The Liability of Non-Corporate, Private Vendors of Land under Section 52 of the Trade Practices Act *1974 (Cth)*

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Section 52 of the *Trade Practices Act* 1974 (Cth) (s52) provides in subsection (1) that:

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

At first reading the substantive requirements in s52 that the conduct prohibited be engaged in by "corporations" in the course of "trade or commerce" appear to exclude from liability under that section non-corporate, private vendors of land who comprise the majority of vendors in the residential property market. However this article will seek to demonstrate that in certain circumstances such vendors might be liable for misleading or deceptive conduct in relation to the sale of their land.

A. The party sought to be held liable must be "a corporation"

Although s52 expressly prohibits conduct by corporations only, an analysis of the constitutional law principles underlying the making of a federal statute such as the *Trade Practices Act* 1974 (Cth) ("the Act") reveals that its application is in fact not so limited.

The Federal Parliament's legislative powers are confined to those powers conferred on it by the *Commonwealth of Australia Constitution Act* 1900 (under the so-called "enumerated powers doctrine"). The Act, which was introduced following the High Court decision in *Strickland v Rocla Concrete Pipes Ltd*,[1] is primarily constitutionally based on the corporations power in s51(xx) of the Constitution. For this reason most of the substantive provisions of the Act, including s52, are directed to "corporations" only.

However, in addition to the corporations power, other constitutional heads of power support an extended federal jurisdiction over transactions engaged in by non-corporate entities. For example, express powers in the Constitution enable the Federal Parliament to regulate transactions involving interstate trade,[2] the use of the post, telephone, television or radio,[3] conduct in a

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1 (1971) 124 CLR 468.

2 s51(i), Constitution.

3 s51(v), Constitution. For examples of cases involving the use of the post, see *Mackman v*

Territory,[4] insurance,[5] and external affairs.[6] The extended operation of the Act over interstate or Territorial transactions, or transactions involving the post, telephone, television or radio is found in s6 of the Act. It follows that s52 must be read together with s6, in particular ss6(2)(a), (h) and (3).

Although s52 therefore is not confined, as would first appear, to transactions involving corporations only, it is clear that the constitutional limitations on s52, even as extended in s6, would have the effect of excluding from its reach most routine residential vendor-purchaser transactions which are generally entered into by private individuals within one state without the use of the telephone, post, television or radio. Indeed, shortly after its introduction, it was suggested that the constitutional limitations on the scope of s52 would be sufficient to restrict the otherwise wide ambit of s52.[7]

It should be noted that the equivalent provisions to s52 in the fair trading legislation of the various States are not subject to the constitutional limitations which fetter the Act and accordingly extend to the conduct of "persons". However, despite the apparent ability of those sections to encompass residential conveyancing transactions, they are nevertheless restricted by the "trade or commerce" requirement discussed in paragraph B below.[8]

B. The misleading or deceptive conduct must take place "in trade or commerce"

There is a further express limitation on the scope of s52 which requires the offending conduct to take place "*in trade or commerce*". It follows that even if a vendor-purchaser transaction satisfies the constitutional restrictions on s52 discussed in paragraph A, the transaction would not necessarily fall within the scope of s52 unless this second requirement were also satisfied.[9]

(a) The reason for the inclusion of this requirement

All consumer protection statutes require a balance to be struck between affording protection to those members of society considered to be in need of such protection without at the same time unduly interfering with freedom of trade and contract or reducing competition in the market place. In any given society the manner in which this delicate balance is achieved will reflect prevailing economic, political, cultural and sociological conditions.

A brief survey of consumer protection statutes in other countries indicates three main legislative approaches to the task of limiting the protection afforded by such statutes:

Stengold Pty Ltd (1991) ATPR 41-105; use of the telephone, see *Morton v Black* (1988) 83 ALR 182; *Snyman v Cooper* (1990) ATPR 40-993; (1991) ATPR 41-068 (Full Federal Court); *Helco Pty Ltd v O'Haire* (1991) ATPR 41-099; use of television, see *Advanced Hair Studio v TVW Enterprises Ltd* (1988) 77 ALR 615; *Rizzo v Fitzgerald* (1988) 83 ALR 169.

4 s122, Constitution.

5 s51(xiv), Constitution.

6 s51(xxix), Constitution.

7 Donald and Heydon, *Trade Practices Law*, Vol 2, 1978, par[11.2.2].

8 s41, *Fair Trading Act*, 1987 (NSW); s11, *Fair Trading Act*, 1985 (Vic); s56, *Fair Trading Act* 1987 (SA); s10, *Fair Trading Act* 1987 (WA).

9 This applies particularly to actions instituted under the fair trading legislation referred to in note 8.

(i) *The "protection of consumers only" approach*

This approach restricts the protection afforded by the statute by concentrating on the character of the parties involved in the transaction. "Consumers" may be defined in relation to the type of goods or services purchased so that non-consumers are excluded by implication, or the statute may expressly exclude from its scope certain categories of persons, such as traders or professionals. Some statutes use a combination of both of these methods to define consumers and in this respect resemble statutes which adopt the approach described in (iii) below.

This approach is adopted in certain consumer statutes in France[10] and the Federal Republic of Germany.[11]

(ii) *The "nature of the relevant transaction" approach*

Under this approach the scope of the legislation extends only to transactions conducted in a business or commercial context as distinct from purely personal or private dealings.

(iii) *The "commercial transaction involving consumers" approach*

The third approach involves a combination of the first and second approaches by restricting the scope of the statute to commercial transactions involving consumers.

An example of the third technique may be found in the Swedish *Consumer Sales Act* and the *Terms of Contract in Consumer Relations Act.*[12]

It is however the second approach which, as a general rule, has been adopted by common law countries to limit the scope of its consumer protection statutes.[13] For example, section 5, *Federal Trade Commission Act* (US) (s5), upon which s52 is modelled, provides that:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices *in or affecting commerce*, are hereby declared unlawful.[14]

The "in or affecting commerce" requirement in s5 serves a dual purpose. Not only does it provide the jurisdictional basis for the federal legislature to regulate commerce by expressly referring to the legislature's commerce power in the American Constitution,[15] but it also restricts the scope of the section to transactions which take place in a commercial context.

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10 Calais-Auloy, *Consumer Legislation in France: A Study Prepared for the EC Commission* (1980) at 8.

11 Reich and Micklitz, *Consumer Legislation in the Federal Republic of Germany: A Study Prepared for the EC Commission* (1983) at 13.

12 Bernitz and Draper, *Consumer Protection in Sweden: Legislation, Institutions and Practice* (1986) at 12-13.

13 This approach has also been adopted in the Swedish *Marketing Practices Act* and in the European Economic Community's Council Directive 84/450 on Advertising.

14 Emphasis added.

15 See discussion of the enumerated powers doctrine in relation to the Australian Federal Parliament. Section 5 in its original form was restricted to conduct "in" commerce. This limitation was however narrowly interpreted by the Supreme Court of the United States to deny the Federal Trade Commission jurisdiction over intrastate practices which merely affected interstate trade. In 1975 an attempt was made to legislatively overcome this

Similarly, the United Kingdom's *Trade Descriptions Act* 1968 restricts the scope of its sections to persons who, "in the course of trade or business" apply false trade descriptions to any goods (s1) or knowingly or recklessly make a false description with regard to services (s14). So too the *Sale of Goods Act*, 1979 (UK) contains a number of implied conditions in the sale of goods where the seller "sells goods in the course of a business".

The second approach has clearly been adopted in s52 by the use of the phrase "in trade or commerce".[16] This requirement should therefore be interpreted having regard to its underlying function as an instrument of policy designed to restrict the protection afforded by s52 to transactions of a commercial nature.

(b) The application of the requirement to an isolated private sale of land

In the context of vendor-purchaser disputes the vital issue in relation to the requirement that conduct within s52 must occur "in trade or commerce" is whether an isolated sale of residential land by a private vendor not made in the course of a business can be so characterised. In other words, can the very act of selling land be characterised as conduct of a commercial nature or in trade? Unless this characterisation is possible the vast majority of conveyancing transactions involving residential land will be excluded from the scope of s52 and by analogy from the equivalent provisions in the fair trading legislation of the various States.[17]

In Australia, the phrase "in trade or commerce" has been the subject of considerable judicial comment in relation to s92 and s51(i) of the Constitution and the *Income Tax Assessment Act*, 1936 (Cth). It has been traditionally widely interpreted with emphasis being placed on the "use, regularity and course of conduct"[18] under consideration.

Despite some early assertions to the contrary,[19] the question as to whether an isolated sale of residential land is capable of constituting conduct "in trade or commerce" was answered in the negative by the Full Court of the Federal Court in *O'Brien v Smolonogov*.[20] Although, it is submitted, the decision reached by the Full Court is correct in law and policy having regard to the purpose for which the phrase was inserted as discussed in (a), the issue cannot be regarded as conclusively settled until decided by the High Court.

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restrictive interpretation by the addition to the section of the words "or affecting". In addition, the past few decades have witnessed an expansion of federal powers in America achieved largely through a broad interpretation of the commerce power by the Supreme Court. It should be noted that in contrast to the enumarated powers of the Australian Federal Parliament, under the American Constitution the federal legislature has relatively few enumerated legislative powers.

16 It should be noted that in other sections of the Act other approaches have been adopted. See, for example, Pt V, Divisions 2 and 2A.

17 See above n8.

18 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 381 (per Dixon J). Similar criteria were adopted by Mason J (with whom Gibbs and Stephen JJ agreed) in relation to the meaning of "carries on a business" in s4(3A), *Consumer Claims Tribunal Act* 1974 (NSW) in *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8-9.

19 See for example Donald and Heydon, *Trade Practices Act*, 1978, Vol 2, par[11.2.2].

20 (1983) 53 ALR 107.

In *O'Brien* the vendor, O'Brien, advertised certain land for sale in a newspaper and spoke to one of the respondents over the telephone. It was found by the trial judge, Ellicott J,[21] that the vendor had made certain false and misleading statements concerning the property within the meaning of s53A of the Act, which like s52, also requires the making of a representation "in trade or commerce". His Honour further found that as the misrepresentations had induced the purchasers to enter into a contract to purchase the land they were entitled to recover damages for the loss they suffered as a result of the misrepresentations.

On the meaning of the phrase "in trade or commerce" in the context of the particular facts Ellicott J held that:

> The words 'in trade or commerce' . . . do not require that what is done must be in the course of carrying on a business. The words are of wide import and should not be given a narrow meaning.[22]

His Honour then went on to hold that, although the mere sale of land is not per se trade or commerce, inviting the public to negotiate through the ordinary means of communication was sufficient to constitute conduct in trade or commerce.

On appeal, the Full Court of the Federal Court noted that the explanatory memorandum explaining the operation of the *Trade Practices Bill* 1974 described Pt V of the Act as prohibiting "a number of commercial practices that are unfair to consumers" but that there was no Australian authority directly on the issue as to whether a private sale of land constituted commercial conduct. It instead relied on a number of American cases involving interpretation of comparable consumer protection statutes to come to a conclusion contrary to that arrived at by Ellicott J. The common thread running through these cases is that the private sale of residential property by an individual vendor is *not* conduct in trade or commerce for the purpose of such legislation unless undertaken as part of a business activity. Since many of those decisions directly relate to the question whether an isolated private sale of land can constitute conduct in trade or commerce, passages from those cases are extracted where relevant.

Hennessey CJ of the Supreme Judicial Court of Massachusetts in *Lantner v Carson* noted that although the *Consumer Protection Act* (US) does not specifically define the phrase "in the conduct of any trade or commerce" its meaning can be inferred from reading the statute as a whole. In fact that statute:

> creates a sharp distinction between a business person and an individual who participates in commercial transactions on a private, non-professional basis . . . . [W]here the Legislature employed the terms 'persons engaged in the conduct of any trade or commerce', it intended to refer specifically to individuals acting in a business context . . . An individual homeowner who decides to sell his residence stands in no better bargaining position than the individual consumer. Both parties have rights and liabilities established under common law principles of contract, tort, and property law. Thus, arming the 'consumer' in this circumstance does not serve to

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21 (1982) 44 ALR 347.
22 Ibid at 360.

> equalize the positions of buyer and seller. Rather, it serves to give superior rights to only one of the parties, even though as nonprofessionals both stand on an equal footing.[23]

In a similar vein Clarke J in *Rosenthal v Perkins* held that the defendant-vendors:

> did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise.[24]

A most useful statement of the relevant criteria to be taken into account in determining whether a sale of land constitutes conduct "in trade or commerce" is provided by Abrams J in *Begelfer v Najarian*:

> The question of whether a private individual's participation in an isolated transaction takes place in a 'business context' must be determined from the circumstances of each case. To establish a private person's liability . . . we assess the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties . . . Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons (as in the sale of a home), and whether the participant played an active part in the transaction.[25]

These principles were relied on by Armstrong J in *Lynn v Nashawaty* in relation to the sale of a stationery store in the following manner:

> The sale of a business or business assets by a businessman is not the same as the sale of a home by an individual homeowner (as in *Lantner*), and the defendants in the present case were fully involved in every aspect of the transaction (unlike the defendants in *Begelfer*), including the false representation . . . In view of the position taken in the *Begelfer* case that an isolated transaction, one that does not take place in the ordinary course of business, may constitute a violation . . ., so long as it takes place in a business context, it is difficult to avoid the conclusion reached by the finder of fact that the transaction at bar violated that section . . .[26]

Applying these principles to the facts of *O'Brien* the Full Court held that:

> . . . the mere use, by a person not acting in the course of carrying on a business, of facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce . . .The conduct complained of was not something done by the appellants in the course of carrying on a business and it lacked trading or commercial character as a transaction.[27]

The principles enunciated in *O'Brien* were applied by the Federal Court[28] and the Full Court of the Federal Court in *Bevanere Pty Ltd v Lubidineuse*[29] where the sale of a beauty clinic was held to be in trade or commerce. On the

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23 373 NE 2d 973 at 976-7 (1978).
24 257 SE 2d 63 at 67 (1979).
25 409 NE 2d 167 at 176 (1980).
26 423 NE 2d 1052 at 1054-1055 (1981).
27 (1984) 53 ALR 107 at 114.
28 (1984) 55 ALR 273.
29 (1985) 59 ALR 334 (per Morling, Neaves and Spender JJ).

issue of whether the isolated sale of a capital asset constituted conduct "in trade or commerce" the Full Court held that:

> The sale of the clinic should not be viewed in isolation from the totality of the appellant's commercial activites. The sale was part of those activities. The proceeds of sale were available to be used by the appellant in other commercial activities, if it so chose...The mere fact that it was the sale of a capital asset did not deprive it of its character as a transaction in trade or commerce.[30]

The members of the Full Court distinguished *O'Brien's* case on the basis that the sale of the business was part and parcel of the totality of the appellant's activities in trade or commerce.

Recently Burchett J applied similar principles in *Morton v Black*[31] in holding that the sale of a farm was conduct "in trade or commerce". By way of contrast Young J of the Supreme Court of New South Wales, although conceding that the expression "in trade or commerce" in s52 should be given "a wide meaning and may even include commercial dealings which are not within the mainstream of ordinary commercial activities", was not prepared to hold that a "body formed predominantly for the holding of land so that religious services can be conducted in a church built thereon" which adopts a name associated with a church is engaged in trade or commerce within s52.[32]

In *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[33] the purchasers of land sought to hold a private vendor liable under s52 by distinguishing the facts of *O'Brien*. It was argued that the act of engaging an estate agent who clearly takes businesslike steps in the course of his own business on behalf of the vendor subjects the land to a business operation with the result that the vendor can be said to be engaged in trade or commerce. In rejecting this submission Hill J held:

> . . . The question to be determined is whether the owner of a house by selling it does so in trade or commerce. It could scarcely be said that a person who sells his home, whether by private treaty or by auction and whether he conducts the negotiations personally or through a real estate agent, is undertaking what he does in the course of a trade or business or in a business context. The conclusion in *O'Brien v Smolonogov* was reached because the land there had never been used at all for the purposes of any business . . .
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> The present is purely a case of a person selling his house and, accepting that *O'Brien v Smolonogov* is correct, it necessarily follows that whether or not an estate agent is used, and whether or not that agent advertises the property by preparing brochures or other advertisements and whether or not the agent sells by auction or merely negotiates a private treaty, the sale still remains a sale by the vendor of his house and not an act done in a business context.[34]

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30 Ibid at 339.
31 (1988) 83 ALR 182 at 185.
32 *Attorney-General: Ex rel Elisha v The Holy Apostolic and Catholic Church of the East (Assyrian) Australian NSW Parish Association* (1989) IPR 609 at 610.
33 (1990) 94 ALR 719.
34 Ibid at 735.

The following interesting observations concerning the moment when a business can be said to have been established were made by Rogers CJ in CommD in *Krahe v Freeman* in considering whether the publication of a book constituted conduct in trade or commerce under s42, *Fair Trading Act*, 1987 (NSW):

> Mr Evatt next submitted that one isolated act of publishing does not mean that a person thereby engages in carrying on a business of providing information. Taken by itself, that may be true. However, the fact of the matter is that every business has to start some time. As decisions under the Money Lenders legislation illustrate, a person or company who makes one solitary loan may be engaged in the business of moneylending. In other words, the fact that a transaction is the first one, does not mean that the person engaging in it is not thereby engaging in a transaction of business.[35]

In contrast to the isolated transactions of private persons falling outside the concept of "trade or commerce", most transactions carried out by trading entities will constitute conduct "in trade or commerce"[36] although in *Videon v Barry Burroughs Pty Ltd* Fisher J conceded:

> . . . that on exceptional occasions isolated acts by a corporation may be outside of the ordinary run of business, and thus not performed in trade or commerce. However, such an exception can have no application where the corporation acts on the assumption that the person with whom it is dealing is a potential purchaser. It is my opinion that the words 'trade or commerce' relate to the activities of the corporation (which activities of course may be affected or influenced by the actions of the other party) . . . Certainly the word 'trade' can apply to a unilateral act (see per King CJ in *R v Mandica* (1981) 24 SASR 394 at 398-9).[37]

The debate concerning the precise meaning of the phrase "in trade or commerce" in s52 has recently been reopened in the context of employment agreements. Although these cases do not directly deal with the issue of whether an isolated private sale of land constitutes conduct "in trade or commerce", they do confirm that where possible a wide meaning will be given to the phrase.[38]

For example, Wilcox J in *Patrick v Steel Mains Pty Ltd* held that:

> In negotiating with employees, or prospective employees, about future employment a trading company acts 'in trade or commerce'. These are words of the widest import.[39]

A similarly wide interpretation was given to the phrase by Lockhart J in *Finucane v NSW Egg Corp*[40] in finding that the conducting of interviews by

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35 (1988) ATPR 40-871 at 49,430.

36 For example, in *Merman Pty Ltd v Cockburn Cement Ltd* (1988) 84 ALR 521 Lee J of the Federal Court regarded a submission made to a Minister of the Crown seeking the commencement of an inquiry or the imposition of customs duties to be an act in trade or commerce since it could be regarded as a step against competition seeking a definite commercial result.

37 (1981) 37 ALR 365 at 383.

38 See also *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1991) ATPR 41-067 at 52,036-52,037 (per Burnett J).

39 (1987) 77 ALR 133 at 136.

40 (1988) 80 ALR 486.

the corporation with prospective purchasers of egg runs fell within the ambit of conduct in trade or commerce. On the precise meaning of the phrase "in trade or commerce" his Honour made the following statement:

> It was emphasised by counsel that there is a distinction between a law 'with respect to' trade and commerce and laws about conduct 'in' trade and commerce. That distinction is illustrated by the difference between sec 51(i) and sec92 of the Constitution. Section 51(i) grants Parliament power 'with respect to' trade and commerce whereas sec 92 provides that trade and commerce between the States shall be absolutely free. Section 92 applies so that matters which are *in*, and not merely *with respect to*, trade and commerce between the States shall be free. Section 52 of the Act uses the word 'in', not the phrase 'with respect to'. It was submitted that the phrase 'in trade or commerce' in sec 52 means 'within' trade or commerce...
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> It may be that not everything done by a corporation that is engaged in trade or commerce is done 'in' trade or commerce. However, whether in the context of sec 52 'in' trade or commerce means 'within' or 'as part of' or 'in connection with' or 'in relation to' trade or commerce, in my opinion the activities of the Corporation in and about the conduct of interviews by its officers of applicants for the purchase of egg runs are 'in trade or commerce' within the meaning of that expression in sec 52.[41]

The meaning of this phrase has also received the attention of the New South Wales Supreme Court and Court of Appeal and more recently the High Court. Since the abolition by the *Workers Compensation Act* 1987 (NSW) of injured workers' common law rights to proceed against their employers for negligence, attempts have been made by injured employees to seek damages from their employers on the basis of misleading or deceptive conduct under s52.[42]

Lee J of the Supreme Court of New South Wales in *Wright v TNT Australia Pty Ltd*[43] took a restrictive view of the meaning of the phrase "in trade or commerce" by holding that it did not encompass the making of a contract of employment and the discharge by the employer of his obligations under the contract. However, on appeal this narrow interpretation was expressly rejected by the New South Wales Court of Appeal.[44]

McHugh JA (as he then was), in a detailed examination of the meaning of the phrase "in trade or commerce", held that the making of a contract of employment and negotiations to enter into such a contract with an employee or potential employee is conduct "in" trade or commerce, as is a failure to provide a reasonably safe system of work and reasonably competent staff.[45]

Some limitations on the wide scope of the section have emerged from the recent High Court decision of *Concrete Constructions (NSW) Pty Ltd v*

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41 Ibid at 504-505, 507.

42 See discussion in Steinwall, "Employment related injuries: claims against employers using the TPA" (1989) Vol 27 No 8 *Law Soc J* 28.

43 (1988) 80 ALR 221 at 233-234.

44 (1989) 85 ALR 442 at 445 (per Mahoney JA) and 458 (per Clarke JA who was prepared to assume for the purpose of the appeal that in employing the appellant the respondent engaged in conduct within the meaning of s52).

45 Ibid at 455-457.

Nelson.[46] The Court unanimously held that information given by a builder's foreman to a workman in the course of his employment which turned out to be untrue and as a result of which the workman suffered serious injuries was not conduct in trade or commerce within the meaning of s52. A majority of the court held that not every activity undertaken by a corporation in the course of trade or commerce constitutes conduct "in" trade or commerce. In a joint judgement Mason CJ, Deane, Dawson and Gaudron JJ explained the scope of the phrase as extending only to:

> . . . the conduct of a corporation towards persons, be they consumers or not, with whom it . . . has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.[47]

Toohey J agreed with the majority that the relevant conduct must take place "in" trade or commerce. His Honour succintly expressed the effect of the phrase as follows:

> The question is not whether the conduct engaged in was *in connection with* trade or commerce or *in relation to* trade or commerce. It must have been *in* trade or commerce . . . the phrase 'as part of trade or commerce' does, I think, come close to what is intended.
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> . . . the conduct [complained of] was not part of the appellant's trade or commerce, which was that of constructing buildings for others for reward. It was, at most, incidental to that business.[48]

On the other hand, Brennan and McHugh JJ, in separate judgments, were not prepared to restrict the meaning of the phrase in this way. Their Honours regarded misleading or deceptive conduct occurring in the course of carrying on an activity of a trading or commercial character as satisfying the requirement of conduct "in" trade or commerce within s52.[49] The basis upon which these two justices rejected the workman's claim under s52 rested upon their interpretation of the scope of the section read in the light of the "Consumer Protection" heading of Pt V of the Act. In their opinion the section prohibits only that conduct which misleads or deceives a person in his capacity as a consumer and as the conduct complained of did not affect the injured workman in that capacity his case under s52 must fail.[50] Toohey J agreed with the minority justices that conduct within s52 must be deceptive of persons in their capacity as consumers.[51]

However, the limitations imposed by the High Court on the scope of s52 in *Nelson's* case do not affect the issue of whether an isolated sale of land by a private vendor constitutes trade or commerce. On the majority view once a sale of land is characterised as a commercial transaction any misleading or deceptive conduct in relation to the promotion of the sale would clearly constitute conduct of a trading or commercial character. Further, such conduct

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46 (1990) 92 ALR 193.
47 Ibid at 197.
48 Ibid at 205.
49 Ibid at 199 (per Brennan J) and 209 (per McHugh J).
50 Ibid at 199 (per Brennan J) and 206, 212 (per McHugh J).
51 Ibid at 203.

would affect a purchaser or potential purchaser in her or his capacity as a consumer and would therefore satisfy the minority interpretation of s52.

In conclusion it would appear to follow from the above that an isolated sale of residential land which does not involve any business elements will not presently be regarded as constituting conduct "in trade or commerce" in Australia. Cases such as *Morton v Black*[52] do however indicate that the courts may be willing to find business or commercial elements in the transaction sufficient to characterise the transaction as a commercial one.

C. *Liability of Vendors for the Acts of Others*

It is apparent from the above discussion that a non-corporate vendor of residential land, who is not an interstate trader or one who has made use of the post, radio or telephone, cannot be *primarily* liable under the Act. The question which will now be examined is whether such a person may nevertheless be legally liable for the acts of others who do satisfy the constitutional and substantive requirements of the section.

The possibility of attaching liability to non-corporate, private vendors for the acts of their agents, servants or employees must not be overlooked. The potential liability of vendors of residential land for the acts of agents assumes great significance when one has regard to the fact that most residential land transactions are conducted for private vendors by real estate agents, many of whom are incorporated, and who would clearly be engaged in "trade or commerce" in the course of selling the land.[53] It is therefore apparent that, unlike the majority of private residential property vendors, many real estate agents will satisfy both the constitutional and the "trade or commerce" requirements of s52.

The primary liability of estate agents for misleading or deceptive statements,[54] made without the vendor's authority to prospective purchasers in the course of negotiations leading to the conclusion of a contract has been recognised in such cases as *Yorke v Treasureway Stores Pty Ltd*,[55] *Latella v L J Hooker*,[56] *Ceravolo v Peter Economou Real Estate Pty Ltd*,[57] and *Walsh v A C & C C Adcock Pty Ltd*.[58] The Trade Practices Commission in fact advises real estate agents that they may be liable under the Act for misleading or deceptive conduct.[59]

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52 (1988) 83 ALR 182.

53 This possibility was recognised by Lehman and Bregovac, "Real Estate Marketing" (1986) 1 *APLB* 3. See also "Liability of a Real Estate Broker" (1980) 10 *Cap ULR* 221.

54 It should be noted in this context that even innocent misstatements may constitute such conduct as intention is not a requirement of s52.

55 (1982) ATPR 40-313.

56 (1985) ANZ ConvR 141. In this case the vendors of land brought an action for damages against an estate agent after the purchaser refused to complete the contract upon discovering that the agent had misrepresented that part of of the land was available for residential use. Franki J held that the words "A person" in s82 of the Act embrace a person who is not a purchaser and who is not himself misled by anything in the advertisement.

57 (1985) ATPR 40-635.

58 (1987) ANZ ConvR 225.

59 *Fair and Square: A Guide to the Trade Practices Act for the Real Estate Industry*, jointly published by the Trade Practices Commission and the Real Estate Institute of Australia (1989) 8-13.

An issue which has not been strenuously argued in the cases is whether a *vendor* can be held liable for the misleading or deceptive conduct of estate agents whether expressly authorised or not. It would seem that section 84(4) of the Act which makes express provision for the liability of natural persons for the acts of their agents or servants would be of little use in this context. It is difficult to see how s84 of the Act, on its own, can overcome the fact that a private vendor of residential land does not act in trade or commerce. Indeed, where an argument along these lines has been raised in the cases it has been either left open[60] or expressly rejected. As Hill J in *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[61] explained:

> The consequence of the application of sec 84(4), as a perusal of its terms makes clear, is to impute the acts of the agent, provided that the agent is acting within the scope of actual or apparent authority, to the principal. It does not impute the business of the agent to the principal.

There appear to be two ways in which liability for the conduct of a corporate agent can be attributed to a private vendor: the first being to regard the vendor as vicariously liable to a purchaser for the acts of the estate agent, the second being to regard the vendor as an accessory to the contravening conduct of the estate agent.[62]

(1) The vicarious liability of vendors under the general law

It is settled law that a principal is vicariously liable for an agent's torts committed within the scope of the agent's actual[63] or ostensible[64] authority.[65] This rule clearly extends to estate agents who are merely agents authorised to perform a particular function for their principals — so-called "special agents".

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60 *MacCormick v Nowland* (1988) ATPR 40-852.

61 (1990) 94 ALR 719 at 737.

62 It is perhaps worth noting in this context that the situation of an agent acting for two consumers (ie, a vendor and a purchaser) is expressly recognised in the consumer protection legislation of some countries. For example, under the Swedish *Contract Terms Act* (which deals with improper terms in consumer contracts used by tradespersons in their commercial activities in consumer goods) as amended in 1977, the Market Court may issue an injunction prohibiting the use of such terms in contracts entered into on behalf of consumers by brokers or agents provided the agent actively contributed to the content of the contractual term. As a result of these amendments an injunction may be issued even though both the purchaser and the seller are consumers as long as a broker or agent is involved in the transaction in his professional capacity. Not surprisingly the greatest need for this extension of the Act was found to be in the area of sales of secondhand residences where the sale is usually from one private person to another with the estate agent employed by the vendor. The Act can be invoked to protect the interests of the home buyer, but not the vendor since, according to surveys, the need to protect vendors had not been proved: see discussion in Bernitz and Draper, above n12 at 213-214.

63 Actual authority may be either express authority or implied authority.

64 This authority is also described as "apparent authority". Such an authority is said to arise where a principal acts in such a way so as to lead others to believe that he or she has given the agent authority to act on the principal's behalf. In such a situation the principal is estopped from denying the validity of the transaction as against a third person who dealt for value with the agent in the bona fide belief that the authority had already been given.

65 *Halsbury's Laws of England* (4th edn) Vol 1, pars 846 and 847; Lang, *Estate Agency Law and Practice in New South Wales* (3rd edn, 1988) at 374-385; Hockley, *Estate Agency and Practice in Victoria* (1985) at 199.

The actual authority of an estate agent may be oral, in writing or partly oral and partly in writing. Some States require an agency agreement to be in writing before the estate agent is entitled to renumeration by way of commission.[66] As a general rule, the agency agreement will relate only to the duration of the agreement, the type of agency and the circumstances entitling the estate agent to commission.

Although the actual implied authority or ostensible authority of estate agents in vendor-purchaser transactions is generally confined to introducing intending contracting parties,[67] and does not ordinarily extend to authorising the agent to enter into a binding contract on behalf of the vendor,[68] nor to receive the purchase money from a purchaser on behalf of a vendor,[69] an authority of an estate agent to make representations regarding the property was recognised by Bacon VC in *Mullens v Miller*:

> A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorize his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorizes the agent to state any fact or circumstance which may relate to the value of the property.[70]

The Vice Chancellor accordingly held that a misrepresentation as to the value of the property made by the agent, even though made without the vendor's actual authority, which induced a purchaser to enter into the contract, deprived the vendor of the right to enforce the contract in an action for specific performance. His Honour however did not expressly identify whether the authority to describe property so conferred on the agent arose under the agent's actual implied authority or ostensible authority although it appears he was referring to an agent's implied authority.

An agent's implied authority to make representations concerning the property was decribed by Jordan CJ in *Gardiner v Grigg* as follows:

> An agent who has been authorised to sell property has implied authority to make representations as to the character or quality of the thing to be sold . . . but has not implied authority to bind his principal contractually by promises that the representations are accurate.[71]

The distinction between the implied or ostensible authority of an estate agent to make representations but not to give contractual warranties was also recognised by the English Court of Appeal in *Hill v Harris* where it was noted that:

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66 See for example s42AA, *Auctioneers and Agents Act* 1941 (NSW).
67 Lang, above n64, ch26.
68 *Halsbury's Laws of England*, above n64, par740; *Davies v Sweet* [1962] 1 All ER 92 at 94.
69 *Halsbury's Laws of England*, above n64, par740; *Petersen v Moloney* (1951) 84 CLR 91.
70 (1882) 22 ch D 194 at 199.
71 (1938) 38 SR (NSW) 524 at 530-1.

> . . . the ostensible authority of an estate agent invited to find a purchaser for premises or a lessee for premises, does not extend to entering into any contractual relationship in respect of the premises on behalf of the person instructing him. It may well be that he has authority to make representations as to the state of the premises, but representations are a very different matter from warranty.[72]

Brightman J in *Overbrooke Estates Ltd v Glencombe Properties Ltd*, although conceding that an auctioneer might have *ostensible* authority to make representations regarding the property, held that the existence in the general conditions of sale of a condition to the effect that the particular auctioneers did not have any authority to make or give any representation or warranty in relation to the property negatived any ostensible authority of the auctioneer to make such representations:

> I am not convinced that an auctioneer, who is selling a wide range of properties . . . according to printed particulars such as were distributed in the present case, has any ostensible authority to do more than accept bids . . . it must be open to a principal to draw the attention of the public to the limits which he places on the authority of his agent and that this must be so whether the agent is a person who has, or has not, any ostensible authority. If an agent has prima facie some ostensible authority, that authority is inevitably diminished to the extent of the publicised limits that are placed on it.[73]

It should be noted that Brightman J proceeded on the basis that an auctioneer's authority to make representations fell within her or his *ostensible* authority, whereas the previous authorities cited either expressly referred to an agent's *implied* authority or left open the question as to whether such an authority were implied or ostensible.

The distinction as to whether an agent is acting under an actual implied authority or an ostensible authority in describing the property is important in determining the rights of the principal and agent *inter se* for torts committed by an agent within the scope of the agent's authority. Where an agent acts in accordance with her or his *actual* express or implied authority it is likely that the agent will be entitled to a complete indemnity from the principal for a tort committed while so acting. On the other hand, where the principal is held liable for a tort committed within the agent's *ostensible* authority, where the conduct clearly constituted a breach of the agent's duty, the ultimate liability as between principal and agent would rest on the agent.[74]

However, in the present context of determining a vendor's potential liability under s52, the distinction between the agent's actual or ostensible authority is not relevant. Indeed, it would seem that as far as third parties, such as purchasers who deal with estate agents, are concerned, if the estate agent has either actual or ostensible authority to describe the property, then under general principles of agency, a vendor, as principal, will be vicariously liable under the general law for a misleading or deceptive description of the property by the agent.

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72 [1965] 2 All ER 358 at 362 (per Diplock LJ).
73 [1974] 3 All ER 511 at 516.
74 Lang, above n64 at 377.

A vendor's general law vicarious liability for the acts of its estate agent was recognised by Burchett J in *JF & BE Palmer Pty Ltd v Blowers & Lowe Pty Ltd* who accepted that the:

> . . . only basis on which the applicant [purchaser of land] could succeed against the second respondent [corporate vendor] . . . would be a finding that the second respondent is vicariously liable for a representation made without its knowledge but on its behalf by a servant of the first respondent [corporate estate agent], that being the very same representation relied upon to fix the first respondent itself with liability.[75]

His Honour then went on to hold that although the parties in such a situation are jointly and severally liable to an innocent purchaser, *inter se* a right of contribution or indemnity exists. Since the purchaser and the corporate estate agent had entered into a settlement agreement in terms of which the purchaser agreed to release the latter from liability with no reservation of rights against the person said to be jointly liable, his Honour found that the terms of settlement also released the vendor even though the legal consequences of the release were obviously not fully appreciated by the purchaser when the terms of settlement were drafted.

The potential vicarious liability of a private vendor for misrepresentations made by an estate agent is graphically illustrated in *MacCormick v Nowland*.[76] In that case an estate agent, appointed by the vendors to sell their home, represented in newspaper advertisements and an auction brochure that the house on the vendors' property was made of brick and that a pool at the rear of the property adjoined a parkland. Prior to exchange of contracts, the applicant purchasers consulted an engineer and builder regarding the feasibility of performing substantial structural alterations to the property. Advice was given by these experts to the applicants on the basis that the property was built of bricks. After exchange of contracts but prior to settlement the applicants ascertained that in fact the house was built of concrete bricks and the land adjacent to the pool was privately owned land. The applicants elected to proceed with the transaction but reserved their rights in respect of the misrepresentations made by the estate agent.

Pincus J held that the misrepresentations were factors inducing the applicants' entry into and performance of the contract and readily found the corporate estate agent which had inserted the misleading advertisement in the newspaper and prepared the misleading brochure liable under s52. In addition His Honour then went on to find that the vendors were vicariously liable as principals under the general law for the estate agent's misrepresentation[77] even though there was evidence that the vendors had told the estate agent that the house was constructed of "Besser brick":

> Here . . . there was a document tending to negative the agent's authority to make such a representation as was made as to the mode of construction of the house . . . There was, however, nothing brought to the notice of the

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75 (1987) 75 ALR 509 at 511-512.

76 (1988) ATPR 40-852.

77 His Honour also discussed the vendors' liability as principals for the fraud or negligence of the estate agent at 49, 183.

purchasers to suggest that the agent did not have the ordinary authority to describe the property.

> It should be added, that there is evidence from which one might well infer actual and not merely ostensible authority to make the representations in question, for it appears that the house was advertised a number of times and one might well infer that the first respondents [vendors] became aware of the terms of the advertisements . . . I do not think it necessary to reach a conclusion on the question whether the terms of the advertisements had the specific authority of the first respondents. I am satisfied that the agent had the ordinary authority to describe the property to prospective purchasers, that it did so, and accordingly the vendors are vicariously liable for the agent's negligent misrepresentation.[78]

Another example of a private vendor being held vicariously liable for the misrepresentation of a corporate estate agent is provided by *Thompson v Henderson & Partners Pty Ltd and Bromberger*.[79] In that case the land agent employed by a private vendor to sell his land misrepresented to the purchaser that the building erected on the land contained 280 square metres of net lettable floor space whereas it did not contain more than 210 square metres. The purchaser subsequently resold the property and sued both the land agent and the vendor for damages for negligent misrepresentation.

Matheson J of the Supreme Court of South Australia held that both the land agent, which had breached the duty of care it owed to the purchaser, and the vendor who was vicariously liable for the acts of the land agent, were liable to the purchaser for the damages she had suffered as a result of the misrepresentation. His Honour apportioned the liability of the land agent and vendor in the amounts of one third and two thirds respectively.

Although there appears little doubt that a vendor will be vicariously liable under the general law for misrepresentations made to prospective purchasers by an estate agent in the course of the agent's actual or apparent authority, the question whether a vendor will be vicariously liable for an agent's breach of a statutory provision does not appear to have been considered in any detail. If this were possible it would be open to a purchaser to argue that although a private vendor of residential land cannot be primarily liable under the Act, he or she can nevertheless be vicariously liable for the breach by the agent of s52. Such an approach would be a way of circumventing the substantial requirements of s52.[80]

It has been suggested that a principal's vicarious liability for offences created by statute depends upon whether the statute can be construed in such a way as to impose this form of liability.[81] Lord Atkin explained the potential vicarious liability of a principal for the criminal acts of an agent in *Mousell Bros v London & North-Western Railway*:

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78 (1988) ATPR 40-852 at 49,184.

79 [1989] ACLD 732.

80 In *Snyman v Cooper* (1991) ATPR 41-068 at 52,041 the Full Federal Court (per Jenkinson, Spender and French JJ) left open the possibility of a cause of action under ss52(1) and 82(1) being founded on a "true vicarious liability" of a master for its servant contravention of s52(1) in the course of the servant's employment.

81 Fridman, *The Modern Law of Employment* (1963) at 535; Brooks, *Contract of Employment*, (2nd edn, 1982) at 51-52.

> . . . while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances by performed, and the person upon whom the penalty is imposed.[82]

It is submitted that a similar test would be applied in determining whether a principal is vicariously liable for the breach of a statutory provision like s52 which does not entail criminal liability. Although warnings have been issued that a court should not lightly presume that the legislature intended a principal to be punished for the fault of another[83] circumstances justifying such a construction might be found to exist. As Devlin J in *Reynolds v G H Austin & Sons Ltd* explained:

> It may seem, on the face of it, hard that a man should be fined . . . for an offence which he did not know that he was committing. But there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in a sentence by Dean Roscoe Pound in his book 'The Spirit of the Common Law', at p52 . . . 'Such statutes', he says, 'are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.' Thus a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed.[84]

The Swanson Committee in its review of the Act in 1976 described s52 as an attempt to prescribe by statute a minimum level of probity and fairness to which it was in the public interest that commercial behaviour should conform.[85] It is therefore possible that courts will be persuaded to hold a vendor vicariously liable for the misleading conduct of an estate agent under s52 on the basis expounded by Devlin J rather than an unwarranted attempt to circumvent the scope of the Act.

(2) *Accessorial liability of vendors under the Act*

The possibility also exists for a vendor to be liable as an accessory under the Act for contraventions of the Act by agents acting on the vendor's behalf. It should be noted that to hold a person liable for the acts of another does not require that person to be capable of being directly liable as a principal under the Act, ancillary liability under the Act being supported by the incidental power of the Constitution : *Ex Parte CLM Holdings Pty Ltd.*[86]

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82 [1917] 2 KB 836 at 845.
83 *Chisholm v Doulton* (1889) 22 QBD 736 at 741 (per Cave J).
84 [1951] 2 KB 135 at 149.
85 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (August 1976) par 9.52.

Section 82(1) of the Act provides that:

> A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part . . . V may recover the amount of the loss or damage by action against that other person *or against any person involved in the contravention.* (emphasis added)

Similarly, in terms of s87(1) the:

> Court may . . . make such order or orders as it thinks appropriate against the person who engaged in the conduct or *person who was involved in the contravention* . . . (emphasis added)

Section 75B defines "a person involved in the contravention of a provision of Part . . . V " as a person who:

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

It would seem that these provisions may be used in a variety of situations as a means of attaching liability for breach of s52 to persons who might otherwise escape the reach of that section. For example, these sections could be used to attribute liability to a natural employee of an corporate estate agency. This could be achieved by characterising the natural employee as a person "knowingly involved in a contravention" of s52 by the corporate estate agency in respect of misleading or deceptive conduct engaged in by the natural employee and attributed to the corporate estate agency by s84 of the Act (subject to the possible qualification on the employee's liability discussed below).

Alternatively a natural estate agent could be held liable as an accessory to a contravention of s52 by a corporate vendor. This latter argument has been raised in certain cases. In *Barnett v Abvay Pty Ltd*[87] it was alleged by the purchasers of certain home units that an estate agent, acting within the scope of his authority on behalf of the vendor, had made certain misrepresentations to them. It was argued by the purchasers that the corporate vendor was accordingly responsible for the agent's misrepresentations made within the scope of his authority and that the agent was therefore liable under s75B as an accessory. Although Fox J held that the purchasers had not established that the estate agents had engaged in misleading or deceptive conduct he did note that it was not disputed that, if supported by the facts, liability in the agent under the Act could be created in this way.[88] Remarks to a similar effect were made by Spender J in *Supetina Pty Ltd v Lombok Pty Ltd*[89] in the course of discussing the liability of a corporate vendor for the alleged misleading

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86 (1977) 2 TPC 4.
87 (1985) ATPR 40-518.
88 Ibid at 46,191.
89 (1986) ATPR 40-716 at 47,852.

conduct of a natural estate agent and an agent employed by him. His Honour noted that the estate agents, being natural persons, could only be liable under the Act by the operation of s75B as persons knowingly concerned, directly or indirectly, in a contravention of the Act by the corporate vendor. However, on the facts of the case his Honour found that the agents had in fact not been appointed to act on behalf of the vendor which was accordingly not liable for any representations alleged to have been made by them.

There appears to be no reason in principle why these provisions could not also be used in a factual situation similar to that which arose in *MacCormick*[90] to attach liability to a natural vendor as a "person involved in the contravention" of s52 by a corporate estate agent.

D. Qualifications on the liability of agents

There are a number of qualifications affecting the primary liability of agents which must be borne in mind in considering a vendor's potential vicarious or accessorial liability for contraventions of the Act by agents. The qualifications dealt with in this paragraph are those relating specifically to an agent's liability under the Act and do not extend to the general prerequisites for the liability of agents under the general law of agency.

1. "Agent as mere conduit" or "disclaimer of responsibility" qualification

This qualification was first adverted to by the Full Court of the Federal Court in *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*[91] in relation to the publication of a defamatory statement. Bowen CJ, Lockhart and Fitzgerald JJ referred to the decision in *Wake v John Fairfax and Sons Ltd*[92] and noted that:

> In the same case it was said (at p50): 'When a defamatory publication purports to repeat or report the defamatory statement of another it is an essentially different libel from one where the same imputation is conveyed directly.' A similar observation is applicable to the publication of the inaccurate statement of another. Such a statement is essentially different in the meaning which it contains or conveys unless it is adopted by the publisher and he will not necessarily do this by merely publishing the statement.[93]

This line of reasoning was adopted by the High Court in *Yorke v Lucas* where Mason ACJ, Wilson, Deane and Dawson JJ in a joint judgment held that:

> It is, of course, established that contravention of that section [s52] does not require an intent to mislead or deceive and, even though a corporation acts honestly and reasonably, it may none the less engage in conduct that is misleading or deceptive or is likely to mislead or deceive... *That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false.* If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly

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90 (1988) ATPR 40-852.
91 (1984) 55 ALR 25.
92 [1973] 1 NSWLR 43.
93 (1984) 55 ALR 25 at 33.

> disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that it misleading or deceptive.[94]

In the present context it would appear to follow from the above passage that no primary liability will attach to an estate agent who merely acts as a conduit by passing on to a purchaser information received from a vendor and in so doing expressly or impliedly disclaims any knowledge of the truth of the information.

By way of contrast, a duty to investigate the truthfulness of certain representations passed on to him by an employee of an art gallery was imposed on a purchaser of paintings in *Plummer v The Saints Gallery Pty Ltd.*[95] In that case certain paintings were alleged by their owner, Kehoe, to be the works of Lloyd Rees and Ian Fairweather. The paintings were sold on consignment by the respondent art gallery to the applicant, Plummer, who happened to be a valuer used by the respondent to value paintings sold by it, but who had only a superficial knowledge of Lloyd Rees' recent works. Both Mr Flannery, a director of the gallery, and Plummer believed that the paintings were genuine. After the purchase it was ascertained that the paintings were forgeries and Plummer claimed damages from the respondent under ss82 and 52 of the Act on the basis that the latter had misrepresented the authenticity of the paintings.

The question arose whether Mr Flannery had disclaimed responsibility for these misrepresentations so as to cast upon Plummer the onus of satisfying himself as to the authenticity of the paintings and whether Plummer had in fact relied upon the representations in deciding to purchase them.

At first instance Wilcox J held that Plummer did not understand Flannery to be merely repeating what he had been told by Kehoe but had believed that Flannery had satisfied himself as to the accuracy of the information given to him by Kehoe. In his Honour's opinion it therefore followed that there had been no effective disclaimer of responsibility by the respondent which was ordered to refund the balance of the purchase price of the paintings to Plummer in return for the paintings.

An appeal by the gallery to the Full Court of the Federal Court[96] was allowed on the basis that although the applicant had relied on the representations of Mr Flannery as to the provenance of the paintings, those representations were made in such a way as to indicate that the gallery was not the source of the information but was merely passing it on for what it was worth. In reaching this decision the Full Court provided the following gloss on the "mere conduit" qualification:

> The reference in *Yorke & Anor v Lucas* (*ubi supra*) to an express or implied disclaimer of belief in an instruction conveyed by an agent does not involve that an agent who *does* believe his client, and makes that fact apparent, may not at the same time impliedly disclaim personal responsibility for what he conveys...

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94 (1985) 61 ALR 307 at 309. Emphasis added. See discussion by Ravech, "*Yorke v Lucas* — Case Note" (1990) 17 *MULR* 521.

95 (1988) ATPR 40-840.

96 (1988) 80 ALR 525 (per Morling, Pincus and Burchett JJ).

> It is true that Mr Flannery did not disclaim belief in the truth of what the owner had told him, but that did not in itself make his statement misleading. A statement of belief may not, depending on the circumstances, be misleading if what is stated truly *is* believed and does not imply any misleading fact . . .
>
> In the particular circumstances of the case, we think it should have been held that nothing said or done on behalf of the appellant should have been taken by Mr Plummer to convey more than that the paintings' owner had represented them to have a certain origin and history; the appellant claimed to have no more knowledge of the matter than that. He stood in the position of an intermediary between Mr Kehoe, the source of the information and the then owner of the paintings, and Mr Plummer, who, like the appellant, did not check Mr Kehoe's assertions and assumed them to be true. The matter would raise quite a different issue if Mr Flannery were shown to have done, or purported to do, anything other than explain what Mr Kehoe had claimed to be the facts.[97]

As a result of the Full Court decision it follows that not only may an agent expressly disclaim responsibility for information provided by another, but that such a disclaimer may be implied. The decision also appears to impose an obligation on the representee to investigate the accuracy of the information received while exonerating the agent from the need to make such investigations before passing on such information. Although the Full Court did not confine its remarks to the particular circumstances before it, it is possible that an implied disclaimer will only be inferred in exceptional circumstances, such special circumstances being provided in the present case by the fact that the purchaser was himself a valuer of paintings and was admitted to have more expertise than the director of the gallery.

The limits to which this qualification can be taken are illustrated by the facts in *National Mutual Holdings Pty Ltd v The Sentry Corporation.*[98] In that case the respondent vendor of shares had allegedly made representations concerning the shares to certain individuals, representing the applicant group of companies, who subsequently became directors of the applicant. The respondent sought an indemnity from these individuals on the following bases:- that these directors had themselves communicated the representations made to them by the respondent to the applicant purchaser; that they had allowed those representations to remain unaltered up until conclusion of the sale agreement; in communicating the representations to the applicant they had not made it apparent that they were not the source of the information contained in the representations and had not expressly or impliedly disclaimed any belief in the truth or falsity of the representations. The respondent then argued that it was accordingly not misleading conduct for the recipient of information to merely pass it on without knowledge of its truth and without accepting responsibility for it.

Northrop J however rejected this argument, describing it as an attempt to introduce an unwarranted "degree of artificial sophistication".[99]

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97 Ibid at 530, 531.
98 (1989) ATPR 40-977.
99 Ibid at 50,680.

The existence of this qualification, although logically justifiable, may produce unfortunate practical results. It has been shown that the qualification may allow an estate agent to escape primary liability under s52 for "merely passing on" misleading information supplied by the vendor to a purchaser. However, where the vendor is a natural person not acting in trade or commerce the purchaser may thereby be deprived of any remedy under the Act since the vicarious or accessorial liability of that type of vendor is dependent upon the agent's being primarily liable under the Act.

It is arguable that the mere passing on of information by an agent should, in policy terms, amount to conduct in breach of s52 rendering the agent liable in damages under s82 of the Act to a purchaser who enters into a contract on the faith on that information. The inequity as far as the agent in such a situation is concerned could be remedied by applying the general rules of contribution as between principal and agent: the vendor should be liable to fully indemnify the agent for such damages, since in passing on the information to the purchaser the agent is merely acting within the scope of his actual authority. This approach would have the benefit of protecting the innocent purchaser from conduct which the Act seeks to prohibit without throwing upon her or him the onus of investigating the accuracy of the information provided.

Support for this proposition may be found in a number of American decisions refusing to allow estate agents to escape liability for misrepresentations on the basis that they act only as conduits of information and which instead require estate agents to actually verify information supplied by vendors.[100] However, even in those cases which accept that estate agents should be required to verify such information there does not appear to be any accepted principle as to the circumstances in which the agent's liability to verify should arise. At one extreme are those cases in which no duty of verification is imposed upon an estate agent unless the agent is aware of facts indicating that the information supplied is false. At the other extreme are those cases in which estate agents have been held liable for even innocently communicating material misrepresentations to purchasers. Yet again still other cases have adopted a middle course requiring agents to verify information supplied by vendors which the agent ought reasonably to know is material to the buyer. The advantages of the middle course are succintly described in the following passage:

> The common thread running through all these cases is the need to balance the damage done to the buyer as a result of the misrepresentation with the relative culpability of the broker . . . Clearly, the broker, as a professional, must be more than a conduit of information between the seller and the buyer. Yet, should the broker be an absolute guarantor of the truth of the information that the buyer receives? A position which is midway between the two extremes is preferable. The broker would be liable to the buyer for misrepresentation if he failed to exercise reasonable care in the obtaining or communicating of the information. Reasonable care would involve a duty to investigate to determine the truth or falsity of information supplied

100 See discussion by Murray, "The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate" (1987) 52 *Villa LR* 939 at 967-984.

> by the seller and, in some instances, a duty to conduct an independent investigation of the property to determine its true condition.[101]

It is submitted that this reasoning should be applied in determining an agent's liability as a "mere conduit" under s52 in preference to the blanket qualification imposed by the Full Court in *Plummer* in order to prevent the qualification prejudicing innocent purchasers relying in good faith upon information provided by estate agents.

This line of reasoning appears to have been adopted in two recent cases. In the first case, *Johnson v Peter Evans Pty Ltd and Dewsnap*,[102] an estate agent placed an advertisement in a newpaper describing the vendors' property as "one acre" in size whereas in fact the property was less than three quarters of an acre. Although the agency agreement signed by the vendors also described the property as "approximately one acre" the vendors claimed that they had informed the agent of the true size of the property before the advertisement was placed. On discovering the true size of the property after entry into the contract the purchaser brought proceedings against the vendors and the estate agent under ss52 and 53A(1) of the Act. The estate agent cross-claimed against the vendors alleging that the advertisement had been placed on the basis of information supplied by the vendors.

Without discussing the basis of the vendors' liability, Woodward J held that the purchasers had been misled and deceived by the vendors' conduct in informing the agent that the property was one acre in size. His Honour[103] then went on to hold the agent liable on the basis that a "careful agent should have queried the round figure of one acre which the vendor had given" and was not a mere conduit for the information provided. Consequently his Honour ordered the vendors and agent to contribute to the purchaser's damages and costs in the proportion of three quarters and one quarter respectively. In arriving at this conclusion Woodward J accordingly applied the "mere conduit" qualification so as to limit the agent's liability but at the same time imposed at least some obligation on the agent to inquire as to the accuracy of the information supplied.

In the second, *Seabridge Australia Pty Ltd*,[104] an agent acting for the lessor of office premises was held jointly liable with the lessor for a misrepresentation regarding the net lettable area of the premises and ordered to pay one-half of the amount awarded to the lessee. Beaumont J reached his decision despite the fact that the relevant information had been supplied to the agent by directors of the lessor, and despite the presence of three disclaimers of responsibility by the agent in the lease. The basis of his Honour's decision

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101 Ibid at 969, 972.

102 Unreported, 19 November 1986, Federal Court of Australia, noted in Glacken, "Real Estate Advertising — the risks of exaggeration under the Trade Practices Act" (1987) Vol 2 *APLB* 19. See also *Mackman v Stenfold Pty Ltd* (1991) ATPR 41-105 where information supplied to accountants acting for a vendor of a motor vehicle paint business was held to have been "totally and uncritically" accepted by the accountant in the drafting of profit projections for the business. A disclaimer by the accountants as to the accuracy of the profit projections was held to be ineffective.

103 Ibid at 23.

104 (1991) ATPR 41-112.

was the active role taken by the agent in the negotiations regarding the size of the floor areas.[105]

Furthermore, the "mere conduit" qualification would presumably not protect an agent who deliberately refrained from obtaining the requisite knowledge by making reasonable inquiries to dispel a reasonable suspicion as to the accuracy of information supplied by a principal.

The Trade Practices Commission advises estate agents that they have to take responsibility for what they say and "not regard themselves solely as a channel for information between the seller and the buyer".[106]

2. *"Intentional participation of accessory" qualification*

A second and more recent qualification to the potential *accessorial* liability of vendors for the acts of estate agents (as distinct from their vicarious liability) was identified by the High Court in *Yorke v Lucas* in the interpretation of s75B(a):

> . . . the words used, 'aided, abetted, counselled or procured', are taken from the criminal law where they are used to designate participation in a crime as a principal in the second degree or as an accessory before the fact . . . a person will be guilty of the offence of aiding and abetting or counselling and procuring the commission of an offence only if he intentionally participates in it. To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime. So much was affirmed recently in *Giorgianni v R* (1985) 59 ALJR 461; 58 ALR 641, where the relevant authorities were examined . . . .
>
> The appellants sought to meet this difficulty by submitting that s75B(a) should not be construed in accordance with the requirements of the criminal law and that no intent was necessary in order to constitute a person an aider, abettor, counsellor or procurer within the meaning of that paragraph. A contravention of s52, it was said, requires no intent and it follows that there is no reason why intent should play any part in secondary participation in a contravention of that section.
>
> The nature of the prohibition imposed by s52 is, however, governed by the terms in which it is created and the context in which it is found. Section 75B, on the other hand, in speaking of aiding, abetting, counselling or procuring, makes use of an existing concept drawn from the criminal law and unless the context requires otherwise, there is every reason to suppose that it was intended to carry with it the settled meaning which it already bore . . . In *Giorgianni v R* it was held that secondary participation required intent based upon knowledge, notwithstanding that the statutory provision creating the principal offence imposed strict liability.[107]

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105 Ibid at 52,733.

106 *Fair and Square: A Guide to the Trade Practices Act for the Real Estate Industry*, jointly published by the Trade Practices Commission and the Real Estate Institute of Australia (1989) at 11.

107 (1985) 61 ALR 307 at 310-311 (per Mason ACJ, Wilson, Deane and Dawson JJ. Brennan J delivered a separate concurring judgment). Emphasis added.

In relation to s75B(c) it was held:

> There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention.

In *T W Ridgway v Consolidated Energy Corp Pty Ltd*[108] Fox J noted that although s75B requires knowledge on the part of those concerned of the essential facts or matters constituting the contravention, knowledge that they amount to a contravention is not necessary.

It is arguable that the proposition that before a person can be found to be liable as an accessory under the Act that person must at least know the essential matters which constitute the offence, would not protect a person who deliberately refrained from obtaining the requisite knowledge by making reasonable inquiries. The question whether the knowledge of the accessory is required to be actual knowledge or whether constructive knowledge will suffice was considered by Wilcox J in *Goroka Pty Ltd v Montgomery Jordan and Stevenson Pty Ltd.*[109] Although his Honour did not decide the matter he expressed the opinion that the reference by Brennan J in *Yorke* to an "honest ignorance of the circumstances"[110] suggests that an assertion of a fact, made with reckless indifference as to its truth or falsity, would not easily be regarded as an "honest" ignorance. In *Crocodile Marketing v Griffith Vintners*[111] it was argued before Cole J of the Supreme Court of New South Wales, Commercial Division, that the failure by the managing director of the respondent company to conduct tests to establish the truth or falsity of representations and facts made by the company regarding wine supplied by it prevented him from asserting absence of knowledge of the contravention. In rejecting this argument his Honour held:

> This is a slight departure from the circumstance addressed by Wilcox J in *Goroka Pty Ltd* because it seeks to impose or deem knowledge flowing from an unutilised capacity to determine a true factual position. This may not necessarily involve carelessness or recklessness . . .
>
> The propositions advanced on behalf of the plaintiff are not, in my view, supported by authority. *York v Lucas* establishes that there is a requirement of knowledge of falsity and thus to have been involved intentionally in the contravention. I do not think one can say that a person intentionally participated in a contravention if, in fact, his unawareness of falsity . . . was due to a simple failure to direct the conduct of acts to establish a fact. Absence of knowledge, save perhaps in the exceptional circumstance of ignorance being dishonestly and deliberately maintained, denies the necessary intent in regard to contravention.[112]

An application of the qualification in a landlord and tenant dispute is provided by *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd.*[113] Pincus J held that in order to find the partners of a real

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108 (1986) 7 IPR 452 at 457.
109 (1986) ATPR 40-722 at 47,916-47,917.
110 (1985) 61 ALR 307 at 317.
111 (1990) ATPR 41-000.
112 Ibid at 51,020.
113 (1985) 61 ALR 504. Pincus J also held that although certain misrepresentations had been made to a number of lessees by the lessor's agent, claims for damages based upon those

estate firm, Jones Lang Wootten, liable under s75B as accessories to a contravention of the Act by persons on its behalf, on the authority of *Yorke*, the alleged misleading representations of a lessor of a shopping centre:

> . . . must be sheeted home to the partners themselves; it is not enough to succeed under s75B, to show that a party to the contravention acted for . . . Jones as agent or servant, the members of [Jones] not being themselves said to have been involved.
>
> . . . where suit is brought against a natural person, in reliance on s75B . . ., it is not enough merely to show that the respondent was a principal on whose behalf acts were done falling within the section; the principal himself must be involved in the contravention.[114]

Cases in which the qualification was found to have been satisfied include *Bateman v Slatyer*[115] (in relation to the directors of a company); the Full Court of the Federal Court decision in *Sutton v A J Thompson Pty Ltd (in liq)*[116] (in relation to an accountant of a vendor company); *Nella v Kingia Pty Ltd*[117] and *Oscty Pty Ltd v Ufford Holdings Pty Ltd*[118] (in relation to the directors of corporate vendors).

It is clear that this qualification severely limits the potential accessorial liability of natural vendors for contraventions of s52 by corporate estate agents by requiring proof of the vendors' intent to engage in the prohibited conduct. Such proof would be provided by evidence of knowledge by the vendor of the misleading or deceptive nature of the estate agent's conduct. In addition a strict application of the qualification can produce paradoxical results. Take for example the situation where a natural vendor innocently furnishes a corporate estate agent with incorrect information in relation to the property which the agent then conveys to a purchaser. It would appear that even if the agent were held primarily liable under s52 (presuming the "agent as mere conduit" qualification discussed above fails), the natural vendor might be able to avoid liability as an accessory under s75B if it can be proved that he or she acted innocently and without knowledge of the contravention — a defence which would not have been available to a vendor primarily liable under s52.

The requirement of knowledge by an accessory is particularly difficult to satisfy where the misleading or deceptive conduct allegedly engaged in by the party primarily liable consists of a failure to disclose material facts.

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misrepresentations failed because of the three year limitation period in s82(2) of the Act. On appeal a majority of the Full Court of the Federal Court (per Morling and Wilcox JJ) held that no contravention of the Act had been made out thereby rendering it unnecessary for them to consider when the limitation period under s82(2) of the Act began to run. Spender J, although accepting the trial judge's finding of a contravention by the lessor of s52, held that the lessee's claims under s52 were statute barred.

114 Ibid at 507, 508.

115 (1987) 71 ALR 553 at 562-563.

116 (1987) 73 ALR 233.

117 (1989) ATPR (Digest) 46-046 (per French J). It should however be noted that a claim against a number of natural estate agents involved in the sale failed on the basis that none of them had the necessary intention or knowledge of the essential facts of the contravention of s52 by the vendor company.

118 (1989) NSW ConvR 55-494.

Indeed, in *Sent v Jet Corporation of Australia Pty Ltd*[119] Smithers J of the Full Court of the Federal Court held that to be "involved" in misleading or deceptive conduct within the meaning of s75B it is necessary not only that the person alleged to be so involved should know that a party proposed to engage in such conduct, but in addition that he should in some positive way be associated with that conduct. More importantly, in this context, his Honour then held that mere silence, inactivity or the acceptance by vendors of an aeroplane of purchase money due to them from corporate purchasers with the knowledge that such money was part of the proceeds of a sale by those purchasers in connection with which misleading and deceptive conduct had occurred, were not acts of participation such as to constitute involvement by the vendors in the conduct of the purchasers.

His Honour noted:

> In *Yorke's* case it was held that the terms of s75B were not to be interpreted as imposing on the managers of a corporation a duty to take positive steps to prevent the corporation from engaging in misleading and deceptive conduct where they have no knowledge of the essential facts necessary to constitute the contravention. It is not to be thought that it imposes such a duty on a party who has no legal relationship of any kind with the person who proposes to engage in misleading and deceptive conduct in relation to a third person.[120]

This approach was followed by Neaves J in *Maisey v Mudgeeraba Village Estates Pty Ltd.*[121] In considering whether a director of an corporate estate agency was liable as an accessory under s75B(c) His Honour found that although there was evidence that she was connected with the matters complained of, she was not liable, not being aware of the representations made. In fact, although on the evidence the conclusion was clearly open that she stood by knowing that the virtues of a project would be accentuated and the disadvantages minimised, his Honour did not regard such conduct as sufficient to enable a positive finding to be made that she concurred in the conduct constituting the contraventions.

However there are indications that in certain circumstances a failure to act can constitute the necessary involvement. In *Collier v Electrum Acceptance Pty Ltd*[122] Woodward J was prepared to accept that it may be possible for a person to participate as an accessory in a contravention of s52 without actively engaging in overt conduct:

> . . . [W]here the conduct relied on to establish a breach of s52 is the misleading maintenance of silence, or failure to correct a misleading statement, it is, I think, possible for another person to be 'involved' in such conduct by also maintaining silence, at least if that conduct also involves the doing of other positive acts.

It is submitted that such an approach accords with the spirit of the Act which expressly provides in s4(2)(c) that a deliberate failure to act can constitute misleading and deceptive conduct.

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119 (1984) 54 ALR 237 at 245-246.
120 Ibid at 246.
121 (1985) ATPR 40-569.
122 (1986) 66 ALR 613 at 651.

3. *"Individual liability differentiated from corporate liability" qualification*

A further qualification on the accessorial liability of individuals has been said to exist where it is sought to hold a natural person liable as an accessory to a contravention by a corporation. The essence of the qualification is that a natural person cannot be liable as an accessory to a contravention by a corporation if the contravening conduct attributed to the corporation is conduct engaged in by that natural person. In the context of conveyancing transactions this qualification would most commonly apply where it was sought to hold a natural estate agent (for example, a director) liable as an accessory for the misleading or deceptive conduct of a corporate estate agency in respect of conduct engaged in by that natural estate agent and attributed to the corporation under s84 of the Act.

The basis for the qualification was explained by the High Court in *Yorke v Lucas*, a case involving the sale of a business through the agency of Mr Lucas, a director of a corporate estate agency, in the following terms:

> . . . the appellants may. . . have encountered difficulty in establishing that Lucas was involved within the meaning of s75B in the contravention constituted by the making of the false representations, having regard to the fact that the representations, albeit made on behalf of the Lucas company, were made by Lucas himself. As Dixon J observed in *Mallan v Lee* (1949) 80 CLR 198 at 216: 'It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts'.[123]

The qualification in the terms described by the High Court would severely restrict the scope of the Act as a means of holding individuals personally liable as accessories for contraventions of the Act and would allow them to hide behind the corporate veil in a manner contrary to that envisaged by the Act.[124]

Fortunately, the High Court has now apparently reconsidered the very existence of the qualification. In *Hamilton v Whitehead* Mason CJ, Wilson and Toohey JJ referred to the qualification expressed by Mason ACJ, Wilson, Deane and Dawson JJ in *Yorke* and added that:

> It would seem to us, with respect, that this reservation, made no doubt out of an abundance of caution, was unnecessary. The provisions of the *Trade Practices Act*, like the [Companies] Code in the present case but unlike sec 230 of the *Income Tax Assessment Act*, were such that the alleged accessory was indeed a true accessory since the offence committed by the company was not the consequence of a vicarious liability for the actions of its servants, carried out on its behalf. It was the consequence of actions undertaken directly by it, that is to say by a person who was the embodiment of the company.[125]

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123 (1985) 61 ALR 307 at 313 (per Mason ACJ, Wilson, Deane and Dawson JJ).

124 The possibility of the existence of such a qualification was raised by Fox J in *T W Ridgway v Consolidated Energy Corp Pty Ltd* (1986) 7 IPR 452 at 457 and raised and rejected by Burchett J in *Bateman v Slatyer* (1987) 71 ALR 553 at 563.

125 (1988) 82 ALR 626 at 631.

French J in *Wright v Wheeler Grace & Pierucci Pty Ltd*,[126] a decision handed down before the High Court judgment in *Hamilton*, upheld a claim under s52 by investors in a scheme promoted by a financial consultant company against the company but dismissed their claim against a natural person employed by the company as a senior client adviser on the basis that the conduct contemplated by s75B was conduct distinct from that which constituted the breach and that no distinct conduct was present. An appeal by the company to the Full Court of the Federal Court was dismissed but a cross-appeal by the investors as to the personal liability of the adviser was allowed.[127] The Full Court found that in the light of the High Court decision in *Hamilton* and the findings of the trial judge that the adviser possessed knowledge of the circumstances which gave the company's conduct its misleading character, he was liable as a person "knowingly involved" in the contravention of s52.

Lee J distinguished the liability under the *Income Tax Assessment Act* 1936 (Cth) which arose in *Mallen* from that arising under s52 and the general law and s84(2). In the former case the liability imposed on the servant of a company is a direct liability for which the company is vicariously liable, whereas in the latter case the liability of a company is a direct and not a vicarious liability and for this reason there is no reason why a servant who is a principal offender could not at the same time be an accessory to the liabiity of the company.[128]

It now appears that a natural person can be an accessory to a contravention of s52 by a corporate principal in relation to conduct by that person which is attributed to the corporation. In the context of vendor-purchaser disputes this would mean that provided the other requirements for liability are satisfied, not only may a corporate estate agent be primarily liable under s52 for the misleading or deceptive conduct of a natural estate agent acting on its behalf but so too may the natural estate agent be liable as an accessory. This result will follow provided the natural estate agent represents the directing mind and will of the corporation The question whether the conduct of a mere sales-person employed by a corporate estate agent would be attributed to the company will depend on the interpretation of s84 of the Act (an analysis of which is beyond the scope of this paper.)

E. Conclusion

This article has attempted to demonstrate that potentially s52 has a role to play in conveyancing transactions, even those involving residential land, provided that the transaction is entered into in the course of trade or commerce by a corporate vendor or one involved in interstate trade, or, subject to a number of qualifications, where a corporate estate agent is involved in the contravention.

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126 (1988) ATPR 40-865.

127 (1989) ATPR 40-490 (per Neaves, Burchett and Lee JJ).

128 See *State of Western Australia v Bond Corporation Holding Ltd* (1991) ATPR 41-095 at52,535 (per French J).