

**A Comparison Between Section 9 of the
Fair Trading Act 1986
and the Common Law**

by

Elizabeth K. Paton*

Introduction

The Fair Trading Act 1986 was enacted to complement the Commerce Act 1986 in promoting competition by maximising the availability and accuracy of consumer information. This article focuses on section 9 of the Act, and compares it to various actions at common law. Section 9 plays an important role in ensuring that conduct which is detrimental to consumer awareness and rational choice will more often attract liability than it did at common law, and a wider range of remedies are now available. Such increased consumer protection is seen as appropriate in today's complex economic environment, and with the diversity of products available.

Section 9 reads as follows:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

"Person" is defined in section 2(1) to include a local authority, and any association of persons whether incorporated or not.

"Trade" is defined as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

Section 2(2) states that a reference to engaging in conduct shall be read as

* BCom/LLB

a reference to doing or refusing to do an act, and includes omitting to do an act, or making it known that an act will or, as the case may be, will not be done.

The Australian cases on section 52 of the Australian Trade Practices Act 1974 (hereinafter referred to as section 52) are of considerable help in interpreting our section 9, as the two provisions are very similar. Section 52(1) reads as follows:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

I Misrepresentation

1. "Conduct" compared with representation

The concept of a representation is more restrictive than that of engaging in conduct.

(i) At common law, a representation may be made expressly by words, gestures, demeanour, writing, drawings, and so on, or it may be implied from words or conduct. For example, there is an implied representation that an article sold is what it appears to be, and that there have not been measures taken to conceal any defects or to make its outside appearance deceptive.¹ However, there is a limit as to what conduct may constitute a representation.

Under section 9, a pattern of activity creating a particular impression might be covered even though it did not amount to a representation.

(ii) At common law, silence will not of itself amount to a representation, but may contribute to establishing a misrepresentation where:

- (a) the representor makes a positive statement but omits to state a material qualification, so that the positive statement is not completely true.²
- (b) there is a positive duty raised by the circumstances to disclose certain matters, so that if the representor is silent, the representee may infer their non-existence.

Under section 9, the situations in which silence may amount to misleading or deceptive conduct are not limited to the two common law categories, since "engaging in conduct" is defined to include omitting to do an act. This definition is wider than its Australian counterpart,³ which excludes inadvertent omissions.

In the *Rhone-Poulenc case*⁴, the Defendant failed to disclose that its fungicide was unregistered. Most of the ultimate purchasers of the Defendant's fungicide were in states which required fungicides to be registered before

¹ See *Cottee v Douglas Seaton (Used Cars) Ltd* [1972] 3 All ER 750.

² *Peek v Gurney* (1873) LR 6 HL 377.

³ Trade Practices Act s 52, Australia.

⁴ *Rhone Poulenc Agronomie SA v VIM Chemical Services Pty Ltd* (1986) ATPR para 46-010 (Digest); cf *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR para 40-782.

sale. A majority of a Full Court of the Australian Federal Court held that the failure was not misleading or deceptive conduct. All three judgments stressed that the Australian equivalent to section 9⁵ should be given its natural and ordinary meaning, and not confined to the common law categories as to when silence may constitute misrepresentation.

However, Bowen CJ stated that the Court could gain assistance from cases decided at common law and in equity. He then examined whether the relationship between the parties was such as to give rise to an obligation to make disclosure, while stating that the Court was not restricted to cases where such a relationship had already been held to exist at common law or in equity.

Jackson J dissented in this approach, and stated that silence will constitute misleading or deceptive conduct if it is the vendor's silence that induces or is likely to induce the mistaken view on the part of the potential purchaser. While such a view would further the objects of the Act in promoting consumer knowledge, it is submitted that such a burden of disclosure would be too onerous and uncertain, and would be better dealt with by positive consumer information standards under Part II of the Act.

- (iii) At common law, the action must be brought by a representee, that is:
- anyone to whom the representation was physically and directly made, or his or her principal or partner; or
 - anyone to whom the representation was intended to be passed on; or
 - any individual member of the public or class to whom the representation was addressed who has acted on it.

Under section 9, persons who would not be representees at common law may be considered in assessing whether conduct is likely to mislead or deceive. This point will be particularly relevant where conduct is in writing or other permanent form, and may be seen by many people not contemplated by the representor.

(iv) At common law, a representation must be a statement of a past or present fact. Hence a promise, forecast, statement of intention or opinion cannot in itself be a representation. Nevertheless, a statement of intention, opinion, or expectation involves a representation that the representor does in fact hold that intention, opinion, or expectation, and perhaps a representation that the representor knows of reasonable grounds justifying the opinion or expectation. However, it is difficult to prove what was the state of mind of the representor.

Likewise, although a statement of a mixed fact and law is a representation of what is stated, a mere statement of law is not, but may involve a representation that the maker of the statement believes it is true. Hence a statement of pure law will involve a misrepresentation only if it is made fraudulently, or with reckless indifference to its accuracy.

It has been suggested that promises and predictions might now be caught by section 52, since a person who has acted in reliance upon an unfulfilled

⁵ Trade Practices Act s 52, Australia.

promise or prediction has been misled. However, this reasoning was rejected by a Full Court of the Federal Court of Australia in *Global Sportsman Pty Ltd v Mirror Newspapers Limited*.⁶ It was held that the same rules which apply at common law should be applied to the statutory provision, so that a statement of opinion, for example:⁷

... conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing... Whether a statement is a statement of past or present fact, a promise, a prediction, or an expression of opinion, the making of it constitutes conduct which is misleading or deceptive or likely to mislead or deceive if the statement contains or conveys a misrepresentation.

The effect of the judgment would seem to be not that all the requirements to constitute a misrepresentation at common law are imported into section 9 but merely that statements as to opinion or the future are capable of being misleading or deceptive only inasmuch as they involve a statement of present or past fact, as at common law.

It is submitted that, as a matter of policy also, the distinction between statements of opinion and fact should be retained, to encourage sellers to state as opinion only matters of which they are uncertain, instead of stating opinions as facts, or remaining silent out of caution. The consumer is thereby more likely to receive the optimal amount of information, and a better idea of how much reliance to place on it.

The definition of "engaging in conduct" in section 2(2) includes "making it known that an act will or, as the case may be, will not be done". This does not, it is submitted, give section 9 any wider scope as to statements of intention than its Australian equivalent. It merely makes clear that a statement of intention or promise can be conduct; it will still be misleading or deceptive only if its maker does not in fact hold that intention, which includes reckless indifference as to whether it will be adhered to or not.⁸

In 1986, the Australian Act was reformed by the insertion of a provision deeming representations as to future matters, including statements of intention, to be misleading if the corporation does not have reasonable grounds for making the representation.⁹ Thus far, nothing is added to the common law. However, the section also provides that, in the absence of evidence to the contrary, the corporation is deemed not to have had reasonable grounds. Hence the corporate maker of the statement bears the burden of proving its own state of mind, which it is usually in the better position to do, having the greater access to and knowledge of its directors, servants, and agents.

However, this burden would be too onerous to place on the private individ-

⁶ (1984) ATPR para 40-463 (FC).

⁷ *Ibid*, 45,344-5.

⁸ *Thompson v Mastertouch TV Service Pty Ltd* (1977) 29 FLR 270.

⁹ Trade Practices Act 1974, s 51A (C'th) as inserted by Trade Practices Revision Act 1986, s 21 (C'th).

uals and unincorporated societies covered by the New Zealand Act. Although it may be reasonable to expect that a person representing a corporate intention will have external verifiable grounds for the representation, due to the element of communication involved in corporate decision-making (board minutes and witnesses of discussions, for instance), an individual will often not, and should not, be held to non-contractual promises where there has been a genuine change of mind. Hence, it is submitted that such a deeming provision as the Australian section 51 A(2) would be inappropriate in the context of the New Zealand Act.

On the other hand, there is no reason why statements of pure law should be treated any differently under section 9 from statements of fact or of mixed fact and law. Making a statement of law is certainly within the expression "engaging in conduct", and is perfectly capable of being misleading or deceptive. Misstatements of law and of fact are equally damaging to consumer awareness and competition. Statements of law can still be made without risk of innocently incurring liability if they are clearly expressed as statements of opinion only as to what the law is, so long as the maker has reasonable grounds for a genuine belief in their correctness.

2. "Misleading or deceptive" compared with "false"

The second factor giving section 9 wider scope than misrepresentation at common law is that "misleading or deceptive" conduct need not involve falsity.

Originally in the Australian Act, the words "misleading or deceptive" were not followed by "or likely to mislead or deceive". There was some disagreement as to whether the former expression meant conduct which in fact leads into error, or conduct which is capable of leading into error. It is submitted that the latter view was preferable, and so the additional words have in fact narrowed the scope of the section, by requiring conduct to be not merely capable of leading into error, but likely to do so. There must be a "real or not remote chance or possibility regardless of whether it is less or more than fifty percent."¹⁰

(i) The difference between "misleading or deceptive" and "false" is less than it may appear on the face of the words. A strong line of authority supports the proposition expressed in the dictum of Lord Halsbury LC in the House of Lords in *Aaron's Reefs Ltd v Twiss*¹¹ as follows:

If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue.

The principle has been extended to innocent misrepresentations. In *Curtis v*

¹⁰ Supra at note 6, at 45,343.

¹¹ [1896] AC 273, 281.

*Chemical Cleaning and Dyeing Co*¹², a customer taking a wedding dress to be cleaned asked why she had to sign a paper headed "Receipt". The shop assistant replied that it was because the defendants would not accept liability for certain specified risks, including the risk of damage by or to the beads or sequins with which the dress was trimmed. In fact, the receipt contained a condition that the cleaners would not be liable for any damage however arising. The ratio of the case is most clearly expressed by Lord Denning, who stated that a representation may be literally true but practically false, because of what it implied. The false impression created, albeit innocently, and although not sufficiently precise and unambiguous to create an estoppel, was an actionable misrepresentation.

Similarly, section 9 will cover statements that are literally true but create a false impression. However, while the common law looks to the *content* of the words or conduct in determining whether there has been a misrepresentation, the focus under section 9 is on the *effect* of the conduct. In *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*¹³ in the context of deciding that no mental element was necessary under section 52, Stephen J commented that section 52(1) 'is concerned with consequences as giving to particular conduct a particular colour. If the consequence is deception, that suffices to make the conduct deceptive.'

(ii) At common law, a representation will be construed according to the meaning which a reasonable person would have given it. Under section 9, the test is also an objective one, but is not based on reasonableness.

Firstly, the relevant section of the public must be identified, which may be the public at large.¹⁴ In identifying the relevant class, the object is to find those who are likely to be misled or deceived, while at common law the object is to determine to whom the representation was addressed, in the contemplation of the representor. For example, where the primary function of a document is to induce the purchase of shares in the market, persons who are induced by it to apply for allotment would not be representees at common law¹⁵, but would be included in the relevant class under section 9. In this respect, section 9 is more similar to negligent misstatement¹⁶ than to misrepresentation but, as discussed below, it extends protection to an even wider class than does negligent misstatement.

Next the matter of whether conduct is misleading or deceptive must be considered by reference to all who come within that class, "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursu-

¹² [1951] 1 KB 805.

¹³ (1978) 18 ALR 639,647.

¹⁴ *Taco Company of Australia Ltd v Taco Bell Pty Ltd* (1982) ATPR para 40-303.

¹⁵ *Overend and Gurney Co v Gibb* (1872) LR 5 HL 480 at 501.

¹⁶ See *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553.

ing a variety of vocations.¹⁷ Although this proposition is supported by the majority of the Australian cases, Gibbs CJ on appeal remarked that the section must be regarded as contemplating the effect of the conduct on reasonable members of the class, since the heavy burdens created by the section could not have been intended for the benefit of persons who fail to take reasonable care of their own interests.¹⁸ It is submitted, however, that such was exactly the intention of the legislature, especially as advertisements so often deliberately play on the gullibility and weaknesses of the public.

More stringent standards may be applied to advertisements directed at children or appealing to particular susceptibilities such as human vanities.¹⁹ To prevent such principles from being taken to absurd lengths (as when it was held that a statement that a product "stops perspiration" was misleading through ambiguity as it only stopped perspiration temporarily²⁰) the line is usually drawn at the quite unusually stupid.

(iii) Misleading or deceptive conduct is not so far removed from any concept of falsity that mere confusion would suffice. This is best illustrated by the passing off cases. Although it is difficult to draw the line, as a general guide the existence of similar products with different names or different products with similar names is more likely to cause confusion only, whereas the existence of similar products with similar names is more likely to be misleading or deceptive.

The former type of case is illustrated by the "*Big Mac*" case,²¹ which involved the use by McWilliam's of the words "Big Mac" in connection with one of its wines. The expression was widely known as the name of one of McDonald's hamburgers, and McDonald's alleged that consumers would be confused as to whether there was a business connection between McWilliam's and McDonald's. The Court held that McWilliam's conduct was not misleading or deceptive, but merely caused confusion.

The latter type of case is illustrated by the *Taco Bell case*,²² in which the owners of a Mexican food restaurant which had acquired a reputation throughout Sydney under the name "Taco Bell's Casa" were granted an injunction against the owners of another Mexican food restaurant restraining them from also operating under the name "Taco Bell".

3. *Inducement*

At common law, for a representation to be actionable it must be intended

¹⁷ *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73, 93.

¹⁸ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) ATPR para 40-307; 43,783.

¹⁹ *Gelb v FTC* 144 F 2d 580, 583 (1944).

²⁰ *Carter Products Inc v FTC* 186 F 2d 821 (1951).

²¹ *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* (1980) ATPR para 40-188.

²² *Supra* at note 14.

to induce, and must in fact induce, the representee to alter his or her position. In contrast, a breach of section 9 can be unintentional; no mental element is needed.²³ Furthermore, evidence of actual deception is not essential, although it is admissible and may be persuasive if it can be shown to have been caused by the conduct in question.²⁴

Reliance causing loss or damage is, however, relevant in relation to remedies. For damages to be awarded or other orders to be made under section 43, loss or damage must be suffered 'by' the contravening conduct, that is, 'by reason of' or 'as a result of' that conduct.²⁵ In other words, a causative link must be proved between the conduct and the loss or damage.²⁶ Where the representee seeks compensatory relief (as opposed to cases in which a non-representee seeks relief, as in passing off) it has been held that reliance must be proved, and that the principles relating to inducement in actions for deceit are applicable in determining whether the claim under the statutory provision may succeed.²⁷

4. *Materiality*

A further requirement at common law is that the representation be material, that is, that its natural and probable result be to induce the representee to act upon it in the kind of way s/he in fact acted. Although materiality is an objective test, it is assessed in relation to the particular representee and the circumstances of the case. It bears some similarity to the test of whether conduct is likely to lead persons into error although, as noted above, the standard is not the reasonable person. Also, under section 9, it is sufficient that persons would be likely to be misled into merely initiating conduct with a seller.

5. *Mental Element*

In addition to the requirements for actionable misrepresentations outlined above, the tort of deceit requires that the misrepresentation be made with knowledge of its falsity or reckless disregard for its truth. While no mental element is necessary under section 9,²⁸ there is some authority that "a Court will much more readily find a breach of [the Australian equivalent to section 9] where there is clear evidence of an intention to deceive or of recklessness."²⁹ This statement reflects an inference not quite a presumption that an intention

²³ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 18 ALR 639.

²⁴ *Supra* at note 14.

²⁵ See *Myers v Transpacific Pastoral Co Pty Ltd* (1986) ATPR para 40-673; 47,423.

²⁶ *Brown v Jam Factory Pty Ltd* (1981) ATPR para 40-213; 42,929.

²⁷ *Collins Marrickville*, *supra* at note 4, at 48,538; see also *Jones v Acfold Investments Pty Ltd* (1985) 59 ALR 613,623-624.

²⁸ *Supra* at note 13.

²⁹ *Nylex Corporation Ltd v Sabco Ltd* (1987) ATPR para 40-752; 48,179.

to deceive will in all probability be effective.³⁰ However, it is submitted that it would be wrong to make the corresponding inference that deception is improbable where there is a lack of intention to deceive. The courts should not be hesitant in finding breaches of section 9 in the absence of fraudulent intent if the conduct is likely to mislead or deceive.

Apart from the Contractual Remedies Act 1979, there is no right at common law to damages for a mere representation made innocently, although it could be a ground for rescission in equity. Under section 9, various remedies including damages are available irrespective of whether the conduct was innocent or fraudulent.

6. *The Contractual Remedies Act 1979*

In situations where a misrepresentation has induced the representee to enter a contract with the representor or the representor's principal, the common law actions in deceit or negligence no longer apply, and the action should be brought under the Contractual Remedies Act 1979. (Where a representation has induced some other alteration of position, such as entering a contract with a third party, the tortious remedies will still apply.) Under the Contractual Remedies Act, all the elements to constitute a misrepresentation still apply, as does the necessity for inducement, but no mental element is needed. The representee's remedies are in damages as if the representation were a term of the contract, or cancellation.

The appropriate measure of damages under the Australian fair trading provisions has been considered by the High Court of Australia in *Gates v City Mutual Life Assurance Society Ltd*.³¹ The proceedings related to a total disability clause which had been added to an existing policy and included in a new policy. The appellant claimed that he had arranged the extra cover on the faith of representations made by an agent of the respondent. The agent had stated that the policy would be payable if he became physically incapable of carrying on his occupation as a self-employed builder, whereas in fact the policy was payable only if he became incapable of attending to any gainful profession, occupation, or employment.

A breach of section 52 was found, but the High Court held that the claim for damages had not been proved. Gibbs CJ stated that actions based on sections 52 and 53 are analogous to actions in tort, and that the Australian damages provision (the relevant words being identical to the New Zealand section 43(1)) appeared to adopt the tortious measure. Mason, Wilson and Dawson JJ stated:³²

... there is much to be said for the view that the measure of damages in tort is appropriate

³⁰ *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* (1980) 32 ALR 387,396.

³¹ (1986) 63 ALR 600.

³² *Ibid*, 609.

in most, if not all, Part V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, in particular fraudulent misrepresentation and negligent misstatement.

The appellant could not prove that the policy was worth less than he had paid for it, or that, but for his reliance on the representation, he could and would have entered policies containing a disability clause of the type represented. Hence no damages could be awarded under the tortious measure. Rescission would have been available, but was not sought.

In New Zealand also, the representee in such a case would be effectively left without a remedy under the Fair Trading Act. However, damages would be available under the Contractual Remedies Act, applying the contractual measure. Thus there is a significant advantage in bringing an action under the Contractual Remedies Act rather than section 9 where the representee would have had a winning bargain if the facts had been as represented.

II Negligent Misstatement

An action under section 9 will generally be preferable to an action for negligent misstatement, for the following reasons:

(i) Under section 9 no mental element is needed so negligence need not be proved.³³

(ii) In *Meates v A-G*,³⁴ it was held that the *Anns* two-step test³⁵ should be applied to cases of negligent misstatement in determining whether a duty of care is owed. That is, there must be established prima facie a sufficient relationship of proximity or neighbourhood, and then it must be considered whether there are any considerations which ought to negative liability or to limit its scope. However, section 9 contemplates a still wider class; the class of persons who may be led into error.

(iii) It is not clear whether there is any way of contracting out of the operation of section 9. It seems that an acknowledgement or exclusion clause is ineffectual, being an attempt to oust the legal effect of an already operative misrepresentation, whilst it is a question of fact whether a disclaimer negates the misrepresentation.³⁶

(iv) Loss or damage which may form the basis of an order for damages under section 43(d) is not confined to physical damage, and may include economic loss. In negligence, there is liability for economic loss resulting from negligent misstatements only in certain limited circumstances, as outlined in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.³⁷ There must be a special relationship between the parties such that the defendant knew or ought to have

³³ Supra at note 13.

³⁴ [1983] NZLR 308 (CA): see also *Scott Group Ltd v McFarlane*, supra at note 16.

³⁵ *Anns v Merton London Borough Council* [1978] AC 728.

³⁶ *Collins Marrickville*, supra at note 4.

³⁷ [1964] AC 465.

known that the plaintiff was relying on the defendant's skill and judgment. In New Zealand, such a relationship is not restricted to persons who hold themselves out as carrying on the business or profession of giving advice of that kind, but has been held to exist, for instance, where a Minister of the Crown negligently promised future financial assistance.³⁸ No special relationship is required under section 9.

III Passing Off

The five characteristics necessary to create a cause of action for passing off, as identified by Lord Diplock in the *Advocaat* case, are:³⁹

(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another (in the sense that this is reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet* action) will probably do so.

Lord Diplock did, however, warn against assuming that all factual situations which present these characteristics would necessarily give rise to a cause of action.⁴⁰ At the conclusion of his judgment he said:⁴¹

The presence of those characteristics is enough unless there is also present in the case some exceptional feature which justifies, on grounds of public policy, withholding from a person who has suffered injury in consequence of the deception practised on prospective customers or consumers of his product a remedy in law against the deceiver.

While passing off cases can be of assistance to the court in interpreting and applying section 9,⁴² "indiscriminate importation into section 52 cases of principles and concepts involved in passing off . . . is likely to be productive of error and to give rise to arguments founded on false assumptions."⁴³ In Australia, the marked difference in policy emphasis between the common law and the statute has been noted; the law of passing off is directed at protecting the proprietary rights of traders, while the intent of section 52 is to protect the public as consumers of goods and services.⁴⁴

Admittedly the Australian provision is located under the headings 'Part V – Consumer Protection' and 'Division 1 – Unfair Practices', whereas nothing in the relevant parts of the long title or in the relevant headings of the New Zealand Act refers specifically to consumers. However, it has been held that the ambit of section 52 should not be confined in any way because of the

³⁸ *Meates v Attorney-General* [1983] NZLR 308 (CA).

³⁹ *Erven Warnink Besloten Vennootschap v J Townsend & Sons* [1979] AC 731, 742.

⁴⁰ *Ibid*, 742.

⁴¹ *Ibid*, 748.

⁴² *Big Mac case*, *supra* at note 21, at 42,585.

⁴³ *Taco Bell*, *supra* at note 14, at 43,748.

⁴⁴ *Big Mac case*, *supra* at note 21, at 42,585.

Australian headings,⁴⁵ although it is accepted that the primary legislative purpose of section 52 is consumer protection.⁴⁶ "It would ill accord with that primary purpose to restrict the operation of the section to conduct which, at common law, would entitle a trader to sue a rival or to impose a limitation upon that operation merely because the common law accepted . . . such a limitation as applicable to proceedings for passing off."⁴⁷

A further question is whether section 9 will cover instances of passing off where the recipients of the conduct are not 'consumers'. It is clear that a rival trader may gain an effective remedy under the section where conduct fitting the statutory description causes damage to its goodwill.⁴⁸ However, it has been said to be a matter of debate whether such protection of rival traders constitutes part of the legislative purpose of section 52. It is easier to argue that the New Zealand section is at least partially directed at protecting those who trade fairly from less scrupulous competitors, due to the short title of the New Zealand Act, and the avoidance of reference to 'consumers' in the headings of Part I.

In any case, it has more recently been confirmed in *Bevanere Pty Ltd v Lubidineuse*⁴⁹ that the Australian provision is not confined to statements directed to the public or some identifiable section of it. That case concerned a misrepresentation made in the sale of a business, but the principle would presumably apply equally in a passing off situation involving deception of, for example, suppliers.⁵⁰ Hence section 9, having a wider purpose than the law of passing off, covers most of the area formerly covered by passing off, and much more. In fact it is difficult to conceive of situations which would give rise to causes of action in passing off but not under section 9.

One way in which the law could conceivably develop in the future to create liability in passing off where there is none under section 9 would be by a relaxation of Lord Diplock's second requirement, that the misrepresentation be made in the course of trade. Already, injunctions have been granted in passing off actions although the *plaintiffs* have not been involved in any commercial activity. In *Dr Barnado's Homes: National Incorporated Assoc v Barnado Amalgamated Industries Ltd*,⁵¹ a charitable organisation was granted an interim injunction restraining the use of its name in connection with novelettes with 'somewhat flaming titles' by a rather doubtful commercial enterprise.⁵²

On the other hand, there have been no instances as yet of relief being

⁴⁵ *Bevanere Pty Ltd v Lubidineuse* (1985) ATPR para 40-565; 46,570; *Hornsby*, supra at note 15, at 17,687 - 17,689 and 17,693.

⁴⁶ *Taco Bell*, supra at note 14, at 43,749.

⁴⁷ *Ibid*, 43,749.

⁴⁸ *Ibid*.

⁴⁹ (1985) 59 ALR 334; (1985) ATPR para 40-565. Follows *Menhaden v Citibank NA* (1984) 55 ALR 709; (1984) ATPR para 40-471.

⁵⁰ See *Larmer v Power Machinery Pty Ltd* (1977) ATPR para 40-021.

⁵¹ (1949) 66 RPC 103.

⁵² See also *British Legion v British Legion Club (Street) Ltd* (1931) 48 RPC 565.

granted in passing off where neither party is engaged in commercial activities.⁵³ In *Kean v McGivan*,⁵⁴ the English Court of Appeal held that no tort had occurred where a new political party adopted the same name as an existing political party. The decision seemed to be based on the non-commercial nature of the plaintiff rather than of the defendant, and the fact that there needs to be some form of property right (goodwill) which has been damaged. Hence it is at least arguable that the courts might be willing to grant relief in passing off where the plaintiff, though not the defendant, is engaged in commercial activity. In such a case, no relief would be available under section 9, as the conduct of the defendant would not be in 'trade', as defined in section 2(1).

Another developing area of the law of passing off is the extension into an area known as 'unfair competition'. It appears that this was to what Wilcox J was referring in *INXS v South Sea Bubble Co Pty Ltd*⁵⁵ when he said the claim in passing off in that case was even stronger than the claims under the Act, since in passing off a common field of activity is no longer required, and wrongful appropriation of the plaintiff's name and reputation is covered.

There have been signs that the tort of unfair competition could develop as a separate action from passing off, even perhaps imposing liability in situations where there would be no action under section 9, because the new tort would be based on unjust enrichment⁵⁶ rather than on deception or confusion.⁵⁷ However, the High Court of Australia has rejected the suggested new tort in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)*⁵⁸ and stated that any new developments should continue to be made within the limits of the traditional and statutory causes of action such as passing off. Those limits were said to 'increasingly reflect what the responsible parliament or parliaments have determined to be the appropriate balance between competing claims and policies.'⁵⁹ It can be expected that the New Zealand courts will follow the High Court of Australia on this matter.

Section 9, unlike the corresponding American provision,⁶⁰ does not deal with conduct which is merely 'unfair', and the ironical result could be that section 9 may not only take over the existing scope of the law of passing off, but may also deter the courts from further developing the law of passing off in the area of unfair competition.

Furthermore, there is the reluctance of the Australian Federal Court to consider alternative claims in passing off once the statutory claim has been

⁵³ See *Day v Brownrigg* (1878) 10 Ch D 294 (CA); *Earl Cowley v Countess Cowley* [1901] AC 450 (HL).

⁵⁴ [1982] FSR 119.

⁵⁵ (1986) ATPR para 40-667; 47,379.

⁵⁶ See *Radio Corp Pty Ltd v Henderson* [1960] NSWLR 279,285.

⁵⁷ See *Vine Products Ltd v Mackenzie & Co Ltd* [1969] RPC 1, 23 and 28-29.

⁵⁸ (1984) 59 ALJR 77.

⁵⁹ *Ibid.*, 88.

⁶⁰ Federal Trade Commission Act 1914, section 5.

accepted or rejected. In the *Taco Bell* case⁶¹ Deane and Fitzgerald JJ, in a joint judgment, stated that:

... the Federal Court should not, as a matter of general discretion, proceed to decide additional claims where it is pointless so to do. There are plainly many cases where an associated claim for passing-off provides no basis for wider or more effective relief than a primary claim for contravention of section 52 and where, if the primary claim fails, the associated claim will plainly also fail.

Although this stance of the Federal Court is due to jurisdictional considerations, it does mean that the passing off principles tend to be 'passed over' in the Australian cases; they are often incorporated into the consideration of section 52 claims, despite the judicial warnings noted above, but are seldom fully considered as a separate cause of action. It is likely that the New Zealand courts may follow suit even though there is no jurisdictional problem in New Zealand, since it will usually be pointless to consider the passing off claim in detail.

If no independent role remains to passing off, the result could be the subsumption of the law of passing off within the statutory cause of action. There would be a corresponding loss of flexibility in the protection of business reputation by the courts. Indeed, such a fate for passing off may already have been accepted in the statement of Barker CJ in *Philip Morris Inc v Adam P Brown Male Fashion Pty Ltd*⁶² that:

... 'passing off' may ... be regarded as no more than an instance of misleading or deceptive conduct within the operation and meaning of s.52 and s.53 of the Act. Clearly, in my opinion, to pass off in the sense used in equitable jurisdiction is to deceive and to mislead.

However, it is submitted that matters of enforcement and remedies may save passing off actions from becoming entirely redundant in New Zealand. Since these matters may constitute the major, if not the only, advantages of proceeding in passing off rather than or as well as under section 9,⁶³ it is proposed to examine them in some detail.

1. Injunctions

(i) Normally the Act will provide wider grounds for injunctive relief than will the common law; see below. Arguably, though, the court may not have power under section 41 to grant mandatory injunctions. Due to the definition of 'conduct' in section 2(2) as including omissions, it may be possible to grant what is in effect a mandatory injunction by restraining a person from omitting to do an act.⁶⁴ It is submitted that such a device would be acceptable only so long as the omission restrained would itself constitute a contravention (or an-

⁶¹ *Supra* at note 14.

⁶² (1981) ATPR para 40-197; 42,683.

⁶³ See *Taco Bell*, *supra* at note 14, at 43,754.

⁶⁴ See *Health Insurance v Hospitals Contribution Fund of Australia* (1981) 36 ALR 204; *TPC v Tooths & Co* (1979) 26 ALR 185.

cillary contravention); that is, to come within the wording of section 41(1), the injunction would need to be framed in sufficiently general terms so that a failure to comply with its terms would necessarily also involve a contravention of section 9. The same reasoning would apply to conditional injunctions, and a useful form of words would be that often used in passing off cases, namely, 'without clearly distinguishing'.

Injunctions with mandatory effect which are framed too specifically not only sit uneasily with the wording of section 41(1), but would have the effect of overriding the legislative intent that orders for the disclosure of information or publication of advertisements be available only on the application of the Commission.⁶⁵ Also, the more general power in Part II of the Act to declare consumer information standards should be noted.

That being said, it is submitted that strict compliance with the wording of section 41(1) is unduly restrictive on the courts,⁶⁶ and the law ought to be reformed along the lines adopted in Australia to allow the court to grant an injunction 'in such terms as the Court determines to be appropriate'.⁶⁷ In the meantime, the availability of more specifically framed mandatory injunctions may be an advantage of passing off actions.

General injunctive relief is more readily available under the Act than in passing off actions. Firstly, there is no locus standi requirement under section 41, and the words 'any other person' should not be qualified.⁶⁸ This means that persons other than the trader whose goodwill has been appropriated may obtain an injunction.

For instance, if trader A is a domestic manufacturer of all kinds of footwear and is passing off its running shoes as being those of B (an overseas manufacturer of expensive imported running shoes), then trader C, who competes with A in producing women's fashion shoes might wish to seek an injunction to prevent the misleading conduct. The fact that C is affected only very indirectly, if at all, by the tort against B is relevant only as a discretionary factor,⁶⁹ and C's motives for bringing the proceedings (such as an intention to expand into producing running shoes at some stage) will only be relevant if there is a question of malicious or vexatious proceedings.⁷⁰

Secondly, on general equitable principles a wrong restrained by injunction must be continuous⁷¹ or threatened to a material extent.⁷² In the case of pass-

⁶⁵ Fair Trading Act, 1986 s 42; see *Mundine v Layton Taylor Promotions Pty Ltd* (1981) ATPR para 40-211 for an example of specifically framed condition injunction.

⁶⁶ For example, see again *Mundine v Layton*, *ibid*.

⁶⁷ Trade Practices Act 1964 s 80(1) (C'th) as substituted by Statute Law (Miscellaneous Provisions) Act (No 1) 1983 (C'th).

⁶⁸ See *R v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 23 ALR 69 (HCA).

⁶⁹ *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181.

⁷⁰ *Phelps v Western Mining Corp Ltd* (1978) ATPR para 40-077.

⁷¹ *McCombe v Read* [1955] 2 QB 429,436.

⁷² *Martin v Price* [1894] 1 Ch 276.

ing off and other torts actionable only upon proof of special damage, the plaintiff must also prove that s/he has suffered special damage or is likely to suffer special damage by the act complained of.⁷³ These rules are modified by section 41(3) and (4), although the courts may still take such factors into account in exercising their discretion.⁷⁴

Thirdly, while in the equitable jurisdiction an injunction may not be granted where damages would be an adequate remedy,⁷⁵ no such constraint should be applicable under the Act since it is not only the damage (if any) to the plaintiff which is to be remedied but primarily the deception of the public.⁷⁶

Fourthly, the court may exercise its discretion to grant relief even though the plaintiff would be disentitled under the court's equitable jurisdiction. As stated by Brennan J in the *World Series Cricket* case:⁷⁷

Although the principles of equity do not mark the limits of relevancy or solely determine the exercise of statutory discretion, they are relevant norms which may provide assistance in larger or smaller measure according to the closeness of the equitable analogue to the case in hand . . .

His Honour then considered the additional discretionary considerations under the Australian Act, stating:⁷⁸

The interests of consumers and, in appropriate cases, of competitors in the market, are . . . relevant factors to be weighed in determining whether an injunction should be granted and, if it be granted, its terms. The relevance of the factors is not determinate upon the interests (if any) of the party who invokes the jurisdiction, though the weight to be given to those factors may be.

Thus, for example, the court may grant an injunction to protect the interests of the public even though the applicant has delayed unreasonably in bringing the action.⁷⁹

The same approach to discretionary factors will also be relevant also in deciding whether it is 'desirable' to grant an interim injunction. Equitable principles should aid but not constrain the court, and the interests of the public should be a prime consideration. The Australian courts have tended to tie themselves to a test either of a 'fair chance of success'⁸⁰ or a 'serious question to be tried'.⁸¹ If treated as a threshold test, this approach would seem to unduly limit the very wide discretion given the court. There is some authority that the appropriate test should be considered together with the balance of convenience 'so that proper consideration can be given to the way in which

⁷³ *White v Mellin* [1895] AC 154 (HL).

⁷⁴ *TPC v Tubemakers of Australia Ltd* (1983) ATPR para 40-390; 44,579.

⁷⁵ *AG v Hallett* (1847) 16 M & W 569.

⁷⁶ See also Donald and Heydon, *Trade Practices Law* (1978), vol 2, 811-812.

⁷⁷ *Supra* at note 69, at 199.

⁷⁸ *Ibid*, 200.

⁷⁹ *Ibid*, 196 and 204.

⁸⁰ *Ibid*, 186.

⁸¹ e.g. *Morenita Pty Ltd v AGC (Advances) Ltd* (1986) ATPR para 40-689.

they interact.⁸² It is to be hoped that the New Zealand courts will heed the warning of Murphy J in the *Hornsby Building Information Centre* case that:⁸³

The principles to be applied . . . will differ markedly from those evolved by equity courts in cases concerned with competing rights and obligations . . . Some [equitable doctrines] are so connected as competing private rights that they are quite foreign to the application of s 80 . . . The wholesale carry over of such principles concerning the granting of permanent or interlocutory injunctions would frustrate the evolution of principles more appropriate to the Trade Practices Act.

An example of the different approach which is required is found in *Rice-growers' Co-operative Ltd v Howling Success*.⁸⁴ In considering the balance of convenience, the judge took into account the absence of any claim that the defendant's goods were of inferior quality or lacked any benefits that the plaintiff's goods had, and the fact that the cheaper retail price benefited consumers.

In *Taylor Brothers Ltd v Taylors Textile Services Ltd*,⁸⁵ the first case in New Zealand brought under sections 9 and 41, McGechan J decided to deliberately leave open the question whether the statutory test of desirability replaces the classical test based on *American Cyanamid*⁸⁶ with a new test turning simply on 'desirability'. For the purposes of the decision he adopted "the *American Cyanamid* tests of serious question, balance of convenience, and overall justice as affording at least guides to determining that which may be 'desirable', remembering to ask . . . an additional and ultimate question whether an interim injunction indeed is 'desirable'.

2. Limitation of Actions

(i) One major factor which may secure a continuing role for passing off is the limitation period applicable. The relevant limitation period for passing off actions is, under section 4(1)(b) of the Limitation Act 1950, six years from the date on which the cause of action accrued, where damages are sought.

On the other hand, under section 43(5) of the Fair Trading Act 1986, an application for any of the orders specific in section 43(2), including an award of damages, must be made within three years from the time when the matter giving rise to application occurred.

However, the matter is complicated by the fact that the court is empowered under section 43(1) to make orders in the specified circumstances not only on the application of any person, but also in any proceedings under Part V of the Act. In relation to section 9, this means that the court has power in the appropriate circumstances to award damages (or make any of the other

⁸² *Weston Communications Pty Ltd v Fortune Communication Holdings Ltd* (1986) ATPR para 40-651; 47,259.

⁸³ *Supra* at note 23, at 652.

⁸⁴ (1987) ATPR para 40-778.

⁸⁵ High Court, Wellington. 10 April 1987 (Cp 95/87). McGechan J.

⁸⁶ *American Cyanamid v Ethicon Ltd* [1975] AC 396.

orders) where an injunction has been sought, or where the Commission has applied for an order for the disclosure of information or publishing of an advertisement under section 42.

On its literal wording, the limitation provision does not apply to this second limb of the court's power. Nor is it clear whether the six-year limitation in section 4(1)(d) of the Limitation Act 1950 would apply, as the action would be for an injunction or disclosure order rather than directly for damages. However, the court would be likely to apply the three year limitation period by analogy in most cases where it did not apply literally. Hence any action for damages in passing off brought within six years after the three year period has elapsed should be brought under the common law rather than the Fair Trading Act.

(ii) Not only is the limitation period under the Fair Trading Act shorter than that applying to passing off actions, but it may run from the earlier date. The limitation period under section 43(5) runs from the time when *'the matter giving rise to the application'* (emphasis added) occurred. The court may make an order under section 43(1) where a person has suffered or is likely to suffer loss or damage by conduct of any other person that constitutes or would constitute a contravention or auxiliary contravention. It follows that there are three possible interpretations in which the court could make an order.

Firstly, there are cases where no contravention has yet occurred, but damage is likely if one does occur. Obviously, since nothing has yet occurred, the limitation provision can have no application.

Secondly, there are cases where an (auxiliary) contravention has occurred, and damage is likely to result in the future. There is no reason to suppose that the limitation provision should not apply in such a case, and so *'the matter giving rise to the application must be the (auxiliary) contravention rather than the damage.* Hence time runs from the time of the (auxiliary) contravention. Of course, damages may not be awarded until actual loss or damage has been suffered, but there does not seem to be any reason why a court could not award damages for loss arising after the application was filed but before the time of the trial.

The third solution is where an (auxiliary) contravention has occurred and loss or damage has been suffered. For consistency, *'the matter'* must again refer to the (auxiliary) contravention, so time runs from the date of the contravention even though the damage may have been suffered somewhat later.

In contrast, the limitation period for passing off runs from the date on which the cause of action accrued.⁸⁷ Damage is an essential element of passing off,⁸⁸ and so there is no cause of action unless and until the plaintiff suffers actual damage (except in a *quia timet* action).

⁸⁷ Limitation Act 1950, s 4(1).

⁸⁸ *Erven Warnink*, supra at note 39, at 742.

However, the difference is of little, if any, practical significance. Passing off is a continuing cause of action, and damage is usually presumed as soon as the offending goods are put on the market or the business passed off as the plaintiff's business, where the parties are direct competitors.⁸⁹

(iii) A more important way in which the limitation period in passing off may run from a later date than under the Fair Trading Act in some cases is found in section 28 of the Limitation Act 1950. The section reads as follows, in so far as is relevant to passing off:

Where, in the case of any action for which a period of limitation is prescribed by this Act, either -

- (a) The action is based upon the fraud of the defendant or his agent . . . ; or
- (b) The right of action is concealed by the fraud of any such person as aforesaid; or
- (c) . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . or could with reasonable diligence have discovered it . . .

Since the limitation period applicable to actions for damages for breaches of section 9 is prescribed within the Fair Trading Act itself, section 28 of the Limitation Act 1950 cannot apply to postpone that limitation period.

On the other hand, it may well apply to cases of passing off. To fall within section 28(a), fraud must be an essential ingredient of the cause of action⁹⁰: in other words, it must be necessary for fraud to be proved for the plaintiff to succeed.⁹¹ Although passing off is actionable in equity without fraudulent intent being proved,⁹² it is unclear whether fraud is still required for a passing off action at common law, and hence whether only nominal damages may be awarded in the absence of fraud.⁹³ If fraud is an essential element of passing off at common law, then section 28 of the Limitation Act 1950 provides another reason to bring an action in passing off rather than under section 9.

3. *Account of Profits*

Another possible advantage of a passing off action may be the availability of the remedy of account of profits. Section 43(2)(d) is compensatory on its terms, as the sum to be paid is 'the amount of the loss or damage'. One author has suggested that an account of profits is merely 'a method of quantifying the plaintiff's loss', and is therefore compensatory in nature.⁹⁴ However, it is submitted that this view is historically inaccurate, and overlooks the development of the remedy in the courts of equity on quite a separate basis from the common law remedy of damages. In the words of Sir Wilfred Greene,

⁸⁹ See *Draper v Trist* (1939) 56 RPC 429, 436 and 442; *Sykes v Sykes* (1824) 3 B&C 541.

⁹⁰ *Beaman v ARTS Ltd* [1949] 1 KB 550, 558 per Lord Greene MR(CA).

⁹¹ *Ibid*, 567.

⁹² *Millington v Fox* (1838) 3 My & Cr 338.

⁹³ See *A J Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273, 283 (HL); *Marengo v Daily Sketch & Sunday Graphic Ltd* (1948) 65 RPC 242, 253 (HL); *Draper v Trist* (1939) 56 RPC 429 (CA). But note *Habib Bank Ltd v Habib Bank AG Zurich* [1982] RPC 1 (CA).

⁹⁴ Donald and Heydon, *Trade Practices Law* (1978), vol 2, 842.

MR in *Draper v Trist*,⁹⁵ "... in taking an account of profits, which is the equitable relief, the damage which the plaintiff has suffered is totally immaterial. The object of the account is to give to the plaintiff the actual profits the defendants have made and of which equity strips them as soon as it is established that the profits were improperly made ..." Clearly, then, an account of profits is not available under the damages provision.

On the other hand, it could be argued that an account of profits could be ordered under section 43(2)(c) as an order to 'refund money'. To 'refund' is defined in the *Shorter Oxford English Dictionary* as 'to make return or restitution of (a sum received or taken); to hand back, repay, restore'. The term may well be wide enough to include accounting for profits, as 'the principle underlying relief in equity is that the defendant has improperly received or withheld property, or profits from property (such property or profits belonging to the plaintiff) and s/he is required to restore the property or to account for the profits'.⁹⁶ In fact, it appears that originally the remedy was granted in the context of the economic torts on the grounds that the owner of the property right could elect to treat the infringer as his or her agent.⁹⁷ In this light, the account of profits can be seen as a refund of money which belonged to the plaintiff (the 'principal') all along.

Even if this view is incorrect, and the account of profits remedy is not available under the Act, the consequent advantage in bringing an action in passing off rather than under the Act may be slight. In the words of Lindley LJ in *Siddell v Vickers*:⁹⁸

... the difficulty of finding out how much profit is attributable to any one source is ... so great that accounts [of profit] ... very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained ...

Injunctions, accounts of profits, and limitation of actions have been covered in some detail, since^o these matters of remedies and enforcement constitute probably the only significant benefits of bringing an action in passing off instead of or in addition to an action under section 9. The ways in which section 9 is wider or more useful than the law of passing off, on the other hand, are many, and have been covered in depth by other writers.⁹⁹ These differences will be covered more briefly, except where something can be added to the previous discussions in the literature.

⁹⁵ (1939) 56 RPC 429, 439.

⁹⁶ *Halsbury's Laws of England*, 4th ed, Vol 16 para 1297.

⁹⁷ Baker and Langan (eds) *Snell's Principles of Equity* (28th ed 1982).

⁹⁸ (1892) 9 RPC 152, 163. See also *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402; 409 et seq.

⁹⁹ See Blakeney, "Old Wine in New Bottles: Influence of the Common Law on the Interpretation of Section 52 of the Trade Practices Act" (1984) 58 ALJ 316; Sharpe, "Protecting Business Reputation in Australia - Section 52 of the Trade Practices Act and Passing Off" (1983) 13 FLR 253; Owen, "Passing off, and s 52 of the Trade Practices Act" (1984) Law Inst J 504.

The common thread running through the law of passing off is that the defendant has wrongfully appropriated the plaintiff's business reputation. This concept is much more restrictive than that of misleading or deceptive conduct.

For instance, it is not enough that the defendant in passing off has undermined or injured the plaintiff's reputation without actually appropriating it. Thus misleading comparative advertising will be caught by section 9, although it may not amount to passing off.

The first case of disparaging comparative advertising ('knocking copy'), brought under the Australian Act was *Calsil Ltd v TVW Enterprises Ltd*.¹⁰⁰ A firm that manufactured clay bricks used advertisements which implied that their competitors' bricks would fade and cause cracking. Although no remedy would have been available in passing off, the judge was able to grant an injunction under section 52.

Neither are a trader's misrepresentations about his/her own goods actionable in passing off unless it is represented that they are the goods of the plaintiff; or unless they are marketed under a name or description with which they have no natural connection in order to make use of the reputation or goodwill of a product or class of products 'genuinely indicated by the name or description'¹⁰¹ (see the *Champagne*,¹⁰² *Advocaat*¹⁰³ and *Sherry*¹⁰⁴ cases).

For example, in *Cambridge University Press v University Tutorial Press*,¹⁰⁵ the defendants falsely represented that their book was prescribed for a university examination. In fact the book prescribed was the plaintiff's book. Although this conduct would now be actionable under section 9, it was held to be merely a representation as to quality and so not a case of passing off. As stated in the *Advocaat case*¹⁰⁶ by Lord Diplock, '... exaggerated claims by a trader about the quality of his wares, assertions that they are better than his rivals even though he knows this to be untrue, have been permitted by the common law as venial "puffing" which gives no cause of action to a competitor even though he can show that he has suffered actual damage in his business as a result.' The competitor can now seek a remedy under the Act if the representation is likely to mislead or deceive. It will only be outside the ambit of section 9 as being mere puffing if nobody save an unusually stupid person would believe it.

However, where the nature of the representation resembles passing off, that is, where it could be seen as appropriating the plaintiff's reputation, the Australian courts have tended to incorporate all the various technical rules

¹⁰⁰ (1984) ATPR para 40-451.

¹⁰¹ *Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262, 283-4.

¹⁰² *Ibid.*

¹⁰³ *Supra* at note 39.

¹⁰⁴ *Vine Products Ltd v McKenzie & Co Ltd* [1969] RPC 1.

¹⁰⁵ (1928) 45 RPC 355.

¹⁰⁶ *Supra* at note 39, at 742.

and distinctions from the law of passing off. This tendency has been the subject of an excellent discussion in "Old Wine in New Bottles: Influence of the Common Law on the Interpretation of Section 52 of the Trade Practices Act",¹⁰⁷ and will not be covered in this article. However, it can be added that more recently, in *Chase Manhattan Overseas Corp v Chase Corp Ltd*,¹⁰⁸ Beaumont J expressly adopted, in their entirety, the factors set out in *Halsbury's Laws of England*¹⁰⁹ as relevant to the establishment of deception or confusion in passing off, and applied them in deciding whether there had been misleading or deceptive conduct.

It is to be hoped that the New Zealand courts will recognise that such direct importation of passing off principles places unwarranted constraints on the usefulness of section 9, and will decline to follow the Australian courts in this matter. In *Taylor Brothers Ltd v Taylors Textile Services Ltd*,¹¹⁰ the first case on section 9 in New Zealand, McGechan J noted that the words of section 9 should be construed in their natural and ordinary meaning, and not read down by reference either to other provisions of the Act or to the general law relating to intellectual property; but then he stated that the principles distilled from those Australian cases would be a convenient starting point in interpreting section 9.

One substantive advantage of section 9 is that actual damage to other traders need not be proved. Hence deception need not continue up to the point of sale, even though that might arguably be necessary for passing off to be established. 'It is unnecessary to . . . establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception.'¹¹¹ A false statement which leads to the initial contact may therefore be actionable under section 9 even though it is corrected before the point of sale.¹¹²

To summarise, little if any scope is left to the law of passing off outside of the ambit of section 9. At the same time, in actions under section 9, which resemble passing off actions, there has been a tendency to directly incorporate passing off principles into the consideration of what is misleading or deceptive conduct. The result is, in effect though not ostensibly, a reading down of the wide words of section 9, and possibly the inhibiting of new developments in the law of passing off, depriving the law in this area of its former flexibility.

¹⁰⁷ *Supra* at note 105.

¹⁰⁸ (1986) ATPR para 40-750; 48,154 (FC).

¹⁰⁹ 4th ed, Vol 48 para 163.

¹¹⁰ *Supra* at note 85.

¹¹¹ *Taco Bell*, *supra* at note 14, at 43,749.

¹¹² See *CRW Pty Ltd v Sneddon* (1972) 72 AR (NSW) 17, 37; *Progress Tailoring & Co v FTC* (1946) 1946-47 Trade Cases para 57, 440.

IV Defamation

An action under section 9 has certain advantages over a defamation action, but also certain disadvantages. The following factors will affect the usefulness of section 9 in the area of defamation:

(i) To prove that a statement is defamatory, it must be shown to have a tendency to lower the plaintiff in the eyes of right-thinking members of society. This will usually be much harder to show than that a statement is misleading or deceptive. However, in an action for defamation, the burden of proof is on the maker of the statement to prove the truth of the statement if s/he wishes to rely on the defence of justification. Owing to the nature of the action, the burden is heavy and an unsuccessful defence of justification may aggravate the damage. In contrast, the burden of proving that conduct is misleading or deceptive under section 9 rests on the plaintiff.¹¹³

(ii) There are various defences available in an action for defamation which are not available under section 9; for instance, fair comment, privilege and consent. The defences in section 44 apply only to criminal proceedings, and not to actions under section 9.

(iii) In *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd*,¹¹⁴ the charterer of a cruise ship sued the publisher and printer of a newspaper for damages for defamation and under section 52 for misleading or deceptive conduct. Following interviews with people who had been passengers on a 'Far East Christmas cruise', the newspaper had published articles containing numerous criticisms of the cruise, under headlines such as 'Nightmare, Say Ship Passengers'. An application to summarily dismiss the proceedings failed.

The following year in the *Global Sportsman case*,¹¹⁵ the Full Court confirmed that the publication of statements by a newspaper in the ordinary course of the publication of news can be misleading or deceptive conduct within the meaning of section 52. It was stated that:¹¹⁶

There is no definable boundary between conduct which is misleading or deceptive or likely to mislead or deceive, and material which is defamatory. Material which is defamatory does not fall outside the operation of s 52(1) of the Act merely for that reason any more than it is brought within the operation of s 52(1) by reason only that it is defamatory.

In the subsequent decision in the *Australian Ocean Line* case, Toohy J held that the statements went beyond the mere reporting of the opinions of others and contained representations by the newspaper itself, and so the publisher and printer were liable in damages under section 52.

The response of the Commonwealth parliament was to pass an amendment exempting 'prescribed information providers' (defined as persons who carry on the business of providing information) from the operation of section 52

¹¹³ *TPC v Vaponordic (Aust) Pty Ltd* (1975) 6 ALR 248.

¹¹⁴ (1983) ATPR para 40-349; (1985) ATPR para 40-538 (FC).

¹¹⁵ *Supra* at note 6.

¹¹⁶ *Ibid*, 29.

(inter alia) except with respect to promotional material. New Zealand has a similar provision in section 15 of the Fair Trading Act, but it only applies to newspapers and broadcasting bodies. Hence although magazines are protected by the Australian provision,¹¹⁷ they have no special protection under the Fair Trading Act, and the *Australian Ocean Line* and *Global Sportsman* cases will still be relevant in New Zealand.

(iv) In *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd*,¹¹⁸ a dissatisfied customer of the applicant's business complained to the respondent about a hair fusion treatment. The interview was recorded and was proposed to be shown on a current affairs programme. An interlocutory injunction restraining the broadcast was refused, on the balance of convenience. However, it was held that although the respondent was protected as a prescribed information provider, third parties such as rival traders or consumers were not protected, and so the customer was in breach of section 52. It was also held that a statement by a dissatisfied customer to other prospective consumers of a particular service could constitute conduct in trade or commerce. Furthermore, a prescribed information provider would not be protected from liability as an accessory if it was fixed with knowledge of the statement's falsity.

This means that such programmes as Television New Zealand's "Fair Go" may find the Fair Trading Act to be somewhat of a two-edged sword, but it seems fair that newspapers and broadcasting bodies should not be protected where they knowingly publish or broadcast false statements.

(v) It seems that "loss or damage" is wide enough to allow for damages to be awarded under section 43(d) for loss of reputation only¹¹⁹ but not merely by way of vindication of reputation.¹²⁰

Conclusion

The very broad and general wording of section 9 of the Fair Trading Act represents a significant legislative attempt to overcome some of the difficulties that resulted from the piecemeal development of the common law in the area of misrepresentations and other forms of misleading conduct. Its availability to competitors and other persons will greatly aid its usefulness, enforcement and effect, as will its application even before any deception has actually occurred. However, the judicial history of its Australian equivalent has shown a tendency of the courts to inhibit the effect of such a provision by importing common law concepts into its interpretation. In some cases this importation is valid and in fact necessary to avoid discouraging sellers from

¹¹⁷ *Horwitz Grahame Books Pty Ltd v Performance Publications Pty Ltd* (1987) ATPR para 40-764.

¹¹⁸ (1987) ATPR para 40-816.

¹¹⁹ *Brabazon v Western Mail Ltd* (1985) 58 ALR 712, 718; *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1986) ATPR para 40-675; 47,461.

¹²⁰ *Switzerland Australia Health Fund Pty Ltd v Shaw* (1988) ATPR para 40-866.

disclosing helpful information such as statements of opinion or intention. More often it sits uneasily with the wording of the section and unnecessarily limits its scope.

Generally an action under section 9 will be preferable to an action at common law, except in certain isolated instances, such as when there is difficulty in proving the truth of a matter which is the subject of a defamatory statement. The section has taken over probably all of the substantive area formerly covered by passing off, and a continuing role for passing off actions is secured only by certain differences in remedies and enforcement, particularly in the areas of injunctive relief and the limitation of actions.

It is to be hoped that the New Zealand courts will not display the same degree of judicial reluctance to abandon common law concepts as has been manifested in the Australian courts, but will further the intention and spirit of the Act in protecting consumers and honest traders and promoting greater availability of information to consumers.