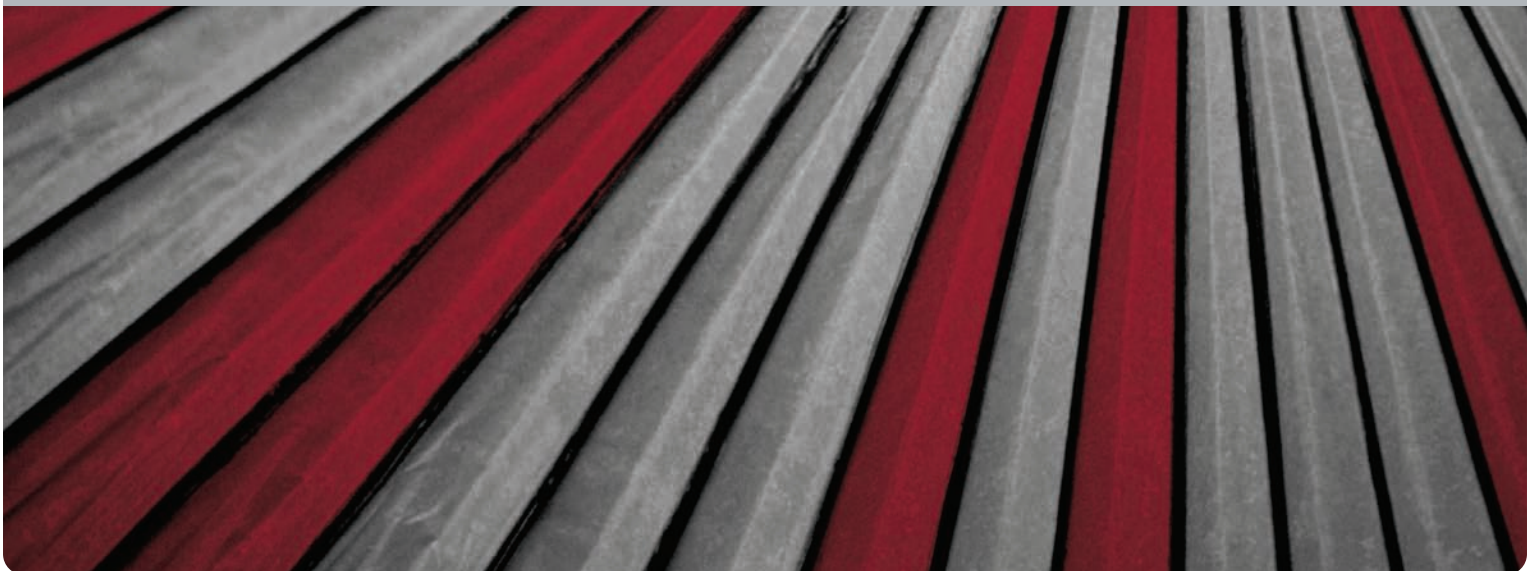


CLAYTON UTZ

Product Risk
Year in Review 2010



Product Risk Year in Review 2010



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In our fifth annual review of product risk developments, we review decisions during 2010 by Australian courts relevant to manufacturers, suppliers and insurers who do business in Australia.

These cases reflect the major issues before the courts in relation to advertising and product liability.

For our international readers, there is one appeal decision which considers provisions in Part VA of the Trade Practices Act 1974 (Cth) (which is based upon the EC Directive on Defective Products 1985).

Notably, the year has been marked by debate about a new Australian Consumer Law which came into effect on 1 January 2011. Information about the new laws is contained in our separate publication, *The Australian Consumer Law: An Essential Guide for Product Manufacturers and Suppliers*.

We also include information on important reforms about the new class action procedures in the Supreme Court of New South Wales.

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Egregious lack of preventative maintenance leads to sole liability

Erwin v Iveco Trucks Australia Ltd [2010] NSWCA 113

- A manufacturer that complies with the industry norm avoids liability for the consequences of an accident that occurred 13 years after manufacture.
- The driver's lack of preventative maintenance is the relevant breach of duty of care.
- Section 75AE of the Trade Practices Act 1974 (Cth) does not give someone whose negligence has caused injuries to an individual a right of indemnity against a manufacturer whose defective goods have also caused the same injuries.

Readers may recall that earlier proceedings involving these parties were reported in last year's annual review. This case was an appeal from those proceedings.

Erwin was the owner and driver of a truck which was involved in November 2002 in a collision with a car, driven by Middleton. The accident had been caused by the failure of the steering mechanism of the truck, which as a result became uncontrollable and crossed onto the incorrect side of the road.

It emerged that Erwin had not undertaken any preventative maintenance work on the truck, despite having acquired it in April 1999 and having driven it for at least 500,000 kilometres. The truck had been manufactured in 1989. The incident left Middleton with serious injuries, and he sued Erwin and the manufacturer of the truck, Iveco Trucks Australia, for damages in negligence. Erwin cross-claimed against Iveco for contributory negligence and for contravention of Part VA of the Trade Practices Act 1974 (Cth) ("TPA").

The trial judge held that Erwin had breached his duty to Middleton by failing to properly inspect or maintain the truck, but that the steering did not fail as the result of any absence of reasonable care by Iveco in the manufacture or design of the truck. Middleton was awarded \$2,380,000 in damages. Erwin's cross-claim failed.

Erwin appealed the decision to the Court of Appeal, seeking judgment in his favour on the cross-claim against Iveco. The Court dismissed the appeal.



Contributory negligence

Erwin argued that a design fault inherent in the steering mechanism of the truck meant that it had a propensity to fail. This argument was rejected because:

- the design of the truck adhered to the industry norm as of 1989; and
- while manufacturers are not necessarily entitled to assume that purchasers or users of their products will invariably follow instructions or act in a prudent or sensible manner, Iveco could not reasonably have expected that preventative maintenance would not take place over such a long interval of time and distance travelled, or that a crucial bolt would not be tightened to the specified torque.

Contravention of Part VA of the TPA

Erwin argued that section 75AE indemnified him for the damages stemming from Iveco's defective truck.

The Court rejected this argument without considering whether Iveco had, in fact, supplied a defective truck on the grounds that section 75AE was not applicable to the damages claim against Erwin. It said that section 75AE does not give someone whose negligence has caused injuries to an individual a right of indemnity against a manufacturer whose defective

goods have also caused the same injuries. Rather, it is intended to provide a remedy to the dependents of a person who is injured or dies because of defective goods.

This case shows the importance for manufacturers of adhering to the industry norm, and is important authority for the construction of section 75AE of the TPA. It will be of some comfort to manufacturers that they do not have to consider another head of liability for damages claims stemming from use of their products.

Diving from a boat at Botany Bay inherently dangerous

Laoulach v El Khoury [2010] NSWSC 1009

- A plaintiff who dived from a boat into dangerously shallow water could not make out a breach of duty of care by those who had selected the dive spot.
- In the circumstances, the risk of catastrophic injury was the manifestation of an obvious, inherent risk in a dangerous recreational activity.

On 30 November 2004, Robert Laoulach was a passenger on a boat anchored in Botany Bay when he dived from the bow of the vessel and struck his head on the sandy bottom of the bay, suffering a significant fracture of the C5 vertebra and subsequent tetraplegia. He was among six men who had taken the boat out for a "test drive", with a view to the plaintiff's brother purchasing the boat.

The men had been diving from the boat at two different anchoring points. They had left the first anchoring point for after one of them had noticed, by striking at the bottom of the bay with his shoulder, that the water was too shallow for safe diving. The injury that gave rise to the proceedings occurred at the second anchoring point. The defendants were the owner of the boat, and three of the passengers on the boat who held boat licences and

had taken turns driving it. The claim against the owner of the boat, who was not on board, was discontinued at trial.

Laoulach claimed that the defendants were negligent, essentially, in:

- failing to warn him of the risk of injury of diving from the vessel;
- failing to assess that the area in which the boat was moored was safe for diving; and
- failing to ensure that the boat did not shift to shallower water while moored.

In response, the defendants contended that:

- they did not owe the plaintiff a duty to warn of the risk because the risk was obvious in terms of section 5F(1) of the Civil Liability Act 2002 (NSW);
- Laoulach voluntarily assumed the risk of injury from diving; and
- the injury was the materialisation of an obvious risk of a dangerous recreational activity in terms of section 5K of the Civil Liability Act.



The matter was heard by Justice Price in the Supreme Court of New South Wales, who found that:

- the defendants had moved the vessel for the sole purpose of finding a position where they considered that the water was deep enough to dive into safely;
- contrary to Laoulach's evidence from weather records, the winds prevailing at the time of the injury were light to moderate;
- because of the topographical irregularity of the bottom of the bay, the depth of water under the boat was not uniformly dangerously shallow;
- the vessel did not drag its anchor, but rather drifted for a short distance on its anchor line; and
- it was more probable than not that Laoulach dived into a shallow sand bank.

Justice Price considered that two of the defendants, who had done the great majority of the driving of the boat, did owe Laoulach a duty of care. While he considered that the circumstances of the case did not fall within an accepted category of duty of care, the relationship between the defendants and the passengers on board the vessel was such that it gave rise to an obligation to exercise reasonable care in locating a position where they considered the water was

deep enough to dive into safely and in ensuring that the vessel was not brought back by winds or currents into water that was too shallow for diving. The scope of the duty of care was to be measured by the plaintiff exercising reasonable care for his own safety.

Justice Price did not consider that the duty had been breached, because the defendants did not fail to act in the manner in which reasonable people in their positions would have acted, in terms of section 5B of the Civil Liability Act. As Laoulach had more likely than not suffered his injury by striking a sand bank, rather than a uniformly shallow bottom, it was not clear that any further action to ascertain depth beyond visually inspecting the second anchoring location would have prevented the injury.

Justice Price further held that the defendants' liability was excluded under section 5L(1) of the Civil Liability Act, because the risk of injury would have been obvious to a person in Laoulach's position and it was the manifestation of an obvious risk of a dangerous recreational activity. A reasonable person in his position would have considered that the water was sufficiently deep to dive into safely, but not that there was no risk at all.

Negligence in allowing domestic danger

Agresta v Agresta [2010] NSWCA 330

- A plaintiff who injured her hand in a mincing machine recovers damages in negligence against the owners of the house in which it was located.
- Where there is a reasonable need for such services to be provided, a plaintiff may recover significant damages for future gratuitous domestic assistance.

In March 2005, Mrs Agresta joined her extended family at the fruit farm owned by her brother-in-law Pat and his wife Barbara for the purpose of making tomato sauce. This was a long-standing annual family tradition, and involved the use of a mincing machine to crush the tomatoes. This task in the sauce production line was usually undertaken by the men of the family and, although Mrs Agresta had seen it being used over a period of 15 years, she herself had never operated the machine. When he was called to go elsewhere, Pat asked Mrs Agresta to take over operation of the mincing machine.

After operating the machine without incident for 10 to 15 minutes, Mrs Agresta was distracted by a question from her niece and inadvertently allowed her left hand to go down into the hopper. She was severely injured; the tops of her

middle and ring fingers needed to be amputated to the first joint and she lost the pads of her index and little fingers.

In the District Court, Judge Sweeney held that, by failing to give Mrs Agresta a warning and by operating the machine without a guard or chute, Pat and his wife, as occupiers of the farm, were negligent. She awarded Mrs Agresta damages, including a significant amount for gratuitous domestic assistance. Pat and Barbara appealed to the New South Wales Court of Appeal against the finding in negligence and the quantum of the award of damages for gratuitous domestic assistance.

The Court firstly considered the issue of negligence. The grounds of appeal were, essentially, that Judge Sweeney:

- had erred in finding that a reasonable response to the risk posed by the mincing machine was for the appellants to purchase a machine of a safer design; and
- ought to have concluded, after taking into account the obviousness of the risk and the domestic nature of the activity, that a reasonable response to the risk was to do nothing.



The Court was not persuaded by these arguments. It found that the issue of the safer machine was not crucial to Mrs Agresta's case. Rather, the negligence lay in allowing the inexperienced Mrs Agresta to operate what they knew was a dangerous machine, especially in view of the real prospect of her becoming distracted.

The Court further found that Mrs Agresta was not guilty of contributory negligence, accepting her evidence that she was being very careful when operating the mincing machine. Mrs Agresta's conduct when operating the mincing machine amounted only to mere inadvertence, inattention or misjudgment and not to negligence.

Turning to the issue of damages for gratuitous domestic assistance, the Court found the award had been overly generous. Considered under the requirement of need imposed by section 15(2) of the Civil Liability Act 2002 (NSW), the evidence only permitted six hours per week of gratuitous domestic assistance in respect of Mrs Agresta's future needs, rather than 10 hours.

Accordingly, the Court partly allowed the appeal on this ground, and rejected it on the others.

Downloaded software not goods

Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd [2010] NSWSC 267

- Computer software downloaded from the internet is not “goods” within the meaning of the Sale of Goods Acts.
- Software obtained by download will receive less statutory protection than software obtained on some physical medium.

Gammasonics and Comrad entered into a contract by which Comrad agreed to deliver and install a software package. The software package was delivered under contract by means of a remote download onto the Gammasonics server. Gammasonics later purported to terminate the contract for breach of a number of terms, including Comrad’s failure to:

- deliver a functioning software package; and
- provide goods of a merchantable quality; and
- deliver a software package which was fit for its intended purpose.

In the Local Court, Comrad was successful in an action for damages resulting from Gammasonics’ repudiation of the contract. Gammasonics appealed on the ground that it had validly terminated the contract with Comrad for breach of implied statutory warranties of merchantable quality and fitness for purpose under the Sale of Goods Act 1923 (NSW). This raised the question of whether the software supplied by Comrad constituted “goods” under the Act.

The matter was heard by Justice Fullerton in the Supreme Court of New South Wales. She upheld the finding of Magistrate Quinn that the software package did not constitute goods under the Act.

She relied upon the distinction between software implanted in a medium, such as a CD ROM or floppy disk, and software downloaded from the internet. Despite the fact that a software program may be a “good” when it is contained in a physical medium, such as the hard disk of the server from which it is downloaded, it loses its character as a “good” in the process of being delivered by download. This is because, while being downloaded, software is in the form of an encoded electrical signal, which cannot be a good. Software



cannot revert to being a good when it is rehoused in a tangible and movable form, such as the hard disk of the computer onto which it is downloaded.

Justice Fullerton further found that Comrad was not in breach of any contractual terms implied at common law and, accordingly, dismissed the appeal.

This case highlights an important lacuna in the Sale of Goods law. Purchasers of software delivered by download do not enjoy the benefit of statutory implied warranties, and need to ensure that they are adequately protected by the contract of sale.

For the future, readers might note that the definition of goods in the new Australian Consumer Law expressly includes “computer software”, so the issue above is not likely to arise after 1 January 2011 in relation to consumer transactions.

A question of weight

Gwam Investments Pty Ltd v Outback Health Screenings Pty Ltd [2010] SASC 37

- A truck that is above the road legal weight breaches both the implied warranty of fitness for purpose, under the Sale of Goods acts, and a similar term implied at common law.
- Customers taking delivery of a unit to be attached to a truck are in a vulnerable position with regard to its weight, and consequently its ability to be legally driven.

Outback Health Screenings (“OHS”) operated a health service business for mining companies in remote areas of South Australia. In July 2006, after seeing an advertisement in a newspaper promoting its products, OHS’ directors contacted Gwam Special Vehicles.

OHS entered into an agreement with Gwam to construct a unit to be fitted to the rear of a truck that could be operated as a mobile drug-testing unit. After some discussion with Gwam, OHS purchased an appropriate Isuzu truck with the intention of fitting the mobile drug-testing unit to it.

When the unit was fitted to the chassis of the truck, the combined weight exceeded the six tonne maximum weight prescribed for the vehicle. As a consequence, it could not be legally driven on South Australian roads. OHS incurred significant losses while the unit could not be profitably used and in rectifying the situation, including the purchase of another more expensive truck, a Hino, and bearing expenses.

The Full Court of South Australia upheld the trial judge’s award of damages to OHS for breach of:

- an implied term of the contract that the truck and the mobile drug-testing unit would together be fit for the purpose contemplated, including being able to drive legally on South Australian roads. This term was implied by section 14 of the Sale of Goods Act 1895 (SA) and at common law;
- the duty of care owed by Gwam to OHS. The duty arose because OHS was in a vulnerable position with regard to the weight of the truck compared to Gwam, which had the means to ascertain the maximum weight of the proposed unit.



The Full Court increased the damages by \$29,000. It rejected Gwam's submissions that OHS was not entitled to recover the difference between the value in the Hino and Isuzu trucks because OHS had acquired a more valuable vehicle and unjustified betterment had arisen. In its opinion, there was no evidence that the heavier, more expensive truck would be of any greater value to the business of OHS.

Defective resin and “The Terephthalate Mystery”

Narellan Pools Pty Ltd v Huntsman Chemical Company Australia Pty Ltd [2010] FCA 267

- A manufacturer with a record of reliability succeeds in proving that liability for a cluster of failures lies with the supplier of a defective component.
- Plaintiffs succeed despite not being able to prove the precise constitutional deficiency in the component that led to the failures.

Huntsman Chemical Company Australia Pty Ltd, a chemical manufacturer, sold industrial resin to Narellan Pools Pty Ltd, which used it to manufacture fibreglass swimming pools. Huntsman was not Narellan’s usual supplier of resin, and it had never sold this type of resin to another manufacturer before or after the sale to Narellan.

This type, resin 942, was specially developed by Huntsman in response to Narellan’s request for a low-styrene emission resin, which was made in or about October or November 2000. Narellan alleged that Huntsman made representations that resin 942 would be suitable for use in fibreglass swimming pools and that adequate laboratory tests had been completed (“the first representations”).

Following the initial expression of interest, and before sale, Huntsman had provided a sample of resin 942 to Narellan which proved acceptable; test pools manufactured from the sample performed satisfactorily. Narellan alleged that Huntsman had again made representations that the resin was suitable for use in pools and made the further representation that the resin that was proposed to be supplied would be the same as the resin in the sample (“the second representations”). Huntsman delivered three tonnes of the resin to Narellan on 2 March 2001.

In September 2001, Huntsman offered to supply Narellan with more resin 942. In this offer, Narellan alleged that Huntsman had again made representations about the suitability of the resin and the fact that the resin was the same as the sample, and made the further representation that the resin that was to be delivered had been retested and was still “in-spec” (“the third representations”). On 14 November 2001, Huntsman delivered 3.83 tonnes of resin 942 to Narellan, this being the remainder of the 6.83 tonnes of the resin manufactured by Huntsman.

More than 40 percent of the 61 pools manufactured by Narellan which incorporated resin 942 exclusively failed due to osmotic blistering. Narellan sued Huntsman, alleging breach of contract and contravention of section 52 of the Trade Practices



Act 1974 (Cth) (“TPA”). The matter was heard by Justice Edmonds in the Federal Court.

It emerged in evidence that the most likely explanation for the unsuitability of resin 942 for use in fibreglass swimming pools was that it had been contaminated by an unwanted compound, terephthalate, that was present in a concentration of around 30 percent. From the expert evidence, and the production records of the two parties, Justice Edmonds found that, while it was uncertain precisely how the resin had become contaminated, on the balance of probabilities the source of the contaminant was to be found in Huntsman’s manufacturing process rather than in some intervening act or default on the part of Narellan in the course of its fabrication process.

Justice Edmonds further concluded that the cause of the osmotic blistering in the pools manufactured by Narellan was the use of resin 942 in their construction, and not Narellan’s fabrication process. In making this determination, he relied upon the fact that only pools manufactured from resin 942 had failed due to osmotic blistering; Narellan had “manufactured many thousands of fibreglass pools which, save for the pools the subject of [the] proceeding, have invariably maintained their integrity”.

Having thus decided causation, Justice Edmonds found that:

- The first representations had been made by Huntsman and relied upon by Narellan. Narellan had relied upon the representation that resin 942 had been the subject of laboratory tests, despite the fact that Narellan had conducted its own tests on the resin. Narellan’s testing facilities were limited, and detailed chemical analysis was impossible.
- Both the second and third representations had been made by Huntsman and relied upon by Narellan.

These findings of fact led to the following findings against Huntsman:

- The representations made gave rise to implied contractual conditions of “fitness for purpose” and “merchantable quality” under section 19 of the Sale of Goods Act 1923 (NSW). Huntsman was in breach of both of these conditions.
- The representations made were misleading or deceptive, or likely to mislead or deceive at the time they were made, in contravention of section 52 of the TPA.

- Huntsman did not have reasonable grounds for making those representations that pertained to future matters, in contravention of section 51A of the TPA.
- The representations made falsely represented that resin 942 was of a particular standard, quality, grade, composition or had a particular previous use, contrary to section 53(a) of the TPA.

This case highlights the importance that can attach to a manufacturer’s record of quality where it is difficult to attribute causation. Had Narellan not been able to prove the essential reliability of its fabrication process, it would have faced difficulties in establishing, on the balance of probability, that liability for the failure of the resin 942-built pools lay with the supplier.

Damages for “epidemic” failure of set-top boxes

Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd [2010] FCA 1028

- A set-top box that was never fit for sale in the Australian retail market breaches warranties implied into the contract of sale by the United Nations Convention on the International Sale of Goods.
- The applicant cannot make out damages for declining to take up a business opportunity in reliance upon the representations of the defendant.

Castel Electronics Pty Ltd is a wholesaler and distributor in Australia of electronic products. Toshiba Singapore Pte Ltd (“TSP”) is a wholly-owned subsidiary of major Japanese consumer electronics manufacturer Toshiba Corporation, which distributes most of the Toshiba-branded products sold throughout Asia.

In 1996 Castel entered into a non-exclusive distribution agreement with Toshiba Corporation, and from 1997 most of Castel’s requirements under this arrangement were met by TSP.

In July 2004, Mr Kwong of Castel attended an event run by TSP in Singapore promoting its forthcoming range of Toshiba products, including the J35 set-top box and the “DLP”

rear projection television receiver. As of 2004, the specifications of the J35 placed it at the leading edge of its product category, and Castel was sufficiently interested in its sales potential to place an order for a commercial quantity to be delivered in January 2005. Castel alleged that TSP had made representations to the effect that the J35:

- was being developed and would be released in July 2004;
- would be capable of received HD video broadcast signals in all relevant Australian display formats;
- would be capable of recording and replaying HD television broadcasts;
- would be more powerful than the existing S25 set-top box;
- would most likely be the “most wanted set top box in the market”; and
- would be available by the launch date set by TSP or a later date that would allow Castel sufficient time to exploit the J35’s technical advantages.

Castel further alleged that TSP had made similar representations in regard to the J35 derivative product, the C26, and had made representations about the reliability and retail desirability of the DLP



television. Each of these representations was said to have been repeated by TSP's entering into each sales contract for the supply of the above products to Castel.

The January 2005 J35 order was not filled, because of unacceptable hardware performance issues, and the product did not go on sale in Australia until commercial quantities arrived in April 2005. Castel made several repeat orders, but the J35 suffered from persistent technical problems. Most significantly, the J35 would occasionally "lock-up" or "freeze" and become unresponsive to user input. While other defects were generally resolved by incremental software updates, the "lock-up" issue remained unresolved throughout the period in which TSP distributed the product.

Castel considered that an "epidemic failure" occurred where more than 3 percent of products in a particular product line failed. Mr Hew of Castel considered that the lock-up issue affected 100 percent of the J35s sold. Similar problems affected the C26.

In April 2007, based upon the failure of the J35 and the C26, and recurrent lamp problems in the DLP television, Castel decided to terminate its distributorship with TSP. By the terms of the "Termination Agreement", Castel and TSP settled all claims except those related to the J35, C26 and DLP television.

By virtue of the fact that Castel and TSP had their respective places of business in Australia and Singapore, Castel's claim invoked the United Nations Convention on Contracts for the International Sale of Goods. Castel claimed that the Convention implied terms into each sales contract a term that:

- TSP was obliged to deliver goods of the quantity, quality and description required by the sales contract (Art 35(1));
- the goods had to be fit for the purposes for which goods of the same description would ordinarily be used (Art 35(2)(a)); and
- the goods would have and retain for a reasonable period of normal use by consumers their specified qualities and characteristics.

Castel claimed that the goods delivered breached these implied terms and that, in making the above representations, TSP had engaged in misleading or deceptive conduct contrary to section 52 of the Trade Practices Act 1974 (Cth). Castel advanced an additional claim for damages as a result of not taking up an opportunity to acquire the distributorship for Harman International, in consequence of its reliance upon representations made by TSP.

Justice Ryan found that the J35 was never developed to a point where it was reasonably fit to be offered for sale to Australian retailers or in the Australian retail market for set-top boxes, and made similar findings in relation to the C26 and the DLP televisions.

Finding that TSP had breached the warranties implied into the contract of sale by the Convention, Justice Ryan considered that it was unnecessary to make findings with regard to the alleged contraventions of the Trade Practices Act, which were advanced as an alternative claim.

Along with *Cortem SpA v Controlmatic Pty Ltd* [2010] FCA 852, which is also reported in this year's annual review, this case is perhaps indicative of the trend towards pleadings based upon the Convention instead of domestic Sale of Goods legislation.



Holiday “disappointment” and section 109 of the Constitution

Insight Vacations Pty Ltd v Young [2010] NSWCA 137

- Section 74(2A) of the Trade Practices Act only applies a State law that, in its own terms, restricts or precludes liability for breach of the statutory warranty.
- It doesn't pick up a state law that permits this result indirectly by authorising a contractual provision.
- “Disappointment”, along with grief, anxiety and distress, is an element of pain and suffering and falls within the statutory definition of non-economic loss in the Civil Liability Act.

Ms Young purchased a European package tour from Insight Vacations. In October 2005, while travelling on a motorcoach in Slovakia, she stood up from her seat and was injured when the motorcoach braked suddenly.

In the District Court, Justice Rolfe found that Insight Vacations had breached the warranty of due care and skill implied by section 74(1) of the Trade Practices Act 1974 (Cth) (“TPA”), and awarded Ms Young \$22,371 in damages, including \$8,000 for “disappointment”.

Insight Vacations had sought to rely upon exclusion clauses in the contract which, inter alia, relieved it from liability when Ms Young was not wearing a seatbelt. It argued that the exclusion clauses were authorised by section 5N of the Civil Liability Act 2002 (NSW). This allows a term of a contract for the supply of recreational services to exclude, restrict or modify any liability that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

Section 68B of the TPA also deals with recreational services and exclusion clauses, but does so in a slightly different way. It defines “recreational services” quite differently and somewhat more narrowly.

So which applied?

Justice Rolfe held that the two provisions are inconsistent. Under section 109 of the Commonwealth Constitution, the state law (here, section 5N) is invalid to the extent of any inconsistency. As a result, he found that the contract between parties was not one for recreational services.

Insight Vacations appealed to the NSW Court of Appeal against Justice Rolfe's findings on the constitutional issue and the award of damages for disappointment.



Insight Vacations sought to rely upon section 74(2A) of the TPA, which allows the law of a State or Territory to limit or preclude liability for breach of an implied warranty under the Act. The Court unanimously agreed that Justice Rolfe had erred in applying section 68B of the TPA, because the type of tourist travel the respondent was engaged in did not fall within the definition of “recreational services” provided by section 68B(2). The correct view was that section 68B was irrelevant to the proceedings. The Court also agreed that the contract between the parties did fall within the definition of that term provided by section 5N of the Civil Liability Act.

However, the Court found that:

- section 74(2A) of the TPA only applies a State law that, in its own terms, restricts or precludes liability for breach of the statutory warranty. It does not pick up a state law that permits this result indirectly by authorising a contractual provision that limits or precludes liability for a breach of the implied statutory warranty;
- section 5N does not purport to exclude the warranty implied by section 74(1) or permit parties to a contract to exclude the implied warranty in its own terms; rather it allows a contract to include a term that excludes or limits liability for breach of the implied warranty;

- therefore, section 74(2A) does not pick up or apply section 5N and the exclusion clause the applicant sought to rely upon was made void by section 68B TPA.

The issue of damages for disappointment was more straightforward. The Court unanimously held that the distinction drawn by the trial judge between distress and disappointment was unpersuasive. In the Court’s opinion, the correct view is that both distress and disappointment are elements of pain and suffering within the statutory definition of non-economic loss in the Civil Liability Act.

Special leave to appeal from this decision was granted by the High Court on 12 November 2010. The special leave question is whether section 74(2A) of the TPA applies to a state statute which authorises the inclusion of a contractual provision that limits or precludes liability for breach of the warranty implied into all consumer contracts by section 74(1). Therefore, readers must not consider the Court of Appeal’s findings on the constitutional issue settled.

Gym sweats damages for slippery floor

Kovacevic v Holland Park Holdings Pty Ltd [2010] QDC 279

- The combination of a wooden floor which became slippery when wet, a vigorous exercise program and no plan to deal with the contamination of the floor with perspiration constitutes a breach of the defendant's duty of care.
- Running exercise classes does not amount to the provision of recreational services in terms of section 68B of the Trade Practices Act, and operators cannot rely upon that provision to exclude warranties implied by the Act.

On 23 July 2005, Ms Kovacevic attended a fitness class called "Body Attack", which was described as a vigorous form of exercise designed to build up the heart, at the defendants' gym. Towards the end of the class, she fell and fractured her left ankle. She brought an action against the defendants for negligence and breach of an implied contractual warranty under the Trade Practices Act 1974 (Cth) ("TPA").

Justice McGill in the District Court of Queensland found that Ms Kovacevic had slipped because her right foot had touched the wooden surface where it was sufficiently lubricated with droplets of perspiration to make it too slippery to enable it to resist effectively the lateral forces associated with the vigorous exercises that the body attack programme entailed. The circumstances in which her injury occurred were reasonably foreseeable, and the operator had a duty to take reasonable care for the safety of the participants in the exercise class. It had breached this duty by failing to ensure that the floor was free of sweat before commencing vigorous exercises which involved strong lateral forces.

The operator sought to exclude its liability by relying upon the gym membership contract between itself and Ms Kovacevic, under which she agreed that she used the fitness centre at her own risk, would not hold the defendants responsible for personal injury which she suffered and waived any legal claims against the defendants for any injury, loss or damage sustained or incurred by her. Ms Kovacevic claimed that each of these terms was unlawful, void and liable to be severed from the balance of the contract.



Justice McGill agreed with the plaintiff. In his opinion, section 74(1) of the TPA implied into the contract a warranty that the services would be rendered with due care and skill. As the express terms of the contract sought to exclude, restrict or modify this warranty, they were void by virtue of section 68 of the TPA. In making this determination, Justice McGill rejected the defendants' claim that the contract was a contract for the supply of "recreational services", and thus excluded from the operation of section 68 by section 68B. Exercise classes lack a competitive element, which he considered to be the dominant characteristic of a sport or a similar leisure time pursuit.

Accordingly, he entered judgment for Ms Kovacevic, with damages of \$80,337.36, including \$50,000 for future economic loss.

What the headline gives, the fine print takes away

Australian Competition and Consumer Commission v Boost Tel Pty Limited [2010] FCA 701

- Merely including an asterisk, without more, will not serve to validly qualify a representation.
- The court will have regard to the prominence of the representation compared to the prominence of the qualification, and the relevant question is the entire effect of the advertisement upon the relevant class of consumer.

Boost Tel Pty Limited is a marketing company which distributes branded prepaid cards for making international calls on the Optus network. It had run four advertisements that were the subject of the proceedings; three flyers and one A4 poster. The ACCC alleged that, together, the four print advertisements contained three representations that each contravened sections 52, 53(aa) and 53(c) of the Trade Practices Act 1974 (Cth) ("TPA"). The second respondent, Prepaid Services Pty Limited, had agreed to the making of consent orders before trial. The matter was heard by Justice Siopis in the Federal Court.

This case demonstrates the importance that the court will attach to the overall impression generated by

advertising when considering whether the TPA has been contravened; as will become evident below, each of the impugned representations in this matter was not adequately qualified by the relevant fine print.

The "no fee" representation

Two of the flyers produced by Boost contained, across the top of the front page, the words "NEW NO CONNECTION FEE!!!". Immediately underneath were the words "24HR FLAT RATES". The reverse of the flyers contained a paragraph of small print, among which was the statement: "A service fee may apply".

Boost levied an in-call surcharge of 39 cents after six minutes of any call had elapsed. The ACCC alleged that the combination and juxtaposition of the former two statements gave rise to an implied representation that no fees other than timed call charges would apply to the use of the Boost cards advertised in the flyers. In response, Boost contended that:

- the class of consumers to whom the advertisements were addressed (English-speaking travellers in the "youth segment") took a "sophisticated approach to the consumption of telephony services", and a reasonable consumer of Boost prepaid cards taking reasonable care for his or her own interests would know that a phone card may contain charges other than a timed call rate.



Boost's additional fees were "well within the industry range".

- the flyers were intended to be hand-held, and a reasonable consumer taking reasonable care of his or her interests would be expected to read the whole of document as one would read a contract.

Justice Siopis was unimpressed by Boost's arguments. In his opinion, the class of consumers to whom the flyers were addressed was broader than Boost alleged; non-English speakers and older consumers could equally be expected to purchase the products advertised. The emphatic nature and style of the statements on the front of the flyers, and the absence of any reference on the front of the flyer to the small print on the reverse, would lead the reasonable consumer to conclude that the only charges payable would be the stipulated flat fee based on the duration of the call made.

Accordingly, Justice Siopis found that the "no fee" representation was misleading and deceptive in contravention of sections 52, 53(aa) and 53(c) of the TPA.

The call rate representation

Each of the four advertisements produced by Boost prominently displayed the call rates to a number of specific foreign locations. Immediately above and to the left of the call rates was the phrase "24 HOUR FLAT RATES". The poster and one of the flyers had an asterisk adjacent to the call rates; two of the flyers did not. The asterisk led to the fine print, on the reverse of the flyers and the front of the poster, which qualified the call rates.

There was clear evidence that users of the cards would in almost every conceivable circumstance pay more than the advertised call rates. The ACCC alleged that Boost represented that calls made by using the Boost phone card were charged at the stipulated call rate, regardless of the length and number of calls made.

Justice Siopis did not consider that the asterisks were sufficient to draw the attention of the consumer to the qualifying statements of the fine print. This was because of the disproportionate prominence given to the call rate representation.

Accordingly, he found that the call rate representation was misleading and deceptive in contravention of sections 52, 53(aa), 53(c) and 53(e) of the TPA.





The call duration representation

Two of the flyers contained the phrase “1896 total minutes” immediately adjacent to the “1/2 cent” call rate and the phrase “366 total minutes” similarly juxtaposed with the “2 ½ cent” call rate. These representations were made in relation to a Boost prepaid card of \$10 dollars value. A small statement in the fine print on the reverse of the flyers provided that the total minutes representation was based upon a continuous call being made.

There was clear evidence that these durations could only be achieved under limited, unrealistic circumstances. The ACCC alleged that Boost had represented that the Boost card could be used to make calls for an aggregate period equal to the number of minutes given.

Boost conceded that the number of minutes advertised was unlikely to be achieved, but argued that the word “total” conveyed that the time period referred to the maximum the card could achieve and not what it was likely to achieve in use.

Justice Siopis was again unimpressed by Boost’s argument, and held that a reasonable consumer would have formed the view that the Boost card could, under ordinary use, yield that advertised number of minutes; this was the construction of the phrase “1896 total minutes” that its unqualified language demanded. For the reasons outlined above, he held that the fine print was insufficient to qualify the call duration representation.

Accordingly, he found that the call duration representation was misleading and deceptive in contravention of sections 52, 53(aa) and 53(c) of the TPA.

Onerous conditions not a game

Australian Competition and Consumer Commission v Panasonic Australia Pty Ltd [2010] FCA 856

- To avoid liability for misleading and deceptive conduct, it is not enough merely to give the impression that conditions apply where it may not be possible to comply with those conditions.
- Relaxing the conditions can breach the Trade Practices Act if there's no serious attempt to widely inform customers of this decision.

This case arose from a promotion Panasonic Australia Ltd ran in which purchasers of certain models of its televisions received a bonus Nintendo Wii videogame console. The offer was advertised nationally across a range of media between 23 November and 24 December 2008, including:

- two television commercials, of 30 seconds and 15 seconds duration respectively. The voiceover to each commercial provided that, with a purchase of "any Full High Definition Viera Plasma", "you'll also get a bonus Wii", followed by the legible printed text: "Buy any Full HD Viera Plasma and get a

bonus Wii". This was followed by a further printed, but barely legible, text: "Conditions apply. Offer available between 29/11/08-24/12/08. Offer via redemption. For full terms and conditions, go to www.panasonic.com.au/vierabonus".

- a double-sided A4 insert advertisement run in several major newspapers. The words "Buy any Full HD Viera Plasma and get a bonus Wii" were marked by an asterisk and the legible words "via redemption". There was further legible text stating that the offer was valid for a limited time only and directing reader to the website mentioned above "for more information". In fine and barely legible print there were conditions as above, but with the further, directly relevant, condition that "all claims must be posted within 14 days of original date".
- a range of in-store promotional material, not materially different to the newspaper advertisement.

As mentioned in the fine print conditions in the print advertisements, to receive the Wii purchasers needed to submit a completed claim form within 14 days of purchase. The required information was the purchase date, the receipt number and the model and serial numbers of





the television. As the serial number of the television appeared only on the box and on the television itself, a purchaser could not complete the claim form until they were physically in possession of the television. As a result purchasers who had bought a television without taking immediate delivery might not have been able to claim a Wii within the 14-day time period.

Panasonic eventually became aware of this problem and decided to accept all late claims provided they otherwise complied with the conditions. It did not, however, generally publicise this decision or otherwise make an effort to inform buyers that this aspect of the conditions would not necessarily be strictly enforced.

The ACCC alleged that the advertising was misleading and deceptive under the Trade Practices Act 1974 (Cth) because it failed to disclose a fundamental requirement that a consumer had to meet before being eligible to receive their Wii.

Justice Mansfield agreed, holding that a significant number of consumers would have received delivery after 14 days of purchase and been ineligible to receive the Wii. Panasonic's attempts to remedy the situation did not make allowance for those television purchasers who "accept the adverse vicissitudes of life without reaction", and simply decided that they were unable to claim the Wii without contacting Panasonic.

Accordingly, Justice Mansfield made orders under sections 80 and 86C(2) of the Act that Panasonic establish, at its cost, a Trade Practices Compliance and Education/Training Program for its employees.

The case shows that advertisers must be careful when offering bonus goods to induce consumers into making a purchase, as onerous conditions will be interpreted strictly by the courts.

If it seems too good to be true it probably is

Australian Competition and Consumer Commission v Powerballwin.com.au Pty Ltd [2010] FCA 378

- A company which claims to be able to predict lottery numbers though its own pseudo-scientific method is held to be operating a bogus scheme.

Powerballwin.com.au Pty Ltd operated a website, and distributed a pamphlet, which made representations that it had discovered a method by which the numbers in the Powerball lottery could be predicted. The representations purported that the method was based on mathematics, statistics, computer modelling and the complex study of the theory of random probability and that it had “totally shocked the experts”.

For an annual fee of \$59, consumers could subscribe to receive weekly so-called “proprietary information”, which included the Powerball number for that week and additional information which would help them to choose the remaining five numbers needed to obtain a first division prize. In addition to its own website, Powerballwin maintained a presence on the Seek Commercial website to recruit distributors of its pamphlets, who would be paid in accordance

with the number of subscribers they had directed to the Powerballwin website. To become a distributor, an investor was required to pay the company \$6,950.

The ACCC brought an action against Powerballwin, its sole director and three former employees of the company, alleging that the company

- had engaged in misleading or deceptive conduct, contrary to section 52 of the Trade Practices Act 1974 (Cth); and
- that it had made representations, in connection with the supply or possible supply of services or promotion of the supply of services, that the services had performance characteristics, uses or benefits that they did not have, in contravention of section 53(c) of the Act.

The matter was heard by Justice Tracey in the Federal Court. Powerballwin made no appearance at the proceedings.

The ACCC adduced expert evidence that the Powerball lottery was designed so that the numbers drawn could not be predicted in advance. Not having any evidence that Powerballwin had reasonable grounds for making the representations, Justice Tracey accepted the claims of the ACCC.





The relief granted by Justice Tracey included compensation for those who had paid subscription and distributor fees, under section 87(1A)(b) of the Act. He also granted compensation to four individuals who had lost small amounts by lodging entries in the lottery using numbers provided by Powerballwin which were not drawn. In his opinion, there was a causal link between the representations made about the prospect of success guaranteed by Powerballwin's lottery numbers and entry into the lottery.

This case provides an excellent example of the tough approach the Court and the ACCC will take to the marketing of bogus schemes.



An ad only for the exceptionally gifted

Australian Competition and Consumer Commission v Singtel Optus Pty Ltd [2010] FCA 1177

- The Court finds that advertisements for high-speed broadband plans mislead and deceive.
- Evidence relevant to the circumstances surrounding the publishing of materials which are alleged to mislead or deceive will be admissible.

This case arose from a family of broadband internet plans marketed by Optus as “Think Bigger Plans”. The extensive campaign launched to promote these plans was run across a broad range of media, including:

- flyers advertising the 120GB and 150GB Think Bigger Plans;
- three television advertisements, two for the 120GB Think Bigger Plan and one for the 150GB Think Bigger Plan;
- a print advertisement for the 150GB Think Bigger Plan;
- an online advertisement for the 120GB Think Bigger Plan;
- a billboard for the 150 GB Think Bigger Plan; and

- online advertisements for the 120GB, 150GB and 170GB “Supersonic Broadband” plans, which exclusively used Optus’ own network, rather than Telstra’s.

Each of the plans advertised a monthly data allowance, which was the sum of a peak and an off-peak component. Usage between midnight and midday was considered off-peak, while all other usage was considered peak. For example, in the case of the 150GB Think Bigger Plan, the 150GB figure was composed of a 75GB peak, and a 75GB off-peak, allowance. If a consumer used all of their 75GB peak allowance, the speed would be throttled back to 64 kbps, a speed far slower than the normal speed of the service. The broadband connection would remain throttled at this low speed during off-peak times, even if the consumer had not exhausted their 75GB off-peak allowance.

The flyer for 150GB Think Bigger Plan may be considered typical of the series of advertisements. The front page consisted of a picture of a moose with extremely large antlers, next to which was the text, in large font, “Think bigger.” Below that, in even larger font, was the text “\$59.00* = 150GB**”. Below that, in considerably smaller font, was the text “BROADBAND (75GB peak + 75GB off-peak)”. The asterisks led to



Misleading and deceptive conduct



two statements in fine print at the bottom of the page, “Min. Cost = \$2,064.71 (bundled)” and “Speed limited once peak data exceeded.”, respectively.

The ACCC complained that the advertisements gave rise to a representation that consumers would receive the total data allowance for the quoted monthly price, \$59.99 in the case of the 150GB Think Bigger Plan, and did not sufficiently inform consumers:

- that their usage would be limited once their peak allowance was exhausted, rather than when the combined peak and off-peak allowance was exhausted (the peak usage issue);
- that their speed would drop to 64 kbps if the peak allowance was exhausted (the throttling issue); and
- that 64 kbps was not a broadband speed (the speed issue).

The matter was heard by Justice Perram in the Federal Court.

Before considering the complaints made by the ACCC, he considered the admissibility of certain evidence Optus wished to adduce. This included:

- evidence that Optus staff made explanatory statements at or around the point of sale which

adequately exposed the true position;

- evidence that pages of the Optus website which would reduce the capacity of the advertisements to mislead received significant volumes of internet traffic; and
- market research evidence that consumers spent a lot of time researching their broadband purchasing decisions, and were unlikely to decide to acquire broadband internet services solely on the basis of television or print advertising.

The ACCC contended that this evidence should not be admitted, essentially, because it was not relevant to the context in which the representations were made in the advertisements. Justice Perram disagreed, finding that the evidence was admissible. In his opinion, as the ACCC could not establish that it could not rationally affect the assessment of the probability that the advertisements were misleading, the evidence was admissible under section 55(1) of the Evidence Act 1995 (Cth).

Regarding the peak usage issue, he held that the advertisements were misleading and deceptive, contrary to section 52 of the Trade Practices Act 1974 (Cth), and were liable to mislead the public contrary to section 55A of the Act.

In his opinion, only exceptionally gifted individuals would have been able to grasp the true position from the advertisement. Viewed in isolation at the moment of its delivery, the advertisement plainly misled consumers into thinking that they would receive 150GB, when they would not receive this amount unless they ensured that they exhausted their off-peak usage allowance before exhausting their peak usage allowance.

Regarding the throttling issue, he held that the advertisements did not mislead or deceive. Despite finding that the relevant class of consumer included internet ingénues, rather than solely heavy users, he considered that this class would realise that exhausting the stated data limit would have consequences. One such consequence might include the speed being throttled at 64 kbps, and this was mentioned in the relevant fine print. For the same reasons, he rejected the complaint as to the speed issue.

Accordingly, he granted an injunction against Optus under section 80(4)(a) of the Act regarding the peak usage issue.

A single price, no matter the day of the week

ACCC v Gourmet Goody's Family Restaurant Pty Ltd (t/as Steersons Steakhouse) [2010] FCA 1216

- **Surcharges on restaurant menus must be prominently included in a single price.**
- **Courts will balance the public interest in deterrence against the respondents' culpability to determine the level of pecuniary penalties under section 76E of the Trade Practices Act.**

These proceedings involved two fast-tracked applications by the ACCC against two corporations involved in the restaurant industry, who traded as Steersons Steakhouse and Georges Bar and Grill respectively. Each of these restaurant chains published menus which were given to customers, amongst other days, on Sundays and public holidays. At the bottom of each menu there was a statement in small print as follows:

- "A 10% surcharge applies on Sundays and public holidays" (at Steersons Steakhouse); and
- "A 10% surcharge Sundays and Public Holidays" (at Georges Bar and Grill).

The ACCC complained that the menus contravened section 53C of the Trade Practices Act 1974 (Cth), which provides that a corporation must specify in a prominent way the single price payable for goods or services. The menus did not specify in a prominent way and as a single figure the single price for the supply of items on the menus on Sundays and public holidays, and the respondents admitted the essential allegations against them.

The matter was heard by Justice Jagot in the Federal Court, who, in consequence of the admissions of the respondents and the fast-tracked nature of the applications, gave a very brief judgment. The majority of her judgment concerned the appropriate pecuniary penalty to be awarded under section 76E of the Act. These proceedings were the first time a penalty had been imposed under this provision.

Considering that a principal object of a penalty under the section is deterrence, the court must deter contravening conduct, but also that the culpability of the respondent was mitigated by its admissions and its prompt rectification of the contravening conduct, she imposed a penalty of \$13,200.



Subterranean barrier system effectively termicidal

Granitgard Pty Ltd v Termicide Pest Control Pty Ltd (No 5) [2010] FCA 313

- An intermediary who publishes the opinion of a third party may sometimes be regarded as having adopted that opinion for the purposes of the Trade Practices Act.
- An intermediary that published an opinion without expressly adopting it in its own language is held not to have made the representation.

Granitgard Pty Ltd and Termicide Pest Control Pty Ltd are rival companies in the market for the supply and installation of barrier systems designed to prevent the subterranean entry of termites into buildings.

Granitgard alleged that, for the purposes of promoting its barrier system Termiglass, Termicide made a number of representations via its website that the installation of Termiglass:

- forms an “impenetrable barrier” to termites;
- provides a barrier that is “too hard to chew, too heavy to move and too small to crawl through”;
- will satisfy the requirements of the relevant Australian Standard;
- provides a suitable physical barrier against subterranean termite entry;
- has been tested by the CSIRO and appraised as satisfying the Australian Standard; and
- has a life expectancy of 50 years.

These representations were purported to arise from statements, and from a hyperlink to a copy of a CSIRO report, which were published on the Termicide website. The CSIRO report found that the Termiglass Termite Barrier System would satisfy the relevant Australian standard. By presenting the report as a hyperlink, underneath text which informed readers of the findings of the report, it was submitted that Termicide had adopted the CSIRO appraisal.



Granitgard argued that, in making each of these representations, Termicide had engaged in conduct that is misleading or deceptive, contrary to section 52 of the Trade Practices Act 1974 (Cth), on the basis that Termiglass:

- does not provide an effective barrier to termites;
- does not have a sufficient proportion of particles which are within the specified quality and shape; and
- cannot be manufactured to consistently comply with the Australian Standard.

The matter was heard by Justice Logan in the Federal Court.

He held that the representations stemming from explicit statements published on the website had been made by Termicide. After considering the technical evidence, however, Justice Logan held that Granitgard had failed to prove, on the balance of probabilities, that Termicide had been

misleading or deceptive in making those representations.

As for the hyperlink to the CSIRO report, the issue was whether publishing the opinion of a third party could give rise to a contravention of section 52 of the TPA, where that opinion was misleading or deceptive. Justice Logan held that it could, but only when the representation was conveyed in a manner which would be regarded by the relevant section of the public as adopting it. This would be a question of fact in each case. He held that, given the language it had used and the manner in which it presented the hyperlink, Termicide had not adopted the CSIRO report, but rather had relayed it as an opinion to the world at large. Accordingly, he dismissed Granitgard's application.

This case highlights the relatively high threshold that is required to make out misleading or deceptive conduct with regard to publishing the opinions of others.

Passing off and the international sale of goods

Cortem SpA v Controlmatic Pty Ltd [2010] FCA 852

- A distributor holds out locally-produced goods as goods imported pursuant to a distributorship.
- Where the parties to an international contract for the sale of goods reside in different states that have acceded to the Vienna Convention, it will apply unless the parties to the contract have expressly excluded its operation.

Cortem SpA is an Italian company engaged in the manufacture and international distribution of a range of products, relevantly including explosion-proof junction boxes (or “enclosures”) adapted to house electrical switches and connections.

Giuseppe Venuti, the second respondent, was appointed as Cortem’s local distributor in 2002. Mr Venuti went to considerable trouble to secure TestSafe certificates for the Cortem products he sold under the distributorship. Controlmatic Pty Ltd, the first respondent, was established by Mr Venuti in 2007, and took over the business formerly conducted by him as a sole trader.

Cortem terminated the distributorship in December 2007 because Controlmatic had not maintained the minimum levels of Australian sales of

Cortem products specified in the original agreement made between the parties. The fall in sales was at least partly because Controlmatic began manufacturing its own enclosures in Australia and supplied them, bearing the Cortem logo, to industrial customers.

It emerged in evidence that, more or less contemporaneously with the transfer of business to Controlmatic in 2007, Mr Venuti made arrangements to have enclosures supplied by an Australian manufacturer. Though they were manufactured in Australia, by a company unrelated to Cortem, Mr Venuti placed identification plates on these enclosures with “Cortem Australia” in the same font Cortem used to brand its own products. Controlmatic sold these enclosures to several of its customers as Cortem products, and represented that they had been granted TestSafe certificates.

Cortem alleged that the respondents held up locally-sourced products as Cortem’s and sold them under the Cortem name and logo. It argued that this involved misleading and deceptive conduct in trade or commerce, contrary to section 52 of the Trade Practices Act 1974 (Cth), and amounted to a false representation that the products were of a particular standard, quality, value, grade or composition, contrary to section 53. It also made a claim in passing off.





Mr Venuti cross-claimed for remuneration or compensation for time he'd spent obtaining TestSafe certificates for Cortem products, and alleging that certain goods he had acquired from Cortem were not of merchantable quality, not reasonably fit for their intended purpose or otherwise defective. The matter was heard by Justice Jessup in the Federal Court.

Justice Jessup had no hesitation in finding that Mr Venuti's conduct was misleading and deceptive contrary to section 52, and also that he had the necessary degree of involvement in the conduct of Controlmatic to be liable for that company's conduct. He also found that Mr Venuti had contravened section 53(c) of the TPA by representing that the Australian made enclosures had been awarded TestSafe certificates, when they had not.

Justice Jessup did not, however, consider that Mr Venuti had made false representations about the quality of the Australian made enclosures. To the extent that such a representation was implied, it was not established that those enclosures were of lower quality than the equivalent Cortem products.

As for Cortem's claim in passing off, Justice Jessup accepted that the case against Controlmatic was a strong and obvious one. However, he found that there was no need for an award of damages as Cortem would be awarded compensation under the Act. He further refused to award an injunction against Mr Venuti based on the claim in passing off, finding that the relevant conduct was that of Controlmatic and not attributable to Mr Venuti personally.

Coming to the cross-claims, Justice Jessup held that Mr Venuti had neither the legal or factual basis to be compensated for the time spent acquiring the Testsafe certificates. He found that Mr Venuti could not establish the facts necessary to substantiate the amount of work he had expended in procuring the TestSafe certificates.

Mr Venuti's claim that certain goods provided by Cortem were not of merchantable quality, not reasonably fit for their intended purpose or otherwise defective, had greater success. Justice Jessup held that he could rely upon Cortem's warranty in its printed conditions of sale to recover damages in relation to certain goods Cortem provided that could not

be certified in Australia. However, he rejected Mr Venuti's claim under the United Nations Convention on Contracts for the International Sale of Goods (the "Vienna Convention"). While the Vienna Convention applied to the contract between Mr Venuti and Cortem, Mr Venuti had failed to establish that the goods were in any way defective contrary to Art 35.

Accordingly, Justice Jessup entered judgment against Mr Venuti for \$222,558.18, and judgment against Cortem on the cross-claim of \$12,775.29.

SoundShield© a sound shield

Dynamic Hearing Pty Ltd v Polaris Communications Pty Ltd [2010] FCAFC 135

- Full Court upholds the findings of the primary judge that a comparison report was misleading or deceptive, and falsely represented that its goods were of a particular standard or quality.
- While the Full Court may make its own findings of fact, where appropriate, the parties will be bound by the conduct of their cases at first instance where they seek to make fresh submissions.

Readers may recall that earlier proceedings involving these parties were reported in last year's annual review. This case was an appeal from those proceedings.

Dynamic Hearing Pty Ltd and Polaris Communications Pty Ltd are rival companies selling acoustic shock protection devices to the call centre market. These are safety devices which limit the level of sounds heard by call centre workers to reduce the risk of acoustic shock. In mid-2005, Dynamic Hearing distributed a report comparing its device, the Plantronics ADRO M15D, with that of Polaris' device, the Polaris SoundShield. Telstra, which at the time was

one-third of the call centre market and was preparing a request for tender for acoustic protection devices, was given a copy.

Polaris claimed that the comparison report made representations which were misleading or deceptive or likely to mislead or deceive, contrary to section 52 of the Trade Practices Act 1974 (Cth), as well as falsely representing that goods were of a particular standard or quality, contrary to section 53(a) of the Act. Specifically, Polaris alleged that the report contained:

- a misleading assessment of the comparative performance capabilities as the devices were tested on their lowest limiting settings, which were different on each of the two devices;
- an incorrect statement that its research was covered by ethic approval from the Royal Victorian Eye and Ear Hospital Human Research and Ethics Committee;
- a misleading implication that the Polaris SoundShield was unsuitable for use in call centres and did not comply with requirements outlined by Telstra, the biggest consumer of the product; and
- misleading representations that the test set up was independent, and that the results were an



accurate reflection of the relative performance of the devices when used in call centres.

At first instance in the Federal Court, Justice Sundberg upheld Polaris' complaint. Considering that the relevant class of consumer to whom the representations were made was managerial staff contemplating the purchase of acoustic shock protection devices for use in call centres, he concluded that:

- the report did represent that the Polaris SoundShield was unsuitable for use in call centres. The fact that the report stated that the product was currently used in the centres did not negate this representation. The representation was misleading or likely to mislead as substantial evidence suggested that the device was suitable for such use ("the unsuitability representation"); and
- the test was not properly designed and scientifically conducted because randomisation protocols were not followed, there was no control condition, the Soundshield was not set up appropriately for test conditions, and poor subject selection ("the test set up representations").

Dynamic Hearing appealed from these findings to the Full Court.

Given that this case was not one in which the credit of witnesses played a large part, the Full Court considered that it was generally in as good a position, or nearly as good a position, as the trial judge to make findings of fact. Accordingly, it considered the evidence relevant to each alleged error and decided for itself the proper conclusion.

With regard to the unsuitability representation, the Full Court dismissed the appeal, holding that Dynamic Hearing impliedly represented the SoundShield was unsuitable for use in call centres and it failed Telstra's intelligibility requirements, which were misleading or deceptive.

With regard to the test set up representations, it found Justice Sundberg had erred in concluding that Dynamic Hearing did not inform itself adequately of the appropriate settings for the SoundShield in the test conditions. This error, however, did not justify any changes to the orders made.

Accordingly, the Full Court dismissed the appeal on all grounds and ordered that Dynamic Hearing pay Polaris' full costs.

Fakes to be destroyed as “artistic crimes”

Blackman v Gant [2010] VSC 229

- An art dealer who authenticated, and sold, three fake artworks is held to have engaged in misleading or deceptive conduct.
- Where an artwork is established as a fake and of no value, the Court may order an injunction to have it destroyed to prevent future contravening conduct.

Charles Blackman and Robert Dickerson are two well-known Australian artists, both belonging to the “Antipodeans” group of artists that emerged in Melbourne in the 1950s. This group’s artistic sensibility was known from its 1959 “Antipodean Manifesto”, a document which asserted the importance of figuration and regional influence in art, and rejected the international trends of the day, such as abstract expressionism. Works by both artists are of significant value, and commonly sell at auction.

These proceedings arose from two works attributed to Blackman, “Street Scene with Schoolgirl” and “Three Schoolgirls”, and from one work attributed to Dickerson, “Pensive Woman”, which were alleged to be forgeries. Mr Blanch, a company director, purchased the paintings from the Gretz Gallery on the

recommendation of the proprietor, Ms Stewart, between 1999 and 2005. The paintings had been supplied to the Gretz Gallery by Peter Gant, an art dealer trading as “Gallery Irascible – Fine Art”. As a 1999 ABC Four Corners report into art fraud described, Peter Gant has had a “long and colourful career”, having been accused of deceptive conduct and association with fraudulent art works before.

When buying the purported Blackman works in 1999, Mr Blanch had asked how he might clarify the authenticity of the works. Ms Stewart responded that she had a Commonwealth-approved valuer who authenticated works, and gave a valuation, before the Gretz Gallery acquired them. These were by Mr Gant, and Ms Stewart passed them on to Mr Blanch. When, after purchasing the purported Dickerson work in 2005, **Mr Blanch requested an updated valuation of the purported Blackman works for insurance purposes, Mr Gant again provided the requested valuation.**

In 2008, Mr Blanch visited **Mr Granek’s art gallery to view various Australian works of art. Mr Granek is an experienced art consultant and dealer whose past experience had included work cataloguing almost 3,000 works of art by Blackman owned by the Blackman Children’s Trust. At Mr Blanch’s request Mr Granek inspected his**



purported Blackman works, and advised him they were fakes. He then put Mr Blanch in contact with Mr Nall, an expert on Dickerson, who gave him bad news about the “Pensive Woman” too. Mr Blanch got a refund from Ms Stewart, and the paintings ended up with Mr Gant.

The artists then sued Mr Gant, alleging that by providing the valuations, he represented to the ultimate recipient of those valuations, Mr Blanch, that the works were authentic. They also alleged that by selling the purported Dickerson work to Mr Blanch, Mr Gant represented that the work was authentic. These representations were pleaded to be misleading or deceptive, or likely to mislead or deceive, in trade or commerce contrary to section 9 of the Fair Trading Act 1999 (Vic). The matter was heard by Justice Vickery in the Supreme Court of Victoria.

After considering the expert evidence, Justice Vickery came to the conclusion that the works in issue were fakes masquerading as the genuine article and were worthless. Further, he rejected the submissions of Mr Gant that the valuations did not make any representations about the authenticity of the works; in his opinion, authentication is part of the process of valuing an art work, and the context in which the valuations were passed to Mr Blanch implied authentication. Accordingly, he found that Mr Gant’s conduct in providing

the valuations, and selling the Dickerson work, was in breach of section 9. As the Act imposes strict liability in this regard, Justice Vickery made no findings that Mr Gant knew that the works in question were not authentic or that he acted other than innocently.

Justice Vickery granted varied relief for this breach, including:

- a declaration that the works in issue were fakes; and
- an injunction requiring the delivery of the works in issue to the plaintiffs to be destroyed by them.

However, Justice Vickery declined to:

- award damages, because the artists had no involvement in the transactions giving rise to the loss and damage claimed; or
- order Mr Gant to provide an affidavit relating to his dealings in the course of his business, as it was not justified by the conduct found against him.

This case is important authority for the tough line the courts will take under the Trade Practices legislation against the sale of fake artworks.

The Great White Shark takes a bite out of parallel imports

Sporte Leisure Pty Ltd v Paul's International Pty Ltd (No 3) [2010] FCA 1162

- Without the consent of the trade mark holder, parallel importation of branded goods may constitute trade mark infringement.
- Creating a perception of discount by overstating the RRP for a product at retail, or inventing it entirely, may amount to misleading or deceptive conduct.

Great White Shark Enterprises ("GWS"), the second applicant, is the head licensor and owner of the Greg Norman Collection ("GNC") brand, which it has registered as a trade mark within Australia. The GNC brand is applied to a variety of apparel, bags and accessories.

In February 2007, GWS entered into a license agreement with an Indian company, BTB Marketing, by which BTB manufactured GNC branded products. Under the licensing agreement, these products could only be manufactured for retail sale within India.

The respondents imported GNC-branded products, manufactured by BTB, into Australia and sold them in their "Paul's Warehouse" chain of

sporting goods stores. The applicants alleged that this was done contrary to section 120(1) of the Trade Marks Act 1995 (Cth).

The respondents contended that GWS had consented to the use of its trade mark, and that, as the trade mark had been applied by or with the consent of registered owner, they had not infringed GWS' trade mark. The matter was heard by Justice Nicholas in the Federal Court.

With regard to the trade mark issue, Justice Nicholas found that BTB did not have the trade mark owner's consent to apply the mark to the goods, as the goods had been manufactured for supply outside India. As a result, the second respondent which had imported, offered for sale and sold the relevant goods, was liable to the second applicant for trade mark infringement. The director was not found liable as a joint tortfeasor for the infringement, largely because he had an honest but mistaken belief that the goods were non-infringing.

The applicants also made claims under the Trade Practices Act 1974 (Cth). They argued that in selling and marketing the products, the respondents had made misleading representations as to price contrary to sections 52(1) and 53(e).





The respondents had advertised GNC branded garments through the distribution of a brochure, which had a section with the heading “GREG NORMAN COLLECTION”, with the words “MINIMUM OF 40% OFF” next to it. Six garments were pictured with relevant pricing information: the advertised price of the style, a saved amount and the RRP. The saved amount represented the difference between the RRP and the advertised price. For five of the six garments, the RRP had been overstated by between 11 percent and 33 percent. The remaining garment did not have an Australian RRP at all.

Justice Nicholas found that the price representations made in the brochure were misleading or deceptive. He found that the brochure would be understood by reasonable consumers to refer to the RRP specified by the manufacturer or wholesaler of the product being advertised. This was not in fact the case. Although the respondents argued they had not intended to mislead or deceive, this was irrelevant as sections 52 and 53 impose strict liability; indeed, he found that the second respondent “displayed a high level of carelessness in the way it went about advertising its products”.

The applicants abandoned their claims for pecuniary relief. Justice Nicholas made declarations with respect to the trade marks and trade practices issues, and granted an injunction in respect of the Trade Practices Act contraventions. He declined however to grant injunctive relief for trade mark infringement.

Optical retailers fail to see eye to eye on comparative advertising

Luxtotta Retail Australia Pty Ltd v Specsavers Pty Ltd [2010] NSWSC 37 and [2010] FCA 423

- An advertisement comparing prices at optical retailers is held to mislead or deceive consumers.
- The fact that the relevant representation misled consumers to the detriment of the plaintiff and the defendant alike does not exclude liability under section 52 of the Trade Practices Act.

Luxtotta Retail Australia Pty Ltd (for convenience, "OPSM") operates about 280 OPSM stores across Australia providing optometry services and optical products such as spectacles. Specsavers Pty Ltd operates approximately 200 stores through a company-owned and franchise structure across Australia.

These proceedings stemmed from Specsavers' comparative advertising campaign which ran on free-to-air national television and on the internet. The television commercial ran for 30 seconds, and the opening (and critical) part was as follows:

- Voiceover: "On average OPSM customers paid over \$480 for their prescription glasses. We believe that's too much."

- Text and image: the word OPSM appears, with a picture of spectacles underneath and the text "PAID OVER \$480 on average" underneath the picture of the spectacles. In small font at the bottom of the screen is the disclaimer, which reads: "Based on 1313 consumers aged 18 and over who bought prescription glasses (Jul 2009 - Jan 2010). Roy Morgan Research 2010. Excludes health fund rebates."
- Voiceover: "That's why at Specsavers our customers paid on average \$114 less for their prescription glasses than OPSM customers."

- Text and image: to the right of the OPSM logo and spectacles, the Specsavers logo and a different picture of spectacles appear. To the right of the text under the OPSM logo, and in the same size and font, appears the text "PAID OVER \$114 LESS on average". The disclaimer remains at the bottom of the screen.

The internet advertisements made representations materially identical to those made in the television commercial.

After the advertisement began running, OPSM complained that the text of the disclaimer was too small. Specsavers produced a version of the commercial which featured the





disclaimer in larger font, which then ran in all capital cities for three days. Specsavers spent around \$1 million on the campaign.

OPSM sought interlocutory relief to restrain the continuation of the advertising campaign in the NSW Supreme Court, but this was refused. The main proceedings were heard by Justice Perram in the Federal Court.

OPSM made three complaints about the commercial:

- The rebate issue: OPSM argued that the inclusion of the \$480 average figure was misleading and deceptive because it was not the sum which most of its customers would ever pay. The majority of its customers were members of private health insurance funds and would be entitled to various degrees of indemnity against the cost of spectacle frames and lenses.
- The \$114 issue: OPSM argued that the advertisement appeared to compare an average price of \$480 with an average price of \$114, in a manner that was misleading or deceptive. In its submission, the word “less” did not dispel the suggestion otherwise implicit in the advertisement that what is being compared is the two average sums of money.

- The single spectacles issue: OPSM argued that the advertisement was misleading or deceptive because it suggested that the average figure of \$480 is the average price paid for a single pair of spectacles, based upon the survey mentioned in the disclaimer. The \$480 figure was, in fact, the average amount of money spent overall by OPSM customers on their most recent visit to a store. This may have amounted to a purchase of more than one pair of spectacles.

Regarding the rebate issue, Justice Perram rejected OPSM’s complaint. In his opinion, the advertisement would not be understood by the casual viewer as saying anything at all about the price of spectacles after health fund rebates.

As for the \$114 issue, Justice Perram again rejected OPSM’s complaint. The emphasis placed on the word “less” in the voiceover meant that the advertisement did not convey a comparison between a payment of \$114 and a payment of \$480.

Finally, Justice Perram upheld OPSM’s complaint over the single spectacles issue. He found that the advertisement plainly suggested a connection between the \$480 figure, the \$114 figure and a single pair of spectacles; it was a “spectacles advertisement” rather than an “average spend” advertisement.





The average price of a single pair of spectacles in the survey conducted on Specsavers' behalf was \$417.58 for OPSM and \$204.97 for Specsavers. Thus, the representation was doubly misleading because it suggested that consumers would save \$114 when they went to Specsavers, whereas, in fact, they would save \$212. Accordingly, he held that a breach of section 52 of the Trade Practices Act was made out.

This case should be read in conjunction with the similar but unrelated proceedings involving Specsavers reported below. The high incidence of comparative advertising litigation shows the fiercely competitive nature of optical retailing in Australia, which is an industry worth \$1.34 billion per annum.

More comparative advertising in optical retail

Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No 2) [2010] FCA 566

- An advertisement comparing prices at optical retailers is held to be, in part, false.
- A representation that certain spectacles were of a higher quality than others is held not to be misleading, notwithstanding that the comparison was between two classes of product at differing price points.

While Specsavers was defending claims stemming from its comparative advertising against OPSM, it was pursuing claims against another optical retailer, The Optical Superstore.

The Optical Superstore is, after OPSM and Specsavers, the third major player in the Australian optical retail market. These proceedings arose from the content of two television advertisements produced for the optical superstore which unfavourably compared the prices offered at Specsavers' stores with those available at The Optical Superstore's outlets. The advertisement for standard lenses ran as follows:

- Text and voiceover: "The Optical Superstore has price comparison advertised against Specsavers 9

times... 9 times Specsavers have reduced their prices. Can we make it 10?"

- Image and voiceover: an image appears of Specsavers" comparison advertising against OPSM, accompanied by the voiceover, "Specsavers are advertising that they're cheaper than OPSM, but Specsavers failed to advise you that the Optical Superstore is cheaper again."
- Image and voiceover: an image appears of a comparison between the price of Country Rd frames and standard multifocal lenses at Specsavers and at the Optical Superstore, accompanied by the voiceover, "The Optical Superstore's two pairs of standard Multifocal glasses are \$36 cheaper than Specsavers".
- Image and voiceover: an optometrist is depicted fitting a pair of glasses, with the voiceover, "Come on, Specsavers. Can you reduce your price? You've done it 9 times before."
- Text, image and voiceover: a picture of a telephone appears with the 1300 phone number for the Optical Superstore and the text "Always check prices at the Optical Superstore. There's a store near you." The voiceover repeated the first sentence of the text.





The advertisement for tailor-made lenses was similar, but included footage of a customer selecting spectacles from a display and an optometrist fitting the spectacles to her, accompanied by the voiceover, "The Optical Superstore highly recommends the latest technology tailor-made multifocal lenses with anti-reflective coating. Much better than Specsavers' advertised standard Multifocals." In addition, the comparison image was slightly different, comparing two pairs of Country Road frames with tailor-made lenses, which the Optical Superstore claimed were \$100 cheaper at its outlets.

Specsavers alleged that the advertisements made representations that were misleading or deceptive, contrary to section 52 of the Trade Practices Act 1974 (Cth), or were false or misleading with regard to the price of goods contrary to section 53(e).

The matter was heard in the Federal Court by Justice Katzmann, who held that Specsavers had proved that the advertisement for standard lenses made two representations:

- that the Optical Superstore offered for sale at all of its stores two pairs of a selection of Country

Road frames with standard multifocal lenses for a cost of \$292.50; and

- that two pairs of standard multifocal glasses could be purchased from The Optical Superstore for \$36 less than they could be purchased from Specsavers.

However, drawing upon the evidence of the mystery shoppers who gathered the price comparison data, she found that neither of these representations was false or misleading.

With regard to the advertisement for tailor-made lenses, Justice Katzmann held that Specsavers had proved that it made two representations:

- that Specsavers' standard multifocals are inferior to The Optical Superstore's tailor-made spectacles (the representation as to quality); and
- that two pairs of the Optical Superstore's tailor-made variety with anti-reflective coating and Country Road frames sell from more than \$100 less than Specsavers' sells two pairs of the best quality (or tailor-made) multifocals (the representation as to price).

Justice Katzmann was not satisfied that the representation as to quality was misleading. The representation did not imply that Specsavers did not sell spectacles of equivalent quality to The Optical Superstore's tailor-made spectacles. Such a belief would be a mistaken assumption and not based upon anything said in the advertisement. It was not a case of misrepresentation by silence because The Optical Superstore's tailor-made multifocals compete in the marketplace with Specsavers' standard multifocals; there is no requirement that advertisements must exhaust the field when making product comparisons.

However, she held that the representation as to price was false. The price reported in the advertisement was odd and anomalous, and did not reflect the price paid by Specsavers' customers in the vast majority of circumstances.

Accordingly, Justice Katzmann allowed the claim on this ground, and dismissed it on the others.

Weighting the experts

Olivaylle Pty Ltd v Flottweg AG [2010] FCAFC 62

- An appeal court will be slow to disturb the primary court's findings about the relative weight to be accorded to expert witnesses.
- Objections to the admissibility of evidence will not be entertained by appeal courts where those objections arise in argument but not in the statement of claim or in the grounds of appeal.

Readers may recall that an important ruling involving these parties relating to the postal acceptance rule and its applicability to electronic communication was reported in last year's annual review. This case was an appeal from those proceedings, in which the major issue was the relative weight given to the expert evidence of the witnesses at first instance.

Olivaylle had purchased a set of mechanised equipment for the production of olive oil (known in the proceedings as the "Olive Oil Line") from Flottweg, a German manufacturer. Olivaylle claimed the Olive Oil Line was defective because it failed to meet certain contractual technical specifications, and purported to withdraw from the

contract when these defects were not remedied within its timeframe. Flottweg did not accept this, and Olivaylle brought an action claiming return of the purchase price and damages for wasted expenditure.

The proceedings at first instance, before Justice Logan in the Federal Court, were dominated by complex technical arguments about the performance of the Olive Oil Line. Justice Logan found that the Olive Oil Line's failure to meet the prescribed technical specifications was caused, at least in part, by Olivaylle's use of it in ways which departed significantly from normal operating conditions. Therefore, Olivaylle could not prove, on the balance of probabilities, a breach of the contractual technical specifications. In arriving at this conclusion, he preferred the expert evidence of two witnesses called by Flottweg, Mr Nieuwkerk and Professor King, to that of Olivaylle's witness, Mr Carey.

On appeal, Olivaylle contended that Justice Logan had erred in the weight that he had accorded to the evidence of the witnesses at first instance. Specifically, Olivaylle claimed that Professor King's evidence did not support the conclusions that Justice Logan had drawn from it, and that Mr Nieuwkerk's evidence was self-serving, non-independent opinion evidence which should have been given no probative value.





Some background information about the witnesses is necessary to understand the decision of the Full Court of the Federal Court.

- **Mr Nieuwkerk was a chemical engineer** who had been involved in the sale of olive oil processing lines, providing technical information and support for new and existing customers; since early 2004, more than half of his business had come from Flottweg. He had accepted an offer from Olivaylle to “come on board as a project manager” to assist with the Olive Oil Line, but had reminded Olivaylle that he would then be “working for both sides”. Mr Nieuwkerk provided crucial evidence relating to the ability of the Olive Oil Line to perform in accordance with the contractual technical specifications if certain normal operational conditions were adhered to.
- **Professor King was Head of the School of Chemical Engineering at the University of Adelaide.** He provided evidence that issues in the performance of the Olive Oil Line were not caused by defects in its design.
- **Mr Carey was a chartered professional engineer** who had been hired work on the irrigation system at Olivaylle’s property and was subsequently engaged to assist in the installation of the

olive oil line. He had provided evidence that there were design issues with the Olive Oil Line. that affected its performance.

With regard to the evidence of **Mr Nieuwkerk, the Full Court found** that it was questionable whether the evidence provided in his affidavits was wholly or substantially based on his specialised knowledge, as required by section 79 of the Evidence Act 1995 (Cth). However, it held that, as no objection to the admissibility of **Mr Nieuwkerk’s evidence was** contained in the grounds of appeal, there was no basis for departing from Justice **Logan’s finding that it should** be preferred to the evidence of **Mr Carey. If there had been such an** objection, Flottweg would have been afforded the opportunity to adduce further evidence to overcome the objection.

With regard to the evidence of **Professor King and Mr Carey, the Court held** that the divergence in their opinions about the soundness in the design of the Olive Oil Line did not affect the decision in the case. It thought that Professor King’s evidence adequately accounted for Mr Carey’s concerns.

Accordingly, the Full Court rejected the appeal.

Exclusion clause in product liability insurance given narrow reading by High Court

Selected Seeds Pty Ltd v QBEMM Pty Limited [2010] HCA 37

- Policies are to be read as a whole, and exclusions are to be read in context.

A crop of low-quality grass and a battle over product liability insurance have given the High Court an opportunity to emphasise the need to read exclusion clauses properly and in context.

The wrong seed, the crop of weeds, and the battle over insurance

Selected Seeds acquired seeds which it believed would produce Jarra grass, which is used as stock feed for all types of stock. Unbeknownst to Selected Seeds, the certificate of analysis was wrong and there was a substantial amount of Summer grass seeds in the product. Summer grass is low-quality and is regarded as a weed when present in commercial hay and seed crops.

The seed went through various hands until it ended up with the consumers, the Shrimps. They planted the seed, got a crop of Summer grass, and sued the seller and Selected Seeds for the costs of eradicating it from their land and the loss of use of the land during that period.

Selected Seeds settled the claim for \$150,000 and turned to its insurer, which refused to pay out on the claim.

What the insurance policy said

The policy indemnified Selected Seeds for “property damage” which included “physical damage to or loss or destruction of tangible property including any resulting loss of use of that property”.

An Efficacy Clause excluded “any liability arising directly or indirectly from or caused by, contributed to by or arising from... the failure of any Product to correctly fulfil its intended use or function and/or meet the level of performance, quality, fitness or durability warranted or represented by the Insured.”

The insurer argued the seed’s function was to produce Jarra grass, it didn’t, and therefore the liability arose from a failure to correctly fulfil its intended use or function. As a result, the settlement cost was excluded.

The Queensland Court of Appeal agreed with QBEMM. The Efficacy Clause had to be read broadly, excluding any liability which has any connection with the failure of the product to fulfil its use.





Why the insurer couldn't rely upon the Efficacy Clause

The High Court disagreed.

The first problem for the insurer was that the seed didn't just fail to produce Jarra grass. It actually produced a weed that had to be removed. It was this property damage and loss of use of the land that was the basis of the Shrimps' claim, and thus of Selected Seeds' liability.

The High Court considered that the question posed by the Efficacy Clause was whether the liability of Selected Seeds for the damage to the Shrimps' land arose out of the failure of the seed to fulfil its use or function. The Court concluded that the answer must be "no". That liability was not caused by the failure of the seed to produce Jarra grass. It arose by reason of the direct effect of the seed upon the land.

This distinction (between failure to achieve your purpose, and causing actual harm) has been made before in product liability cases, most notably in the English case *John Wyeth & Brothers Ltd v Cigna Insurance Company of Europe SA/NV* [2001] EWCA Civ 175.

What this means for other efficacy or exclusion clauses

The High Court's decision in *Selected Seeds* is a sensible one for insureds, and a clear reminder of one of the basic issues in insurance: policies are to be read as a whole, and exclusions are to be read in context.

Could Government class action reforms make NSW the next hot-spot for class actions?

- NSW's changes to its representative proceedings are significant and make the State more plaintiff-friendly.

Changes to NSW's class actions laws in the Courts and Crimes Legislation Further Amendment Act 2010 could see it leap-frog the Federal and Victorian court systems to become the most popular forum for class actions in Australia.

It would allow class actions to be brought where claims are based only in negligence and for breaches of NSW statute, and will not require a federal cause of action. These claims not only are those in respect of a cause of action arising on or after the commencement of this section, but also in respect of historical causes of actions "with the leave of the Court".

The original reform proposals

The exposure draft Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 was based on Part IVA of the Federal Court of Australia Act 1976 but it was not exactly the same.

Originally, there were three significant differences:

- class actions may be brought on behalf of a defined, limited group of identified individuals, not only an open, generally-specified class;
- class actions may be taken against several defendants – even if not all group members have a claim against all the defendants; and
- the Supreme Court can distribute the undistributed part of a fund of damages to charities or public interest beneficiaries.

Why these were of concern

There were two main problems with these proposals:

First, they seemed to give the Court largely unfettered powers to order the establishment of a fund of money to be distributed to group members and also to establish a scheme for money remaining in the fund (or any part of it), that cannot practicably be distributed to group members, to be applied *cy-près*, which means "As near as (possible)". In effect, this





could spur the growth of class actions, if the US is any guide. There, the growth of “coupon litigation” (class actions for claims involving very small amounts, where it is difficult to identify members of the class, and the administrative costs of any settlement are prohibitive) has led to minimal returns for class members, but significant returns to plaintiff lawyers.

Secondly, the proposals would allow class actions against several defendants – even if not all group members have a claim against all the defendants. A party brought into a class action as a respondent, but in respect of a different claim by different group members, will incur costs associated and generated by its mere (long-term) presence in the class actions, but is less likely to have the case against it determined in a speedy, just and efficient manner. In short, it would be more likely that you will be joined to a class action, and could pay more to defend yourself.

The reforms as passed

Following the consultation process, including submissions by Clayton Utz, the NSW Government removed the contentious provision in its class actions bill allowing the cy-près distribution by the Supreme Court.

The Bill was passed and assented to on 7 December 2010. On 4 March 2011, the new commenced and the Supreme Court of New South Wales issued its representative proceedings Practice Note (SC Gen 17) that commenced on the same day.

The Civil Procedure Act (NSW) now contains a new Part 10 (as amended by the Courts and Crimes Legislation Further Amendment Bill 2010). Accompanying Part 10 and also taking effect from 4 March is a new Part 58 in the Uniform Civil Procedure Rules (UCPR).

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