

TALKING ABOUT SOCIAL RESPONSIBILITY: LIABILITY FOR MISLEADING & DECEPTIVE STATEMENTS IN CORPORATE CODES OF CONDUCT

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Changing attitudes, of both investors and consumers, to the role of corporations in society has led many organisations to adopt corporate codes of conduct to address corporate social responsibility issues. While on their face these documents would appear to have little legal consequence, the recent US decision of Nike v Kasky suggests that misleading statements in such codes (or other corporate 'image' advertising) will carry legal penalties. This possibility is even stronger in Australia, where such statements are likely to contravene the Trade Practices Act 1974 (Cth), leaving the organisation liable to significant penalties. Accordingly, organisations should be aware of the risk of talking about social responsibility, without any commitment to action.

I INTRODUCTION

Changing community attitudes to the role of corporations in society¹ has heightened consumer expectations of the products and services they purchase.² In addition to acceptable price and quality, consumers are becoming more concerned with the history of those products and services, and the values of the companies that produce them. Environmental performance, sustainable development practices, human rights standards and ethical decision-making can now all significantly affect consumer perception of a company, its brand, and therefore purchase decisions.³ Many in the investment community are also beginning to focus not just on the financial measures of company performance, but are screening for social responsibility factors in making investment decisions.⁴ A growing number of non-governmental organisations (NGOs) are

* This article is based on the author's paper submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws (Hons) at Monash University. The author gratefully acknowledges the assistance of Associate Professor Mark Davison, Monash University, in the preparation of the paper.

¹ Findings of the Millennium Poll (a survey of 1,000 citizens in each of 23 countries on six continents, carried out in 1999) included that 88 per cent of people in Australia, Canada and the USA, and 81 per cent of people in Great Britain thought that the role of companies in society should go beyond making profits, paying taxes and obeying all laws - *The Millennium Poll on Corporate Social Responsibility*, Executive Briefing <<http://www.mallenbaker.net/csrCSRfiles/Resources.html>>.

² Lance Compa and Tashia Hinchliffe-Darricarrere, 'Enforcing International Labor Rights through Corporate Codes of Conduct' (1995) 33 *Columbia Journal of Transnational Law* 663, 668; Ryan Toftoy, 'Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?' (1998) 15 *Arizona Journal of International & Comparative Law* 905, 919.

³ Jem Bendell (ed), *Terms for Endearment: Business, NGOs and Sustainable Development* (2000) 23.

⁴ Janice Carpenter, 'Triple bottom line reporting gains currency' (2001) 4 *Ethical Investor* 66.

now taking a more active role in monitoring and exposing socially irresponsible practices, and the continued spread of the internet has facilitated real-time communication of these findings to countless array of diverse consumers. When one adds to these factors increased activism, by both shareholders⁵ and consumers,⁶ developments in international law increasing the likelihood of liability for environmental and human rights violations abroad, and the increasing willingness of governments to legislate upon these issues, it becomes obvious that many corporations, particularly multi-national corporations, are facing a multi-faceted compliance headache.

It is not surprising then, that a common response to the pressure for corporate social responsibility has been the use of codes of conduct.⁷ These codes range from the company-specific, to the industry-wide. Some codes are developed by independent groups, others by companies themselves. The issues they cover may be diverse, and the methods used for monitoring compliance varied. However, what they all have in common is an apparent lack of enforceability.⁸ Except for where a code requires conduct which is also a legal standard, the consequences of non-compliance do not, at first glance, appear to stretch beyond public embarrassment - and only then if anyone finds out. However, a recent case in the United States⁹ suggests that where a corporation represents that it is meeting a certain standard of conduct when in fact it is not, the consequences could be more than a public relations disaster - they could carry legal penalties. This possibility is even more likely in Australia, where the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*') establishes heads of liability, without the constitutional protections of free speech enjoyed in the US.

This paper examines trends in corporate social responsibility, and codes of conduct as a response to these issues. It then turns to an analysis of the law of misleading and deceptive conduct as one area of potential liability for corporations that hide behind, rather than live up to, their code of conduct.

II TRENDS IN CORPORATE SOCIAL RESPONSIBILITY

It is probably no coincidence that society is now beginning to question the appropriate role of corporations, at a time when these private entities have never

⁵ Peter Nobel, 'Social Responsibility of Corporations' (1999) 84 *Cornell Law Review* 1255, 1261; David Birch, 'The Shareholders Project: Shareholder-Corporate Relations in Australia - Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspective' (2001) St James Ethics Centre 2 <http://www.ethics.org.au/our_services/project/shareholder-corporate_relations.pdf>.

⁶ Jem Bendell, 'Civil Regulation: A new form of democratic governance for the global economy' in Bendell, above n 3, 239, 242; David Birch and Mark Glazebrook, 'Doing business - doing culture: corporate citizenship and community' in Stuart Rees and Shelley Wright (eds), *Human Rights, Corporate Responsibility: A Dialogue* (2000) 41, 46-7.

⁷ Meaghan Shaughnessy, 'The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct' (2000) *Colorado Journal of International Law & Policy* 159, 162; Bob Hepple, 'The importance of law, guidelines and codes of conduct in monitoring corporate behaviour' in Roger Blanpain (ed), *Multinational Enterprises and the Social Challenges of the XXIst Century* (2000) 3, 6.

⁸ Shaughnessy, above n 7, 159-60; Hepple, above n 7, 8; Toftoy, above n 2, 914, 919-20.

⁹ *Marc Kasky v Nike Inc* 27 Cal 4th 939 (2002).

been so large or powerful.¹⁰ Some would argue that corporations have become the most powerful world actors,¹¹ and indeed of the 100 biggest world economies, 51 are global conglomerates and only 49 are nations.¹² Many consider that with this power comes responsibility,¹³ and would disagree with Milton Friedman, that the sole responsibility of business is to generate profit.¹⁴ This is not to say business should ignore profit maximization, merely that profit should be generated in a way that is within ethical parameters. Management theorists refer to this concept as a stakeholder (as opposed to a shareholder) focus,¹⁵ and it is a philosophy which is gaining currency within the business community.¹⁶ Indeed, many would simply consider this approach to business sustainable practice, considering long-term as well as short-term objectives.¹⁷ Others would recognise this approach as the basis for the newly fashionable concept of 'triple bottom line' reporting, that is, measuring a corporation's financial, environmental and social performance to determine the true success of the company.¹⁸

The term corporate social responsibility can refer to many things,¹⁹ but in this paper it is used in the broad sense, to refer to the numerous issues which society may consider appropriate for business to consider when making decisions. These may include: environmental issues such as waste disposal, emissions, use of non-renewable energy sources, land degradation, endangering fauna and flora, and pollution; human rights issues such as living wages, use of child labour, forced labour and sweatshops, occupational health and safety issues, dealing with governments with poor human rights records and discrimination; and other ethical concerns, such as corruption and bribery, product safety, animal testing, and community engagement. Of course, these, and other social concerns, will be

¹⁰ Anita Roddick, 'Foreword' in Bendell, above n 3, 8.

¹¹ Harry Herbert, 'Investors, not nations, control multinationals' (2001) 4 *Ethical Investor* 47.

¹² Eva Cox, 'A civil corporation for a civil society' *The Australian Financial Review* (Sydney), 23 November 2001, R6-7.

¹³ Shaughnessy, above n 7, 162; Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171, 202; Kimberly Gregalis Granatino, 'Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?' (1999) 23 *Suffolk Transnational Law Review* 191, 210; Su-Ping Lu, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law' (2000) 38 *Columbia Journal of Transnational Law* 603, 607.

¹⁴ Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits', *New York Times Magazine*, 13 September 1970, 32; cf Dexter Dunphy, Jodie Benveniste and Andrew Griffiths *et al* (eds), *Sustainability: The Corporate Challenges of the 21st Century* (2000) 105.

¹⁵ Gerry Johnson and Kevan Scholes, *Exploring Corporate Strategy* (6th ed, 2002) 206-17.

¹⁶ See, eg, BP Australia, 'Triple Bottom Line Report' (2001) <http://www.bp.com.au/news_information/press_releases/previous/2002/pr_tbl.asp>; the engagement of the UN Global Compact by the City of Melbourne - Committee for Melbourne, *Interaction* (November 2001), Issue 19, 1 (on file with author) - as part of its commitment to 'triple bottom line practice' - Michael Malouf, 'The triple bottom line in practice' (2001) 17(7) *Company Director* 48; and discussion of the issue in major financial press - for example Cox, above n 12.

¹⁷ Dunphy, Benveniste and Griffiths, above n 14, 6.

¹⁸ Carpenter, above n 4; the Australian Bureau of Statistics has also recognised that economic indicators such as GDP do not reflect the true performance of nations and that social and environmental indicators should be taken into account. The 'Measuring Australia's Progress' report was released in April 2002 and it takes a triple bottom line approach to measuring progress and development.

¹⁹ David Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25 *The Journal of Corporation Law* 41, 46, 52-4.

of varying importance to individual companies and industries, depending upon the nature of the business concerned.

A Consumers

The importance of these issues to the consumer should not be underestimated, and continues to grow. A recent study found 84 per cent of people would be willing to pay more for a product that was manufactured in a socially responsible way,²⁰ and further, 51 per cent of people said they had actually been influenced by such concerns in making purchase decisions.²¹ A further illustration of this point is the dramatic drop in sales experienced by Shell (as much as 50 per cent), when the company announced its intention to dump the Brent Spar oil platform into the sea²² The trend is toward increased activism by consumers, and therefore a favourable brand image with regard to socially responsible practices can be considered a competitive advantage by corporations.²³ Conversely, negative publicity surrounding alleged contraventions of social expectations with regard particularly to environmental and human rights standards, can have potentially significant adverse effect on both short-term sales and long-term brand image.

B Investors

Just as people in their capacity as consumers are increasingly being influenced by social considerations in their purchasing decisions, as investors, the trend towards such considerations is similarly significant. The number of investment funds now offering screening for some sort of social factors has risen in the US from 168 in 1999 to 230 in 2002.²⁴ This trend is also evident in Europe²⁵ and can also be seen in Australia with the recent introduction of socially responsible investment products by major financial services providers such as AMP, Australian Unity and Rothschild.²⁶ Not only has the number of available funds grown, but the amount invested in such funds has also exploded to over US\$2.3 trillion (in the US alone) - or one dollar in eight under management in the US.²⁷ In Australia the ethical investment market is estimated at A\$10.3 billion, and is growing rapidly.²⁸ The value of this sector of the investment community is reflected in the development

²⁰ Birch and Glazebrook, above n 6, 47.

²¹ A further 16 per cent had considered punishing a company perceived as not socially responsible in the past year. These figures are for North America / Oceania, the corresponding figures for Northern Europe are 39 per cent and 14 per cent, the worldwide average being 23 per cent (actually punished) and 17 per cent (have considered doing so) - *The Millennium Poll*, above n 1.

²² Shaughnessy, above n 7, 162.

²³ Dunphy, Benveniste and Griffiths, above n 14, 45.

²⁴ SRI in Asia, *Growth* <<http://www.asria.org/sri/markets/growth>>.

²⁵ It is estimated that funds with some sort of social/ethical screen in the UK have grown from £1.7bn in 1998 to £4bn in June 2001 <<http://www.eiris.org/Pages/TopMenu/Public.htm>>; five-fold growth is expected in the next few years - A History of Ethical Investment <<http://www.uksif.org/Z/Z.Z/lib/2001/05/art-ps-histupd/index.shtml>>. One study suggests the value of institutional socially responsible investment in Europe is over Euro 336 billion <<http://www.eurosif.org/pub/lib/2003/10/sri rept/press.shtml>>.

²⁶ For a full listing of Australian ethical investment products refer to Ethical Investor Magazine, or its website <<http://www.ethicalinvestor.com.au>>.

²⁷ *Report: Socially Screened Assets Grew 1.5 Times Faster than All US Managed Portfolio Assets Since 1999* <<http://www.socialinvest.org/areas/news/2001-trends.htm>>.

²⁸ Growth for last year was 84 per cent - Janice Carpenter, 'Home and Away' (2001) 7 *Ethical Investor* 74.

of certain indices, such as the Dow Jones Sustainability Index in the US,²⁹ the FTSE4 Good Index in the UK³⁰ and the Monash/Westpac EcoIndex in Australia.³¹ It is interesting to note, the companies followed by these indices have outperformed general market indices in their relevant market (such as the Dow or the All Ordinaries) the world over,³² and Australia's best-performing share fund is an ethical one.³³ This would tend to indicate that not only are socially responsible practices adopted by well managed companies, they can also make a significant contribution to shareholder value³⁴ - an effect which would see even Friedman arguing the case for socially responsible practice!

Not only are shareholders making investment decisions based upon social considerations, but, like consumers, they are becoming more activist in exercising their power within companies.³⁵ In particular, NGOs and institutional investors are using targeted shareholdings to bring shareholder resolutions, forcing companies to adopt socially responsible practices.³⁶ Often the foundation of these resolutions has been an attempt to introduce codes of conduct, as a way of improving the practices of these organisations.³⁷

C Regulating Foreign Conduct - Legislation and the Forum Non Conveniens Doctrine

Another trend encouraging corporations to consider social responsibility issues with reference to their foreign operations is the increasing willingness of governments to legislate on the issue and of courts to allow litigation. In the US, legislation is before Congress which would impose certain minimum standards on the foreign operations of US companies.³⁸ Similar legislation was considered

²⁹ <<http://www.sustainability-index.com>>.

³⁰ <<http://www.ftse.com/ftse4good/>>.

³¹ <<http://www.westpac.com.au/internet/publish.nsf/Content/CBIVMISR+Westpac+and+Monash>>.

³² *Two-thirds of Socially Responsible Mutual Funds Receive Highest Performance Ratings through 2001* <<http://www.socialinvest.org/areas/news/2001-Q4performance.htm>>; the Monash/Westpac Eco Index has outperformed the All Ordinaries by almost 4 per cent since its inception in January 1999 - John Rouw, *Eco-friendly Stock Index Overtakes All Ords on the Green* <<http://www.theage.com.au/business/2001/05/05/FFXS9EWTAMC.html>>; the Domini Social Index has consistently outperformed the Standard & Poor's 500 Index - Jem Bendell and Rob Lake, 'New Frontiers: Emerging NGO activities to strengthen transparency and accountability in business' in Bendell, above n 3, 226, 234.

³³ John Collet, 'Virtue goes rewarded', *The Age* (Melbourne), 1 December 2001, B5.

³⁴ Mark Diesendorf, 'Sustainability and Sustainable Development' in Dunphy, Benveniste and Griffiths, above n 14, 19, 27; *The FTSE4 Good Index and Corporate Social Responsibility*, 6 <<http://www.ftse.com/ftse4good.csr.jsp>>.

³⁵ Birch, above n 5, 2.

³⁶ *Business Ethics* <<http://www.bsr.org/BSRResources/WhitePaperDetail.cfm?DocumentID=270#recent>>. See for an example of such a campaign Paddy Manning, 'Gunns Ltd Felling the Giants' (2001) 4 *Ethical Investor* 20, which details the steps taken by concerned shareholders against forestry company Gunns Ltd, in an effort to stop logging of old-growth forests; another illustrative campaign is that of environmentalist Christine Milne's attempt to be elected to the board of Boral Limited - Ross Kendall, 'Second Milne Tilt for Boral' (2001) 6 *Ethical Investor* 14.

³⁷ Compa and Hinchliffe-Darricarrere, above n 2, 675.

³⁸ The Corporate Code of Conduct Bill 2001 (US) is currently before a number of Congressional Committees.

by the Australian Senate.³⁹ Furthermore, the US has introduced legislation which prevents the importation of goods made with bonded or child labour,⁴⁰ and Sweden has linked additional export credits to environmental compliance.⁴¹ The importance of ethical investment has also been recognised by many governments, with legislation requiring disclosure of the extent to which managed investments (including superannuation funds) screen for ethical, environmental and human rights factors now in force in Australia, the United Kingdom, Germany and France.⁴²

In addition, Western courts have taken a more expansive approach to the doctrine of forum non conveniens, allowing actions to be brought against corporations in their home state, for torts committed in another jurisdiction.⁴³ This represents a significant increase in potential liability for corporations operating in foreign jurisdictions, where previously there was little threat of action, due to underdeveloped or corrupt legal systems.

D The Rise of Non-Governmental Organisations

Mirroring the increasing globalisation of world markets is the growth of international bodies, including NGOs. Although the total number of NGOs worldwide is unknown, they are a significant global force, providing more aid than the World Bank, employing more than 19 million people and accounting for at least US\$1.1 trillion of world trade.⁴⁴ Many of these organisations are concerned with various corporate responsibility issues. For example, Greenpeace monitor environmental issues, including violations by corporations.⁴⁵ Some of these organisations work in partnership with companies to develop standards and monitor compliance,⁴⁶ while others generate publicity surrounding particular instances of poor practice, in an attempt to harness consumer and investor power.⁴⁷ Perhaps the most significant development is the emergence of NGOs in

³⁹ The Corporate Code of Conduct Bill 2000 (Cth) was introduced as a Private Senator's Bill by Senator Bourne and investigated by the Joint Committee on Corporations and Securities, however it failed to gain the support of the Liberal Party, although attracted much interest from the community, as evidenced by the 43 submissions to the Committee - see the report of the Committee at <http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf>. Although this Bill was not passed, it evidences a growing willingness of the Australian Parliament to consider legislation in the area, a trend that can also be seen in the new Product Disclosure Regime under the *Corporations Act 2001* (Cth), see below n 42.

⁴⁰ 19 USC § 1307.

⁴¹ Richard Howitt, 'Report on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct' in Blanpain (ed), above n 7, 67, 79; the US has also linked labour rights to trade preference programs, and a side accord covering labour rights was negotiated as part of the North American Free Trade Agreement - Compa and Hinchliffe-Darricarrere, above n 2, 667.

⁴² See <<http://www.eiris.org/Pages/TopMenu/Public.htm>>. In Australia these provisions are contained in the new Product Disclosure Statement regime in the *Corporations Act 2001* (Cth) s 1013D(1)(l) and s 1013DA, that came into force 11 March 2002.

⁴³ Joseph, above n 13, 178-81; Armin Rosencranz and Richard Campbell, 'Foreign Environmental and Human Rights Suits Against US Corporations in US Courts' (1999) 18 *Stanford Environmental Law Journal* 145, 146.

⁴⁴ Bendell (ed), above n 3, 16.

⁴⁵ See <http://www.greenpeace.org/international_en/>.

⁴⁶ For case studies of NGO/business partnerships see Bendell (ed), above n 3.

⁴⁷ See for example campaigns by Corpwatch <<http://www.corpwatch.org>>.

developing countries, who have played a major role in exposing the practices of multi-national corporations operating in their countries. The power of these organisations has been further enhanced by constant improvement in access to world communications, through the media and the internet.⁴⁸

III RESPONSE: CODES OF CONDUCT

In response to these issues a growing number of corporations, particularly multi-national corporations, are developing or adopting codes of conduct.⁴⁹ These codes may address legal compliance, labour standards, environmental benchmarks, anti-corruption policies, and other social concerns a corporation's stakeholders may have.

The business benefits of having such a code may include the provision of a mechanism to ensure compliance with all relevant laws and social standards⁵⁰ and, in some jurisdictions, demonstrated effort to comply with a code will provide some protection from liability, or mitigate penalties for breaches of the law.⁵¹ It may also make the company eligible for government concessions or permit it to tender for government contracts where performance on social factors may be taken into account.⁵² The code may act as a marketing tool, strengthening the company's brand image and creating brand equity - a strong social brand may be regarded as a competitive advantage, allowing for premium pricing, increasing customer loyalty and attracting investment.⁵³ Even without branding, promotion of a code of conduct may attract capital from the growing ethical investment sector.

There are also human resources benefits to implementing a code of conduct, both for the company itself and for any suppliers/contractors that the company demands adhere to its code.⁵⁴ Ensuring certain labour standards can increase retention rates and employee satisfaction and motivation, while lowering absenteeism, employee turnover and industrial action.⁵⁵ Job satisfaction and employee motivation are also likely to be positively affected if the employee perceives the employer to be socially responsible, and therefore 'feels good' about

⁴⁸ John Bray, 'Web Wars: NGOs, companies and governments in an Internet-connected world' in Bendell, above n 3, 49.

⁴⁹ Compa and Hinchliffe-Darricarrere, above n 2, 665.

⁵⁰ Hepple, above n 7, 4.

⁵¹ Such as in the US where the *Caremark* decision and sentencing guidelines allow for mitigation of liability for company directors who can demonstrate commitment to compliance efforts - Monty Raphael, 'Corporate Self-Regulation - the Whole Answer, Part of the Answer or No Answer?' (2001) 29 *International Business Lawyer* 195.

⁵² Such as s 4 of the Corporate Code of Conduct Bill 2001 before the US Congress, which provides for trade and investment assistance and preference in the award of government contracts.

⁵³ Rolf Thüsing, 'Codes of Conduct - A growing concern for enterprises?' in Blanpain, above n 7, 95.

⁵⁴ Michael Skapinker, 'Inside Track: why Nike has broken into a sweat', *Financial Times* (UK), 7 March 2001 <<http://globalarchive.ft.com/globalarchive/article.html?id=020307001803>> notes that the publicity surrounding Nike's factory conditions had a negative effect on the morale of Nike's own employees (Nike does not own factories, its employees are designers etc in the US). Nike also notes that initially factory owners thought their code was 'a bunch of baloney' but that attitude is changing as the financial benefits of improved labour practices are being demonstrated.

⁵⁵ Raymond Stone, *Human Resource Management* (4th ed, 2002) 397.

their work. These factors are in turn likely to increase productivity, lower production costs and improve quality, therefore increasing profit.⁵⁶ A code may help improve occupational health and safety and can act as an organisational cultural change tool, where the employer wishes to communicate ethical standards and values to a diverse workforce.⁵⁷ A code that sets standards for suppliers and affiliated companies can assist in managing the value chain and help ensure consistent quality.⁵⁸ Finally, a code of conduct may provide a shield against attack from human rights and environmental activists, trade unions, consumer groups and the media.⁵⁹ However, a code may actually invite scrutiny and set a higher standard of expected compliance; and given that total compliance will be impossible (as there will always be difficulties with implementation, monitoring, auditing, reporting and enforcement), there is a risk that it will be the company's short-comings that will be highlighted rather than its successes.⁶⁰

There are three broad types of codes that an organisation may seek to adopt. A code developed by a government or by a private body or industry group, both referred to as external codes, or an internal code, that is, a code developed by the organisation itself.⁶¹ Examples of external codes include the Sullivan Principles, a 1977 code of conduct developed for US companies operating in apartheid South Africa;⁶² the McBride Principles, a 1984 code for operations in Northern Ireland;⁶³ the Slepak and Miller Codes for companies in the Soviet Union and China;⁶⁴ the UN Global Compact;⁶⁵ the OECD Guidelines for Multinational Enterprises;⁶⁶ the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy;⁶⁷ the Clinton Administration's Model Business Principles;⁶⁸ and SA8000 a certification program created by the Council on Economic Priorities Accreditation Association.⁶⁹ Many industry groups have developed their own codes such as the one designed by FIFA to tackle the child labour problem in the soccer ball industry.⁷⁰ Finally, an organisation may chose to develop its own code, such as Levi-Strauss and Reebok have done.⁷¹

⁵⁶ Ibid 400; Compa and Hinchliffe-Darricarrere, above n 2, 681, 689.

⁵⁷ *Business Ethics* <<http://www.bsr.org/BSRResources/WhitePaperDetail.cfm?DocumentID=270#recent>>; Gerry Johnson and Kevan Scholes, *Exploring Corporate Strategy* (6th ed, 2002) 483.

⁵⁸ Anne Weir, 'Meeting social and environmental objectives through partnership: the experience of Unilever' in Bendell, above n 3, 118.

⁵⁹ Cox, above n 12.

⁶⁰ Compa and Hinchliffe-Darricarrere, above n 2, 686; Toftoy, above n 2, 917.

⁶¹ Toftoy, above n 2, 913.

⁶² <<http://www.globalsullivanprinciples.org>>.

⁶³ See Jorge Perez-Lopez, 'Promoting International Respect for Worker Rights Through Business Codes of Conduct' (1993) 17 *Fordham International Law Journal* 1, 9-12.

⁶⁴ See Diane Orenthlicher and Timothy Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China' (1993) 14 *North Western Journal of International Law & Business* 66.

⁶⁵ <<http://www.unglobalcompact.org/Portal/>>.

⁶⁶ <http://www.oecd.org/document/28/0,en_2649_34889_2397532_1_1_1_1,oo.html>.

⁶⁷ <<http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/triparti.htm>>.

⁶⁸ <<http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/usmodel.htm>>.

⁶⁹ <<http://www.sa-intl.org/>>.

⁷⁰ <<http://www.fifa.com/en/solidarity/childlabour.html>>; <<http://www.globalmarch.org/world-cup-campaign/about-world-cup-campaign/code-of-labour-practice-fifa.php3>>.

⁷¹ For a discussion of these codes see Compa and Hinchliffe-Darricarrere, above n 2, 675-82, for the text of the codes see <<http://www.levistrauss.com/responsibility/conduct>> and <<http://www.reebok.com/x/us/humanRights/business/>>.

IV MARC KASKY V NIKE INC⁷²

After developing or adopting a code of conduct, many corporations publicise their code on their website,⁷³ on product packaging,⁷⁴ in the media⁷⁵ and through 'image advertising'.⁷⁶ Where these statements imply, or in fact assert, that the corporation is meeting/striving for a particular standard of social/environmental performance, the corporation exposes itself to potential legal liability, if these statements are misleading. This possibility is highlighted by the recent case of *Marc Kasky v Nike*.

This case was a private attorney general action, brought on behalf of the people of the State of California. The nominal plaintiff alleged that Nike had engaged in negligent and intentional or reckless misrepresentation, unfair and unlawful business practices and false advertising, in contravention of ss 17200 and 17500 of the Californian *Business and Professions Code* ('the Code'). The relief sought included an order for restitution requiring Nike to disgorge all monies acquired through unlawful or unfair business practices, and an injunction requiring corrective advertising.

The alleged misrepresentations arose in the context of a Nike public relations campaign designed to respond to unfavourable reports during 1996-97 in various media, critical of Nike's Asian factory working conditions. Kasky based his claim on nine specific communications by Nike which included a posting on Nike's web site about its code of conduct, and press releases and letters defending Nike's labour practices and denying exploitation.⁷⁷ Interestingly, in a letter sent to university presidents and athletic directors, Nike stressed 'wherever Nike operates around the globe, it is guided by principals set forth in a code of conduct' and further, 'we have been proud that in all material respects the code of conduct is complied with. The code is not just word. We live by it'.⁷⁸

At trial, Nike challenged the applicability of the *Code*, claiming the speech at issue was protected by the First Amendment to the US Constitution, and therefore not subject to regulation. As the Californian Court of Appeal upheld Nike's demurrer on constitutional grounds,⁷⁹ it is yet to be determined whether the statements complained of by Kasky constitute misrepresentations (or unfair business practices or false advertising in contravention of the *Code*). The Court

⁷² 27 Cal 4th 939 (2002); for the decision of the US Supreme Court dismissing a writ of certiorari see *Nike v Marc Kasky*, 539 US (2003); 123 S.Ct 2554.

⁷³ Raphael, above n 51, 195; see, eg, <<http://www.bhpbilliton.com/bb/sustainableDevelopment/home.jsp> and <<http://www.westpac.com.au/internet/publish.nsf/Content/WI+Social+accountability>>.

⁷⁴ For example The Body Shop uses its packaging to promote its 'Against Animal Testing' stance.

⁷⁵ Such as the press releases and letters to the editor at issue in *Marc Kasky v Nike*.

⁷⁶ In BP's re-branding advertisements it asks, 'Is it possible to drive a car and still have a clean environment. Can solar power become mainstream? Can business go further and be a force for good. We think so', promoting the company's new 'sustainable' image rather than particular products - BBC, 'BP goes green' 24 July 2000 <http://news.bbc.co.uk/hi/english/business/newsid_849000/849475.stm>.

⁷⁷ *Nike v Kasky* 539 US (2003); 123 S.Ct 2554 (Breyer J dissenting).

⁷⁸ *Ibid* 22, Appendix to Opinion of Breyer J.

⁷⁹ 79 Cal App 4th 165 (2000).

found that as the speech at issue was intended to promote a favourable corporate image, so as to induce consumers to purchase Nike products, rather than communication conveying information about specific characteristics of particular goods, it was outside the boundaries of commercial speech. Being classified as non-commercial speech, the communications were protected by the First Amendment.

However, on appeal,⁸⁰ the Supreme Court of California, by a majority of 4:3, held that the representations made by Nike about its business operations were commercial speech, and therefore not entitled to the protection of the First Amendment. Interestingly, a parallel with origin labeling was drawn, the majority noting that regulating misleading and deceptive speech with regard to labour practices was consistent with traditional regulation of statements about where a product was made.⁸¹ The majority recognised that modern public relations campaigns use sophisticated techniques to increase sales and profits by enhancing the image of a product, its manufacturer or seller. Accordingly, commercial speech should be defined widely enough to encompass statements directed at enhancing corporate image, because, as the Court noted, '[f]or a significant segment of the buying public, [issues such as] labor practices do matter in making consumer choices'.⁸²

This seems a sound decision, as the contrary view would tend to undermine consumer protection regulation and its intended function as a form of market correction. The majority acknowledged this role: 'for the public as a whole, information on commercial matters is "indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered"'.⁸³ Because of the importance of such information and because corporations are in the position to verify the accuracy of statements they make about their business practices, it is not unreasonable to require that such statements not be misleading.

Nike appealed to the US Supreme Court, arguing that the Supreme Court of California's decision conflicted with the superior courts' First Amendment jurisprudence. It also challenged the constitutionality of the Californian regime giving standing to a member of the public to bring cases of this type.⁸⁴ The case attracted intense interest, demonstrated by the 31 amicus briefs that were filed. However, while the US Supreme Court acknowledged that the issues raised were important and complicated ones it may have to deal with in the future, it found that it lacked jurisdiction to determine the matter at this stage, and further, that Nike lacked standing to seek certiorari.⁸⁵ Accordingly the case has now been remanded for trial.

⁸⁰ 27 Cal 4th 939 (2002).

⁸¹ Ibid 964.

⁸² Ibid 969.

⁸³ Ibid 965.

⁸⁴ Like the Australian *Trade Practices Act* (as to which see below Part V(D)), the *Californian Business and Professions Code* allows a member of the public to bring an action to enforce certain of its provisions without the need to have personally suffered any damage. This creates a private attorney general action.

Regardless of the eventual outcome, the existence of this case should serve as warning to corporations to be wary of the claims they make to social responsibility. In fact, Nike in its brief to the US Supreme Court claims it is already having this effect.⁸⁶ Certainly it is already having a financial impact, with a six per cent fall in Nike's share price following the Supreme Court ruling.⁸⁷ Furthermore, other jurisdictions, such as Australia, do not have the same constitutional protection of free speech, removing the arguments raised by Nike as a barrier, and making legal liability for misleading statements more likely.⁸⁸

V THE AUSTRALIAN POSITION - SECTIONS 52, 53 and 75AZC OF THE TRADE PRACTICES ACT

Without constitutional protection for such communication in Australia, it is likely that corporations may face liability for similar statements under the *Trade Practices Act*. Section 52 of the *Trade Practices Act* prohibits misleading and deceptive conduct in trade or commerce. Section 53 more specifically addresses representations about particular qualities of goods and services, and s 75AZC renders these representations a criminal offence. There are a number of issues that need to be considered to determine the likelihood of liability.

A Territorial Scope

The *Trade Practices Act* applies to conduct engaged in within Australia by foreign corporations, and by trading or financial corporations incorporated in Australia.⁸⁹ Conduct outside Australia by bodies corporate incorporated or carrying on business in Australia, and Australian citizens, will also be caught by ss 52, 53 and 75AZC.⁹⁰ Where a statement is made outside Australia, but is directed to Australia, and it is known or anticipated that the communication will be received in Australia, then it is deemed to have been made in the place to

⁸⁵ *Nike v Kasky* 539 US (2003); 123 S.Ct 2554.

⁸⁶ *Ibid* 19 (Breyer J dissenting).

⁸⁷ Chris Ayres, 'Nike faces trial for lying', *The Times* (London), 28 June 2003, 20.

⁸⁸ Australia has an implied constitutional protection of political speech only, although initially widely defined in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 so to have possibly included public debate of labour and environmental standards, it is extremely unlikely given later decisions such as *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and the attitude of the current High Court to the implied rights doctrine that such speech would receive constitutional protection. Further, in *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, the Full Federal Court refused the appellant leave to argue the constitutional validity of s 52 of the *Trade Practices Act 1974* (Cth) on the basis that any guarantees of political free speech do not support similar guarantees of the right to make misleading or deceptive statements, even where the subject matter is political communication.

⁸⁹ *Trade Practices Act 1974* (Cth) s 4(1). The Act is restricted to Australian trading and financial corporations because of the constitutional limits on federal power, however, State Fair Trading Acts also contain similar provisions and are not limited to corporations.

⁹⁰ *Trade Practices Act 1974* (Cth) s 5(1), note however that in an action for damages, consent of the Minister is required before the plaintiff is entitled to rely on this provision, s 5(3).

which is was directed.⁹¹ Therefore statements in Australian media such as television advertisements, press releases, letters to newspapers etc by local and foreign corporations will fall within the *Trade Practices Act*. Publication on a corporation's website will be relevant conduct for an Australian corporation, and if a foreign corporation was aware that its website was viewed by Australians, it may be deemed to have engaged in relevant conduct.⁹²

B 'Misleading or Deceptive'

Whether conduct is misleading or deceptive is a question of fact.⁹³ The test is an objective one, applied to the class of persons likely to be affected by the conduct.⁹⁴ The court must consider the effect of the conduct on ordinary or reasonable members of the class, however it may decline to regard reactions that are extreme or fanciful.⁹⁵ If the relevant people were, or were likely to be led into error by the conduct of the respondent, the conduct conveys a misrepresentation and is misleading and deceptive.⁹⁶ Therefore if a corporation makes statements that it is complying with its code of conduct, or that it maintains particular environmental or labour standards, when this is in fact not true, it will have engaged in misleading and deceptive conduct.

In some cases, silence can constitute a misrepresentation,⁹⁷ as can a prediction or opinion.⁹⁸ This may be especially relevant in situations where corporations present their codes of conduct in such a way as to suggest they are complying with them, or where they make aspirational statements such as, 'we aim to reduce our greenhouse gas emissions by 10 per cent in the next two years' or 'we are committed to increased employment of minorities'. Silence may be regarded as misleading if withheld information substantially affects the correctness of what is expressly said.⁹⁹ It forms one of the factors to be taken into account when determining whether the conduct was misleading in all the circumstances.¹⁰⁰ Further, as it is the overall impression on the consumer which is judged, qualifications and limitations will be assessed in light of the conduct as a whole,

⁹¹ *Voth v Manildra Flour Mills* (1990) 171 CLR 538; conduct is engaged in where the communication was received - *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485 ('*Paper Products*').

⁹² In the context of defamation law Hedigan J in *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 applied *Paper Products* and found that a US corporation publishing defamatory material on its website, which it knew would probably be read by subscribers in Victoria committed a tort in Victoria. His decision was upheld by the High Court in [2002] HCA 56. It is suggested the same reasoning would be applied to a corporation placing misleading and deceptive material on its website with the intention or knowledge that it would be accessed by Australians - the statutory tort would be committed in Australia, and therefore under the jurisdiction of the *Trade Practices Act*.

⁹³ *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88.

⁹⁴ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.

⁹⁵ *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 86.

⁹⁶ *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

⁹⁷ See, eg, *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.

⁹⁸ See, eg, *James v ANZ Banking Group Ltd* (1986) 64 ALR 347.

⁹⁹ Butterworths, *Halsburys, Laws of Australia*, 100 Consumer Protection, '2 Unfair Conduct' [100]-[120].

¹⁰⁰ *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84, 88 (Samuels JA); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32 (Black CJ); *Farquhar v Bottom* [1980] 2 NSWLR 380, 385-6 (Hunt J) - ordinary readers do not take much care in reading advertisements, their capacity for implication is higher than lawyers, the test applied must be one of reasonableness.

and may be totally ineffective.¹⁰¹ Therefore, depending on the way in which a corporation displays its code of conduct on its website, or refers to it in promotional material, it may lead to an inference that the code is being complied with, or at least an attempt is being made to comply with it. This may be the case notwithstanding a disclaimer, depending upon its effect on the overall impression the message has on the reader. If this inference is incorrect, and the corporation is in fact not complying with its code, or not attempting to comply with it, then the display of the code or reference to it could constitute misleading and deceptive conduct.

Predictions or opinions can be regarded as a statement of the representor's state of mind.¹⁰² So where a corporation publicises its plans to for example, improve labour standards, to strive for environmental leadership or to develop a code of conduct, it must actually have a present intention to do these things, or its conduct will be misleading and deceptive. Furthermore, s 51A provides that a representation as to a future matter will be taken to be misleading, unless the maker of the representation can prove they had reasonable grounds for making the representation. This would require the corporation to lead evidence demonstrating the relevant intention at the time of the conduct.¹⁰³ This provision need not be relied on in the case where a corporation makes an unqualified promise or prediction, in circumstances where qualification was needed. In this situation, the misleading and deceptive conduct is the failure to qualify the promise or prediction.¹⁰⁴ An example may be where a corporation predicts it will be using entirely renewable energy by 2005, but fails to add that this only applies to its Australian, and not foreign, operations.

Sections 53 and 75AZC look to false representations rather than misleading and deceptive conduct. Particularly, s 75AZC makes it a strict liability offence to falsely represent that goods are of a particular standard, quality, value, grade, composition, or have had a particular history;¹⁰⁵ or that services are of a particular standard, quality, value or grade;¹⁰⁶ or that goods have approval, performance characteristics, uses or benefits they do not have.¹⁰⁷ Section 53 provides for civil liability in these situations. A representation is false if it is in fact not correct, regardless of the knowledge of the person making it.¹⁰⁸ Quality refers to features, attributes or the character of something.¹⁰⁹ Therefore, a corporation that falsely claims, for example, that its products are manufactured without exploitation (such as the alleged claims made by Nike in *Marc Kasky v Nike*) may be in contravention of ss 53 and 75AZC. The process by which products are

¹⁰¹ *Henderson v Pioneer Homes Pty Ltd (No2)* (1980) 29 ALR 597; *Britt Allcroft (Thomas) LLC v Miller t/as The Thomas Shop* [2000] FCA 699.

¹⁰² *Butterworths, Halsbury's Laws of Australia*, 100 Consumer Protection, '2 Unfair Conduct' [100]-[125].

¹⁰³ *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217.

¹⁰⁴ *Wheeler Grace & Pierucci Pty Ltd v Wright & Anor* (1989) ATPR 40-940, 50,251 (Lee J).

¹⁰⁵ *Trade Practices Act 1974* (Cth) s 75AZC(1)(a).

¹⁰⁶ *Trade Practices Act 1974* (Cth) s 75AZC(1)(b).

¹⁰⁷ *Trade Practices Act 1974* (Cth) s 75AZC(1)(e).

¹⁰⁸ *Given v C V Holland (Holdings) Pty Ltd* (1977) 15 ALR 439.

¹⁰⁹ *Ibid.*

manufactured could be regarded as a quality of those products, or as a representation about the history of the product, or could be construed as a benefit of the product. Likewise, false statements about meeting certain codes or standards in production may be caught by ss 53 and 75AZC.

C 'In Trade or Commerce'

The conduct must also have been engaged in 'in' trade or commerce, rather than merely in connection with trade or commerce.¹¹⁰ It is this element which produces the most uncertainty of liability for corporations making statements about their business practices. McHugh J in *Nelson*,¹¹¹ thought the restrictive interpretation given to the phrase by the majority¹¹² would weaken consumer protection because

[m]uch conduct which affects the marketplace, and thereby affects the choices of consumers, is of a social, sporting, industrial or political character and cannot properly be described as being of a trading or commercial character or as being made in the course of activities which are of the essence of trade or commerce. Statements concerning the environment, political issues, industrial practices, women and ethnic groups, for example, may influence consumers interested in those matters to deal with one trader in preference to another even though those statements are not made as part of those activities which are of the essence in trade or commerce. Many corporations, without referring to their goods or services, also spend much time and money promoting their corporate images. They take these steps to enhance the goodwill of their corporations and to influence the attitude of consumers towards them.¹¹³

However, it is suggested that McHugh J's fear was unfounded, because the majority's formulation of 'in trade or commerce' was concerned with preventing s 52 from becoming a 'side-wind'¹¹⁴ that undermined regulation in other areas, and still leaves room for regulating indirect promotion and 'image advertising'. In fact the majority recognises that the section is concerned with 'the conduct of a corporation towards persons ... with whom it ... has or may have dealings in the course of those activities ... which ... bear a trading or commercial character.'¹¹⁵ This would appear to include conduct toward consumers and investors that is intended to encourage commercial involvement with the company, and in fact the majority identifies promotional activities to actual and potential customers as one

¹¹⁰ *Concrete Constructions v Nelson* (1990) 169 CLR 594 ('*Nelson*'). For a more in depth analysis of the meaning of 'in trade or commerce' see David Meltz, 'The persistent side-wind - The notion of "in trade or commerce" under s 52 of the Trade Practices Act 1974' (2001) 9(2) *Competition & Consumer Law Journal* 128.

¹¹¹ (1990) 169 CLR 594.

¹¹² That conduct in trade or commerce is only conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character, *ibid* 603 (Mason CJ, Deane, Dawson and Gaudron JJ).

¹¹³ *Nelson* (1990) 169 CLR 594, 620.

¹¹⁴ *Ibid* 604 (Mason CJ, Deane, Dawson and Gaudron JJ). This case was concerned with an employee attempting to claim damages for the 'misleading' information given to him by a co-worker that resulted in an industrial accident. Accordingly, the Court was concerned that s 52 did not become 'an overlay ... upon every field of legislative control into which a corporation might stray'.

¹¹⁵ *Ibid*.

of the types of conduct to which the section is directed.¹¹⁶ It would seem odd, as McHugh J highlighted,¹¹⁷ that a shopkeeper may be liable for a misleading statement that his products were safe, but not for a misleading window sign that said he financially supported the Australian Olympic team. Both of these statements are designed to induce purchase of the shopkeeper's products, and both should be regarded as promotional conduct that is appropriate for regulation by the *Trade Practices Act*. This is even more so given the changing attitudes of consumers to issues of corporate social responsibility. Later cases have recognised that statements about public interest issues can be made for a commercial purpose, and therefore must not contravene s 52.¹¹⁸

It is here that parallels can be drawn with *Marc Kasky v Nike*. Arguing that image advertising or promotion of a code of conduct is not conduct in trade or commerce is tantamount to the argument in that case that such speech is not commercial. Clearly, this is a conclusion that is offensive to common sense, and fails to recognise the realities of modern public relations and marketing techniques. Corporations derive immense value from their brands, with a recent study estimating that there are more than 100 global brands worth more than US\$1 billion.¹¹⁹ The most valuable brand, Coca-Cola, is estimated to be worth US\$68.95 billion,¹²⁰ far more than the company's income for last year of US\$3.9 billion and representing more than half the company's market capitalisation of US\$132.6 billion.¹²¹ Given that such brands, making up a significant proportion of the value of a company, can be materially affected by public perception of a company's social responsibility record,¹²² it is hard to see how communications (to the public) regarding social responsibility cannot be regarded as core commercial activities.

Further, the financial importance of corporate brands and images has been recognised by legislation protecting trademarks worldwide.¹²³ Interestingly, s 52 of the *Trade Practices Act* is commonly used in 'passing off' actions, in an effort by corporations to protect their brands. In this context, it is accepted that conduct damaging a brand is conduct 'in trade or commerce', or it is submitted that conduct *promoting* a brand (such as the publication of a corporate code of conduct) should be similarly regarded. The majority in *Nelson* dictate that the activity must be within the central conception of trade and commerce, but what could be more central to a business than its image, its brand, which often comprises a significant portion of the value of the corporation, and therefore goes to the very heart of the corporation's existence? Because social responsibility

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* 620.

¹¹⁸ *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1; *Fasold v Roberts* (1997) 70 FCR 489; *Nixon v Slater & Gordon* [2000] FCA 531.

¹¹⁹ 'The 100 Top Brands', *BusinessWeek* (US), 6 August 2001, 60.

¹²⁰ *Ibid.*

¹²¹ Coca-Cola Corporate Website <<http://www2.coca-cola.com/investors/index.html>>.

¹²² The Millennium Poll, above n 1, found that social responsibility factors were the number one influence on public impressions of individual companies.

¹²³ Such as the *Trademarks Act 1995* (Cth) in Australia.

factors are becoming increasingly important to consumers and investors,¹²⁴ they can play a major role in purchase and investment decisions. These decisions are at the heart of trade and commerce, and it is the very purpose of the *Trade Practices Act* to ensure the public has accurate information to facilitate such decisions. Moreover, the strong parallels to origin labeling which is expressly regulated by the *Trade Practices Act*,¹²⁵ and the ACCC's recognition that privacy codes may be misleading and deceptive (and therefore, presumably, in trade or commerce)¹²⁶ make it likely that statements in corporate codes of conduct will be found to be in trade or commerce.

D Enforcement and Remedies

Who then can, and would be likely to, bring an action for infringement of ss 52, 53 or 75AZC? As the answer to 'who?' is 'anyone whatsoever',¹²⁷ the class of potential plaintiffs is wide, although the remedies they may seek differ. The Australian Competition and Consumer Commission (ACCC) may prosecute corporations or any person involved in contraventions of s 75AZC, within three years of the commission of the offence.¹²⁸ The ACCC may also seek injunctions,¹²⁹ declarations¹³⁰ and other orders¹³¹ (such as community service orders or adverse publicity orders) for the contravention of ss 52, 53 and 75AZC. Whether the ACCC is likely to institute a proceeding may depend on the profile of the matter, the likelihood of success vis-à-vis the cost of proceedings, whether the offending conduct is an industry-wide problem, and the number of consumers affected.¹³² In practice, this may mean that the ACCC is only likely to proceed to create an example against what it perceives to be a widespread problem, or where a large number of consumers are affected. It is interesting to note however, that the ACCC has signed a memorandum of understanding with the Office of the Federal Privacy Commissioner, one of the outcomes of which is that the ACCC will be ensuring that corporate privacy codes are not misleading or deceptive.¹³³ This may indicate that the ACCC considers that corporate codes of conduct generally are subject to s 52, and a willingness to enforce compliance in this area.

Perhaps a more serious threat of action is from consumers and investors affected by conduct which contravenes ss 52 or 53. Any person who suffers loss or damage may bring an action for damages within six years.¹³⁴ This may occur, for example, where a cosmetics retailer has a well-publicised against animal testing

¹²⁴ See above Parts II(A) and II(B).

¹²⁵ See *Trade Practices Act 1974* (Cth) pt V, div 1AA - Country of origin representations.

¹²⁶ See below Part V(D).

¹²⁷ *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591.

¹²⁸ *Trade Practices Act 1974* (Cth) s 79.

¹²⁹ *Trade Practices Act 1974* (Cth) s 80.

¹³⁰ *Trade Practices Act 1974* (Cth) s 163A.

¹³¹ *Trade Practices Act 1974* (Cth) ss 86C, 86D.

¹³² See <<http://www.accc.gov.au/consumer/fs-consumer.htm>>.

¹³³ ACCC, *Regulators Co-operate to Improve Privacy Compliance*, Media Release 45/02, 12 March 2002 <<http://www.accc.gov.au/media/mediar.htm>>.

¹³⁴ *Trade Practices Act 1974* (Cth) s 82.

policy, and therefore sources its products from suppliers based upon their stated codes of conduct, which include a ban on animal testing. If it were discovered (by the media) that one of these suppliers was not adhering to its code of conduct, the cosmetics retailer could suffer considerable loss of sales and damage to its reputation, which it could then seek to recover. Another example may be where an ethical investment fund screens investments based upon corporations' environmental record and stated code of practice. Should the corporation in question be involved in an environmental disaster, due to non-adherence to its code of practice, the share fund is likely to suffer two kinds of loss, which it may seek to recover. First, the fund may seek to recover its drop in value (caused by the likely drop in the corporation's share price - although the actual calculation of damages may be a difficult issue, one which is beyond the scope of this paper) and secondly, the fund may seek compensation for the damage to its reputation as an ethical fund manager. In addition to institutional investors, individual investors in the company may have an action for the loss of value suffered by their shares, as a result of the non-compliance with the company's code. However, causation and the quantum of damage may prove complex issues to overcome.

Finally, the literal interpretation that has been adopted of 'any other person' in s 80¹³⁵ means that any person has standing to seek an injunction or declaration,¹³⁶ irrespective of whether they have suffered any damage or been in any way affected. This ability to effectively bring a public interest proceeding makes competitors and environmental and human rights lobby groups and other NGOs likely plaintiffs. These parties would probably seek injunctive relief in the form of corrective advertising.

In summary, for conduct which infringes ss 53 and 75AZC, a corporation could be liable for up to a \$1 million fine,¹³⁷ plus paying compensation for any loss or damage caused.¹³⁸ Further, the corporation could be forced to publish corrective advertising,¹³⁹ issue refunds or have contracts voided,¹⁴⁰ while any individuals either directly or indirectly knowingly involved in the contravention (such as directors or managers) could be individually fined up to \$200,000.¹⁴¹ Where conduct only infringes s 52 no fines will be payable,¹⁴² but all other remedies, including damages are available to claimants.

E Other Sources of Potential Liability

In addition to the *Trade Practices Act*, there is potential for liability for misleading and deceptive conduct in specific situations under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act*

¹³⁵ *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591.

¹³⁶ *Trade Practices Act 1974* (Cth) s 163A.

¹³⁷ *Trade Practices Act 1974* (Cth) s 75AZC.

¹³⁸ *Trade Practices Act 1974* (Cth) s 82.

¹³⁹ *Trade Practices Act 1974* (Cth) ss 80, 86C, 86D.

¹⁴⁰ *Trade Practices Act 1974* (Cth) s 87.

¹⁴¹ *Trade Practices Act 1974* (Cth) ss 6(6), 75AZC, 79.

¹⁴² *Trade Practices Act 1974* (Cth) s 78.

2001 (Cth). Although it is beyond the scope of this paper to examine these provisions in any detail, corporations should be aware that there are provisions dealing with misleading and deceptive statements in takeover and fundraising documents,¹⁴³ and statements made in relation to financial services or products.¹⁴⁴ This may be of increasing relevance as the trend toward ethical investing continues, and corporations include statements regarding social and environmental policy and performance in fundraising documents in an attempt to attract such investors. Further, making misleading statements that are likely to induce the purchase or sale of financial products,¹⁴⁵ or are likely to change or stabilise the price of a financial product is an offence.¹⁴⁶ This may be of relevance to companies with a substantial shareholding of ethical investors, where statements relating to codes of conduct and ethical concerns could be considered to have a material effect on that company's share price. Similarly, a dishonest concealment of material facts that is likely to induce a person to deal¹⁴⁷ in a financial product is also an offence.¹⁴⁸ This could require the disclosure of serious breaches of a code of conduct (such as an environmental accident) if shareholders or prospective shareholders of the company were likely to trade based on that information.

VI CONCLUSION

The Millennium Poll found that 88 per cent of Australians thought that corporations have some role to play in building a better society, and 67 per cent had, or had thought about, punishing a company not seen as socially responsible.¹⁴⁹ A growing number of Australians are becoming ethical investors, and the government has responded with disclosure provisions in the new *Corporations Act 2001* (Cth).¹⁵⁰ NGOs continue to act as watchdogs, and more recently as corporate partners to improve labour and environmental standards.¹⁵¹ And it would appear that Australian corporations are responding to this changing paradigm, many by posting voluntary codes of conduct or policy statements on

¹⁴³ *Corporations Act 2001* (Cth) ss 670A, 728.

¹⁴⁴ *Corporations Act 2001* (Cth) s 1041H. Note that misleading/false statements in relation to financial services also come under the *Australian Securities & Investment Commission Act 2001* (Cth) ss 12DA, 12DB.

¹⁴⁵ Financial product is defined in *Corporations Act 2001* (Cth) ch 7, div 3.

¹⁴⁶ *Corporations Act 2001* (Cth) s 1041E.

¹⁴⁷ Dealing in a financial product is defined in *Corporations Act 2001* (Cth) s 766C and includes applying for, issuing, varying or disposing of a financial product.

¹⁴⁸ *Corporations Act 2001* (Cth) s 1041F.

¹⁴⁹ The Millennium Poll, above n 1.

¹⁵⁰ See above Part II(B) and n 42.

¹⁵¹ See above Part II(D).

their websites.¹⁵² However, if these codes and policies are mere public relations exercises and are not backed up by intentions and actions, the corporations concerned could be exposing themselves to legal liability - the consequences of which could be expensive and embarrassing. The risk of litigation by consumers, investors, the ACCC, competitors and NGOs for misleading and deceptive conduct is a real one - such an action has already been brought in the United States, surely it is only a matter of time before similar litigation is seen in Australia. The potential losses from such litigation could be significant, with the possibility of unlimited damages claims, million dollar penalties, damage to brand reputation (and probably share price) and the erosion of customer trust and loyalty that would result from the publication of corrective advertising.

This is a risk that all corporations making claims to socially responsible practice must address. While insurance may cover the costs of any litigation, it will not compensate for the damage that would be caused to a company's image by involvement in litigation of this type. The best way to minimise such a risk would be to take active steps to ensure the accuracy of the information (and the impressions it creates) that is made available to the public. This may require significant cultural change within the organisation, so that the commitment to social values on paper becomes a part of the way the organisation operates. The Business Council of Australia advocates creating board-level responsibility for sustainability issues,¹⁵³ and not only would this be likely to improve the management of the company, it would go a long way toward alleviating the significant risks posed by talking about social responsibility, without any commitment to action.

¹⁵² See for example <<http://www.telstra.com.au/investor/vision.htm>>; <<http://www.westpac.com.au/internet/publish.nsf/Content/WI+Social+accountability>>; <http://www.national.com.au/About_Us/0,,1306,00.html>; <<http://www.anz.com/NZ/tools/community/intro.asp>>; <<http://www.bhpbilliton.com/bb/sustainableDevelopment/home.jsp>>; <<http://shareholders.commbank.com.au/display/0,1694,N12221%255FCH2221,00.html>>; <http://www.amcor.com.au/main.asp?page=environment_default.htm>; <<http://www.corporate.colesmyer.com.au>> (ethics & policies); <<http://www.riotinto.com/community/default.asp>>; <<http://www.woolworthslimited.com.au/community/index.asp>>; <<http://www.ampgroup.com/2column/0,2445,CH939%255FSI3,00.html>>; <<http://www.goodmanfielder.com.au/dir065/gfsite/gflimited.nsf/Content/Community+Relations>>.

¹⁵³ John Rouw, 'Boards need green member: BCA', *The Age* (Melbourne), 5 June 2001.