that the employment was *"long term"*, or that the employee would be *"very happy"*, will not be actionable merely because the employment ended relatively early and/or the employee did not in fact enjoy working there.

56. A further limiting factor is that to be actionable the statements must be clear and unambiguous and more than just puffery. Statements such as "we will look after you", that the employment is "permanent" and "ongoing" are likely to fall into that category (although note the decision in *O'Neill*).

57. If a claim can be successfully brought under s52 then in some circumstances damages flowing from the misrepresentation can be significantly higher than the damages that would be claimed for breach of contract. This is particularly the case where the contract permits a party to terminate without cause by providing a fixed period of notice. Any claim in contract is likely to result in damages limited to that notice period, whereas applying the tortious approach to damages applicable to a Trade Practices claim may result in more significant damages being awarded. In addition, damages sought in a Trade Practices claim can include a component of general damages[40], which may be more than nominal in situations where an employee can demonstrate that the misrepresentations have caused significant loss to their reputation or significant distress.

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State Chambers

2 September 2010

[40] As awarded in *Walker v Citigroup* (2006) 233 ALR 687.