

# ENFORCEMENT AND REMEDIES OF THE TRADE PRACTICES ACT 1974 (Cth)<sup>1</sup>

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Part VI of the *Trade Practices Act 1974 (Cth)* (“**TPA**”) covers enforcement provisions and remedies available that arise from breaches of particular provisions in the TPA. The body of this paper provides an overview of the type, range, purpose, and application of the remedies available under sections 80, 82 and 87 of Part VI, where relief is claimed in the context of a misleading and deceptive conduct claim in breach of s 52. I also assess the application of s 75 which is concerned with the way in which a person may be involved in a contravention of these sections of the TPA.

I provide a summary of the types of remedies available under these sections in Schedule A.

## 1. OVERVIEW OF REMEDIAL FRAMEWORK

The ‘protection of perceived public interests’ is ‘a primary objective’<sup>2</sup> of the TPA and must be kept in mind any analysis of the remedial framework.<sup>3</sup> A preliminary assessment of the application of a particular remedy involves asking whether the matter involves a public interest concern and if answered in the affirmative, thinking about what weight will be given to that public interest. It is therefore important to understand the purpose of the remedies available under s 80, 82 and 87 in addition to their form.

## 2. BREACH OF SECTION 52 OF THE TPA

To establish breach of s 52, the aggrieved party must establish a causal link between the breach of the prohibition and the loss claimed. Once established, the type of remedy and quantum of damages awarded will depend on the type of damage and/or loss suffered and what the Court considers is appropriate in the circumstances. A breach of section 52 may result in two streams of remedies loosely classed as follows:

### 2.1 Preventative or Corrective Orders

Preventative or corrective orders are non-monetary orders which include:

- a prohibitory injunction (preventative);
- a mandatory injunction (corrective). For example, s 80(1) of the TPA states that the “Court may grant an injunction in such terms as it determines”; and
- corrective advertising (corrective).

Non-monetary orders are primarily directed at preventing or correcting misleading conduct rather than redressing damage caused by a breach.

### 2.2 Compensatory Orders

Compensatory orders include:

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<sup>1</sup> The author presented this paper at a LegalWise seminar in July 2006.

<sup>2</sup> Both quotations, *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 474.

<sup>3</sup> Lockhart, Colin, “*The Law of Misleading and Deceptive Conduct*” 2<sup>nd</sup> Ed, LexisNexis Butterworths 2003 at 206.

- a monetary award (s 82); and/or
- orders to prevent or reduce loss or damage (s 87).

Compensatory orders are aimed at redressing individual losses caused by contraventions of the TPA.

### 3. SECTION 75B

“A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU or 75AYA, shall be read as a reference to a person who:

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, **knowingly concerned** in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.”

The purpose of s 52 of the TPA is to catch potential offenders; the purpose of s 75 is to catch those who assist the offenders.

Section 75 is procedural in form. It is not a source of liability. The liability arises under ss 82 and 87. Section 75 deals with the way in which a person may be involved in a contravention of the TPA in particular circumstances and must always be pleaded together with these sections.

The purpose of s 75 is to join a person, usually a director of the respondent corporation to the proceedings, in their personal capacity. A pleading which alleges that a person, such as a director, has engaged in a contravention provides another particular basis upon which damages may be recovered, not a new cause of action. The effect is that orders for compensation or damages pursuant to ss 82 and/or 87 apply to that director for a contravention by the respondent corporation.

The focus of this paper is on s 75(c). To establish that the director of the respondent corporation was “knowingly concerned”, the applicant must prove that:

- (a) the person intentionally participated in the contravention of s 52. This requires actual rather than constructive knowledge of the misrepresentations; and
- (b) the person must have had some involvement in the complaint and not just mere knowledge.

The test is whether that person has knowledge of the essential elements that constitute the offence. If the person is unaware of the impugned conduct and of the circumstances that give the conduct a misleading or deceptive character, which in the case of misrepresentations means knowledge of the falsity of the statement, then that person lacks knowledge of the essential elements that constitute the offence.<sup>4</sup> In *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, the Court took the view that knowledge of the fact of publication of the television advertisement, knowledge of its content and awareness of matters that would make the advertisement misleading were sufficient.

<sup>4</sup> *Yorke v Lucas* (1983) 80 FLR 143 at 152

#### 4. SECTION 80 - INJUNCTION

Section 80 enables an applicant to restrain a breach or attempted breach of the restrictive trade practices and consumer protection provisions of the TPA by obtaining an interim or permanent injunction against the offender.

Section 80 is a discretionary remedy and is designed to prevent the likelihood of future breach.

To bring an application, an applicant does not need to show that a proprietary interest of his is affected or that he personally has suffered damage or has been misled or deceived by the impugned conduct. In addition, unlike equitable injunctive relief, a delay in bringing proceedings will not automatically preclude this remedy for the following 2 reasons:

- (a) there is no express limitation period for injunctive relief (it would at best, be a discretionary consideration); and
- (b) public interest considerations ‘in being prevented from being deceived’<sup>5</sup> usually outweigh any delay (where they apply).

The following principles apply to granting an interlocutory injunction:

- (a) the Court must be satisfied that there is a serious question to be tried. This exercise involves assessing the strength of the applicant’s case. The duty of the Court is not to resolve conflicts of evidence; and
- (b) the Court must then consider the ‘balance of convenience’. This involves balancing the harm caused to the applicant if the interlocutory injunction is not granted versus the harm caused to the respondent if the injunction is granted. The standard of proof is balance of probabilities.

For example, if the remedy involves if the remedy involves closing a business, the Court will consider the impact on the business versus the damages to consumers if the misleading conduct continues.

The Court only in exceptional circumstances will grant an interlocutory injunction to restrain the carrying on of a business because it would be too damaging to the goodwill if the business stops trading before trial and starts after it, if successful.

A Court is empowered to grant an injunction on such terms as it determines to be appropriate in the particular circumstances. It will not make an order that the respondent cease to breach the TPA. The boundaries of what is legitimate and illegitimate conduct must be clear. The terms of the order must be specific so that the respondent understands what conduct amounts to a breach of the injunction.

The Court may also grant an order that the respondent publish corrective advertising in a form approved by the Court. In *ACCC v Real Estate Institute of WA* [1999] FCA 18, French J held that such orders would not be made ‘for such wide purposes as the general education of the public about the [TPA]’ or to ‘merely announce a win’ for the applicant.

#### 5. SECTION 82 – ACTIONS FOR DAMAGES

“(1) a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

<sup>5</sup> See eg *Gollel Holdings Pty Ltd v Kenneth Maurer Funerals Pty Ltd* (1987) 9 IPR 109 at 122 per Einfield J.

(1B) Despite subsection (1): .....the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.”

Section 82 provides the primary basis for compensation for breaches of Pts IV, IVA, IVB and V. The aggrieved party relying on this section must prove that:

- (a) it *has* suffered loss or damage<sup>6</sup> (contrast with s 87 which also deals with cases where loss or damage is *likely* to be suffered); and
- (b) the loss or damage has been sustained “by” a breach of one of the relevant parts of the TPA (causal relationship that introduces element of establishing ‘reliance’). The Court looks at the effect which the representation is determined to have had, not the part the relevant representation played.<sup>7</sup> This is a question of fact.

The offending conduct need not be the only cause of the applicant’s loss or damage. It is sufficient if it plays a part in the applicant’s loss or damage, even if only a minor part.<sup>8</sup>

### 5.1 Assessment of damages

Once causation is established the measure of compensation is ‘the amount of’ the loss or damage sustained. Unlike s 87, this means complete recovery of loss or damage.<sup>9</sup> The amount of damage must be proven with as much certainty as is reasonable in the circumstances.<sup>10</sup>

Generally, damages are awarded with the object of placing the applicant in the position in which it would have been had the breach not been committed.

If the applicant contributes to the loss or damage suffered where the action is based on s 52, claims for economic loss and property damage are apportioned between the parties: s 87CD(3).

### 5.2 Types of Losses

The types of losses include:

- (a) capital loss (e.g the price paid for an asset or business);
- (b) trading loss (e.g expenses incurred in operating a business);
- (c) wasted expenses (usually subsumed under the above 2 heads of damage. If there are no capital or trading losses, wasted expenses will often be the primary head of damage claimed);
- (d) lost interest;
- (e) lost income (e.g opportunity to purchase another business which was more profitable than the one purchased or to earn wages); and

<sup>6</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514

<sup>7</sup> *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357

<sup>8</sup> *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41

<sup>9</sup> *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* [2001] FCA 1620

<sup>10</sup> *O’Neill v Medical Benefits Fund of Australia Ltd* [2002] FCAFC 188

- (f) damage to commercial reputation (e.g the diversion of sales).

Damages for loss of opportunity may be awarded where the applicant can prove that the opportunity was available to it and would have been taken but for acting on the impugned conduct.<sup>11</sup>

Exemplary and punitive damages cannot be awarded. In addition, nominal damages cannot be awarded because the suffering of actual loss or damage is an essential element of the application of the section.<sup>12</sup>

### 5.3 A Case Example

In *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116; 2 TPR 199; 45 ALR 299, a case relating to breaches of s 52 in the course of the sale of a business, the court held that in assessing damages the applicants were entitled to:

- compensation for the actual losses they incurred in carrying on the business flowing directly from the inducement, not only those losses which were reasonably foreseeable;
- interest on the purchase price paid by them;
- the amount payable by the applicants to the lessor in respect of loss and expenses incurred by it on re-entry and reletting of the premises;
- costs of going into and out of the business; and
- a proportion of the additional money provided by the applicants for the business.

The applicants were not entitled to:

- the financing costs associated with the purchase; or
- their loss of wages.

## 6. SECTION 87 – OTHER ORDERS

- (1) Without limiting the generality of section 80, where, the Court finds that a person who is a party to the proceeding **has suffered, or is likely to suffer**, loss or damage by conduct of another person that was engaged in contravention of a provision of Part IV, IVA, IVB, V or VC, the court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C or 86D, make such order or orders as it thinks appropriate if the Court considers that the order or orders concerned will **compensate** the first mentioned person **in whole or in part** for the loss or damage or will **prevent or reduce** the loss or damage.
- (2) The orders referred to in subsection (1) and (1A) are:
- (a) an order declaring the whole or any part of a contract to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (b) an order varying such a contract or arrangement in such manner as is

<sup>11</sup> *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332

<sup>12</sup> *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237)

specified in the order.

- (ba) an order refusing to enforce any or all of the provisions of such a contract;
- (c) an order to pay to the person who suffered the loss or damage the amount of the loss or damage.

Section 87 confers wide powers on the Court to make monetary and non-monetary orders and ‘to do more complete justice than can...be done merely by an award of damages’<sup>13</sup>. Where an applicant has already suffered loss or damage by a breach and may claim for that loss under s 82, an applicant may wish to make a claim under s 87, in the alternative, if applicable.

### 6.1 Application of Section 87

Section 82 orders must be granted if sought and loss and damage by the impugned conduct is established. Section 87 orders on the other hand are discretionary. In addition, s 82 orders may be the sole remedy where the limitation period for a cause of action under s 87 has expired prior to that for a damages claim under s 82.

The cause of action under s 87 accrues from the date on which the applicant has suffered or is likely to suffer, loss or damage.<sup>14</sup> This is usually the date on which the conduct complained of occurred. Under s 82, the cause of action accrues when the applicant first suffers damage caused by the respondent’s breach.

Unlike s 82, the relief that may be awarded under sub-section 87(1) includes relief which compensates only in part for loss or damage suffered. Sub-section 87(1A), then provides an additional right to claim for loss or damage “likely to be suffered”. The courts have not yet determined whether this is interpreted to mean apprehended loss or damage. Like s 82, loss under s 87 is not limited to economic loss.

Once the causal connection is established, nothing in s 87 suggests that the amount that may be recovered is to be limited. The fact that the applicant contributed to the consequences of the conduct is not relevant. The measure of the compensation is the amount of the loss or damage sustained. The amount is not reduced in accordance with the applicant’s contribution.<sup>15</sup>

Relief in respect of a misrepresentation in breach of s 52 is limited to orders necessary to allow the applicant to recoup, reverse, prevent or limit any consequential loss or damage which he or she may have sustained.

A comparison is made between the position in which the person who suffered loss or damage is in and the position that person would have been in had there been no contravention, but this may not be an exclusive test either.

### 6.2 Type of Orders Court May Grant

Assistance can be gained from the common law in deciding what damages should be awarded under s87.<sup>16</sup> The type of orders a court can make include:

<sup>13</sup> *Deane v Brian Hickey Invention Research Pty Ltd* (1988) 11 IPR 651 at 656 per Burchett J.

<sup>14</sup> *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245

<sup>15</sup> *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41

<sup>16</sup> The leading authorities on compensation for loss or damage in a trade practices context are the decisions of the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1)

- (a) that the whole or part of a contract is void: s 87 (2)(a) (rescission right);
- (b) that a contract or arrangement be varied;
- (c) refusing to enforce a contract;
- (d) the refund of money or return of property: s 87(2)(c) (specific performance);
- (e) the payment of compensation (this overlaps with s 82 but here the cause of action arises when loss or damage is likely to be suffered);
- (f) an undertaking to repair or supply parts: s 87(2)(e) (specific performance);
- (g) the provision of specified services: s 87(2)(f) (specific performance);
- (h) the termination of a lease and mortgage or the transfer of land s 87(2)(g) (specific performance).

The Court cannot make the following orders:

- exemplary damages;
- an account for profits because it is an award to prevent undue enrichment: *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101 at 111; or
- compensation for disappointed expectations: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.

### 6.3 A Case Example

In *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; ATPR 41-665, the appellants borrowed money from GIO under loan facilities which allowed GIO to vary the interest rate whereas GIO had represented to them that the rate would be fixed for the term of the loan. The appellants claimed the difference between the actual cost and the represented cost. The High Court held that no loss or damage had been suffered because no other loan available in the market at the relevant time would have given them a better rate than the actual rate provided by GIO (*Also applicable to a s 82 claim*).

## SCHEDULE A

### Summary of the Type and Range of Remedies Available under Part IV of the TPA

SECTION	APPLICATION	REMEDY
80	To prevent or correct misleading conduct	<ul style="list-style-type: none"> <li>• Injunction; and</li> <li>• Corrective advertising</li> </ul>
82	To redress individual losses caused by contraventions of the TPA.	<p>Economic or financial compensation for the amount of the loss or damage sustained under the following heads of damage;</p> <ul style="list-style-type: none"> <li>• capital loss;</li> <li>• trading loss;</li> <li>• wasted expenses (usually subsumed under the above 2 heads of damage. If there are no capital or trading losses, wasted expenses will often be the primary head of damage claimed);</li> <li>• lost interest;</li> <li>• lost income;</li> <li>• damage to commercial reputation.</li> </ul>
87	Likely to suffer loss or damage	<ul style="list-style-type: none"> <li>• that the whole or part of a contract is void: s 87 (2)(a);</li> <li>• that a contract or arrangement be varied;</li> <li>• refusing to enforce a contract;</li> <li>• the refund of money or return of property: s 87(2)(c) (specific performance);</li> <li>• the payment of compensation (overlaps with s 82 but here the cause of action arises when loss or damage is likely to be suffered);</li> <li>• an undertaking to repair or supply parts: s 87(2)(e) (specific performance);</li> <li>• the provision of specified services: s 87(2)(f) (specific performance);</li> <li>• the termination of a lease and mortgage or the transfer of land s 87(2)(g) (specific performance).</li> </ul>