



# Damages for breaching s52 of the *Trade Practices Act 1974*

By Lynden Griggs

Of itself, s52 of the *Trade Practices Act 1974* merely establishes a norm of conduct. Corporations in trade or commerce cannot engage in conduct that is misleading or deceptive.

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**T**he majority of the voluminous litigation on this provision has focused largely on the definitions and limitations of the terms 'corporation', 'trade and commerce' and 'engage', with regard to deceptive and misleading conduct. However, once this is established, no remedy necessarily follows. For this, s82 of the *Trade Practices Act 1974* must come into play. As succinctly stated in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,<sup>1</sup> 'the issue of contravention is anterior to, and to be distinguished from, the administration of remedy.' Section 82 says:

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

A number of principles govern the interpretation of s82:<sup>2</sup>

- (i) Common law and tort principles do not determine the recoverable amount;
- (ii) The loss must result from the contravening conduct – though it need not be the sole cause;
- (iii) Liability under s52 is limited neither by remoteness or foreseeability;<sup>3</sup>
- (iv) While exemplary damages are not recoverable, aggravated damages are (although this is not uniform – where the claim relates to compensation for personal injury or death, neither head of damages is available);
- (v) As a general principle, and apart from the previous point, the available heads of damage are extensive;
- (vi) Contributory negligence (or something akin) is now relevant, given the recent introduction of s82(1B) of the *Trade Practices Act 1974*;

- (vii) There is a quantum limitation on the amount recoverable for loss associated with personal injury and death;<sup>4</sup>
- (viii) Interest can be awarded;<sup>5</sup> and
- (ix) While the time limit will normally be six years,<sup>6</sup> this can be shortened to three years in circumstances within the confines of Part VIB – ‘Claims for Damages for Compensation for Death or Personal Injury’.

Within this list, a number of points are worthy of closer attention:

- (a) proportionate liability;
- (b) assessment for personal injury or death claims;
- (c) causation; and
- (d) the measure of damages.

**PROPORTIONATE LIABILITY**

Part VIA of the legislation (Proportionate Liability for Misleading and Deceptive Conduct) was introduced following a review that culminated in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*. Concern had been expressed for a number of years as to the cost of insurance, and this provision was part of a package of reforms introduced to protect against what was perceived to be a ‘deep-pocket’ syndrome targeting parties with insurance (such as professionals).<sup>7</sup> The structure of the legislation is that concurrent wrongdoers will be required to bear the cost of their contribution to conduct that causes loss, in contravention of s52. Section 87CB of the *Trade Practices Act 1974* defines a concurrent wrongdoer as a person who is one of two or more persons whose acts or omission (or act or omission) caused, independently of each other, or jointly, the damage or loss that is the subject of the claim. Section 87CD then limits the liability of a concurrent wrongdoer to the proportion of the damage or the loss that the courts considers just, having regard to the extent of the defendant’s responsibility for that loss or damage. A defendant is required to notify the plaintiff of a concurrent wrongdoer of whom the defendant is aware (s87CE).

Connected to these provisions is s82(1B) of the *Trade Practices Act 1974*: where a person makes a claim for economic loss or damage to property, and both the plaintiff and defendant contributed to that (with the proviso that the defendant did not fraudulently cause, nor intend to cause the loss or damage), the court may limit the recovery for the plaintiff by an amount that is just and equitable, given the plaintiff’s share in the responsibility for the loss.

**CLAIMS FOR DAMAGES OR COMPENSATION FOR DEATH OR PERSONAL INJURY**


Part VIB of the *Trade Practices Act 1974* was inserted in 2004. It flowed from the insurance crisis in the early part of this millennium, which led to the Ipp Report.<sup>8</sup> Two of the principles that underlay the recommendations were that:

- (i) there be a shorter timeframe within which to recover damages or compensation for personal injury or death; and
- (ii) the recoverable quantum be limited.<sup>9</sup>

As far as actions under the *Trade Practices Act 1974* are concerned, s82(1AAA) provides that a person may not recover loss or damage by an action under s82(1), to the extent that the action is based on a contravention of Division 1 of Part V (ss52 and 53 actions) and the loss or damage results from death or personal injury. However, and making a distinct policy decision, the limitation does not apply if the death or personal injury results from smoking or tobacco products. Complementing this is Part VIB, which applies to proceedings under Part IVA, Division 1A, and 2A of Part V or to Part VA. Commencement of an action must be within three years.<sup>10</sup> Damages are limited in the following way:

- (i) Non-economic loss is limited to \$250 000 (plus adjustments for inflation);<sup>11</sup>
- (ii) Damages for past and future loss of earning capacity are capped at twice average gross weekly earnings;<sup>12</sup>
- (iii) Limits are placed on recovering damages for gratuitous attendant care services;<sup>13</sup>
- (iv) Damages for loss of superannuation entitlements are restricted;<sup>14</sup>
- (v) Aggravated and exemplary damages are not recoverable<sup>15</sup> (with this, in the case of aggravated damages, diverging from the general principle which permits recovery); and,
- (vi) Structured settlements can be made instead of a lump sum award.<sup>16</sup>

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**CAUSATION**

As noted at the outset, there needs to be a causal connection for the award of damages between the financial loss and the contravening conduct. The simplicity of this statement belies the difficulties that it can cause. Consider the following High Court authority, decided prior to the recent introductions dealing with proportionate liability.

In *Henville v Walker*,<sup>17</sup> the appellant (an architect) had purchased a property for redevelopment. Walker was the real estate agent. Walker had misrepresented the demand for luxury units in the area. His advice was that three units built on the land could reach a total sale price of \$750,000. To assist him in the redevelopment Henville prepared a feasibility study, but this contained a number of errors. If the study had been done properly, it would have shown that it was not feasible to build three units on the property and seek the type of return that he wanted. On sale, the units realised only \$545,000 (\$205,000 less than the minimum return suggested by the agent). What was the loss, if any? Three questions arose:

1. Was there an intervening cause?;
2. Was the loss restricted to \$205,000?; or
3. Could Henville also include additional costs incurred by him, which left a total loss of \$319,846.51?

Demonstrating the divergence of opinion that learned minds can reach on such an issue, the trial judge, Court of Appeal and High Court all reached different conclusions. Whereas the Court of Appeal considered that the negligently prepared feasibility study acted as an intervening cause, the trial judge restricted damages to \$205,000. By contrast, the High Court, in restoring the trial judge's order, indicated that the higher amount would have been recoverable if requested. Today, of course, s82(1B) is operable, allowing for the damages to be reduced to the extent that it is just and equitable given the claimant's own failure to take reasonable care. In these circumstances, it is likely that the award to Henville would be less today. However, given that s52 has routinely been recognised as protecting the astute and the gullible, the intelligent and not so intelligent, and the well and poorly educated,<sup>18</sup> a definitive conclusion cannot be stated. A court may well take the view that there was no obligation on Henville to prepare a feasibility study and that s82(1B) may apply only where the actions of both the claimant and the wrongdoer are necessary to achieve the outcome sought. If, in that scenario, they have both been negligent, then some form of apportionment is required. By contrast, the legislation may be interpreted so that where the claimant is not required to do anything to achieve the outcome (that is, Henville may have purchased the property solely on the agent's advice without doing the feasibility study – in other words, the actions of Henville were not a necessary contribution to the loss), the result may well be the same. In summary, those times when the court is likely to attribute parts of the loss to specific causative events are likely to be rare.<sup>19</sup>

**MEASURE OF DAMAGES**

A number of principles are relevant:

1. As the legislation does not stipulate a date when damages are to be assessed, the court must resolve this. Given that a cause of action under s82 will accrue only on the incurring of a loss, it is likely that the date of any breach will rarely feature as the date of assessment. The court can take material factors that influence loss post-breach into account;<sup>20</sup>
2. In many instances the measure of damages that would have been recoverable in tort will be appropriate,<sup>21</sup> although there is no reason to confine damages in this manner;<sup>22</sup>
3. Expectation loss is probably recoverable;<sup>23</sup>
4. Loss of opportunity is recoverable,<sup>24</sup> as is loss of reputation,<sup>25</sup> and damage for mental distress is also a recognised head of recovery;<sup>26</sup> and
5. As previously noted, while exemplary damages are not recoverable,<sup>27</sup> aggravated damages are attainable<sup>28</sup> (although, in application, the distinction between the two is extraordinarily difficult to draw).

Again, though, the principles mask the difficulties that can arise in application. The following authorities highlight this.

***Gates v The City Mutual Life Assurance Society Ltd***<sup>29</sup>

Gates purchased an income protection insurance policy that, he thought (as it had been represented to him) would provide a certain percentage of his income should he become disabled in his usual occupation. The reality, however, was that the policy would provide a benefit only if he were unable to perform any type of work. There was no doubt that there had been a misrepresentation. However, was there any loss? The answer to this was no. There was no evidence that he would have been able to obtain a policy that would have allowed him to get the cover that he sought.

***Sellars v Adelaide Petroleum NL***<sup>30</sup>

The plaintiff (Adelaide Petroleum) was close to finalising a contract with a third party. It broke off negotiations after the defendant made a better offer. The contract with the defendant was ultimately repudiated, after the defendant claimed that its negotiator had acted outside the ambit of its authority. The plaintiff then entered into a contract with the original third party, but on far less favourable terms. Adelaide Petroleum then sought damages for the loss of a chance to conclude the original contract on the more favourable terms. The plaintiff was successful, the High Court holding that damages are available under the Act even in circumstances where the chance had only a 40 per cent probability of being realised. However, the difficulty with this case is that the High Court has appeared to have allowed a lower standard of proof (less than the balance of probabilities) to establish this. Mason CJ, Dawson, Toohey, and Gaudron JJ comment:

'Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the

applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities, because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.<sup>31</sup>

**Marks v GIO Australia Holdings Ltd**<sup>32</sup>

Borrowers entered into contractual arrangements with GIO on the understanding that the interest rate on the money lent would always be set at a specified base rate, plus a margin of 1.25 per cent. The representation was made that this would never alter. GIO, wanting to alter these arrangements, accepted that its conduct was misleading and offered a timeframe in which the borrowers could refinance without penalty. Some borrowers under s52 of the *Trade Practices Act 1974* brought proceedings. Damages via s82 were sought. What was the loss suffered? The High Court held that there was no loss suffered. There was no proof that the borrowers could have obtained elsewhere the bargain to which they sought to hold GIO.

**REFORMING s82**

Perhaps, from a client's perspective, one suspects that the only relevant issue for them is 'how much'. If this is correct, clarity within the operation of s82 is critical. The technical nuances and differing views that surround decisions such as *Henville*, *Gates*, *Sellars*, and *Marks* do little to serve the aims of legislation designed to protect consumers. The exacerbation of this complexity by the recent reforms governing proportionate liability and limitations in case of death and injury only highlights the need for reform. The time is now opportune to look at s82 afresh, decide its purpose or goal, and then draft and interpret accordingly. The piecemeal, ad hoc developments stemming from legislative intrusion and judicial exploration have now resulted in a section whose object is unclear. Is it to benefit consumers, or to balance the interests of insurers and business with consumer welfare? Without this resolution, unnecessary expense continues to be imposed on plaintiffs taking action, and defendants responding to claims, under the *Trade Practices Act 1974*. ■

**Notes:** **1** (2002) 210 CLR 109, [102]. **2** See L Griggs, E Webb and A Freilich, *Consumer Protection Law*, Oxford University Press, Victoria, 2008, pp201-2. **3** In *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) ATPR 41-711, 43, 310; *Henville v Walker* (2001) 206 CLR 459, [66], the indication was that liability under s52 was not to be limited by either remoteness or foreseeability. However, the wording of s82 might suggest that they are applicable. See the comments by McHugh J in *Henville v Walker* (200) 206 CLR 459, [136]. See also *Fico v O'Leary* (2004) ATPr (Digest) 46-259, [202]. **4** Section 82(1AAA)/Part VIB of the *Trade Practices Act 1974*. **5** After 22 November 1984, under s51A of the *Federal Court of Australia Act 1976*. **6** Section 82(2) of the *Trade Practices Act 1974*. **7** See the comments by Besanko J in *Shrimp v Landmark Operations Ltd* [2007] FCA 1468; BC200708057, [58]-[61].

**8** Justice David Ipp, *Review of the Law of Negligence*, September 2002, accessible at <http://revofneg.treasury.gov.au>. **9** This led to civil liability legislation in each jurisdiction: *Civil Liability Act 2002 (NSW)*; *Civil Liability Act 2003 (Qld)*; *Wrongs Act 1958 (Vic)*; *Civil Liability Act 2002 (Tas)*; *Civil Liability Act 2002 (WA)*; *Civil Liability Act 1936 (SA)*; *Civil Law (Wrongs) Act 2002 (ACT)*; *Personal Injuries (Liabilities and Damages) Act 2003 (NT)*. **10** Section 87F *Trade Practices Act 1974*. **11** *Ibid*, at 87M. **12** *Ibid*, at 87U. **13** *Ibid*, at 87W. **14** *Ibid*, at 87Z. **15** *Ibid*, at 87ZB. **16** *Ibid*, at 87ZC. **17** (2001) 206 CLR 459. **18** *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303, 43, 751. **19** See the comments in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, [62]. **20** For example, *Starborne Holdings Pty Ltd v Radferry Pty Ltd* (1998) ATPR 41-634. **21** *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281. **22** *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494. **23** *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, [46]-[46], [54]-[55]. **24** *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1. **25** *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1985) 65 ALR 500. **26** *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; *Walker v Citigroup Global Markets Pty Ltd* [2005] FCA 1678; BC200509986. **27** *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448. **28** *Lamb v Cotogno* (1987) 164 CLR 1. **29** (1986) 160 CLR 1. **30** (1994) 179 CLR 332. **31** (1994) 179 CLR 332, 355. **32** (1998) 196 CLR 494.

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