

NCLSS - Pitfalls in Sale of Business

Warranties, Disclaimers and the Australian Consumer Law

Mark Robins Q C

1. For most of us, early in our study of law we encountered *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 and learnt of the somewhat rarefied distinction between a contractual promise enforceable at law and mere “puffery” which was not actionable.
2. The misleading conduct provisions of the *Trade Practices Act 1974* and its successor legislation, the *Australian Consumer Law (ACL)*, were in part calculated to drive a stake through the heart of the 19th Century concept of “puffery”. But a little like Christopher Lee’s numerous vampiric returns in the Hammer House of Horror movies, the stake driven through the heart of “puffery” has not been entirely efficacious.
3. Burchett J commented in *Poseidon Ltd v Adelaide Petroleum NL* (1992) ATPR 41-164 at p40,227:

“I do not think it has ever been suggested that s 52 strikes at the traditional secretiveness and obliquity of the bargaining process. Traditional bargaining may be hard, without being in the statutory sense misleading or deceptive. No-one expects all the cards to be on the table. But the bargaining process is not therefore to be seen as a licence to deceive.”
4. In *Inderby Pty Ltd & Rust v Quinert* (1995) ATPR (Digest) 46-141 at 53,117 Nathan and Teague JJ [Brooking J agreeing] expressly approved Burchett J’s comment, adding at 53,115 the further observation that:

“Games and ploys designed to induce a wrong and detrimental state of facts are obvious examples of conduct which is or could be misleading”
5. Nettle JA (as his Honour then was) in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* (2005) ATPR 42-042 at paragraph 33 observed that:

“...if the bargainer has no intention of contracting on the terms discussed, his conduct in seeming to bargain may accurately be stigmatised as misleading. I add, that just as certainly, if a bargainer having no more capacity than a hope and a prayer of providing goods or services conducts negotiations in a fashion calculated to create the impression that he has the capacity to do so, and extracts payment on the faith of that assumption, his conduct is liable to be stigmatised as misleading and deceptive.”
6. More recently in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 the High Court at [22]-[23] after referring to Burchett J’s judgment in *Poseidon* observed that:

“However, as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless

disregard, for its own interests, of another party of equal bargaining power and competence...

Reasonable expectation analysis is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation. A party to pre-contractual negotiations who provides to another party a document containing a false representation which is not disclaimed will, in all probability, have engaged in misleading or deceptive conduct. When a document contains a statement that is true, non-disclosure of an important qualifying fact will be misleading or deceptive if the recipient would be misled, absent such disclosure, into believing that the statement was complete. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete.”

7. Thus the inherent tension between the tough love of the “traditional bargaining” process and the misleading conduct provisions of the ACL remains with us. Indeed, very occasionally you will still see someone pleading “mere puffery” in a defence to a misleading conduct claim.
8. This tension remains heightened in situations where a party to a contract, as often happens in a sale of business contract, usually the vendor, seeks to either disclaim the making of any representations at all, or to at least confine representations to discrete and explicit warranties. A separate disclaimer of reliance is in turn then imposed on the purchaser, and even sometimes deeds of release in favour of the vendor and its agents.
9. I have been encouraged to comment on the recent mega litigation in this court by the Japanese brewer, Asahi, arising from its purchase of a large Australian and New Zealand distillery business. There the vendors, a cartel of merchant bankers and international investment trusts, had sought to protect themselves with the full array of disclaimers, specific warranties, limitation of documents to those stored in a data room and broad releases of the vendors, their servants and agents. When the business was found post settlement not to be quite the jewel in the crown that Asahi had perceived it to be, a massively complex and large court case evolved, involving a hundred thousand discovered or subpoenaed documents, accounting and valuation experts from around the globe, bringing gainful work to a score of Victorian and Interstate silks, two score or more juniors and well over a hundred solicitors and their support staff. Needless to say the running of such a case at trial represented what Sir Humphry Appleby would have characterised as an “insuperable opportunity” and it settled before trial.
10. But what the Asahi litigation demonstrated to those involved was that even with the most cleverly crafted of contracts, drawn by the most elite top end of town commercial solicitors, no sale of business transaction is bullet proof against litigation. Indeed, the bigger the transaction is, the greater the scope is for something to slip through the cracks, even if only on an arguable basis sufficient to create a significant litigation risk.

11. But rather than talk in generalities, or risk being sued for defamation or misconduct if I express too many personal views on the rights or wrongs of the Asahi litigation, which of course was not litigated to a final adjudicated verdict, I will rather discuss one recent decision where the vendor's protective provisions in a sale of business contract worked to defeat a claim for misleading conduct under the *Australian Consumer Law*. This is Robb J's recent decision in *Jewelsnloo Pty Ltd v Sengos (No 2)* [2016] NSWSC 61.
12. Despite the evocative name of the plaintiff, *Jewelsnloo* in fact dealt with the purchase of a business that traded under the name "Amazing Water" which sold water coolers, filters and benchtop filters through the Internet. *Jewelsnloo* complained that it was induced to enter into and complete the contract of sale by misleading and deceptive conduct engaged in by the vendor defendants, and sought an order avoiding the sale, or damages in the alternative. There was also a passing off claim which I will ignore for the purposes of this discussion.
13. In particular, *Jewelsnloo* alleged that it had been misled by statements made by the vendors as to the turnover of the business.
14. The first point for observation made by Robb J in this case, was that his Honour was highly critical of the delay by *Jewelsnloo* at [28], as to it first waiting 4 months after it took possession of the business before issuing proceedings, and secondly, only pleading relief seeking to avoid the contract of sale of the business due to misrepresentations as to the turnover by way of amendments to the statement of claim a few months after issue. That criticism struck me as somewhat harsh, as plainly there will be a lead time after settlement of a purchase of a business before a purchaser can fairly appreciate whether they have been misled in any substantive way, and 4 months did not strike me as excessively lax. A more valid criticism of the plaintiff there was that it never sought to formally rescind or terminate the sale of business contract. But the point remains that a purchaser wishing to avoid, rescind or terminate a contract of sale of a business needs to act expeditiously.
15. Robb J was further critical of *Jewelsnloo* as plaintiff for only amending its claim to raise unconscionable conduct under s.18 of the ACL much later. Again the point of observation is that if a contract is to be successfully sought to be avoided in equity or by the statutory equivalent under s.18 of the ACL, then a plaintiff needs to act with expedition.
16. There were a number of hurdles that the plaintiff *Jewelsnloo* faced in making good its claim that the defendant vendors misrepresented the business' turnover:
 - (1) The defendant vendors had only purchased the business 5 months earlier from Mr Sengos and had no completed BAS or Tax returns;
 - (2) Before the selling agent supplied *Jewelsnloo* with any financial information, it required the plaintiff to execute a so-called confidentiality agreement. That agreement contained the following provision:

I/We hereby acknowledge that ... the Agent has pointed out that the Confidential Information provided to me/us has been provided by the vendor or the VENDOR'S

representatives or advisers or compiled by the AGENT from material obtained from the VENDOR or the VENDOR'S representatives or advisers, and should be checked independently for accuracy and truth. The AGENT informed me/us that it is not possible for the AGENT to check the validity of such information and invited me/us to make my/our own enquiries in relation to the financial and other data concerning the above business/es. The AGENT also warned me/us that any indication of past performance was in no way a warranty or representation that the new owner would be able to achieve such results in the future and advised me/us to seek independent advice as appropriate before proceeding with any purchase.

- (3) After signing the above “confidentiality agreement”, the plaintiff was given financial statements asserting a five months’ turnover of \$166,000 but bank statements consistent with only something in the order of \$54,000 being received;
 - (4) There was strong evidence from the selling agent that before agreeing to purchase the business, the plaintiff became aware of the discrepancy between the bank statements of the vendors and the reported 5 months trading revenue, which revenue figure the agent for the vendors said to the plaintiff could not be verified, this then led to a vastly reduced purchase offer by the plaintiff which the defendants accepted (selling the business for \$200,000 plus stock which they had purchased only 5 months before for \$300,000). Robb J accepted the evidence of the selling agent to this effect.
17. Nevertheless at [132]-[133], given concessions by the defendants, Robb J found the turnover representations to have been made and to be misleading and deceptive. At [139] Robb J held the turnover figure to be misleading and deceptive despite the provision of the bank statements showing only \$54,000 odd of actual receipts and despite accepting the selling agent’s evidence that he had told the plaintiff that the turnover figure simply could not be verified.
 18. Less surprisingly, Robb J ultimately found that the plaintiff did not rely upon the defendants’ misleading and deceptive conduct as to turnover. His Honour noted that disclosure of the bank statements which showed actual receipt of less than a third of the stated turnover. His Honour noted the conversation with the selling agent to the effect that the 5 months’ turnover figure could not be verified. His Honour noted the effect of clause 2.1 of the Confidentiality Agreement. His Honour further noted that the contract of sale itself warranted that the plaintiff had made its own enquiries regarding any financial return or income which may be derived from the business (clause 5.2.2), and that it did not rely on any representation whether oral or in writing made by the vendor in respect of the subject matter of the agreement other than those expressly contained in it (clause 5.2.5).
 19. Robb J at [145] correctly referred to the authorities demonstrating the degree of scepticism which normally ought to be applied to such boiler plate provisions as to exclusionary warranties, citing *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592. But his Honour concluded that on the facts before him, these particular provisions did have real force in the context of assessing what was or was not relied upon by the plaintiff purchaser. He explained at [146]:

“However, in my view it would be wrong for the court lightly to ignore the effect of such provisions in arm’s length commercial transactions in which the parties are professionally represented. Terms of this nature should not be treated as mere verbiage. If a potential purchaser does not want its rights to be governed by such terms, it may insist upon a variation to the agreement, or decline to proceed with it. Terms of this nature are important to the way that the parties have agreed to divide between them the risk of error being made by one party or the other. Vendors are likely implicitly to conduct the negotiations on the basis that the purchaser has accepted the obligation to make its own enquiries, and to judge the risks of the transaction on the basis that the provisions govern the distribution of risk between the parties; and the vendor is likely to provide information to the purchaser without taking the care to protect the vendor’s own interests that would be necessary if the vendor could not rely upon the provisions. As the present case to some extent demonstrates, not all matters relevant to the operation of the business are black and white and capable of absolute demonstration. It is a perfectly sensible commercial arrangement that the agreements apportion the obligation to make enquiries about the operation of the business and the risk of error as between the parties.”

20. His Honour’s conclusion was supported by the lack of direct evidence by the plaintiff explaining how or why its director came to sign a contract including these provisions let alone clause 2.1 of the Confidentiality Agreement. Often the very fact that a person has been misled and deceived will explain why they enter into an onerous contract, but curiously the plaintiff gave no such evidence to Robb J. Given his Honour’s acceptance of the conversation with the selling agent as to the vendor’s inability to justify or support the turnover figure, this omission in the evidence led Robb J almost inevitably to the conclusion that there was no operative reliance by the plaintiff purchaser. See [147]-[148].
21. No less importantly, his Honour noted at [149] that the business in question was an internet based business. It was not a cash in hand street-front business and the very disconformity between the bank statements and the 5 months’ turnover figure, unsupported by emails and other internet data recording sales of \$166,000 which ought to have been available ought to have put the plaintiff purchaser on its guard. But the plaintiff neither sought an express warranty from the defendant vendors as to turnover nor refused to execute the contract with the disclaimer of warranties provision in clause 5.2 as noted above.
22. The plaintiffs’ delay in properly raising and pleading its case as to the misleading and deceptive conduct by the turnover figure further supported Robb J’s conclusion as to a lack of substantive reliance by the plaintiff. His Honour also noted the very tiny revenue in fact received by the plaintiff in the four months’ post settlement, which coupled with the absence of early complaint was held to be further consistent with a lack of reliance by the plaintiff purchaser.
23. In addressing how he would have assessed damages, Robb J at [164]-[165] cited the recent observations by Emmett JA on this subject (with whom Bathurst CJ and

McCull JA agreed on this issue) in *Williams v Pisano* [2015] NSWCA 177 at [98] to [101] (footnotes omitted):

[98] However, **under s 236 of the Law, a claimant may recover the amount of the loss or damage suffered by the claimant because of the conduct of another person.** Thus, it is necessary to determine what loss or damage was caused by the Representations, which were made in contravention of s 18 or s 30.
...

[99] **Section 236 is the statutory source of the Purchasers' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word "because".** The predecessor of s 236, s 82 of the Trade Practices Act, conferred a right to recover loss or damage suffered "by" the contravening conduct. **It is reasonable to assume that the principles established in relation to s 82 are applicable to s 236:** generally, where Parliament repeats words (by way of re-enactment) that have been judicially construed, it is taken to have intended the words to bear the meaning already judicially attributed to them. Although the earlier and later provisions here are not in identical terms, neither party suggested that the principles applicable to s 82 are not applicable to s 236.

[100] The task of a court is to select a measure of damages that conforms to the remedial purpose of the Law and "to the justice and equity of the case". The purpose of the Law is to establish a standard of behaviour in trade or commerce by proscribing certain conduct and by providing a remedy in damages for contravention of the proscription. **Accordingly, the principles of common law that are relevant to assessing damages in contract or tort are not directly in point. However, they will normally provide useful guidance,** in so far as the principles of contract and tort have had to respond to problems of a nature similar to the nature of the problems that arise in the application of the Law. While the principles of the common law are not controlling, they represent an accumulation of valuable insight and experience that will be useful in applying the Law.

[101] **In many cases, the measure of damages in tort is the appropriate guide in determining an award of damages under s 236. However, in assessing damages, it is not necessary to choose between the measure of damages in deceit or other torts and contract. The central requirement under s 236 is to establish a causal connection between the loss claimed and the contravening conduct. Once such a causal connection is found to exist, the principles in relation to remedies in contract, tort or equity such remedies will usually be of considerable assistance by way of analogy. However, the recoverable amount should not be limited by drawing an analogy with such remedies and, in particular cases, general principles for assessing damages may have to give way to solutions better adapted to give the injured claimant an amount that will most fairly compensate for the wrong suffered.**

[my emphasis added]

24. His Honour's short obiter conclusion being that a purchaser of a business who has been misled and deceived does not automatically get back their full purchase price.

25. Robb J then considered whether had there been reliance, he would have allowed avoidance of the contract under s 243(a) of the Australian Consumer Law. At [175] he cited statement of principle by Allsop ACJ (as his Honour then was) in *Awad v Twin Creeks Properties Pty Ltd* [2012] NSWCA 200 at [43] to [46]:

[43] ... Relief under the TPA, s 87, should be viewed not by reference to general law analogues but by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct: *Marks v GIO Australia Holdings Ltd* [1998] HCA 69 ; 196 CLR 494 at 503–504, 510 and 528–529; *Henville v Walker* [2001] HCA 52 ; 206 CLR 459; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3 ; 216 CLR 388 at 407; and see generally *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259 at [64]–[72] and *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364–367. Involved in that rule of responsibility is the public policy of protection of people in trade and commerce from being misled, and the width of the powers given by the TPA that are apt to be employed in a manner conformable with the just compensation or protection of the representee. **Whether or not to grant a form of rescission under s 87, or to limit a plaintiff to damages under s 82, is a question in the nature of a discretion to be approached by reference to the facts of the particular case, the policy and underpinning of the TPA and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of, loss or damage “by” the conduct:** see *Kizbeau Pty Ltd v WG & B Pty Ltd* [1995] HCA 4 ; 184 CLR 281 at 298; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41 ; 210 CLR 109 at 117–120 [19]–[29], 127–128 [52]–[57] and 142 [106]; and *Akron Securities v Iliffe*. An approach that is limited mechanically around a but for causation enquiry will be likely not to involve a full evaluative assessment of the appropriate relief.

[44] **If a defendant has contravened the norm of the statute and made misleading or deceptive representations that are operative to induce the representee to enter a contract, many factors may influence the question of relief. One of them could be the weight of the influence of the impugned conduct. It is not, however, a determinative factor upon which relief under s 87 turns. To view the matter thus is to constrict the exercise of power contemplated by the TPA.** This is how the primary judge appears to have approached the matter. With respect, that was an error.

[45] Here the findings of the primary judge were not that the Awads would still have purchased the land. Rather, he was unpersuaded that they would not have done so. The attempt to disentangle these kinds of operative factors on the mind of a representee in respect of the relevant decision may often be an unrewarding exercise. In some cases, however, the relevance of the impugned conduct may be seen only to have affected price, rather than entry at all into a contract. **Each case must be assessed individually.** Here, though the Peppers representation was not necessarily decisive, there was considerable difficulty in assessing any reliable sum for the value attributable to it. The somewhat unsatisfactory evidence of Mr Foley-Jennings reflects that difficulty. Ascribing a value to a vague but (on the findings) material inducement of this character to enter into a contract may also be an unrewarding task. The difficulty of extracting from the various inducing considerations a value for one ephemeral (though material)

consideration may militate against the appropriateness of the task and in favour of an order in the nature of rescission. This might be seen to be particularly so where damages are reduced to reflect the operative contribution of the solicitor found to be negligent.

[46] In the circumstances here, if I be wrong in relation to the Peppers representation, I would allow the second aspect of the Awads' appeal and make an order under s 87. **The representation was operative; it was intended to be material; and it contributed to the decision to purchase. It was accepted that there was some loss or damage. It would be appropriate, in my view, to give relief conformable to the rule of responsibility and relieve the Awads of the purchase that they were induced to enter into by misleading or deceptive conduct, in particular where ascription of value is so difficult. Any such grant of relief would be subject to counter restitution being able to be made by them.**

[my emphasis added]

26. Thus, as in equity, if relief is to be obtained under s.243(a) under the ACL permitting a purchaser to avoid a contract, then the purchaser must do equity and make the appropriate "counter restitution". But *Jewelsnloo* offered no such "counter restitution". Unsurprisingly, its claim failed entirely.
27. Accordingly, the decision in *Jewelsnloo* is almost a text book example of how a purchaser of a business should not proceed where they seek to claim that they have been misled and deceived:
 - First, a purchaser of a business who claims to have been misled and deceived by the vendor ought to act promptly. But if there has been delay, good explanation should be given for that delay.
 - Secondly, a purchaser of a business ought not to lightly execute a confidentiality agreement or other release document, as that may heavily limit the degree of reliance that a purchaser may place on any financial information so provided.
 - Thirdly, if a purchaser does in fact place reliance upon any of the financial or other information supplied by a vendor to it pre-contract, whether or not it has first been required to execute a confidentiality agreement or other release document, then the purchaser really should insist upon a contractual warranty as to the accuracy and reliability of any such key financial information or other data or assurance on which it relies.
 - Fourthly, a purchaser of a business ought not to lightly execute a sale contract which disclaims its reliance upon any warranties or representations not expressly recorded in the contract. Whilst such a clause will not necessarily operate to exclude liability for misleading or deceptive conduct contrary to the ACL, the fact of the execution of such a contract including such a provision without demur or complaint is likely to count heavily against the purchaser's reliance.

- Fifthly, if a purchaser has been so imprudent as to execute such a confidentiality agreement or a contract with a boilerplate provision excluding warranties or pre-contractual representations, then the draftsman of any pleading, and the lawyers ultimately conducting any trial by the purchaser, have to grapple with those matters and advance the best explanation they can give. It may well be that the purchaser was operating under some other inducement or misstatement when they executed such documents so there may be a good answer. Ignoring the problem will not make it go away.
- Sixthly, if a purchaser is seeking to avoid a contract ab initio, either in equity or under the ACL, they must give counter restitution of any benefits they received. There is no point in simply focusing on expenses and liabilities if there has been some appreciable revenue, as both sides of the ledger will need to be addressed even if the purchaser is simply seeking a damages claim and not avoidance.

1 June 2016.