The target audience test for misleading or deceptive conduct in Australian law

by

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A. SUMMARY AND INTRODUCTION

1. Section 18(1) of the *Australian Consumer Law* proscribes conduct in trade or commerce which is misleading or deceptive or likely to mislead or deceive. The beguiling simplicity of this statutory norm of conduct has been confounded by five decades of decision-making about how conduct directed to a large audience should be assessed. It is unclear whether conduct should be assessed by its effect on a single hypothetical representative member of the target audience or by its effect on ordinary and reasonable members of the target audience. If the former, how is allowance made for diverse or heterogenous target audiences? If the latter, is it sufficient if the conduct would have misled or deceived a small number of ordinary and reasonable members of the target audience or must it be a significant (or even "not insignificant") number or proportion?

2. The confusion created by the judge-made rules of interpretation might be avoided in future if juries were given the task of deciding whether or not conduct is misleading or deceptive.

B. CONSUMER LAW IN AUSTRALIA

1. The constitutional framework

3. Australia is a federal State comprising the federation (formally the Commonwealth of Australia), six States and a number of federal territories, the most important of which are two self-governing mainland territories.

4. The Australian Constitution effects a distribution of legislative powers between the Commonwealth and the States. It achieves this by enumerating in s 51 the powers of the federal Parliament. The States are not excluded from legislating in these areas unless the federal Parliament enacts a valid law under a head of power contained in s 51. Section 109 of the Constitution then provides that any inconsistency between a law of a State and a law of the Commonwealth is resolved in favour of the Commonwealth law. By the "covering the field" doctrine,[1] comprehensive Commonwealth legislation in respect of a shared power ousts the power of the States to legislate in that field even

[1] See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 492; *Victoria v Commonwealth ("The Kakariki")* (1937) 58 CLR 618 at 638; *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 102–3.

on matters not specifically dealt with by the Commonwealth law. Except where State power is excluded in this way and for a small number of powers reserved by s 52 exclusively for the Commonwealth, the States have full power to legislate.

5. The primary objective of the federation of the former British colonies in 1901 was to establish a single polity on the Australian continent and, just as importantly, a single national economy. The Constitution did this by removing trade barriers between the former colonies, now States,[2] and by conferring certain powers on the Commonwealth Parliament such as powers in respect of interstate trade and commerce,[3] banking,[4] insurance,[5] bills of exchange and promissory notes,[6] bankruptcy and insolvency,[7] intellectual property,[8] foreign, trading and financial corporations[9] and employment disputes extending beyond the limits of a State.[10]

6. The Constitution can only be amended by referendum in which there is a national majority in favour of the amendment as well as a majority in four out of the six States.[11] Unsurprisingly it has proved difficult to secure amendments and in over 120 years only 8 out of 43 proposed amendments have passed at referendum. It is also unsurprising that the framers of the Australian Constitution at the end of the 19th century did not foresee every development in society and the economy in Australia in the 20th and 21st centuries. To deal with such developments, and taking account of the difficulty of formal amendment, the High Court of Australia (established by Chapter III of the Constitution as the supreme court of the Commonwealth) has adopted a liberal and expansive approach to the interpretation of the heads of Commonwealth power in the

[2] Sections 86, 88, 90, 92.
[3] Section 51(i).
[4] Section 51(xiii).
[5] Section 51(xiv).
[6] Section 51 (xvi).
[7] Section 51(xvii).
[8] Section 51(xviii).
[9] Section 51(xx).
[10] Section 51(xxxv).
[11] Section 128.

Constitution.[12] There is no originalist doctrine in Australian constitutional law and instead the Constitution is interpreted in the light of changes since federation.[13] Thus, for example, the High Court has held that the Commonwealth Parliament has power to legislate in respect of telecommunications – including radio, television and the internet – based on the power in s 51(v) in respect of "postal, telegraphic, telephonic, and other like services."[14]

7. Commonwealth power can also be expanded under s 51(xxxviii) whereby State Parliaments can transfer powers to the Commonwealth Parliament. This was used in 2001 to transfer powers in respect of corporations to the Commonwealth Parliament to give it full powers in respect of corporations.[15] Section 51(xx) already conferred power in respect of "trading or financial corporations formed within the limits of the Commonwealth" but this had been interpreted not to cover the incorporation of such entities or their intra-state activities.[16] Successive attempts at uniform legislative regimes[17] had been defective[18] and so an agreement was struck between the Commonwealth and the Sates for the former to take over all legislative power in respect of corporations.[19]

8. In line with the expansive approach to the interpretation of the Commonwealth's heads of power, the High Court has held that the Commonwealth Parliament may legislate in respect of the employment relations of all corporations, notwithstanding that its express power to legislate for employment is restricted to disputes extending beyond

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[12] *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers Case*); *New South Wales v Commonwealth* (2006) 229 CLR 1.

[13] See, e.g., *Jumbunna* per O'Connor J at 367-8; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 per Evatt J at 115; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 per Dixon J at 81.

[14] *Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418.

[15] Given effect by the *Corporations Act 2001* (Cth) and enabling State legislation.

[16] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Strickland v Rocla Pipes Ltd* (1971) 124 CLR 468; *New South Wales v Commonwealth* (1990) 169 CLR 482.

[17] See the *Uniform Companies Acts* of 1960; the *Companies and Securities Codes* of 1981 and the Corporations Law of 1991, which adopted different uniform law models.

[18] See *Re Wakim; Ex P McNulty* (1999) 198 CLR 511.

[19] *Corporations Act 2001* (Cth).

the limits of a State.[20] But this still left the Commonwealth with incomplete coverage of employment law as its legislation could not cover employment by individuals, partnerships and other non-corporate entities. And so a political settlement was reached whereby the States transferred their residual employment powers to the Commonwealth so that the Commonwealth Parliament can legislate nationally for all types of employment.[21]

9. It can thus be seen that, despite the difficulties of formal amendment to the Constitution, the original distribution of powers between the Commonwealth and the States has been dramatically altered in favour of the Commonwealth in the 120 years since federation. As we will see, something similar has happened in the area of consumer law.

2. Consumer law

10. At the time of federation in 1901 Australia was not a consumer society and there was therefore at that time no recognised body of law answering the description of consumer law. That body of law did not emerge until the second half of the 20th century with the rise of a consumer society in Australia. Section 51 of the Constitution therefore makes no direct and express provision for consumer law and so it generally falls within the sphere of the States. This does not mean that the Commonwealth Parliament had no power with respect to consumer law. Its powers with respect to corporations, banking, insurance, bills of exchange and promissory notes and interstate trade and commerce gave it some power to legislate with respect to consumer law. But for the most part consumer law when it first emerged in Australia in the second half of the 20th century was a matter of common law and State law.

11. When British colonies were established in what is now known as Australia In the late 18th and 19th centuries, the common law of England was received into those

[20] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[21] *Fair Work Act 2009* (Cth). There is, however, a residual sphere of operation for State law in respect of the employment by the States of their own employees: s 14(2) of the *Fair Work Act*. This recognises the principle that the Commonwealth Parliament cannot legislate in respect of the States in a way which undermines their capacity to function as States: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

jurisdictions, with necessary modification for local conditions.[22] Unlike the United States, since federation Australia has a uniform common law deriving from the status of the High Court of Australia as the final court of appeal from all State and federal Courts.[23] The common law of contract and tort (delict or civil wrongs) is the foundation of consumer law in Australia.

12. The common law recognised a right to rescind a contract induced by a misrepresentation but only if the misrepresentation was fraudulent.[24] Other common law principles such as the doctrine of frustration and principles of contractual interpretation and termination also played a role in the emerging body of consumer law. The tort of negligence offered some protection for manufacturer's liability.[25] Tort law also recognised a right of action for damages for losses caused by a dishonest[26] or negligent[27] representation. In addition, the tort of passing off conferred some consumer protections, although only indirectly as the cause of action is only available to traders against rivals who seek to mislead consumers as to the origins of goods.[28] However, the common law's focus on interpersonal relations made it unsuitable to give consumers adequate legal protection in an era of standard form contracts and mass-produced consumer goods. State legislatures stepped in to fill these gap.[29] It was only a matter of time before the federal Parliament intervened.

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[22] See *PGA v R* (2012) 245 CLR 355 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ at 371-2 [25]- [28]; Castles "The Reception and Status of English Law in Australia" (1963) 2 *Adelaide Law Review* 1 at p 9.
[23] Constitution, s 73(ii); *Lipohar v R* (1999) 200 CLR 485; *Tame v New South Wales* (2002) 211 CLR 317.
[24] *Cheshire & Fifoot Law of Contract* (Online version) [11.8] – [11.25].
[25] The famous case of *Donoghue v Stevenson* [1932] AC 562, the foundation of the modern common law of negligence, involved a consumer who alleged harm caused by a faulty product (a bottle of soft drink with a snail in it.)
[26] *Derry v Peek* (1889)14 App Cas 337.
[27] *Mutual Life & Citizens' Insurance Co Ltd v Evatt* [1971] AC 793.
[28] *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45; *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731.
[29] See, e.g., *Sale of Goods Act 1923* (NSW); *Consumer Protection Act 1969* (NSW); *Consumer Credit Act 1981* (NSW); *Motor Dealers Act 1974* (NSW); *Contracts Review Act 1980* (NSW); *Consumer Affairs Act 1972* (Vic); *Credit Act 1981* (Vic); *Goods Act 1958* (Vic); *Hire-Purchase Act 1958* (Vic); *Money Lenders Act 1958* (Vic); *Motor Car Traders Act 1973* (Vic).

3. The *Trade Practices Act 1974*

13. In 1974 the Commonwealth Parliament enacted the *Trade Practices Act* ("TPA"). It replaced the *Trade Practices Act 1965* which contained rather tame restrictions on certain restrictive trade practices such as price-fixing, third line forcing and monopoly practices. The TPA was modelled on the United States *Sherman Act*[30] and Part IV prohibited restrictive trade practices. In addition, it contained in Part V a number of consumer protections. These included prohibitions against bait advertising (s 56), referral selling (s 57), aggressive door-to-door selling (s 60) and pyramid selling (s 61). But by far the most significant of the prohibitions were against misleading or deceptive conduct (s 52) and false representations (s 53) in trade or commerce.

14. Section 80 of the TPA enabled the grant of an injunction to restrain a contravention of Part V and s 82 conferred a right of action for damages on persons who had suffered loss or damage by a contravention of Part V. Under s 87 a contract induced by conduct in contravention of s 52 or s 53 could be rescinded, thus overcoming a major limitation of the common law which only permitted rescission for fraudulent misrepresentation.

15. The TPA was undoubtedly a major milestone in consumer protection law in Australia but limitations on the powers of the Commonwealth Parliament meant that the TPA protections did not cover all consumer transactions. The main head of power relied on for the TPA was the corporations power[31] and the prohibitions bound all corporations. The protections were also given extended operation where the conduct involved the use of postal, telegraphic or telephonic services or took place in a radio or television broadcast.[32] But there were significant parts of the consumer economy left untouched by the TPA.

16. State law filled in these gaps. State Parliaments enacted similar prohibitions to ss 52 and 53 of the TPA.[33] Section 75 of the TPA expressly allowed the concurrent operation of

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[30] 15 USC §1.
[31] Constitution s 51(xx).
[32] Constitution s 51(v).
[33] See, e.g., *Fair Trading Act 1987* (NSW) ss 42 and 44; *Fair Trading Act 1999* (Vic) ss 9 and 12.

these State laws and so avoided any ouster of State legislative power. Federal and State legislation thus operated concurrently to prohibit comprehensively misleading or deceptive conduct and false representations in trade or commerce. The federal legislation applied to corporations and the State legislation to individuals. Thus, where it was alleged a company had made a false representation by the act of its director, the company would be sued under the TPA and the director under the State Act.[34] State Courts are invested with federal jurisdiction[35] and federal courts have jurisdiction to deal with matters arising under State laws which are ancillary to a federal cause of action.[36] Accordingly there were no difficulties in suing concurrently on federal and State causes of action for misleading or deceptive conduct.

17. Nevertheless, inconsistencies between federal and State legislation and the awkwardness of dealing with concurrent legislative regimes prompted reform in 2010. Instead of the States transferring all power in respect of consumer law to the Commonwealth a uniform law was agreed. It became the *Australian Consumer Law* ("ACL") and is a schedule to the *Competition and Consumer Act 2010* (Cth) as the TPA was re-named. Each State and Territory has adopted the ACL as its own law[37] and so the ACL now operates as a single nation-wide law for consumer protection in Australia. Section 18 of the ACL corresponds to s 52 of the TPA and s 29 of the ACL corresponds to s 53 of the TPA. The substantive law has remained the same but a major reform of the ACL was to empower the regulator[38] to seek pecuniary penalties (i.e civil or non-criminal fines) in respect of contraventions of consumer protections.[39]

18. The uniformity achieved by the ACL is undermined to a degree by Commonwealth laws in respect of corporations and securities which prohibit misleading or deceptive conduct

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[34] See, e.g., *Houghton v Arms* (2006) 225 CLR 553.
[35] Constitution, s 77(iii) and *Judiciary Act 1903* (Cth), s. 39.
[36] *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457.
[37] See, e.g., *Fair Trading Act 1987* (NSW), s 28; *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 8.
[38] The federal Australian Competition and Consumer Commission ("ACCC") or the State Directors of Consumer Affairs.
[39] ACL s 224. But note that a pecuniary penalty cannot be sought in respect of a contravention of s 18 (misleading or deceptive conduct) although one can be sought in respect of a contravention of s 29 (false representations). There are also criminal offences for certain breaches of the consumer protections but they are beyond the scope of this paper.

and false representations with respect to financial products and financial services.[40] These laws operate similarly to the consumer laws and confer rights of action for damages and other private remedies.[41] In addition the corporate regulator can seek pecuniary penalties for contraventions of the false representation provisions.[42]

C. THE STATUTORY PROHIBITION OF MISLEADING OR DECPETIVE CONDUCT

1. The Australian Consumer Law

19. Section 18(1) of the ACL provides as follows:

> *"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."*

20. Section 29(1) of the ACL provides as follows:

> *"A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*
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> *(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or*
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> *(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or*
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> *(c) make a false or misleading representation that goods are new; or*
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> *(d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or*
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> *(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or*
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> *(f) make a false or misleading representation concerning:*
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> *(i) a testimonial by any person; or*
>
> *(ii) a representation that purports to be such a testimonial;*
>
> *relating to goods or services; or*
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> *(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or*
>
> *(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or*
>
> *(i) make a false or misleading representation with respect to the price of goods or services; or*
>
> *(j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or*

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[40] *Corporations Act 2001* (Cth) ss 1041E and 1041H; *Australian Securities and Investments Act 2001* (Cth) ss 12DA and 12DB. See also s 131A of the CCA excluding the operation of the ACL to financial products and financial services.

[41] *Corporations Act* ss 1324 and 1325; *Australian Securities and Investments Act* ss 12GD and 12GF.

[42] *Corporations Act* s 1317G; *Australian Securities and Investments Act* s 12GBB.

(k) make a false or misleading representation concerning the place of origin of goods; or

(l) make a false or misleading representation concerning the need for any goods or services; or

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or

(n) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).”

2. Settled principles of interpretation

21. In the common law world the interpretation by superior courts of statutory provisions controls the meaning and application of those provisions. By the doctrine of precedent (or *stare decisis*) courts are bound to follow the interpretations of courts above them in the judicial hierarchy. In Australia the High Court sits atop that hierarchy. Beneath it are the Federal Court of Australia and the State Supreme Courts. These courts have appellate divisions (either ad hoc Full Courts in the Federal Court or permanent Courts of Appeal in most States) and beneath them trial divisions. Although a State Supreme Court is not bound by the decisions of other State Supreme Courts or the Federal Court, nor is the Federal Court bound by decisions of State Supreme Courts, nevertheless on questions of interpretation of national legislation an Australian court is expected to follow the decision of the appellate division of another court unless persuaded it is clearly wrong.[43]

22. By this means the following principles concerning the interpretation of ss 18 and 29 of the ACL have emerged in Australia since their original enactment in the TPA in 1974.

[43] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

(1) Conduct which is alleged to be misleading or deceptive, or likely to mislead or deceive, must be considered as a whole in both its immediate and wider contexts.[44]

(2) There is no relevant distinction between the expressions "misleading or deceptive" in s 18 and "false or misleading" in s 29.[45]

(3) Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so.[46]

(4) It is not necessary to prove an intention to mislead or deceive.[47]

(5) It is unnecessary to prove that the conduct in question actually deceived or misled anyone. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself. [48]

(6) It is not sufficient if the conduct merely causes confusion.[49]

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[44] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 per French CJ at 318-9 [24] - [25]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 per French CJ, Crennan, Bell and Keane JJ at 655 [49]; *Self-Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 408 ALR 195 at 219-20 [88] – [90].

[45] *ACCC v Employsure Pty Ltd* (2021) 392 ALR 205 at 222 [87]; *ACCC v Dukemaster Pty Ltd* (2009) ATPR ¶42-290; *ACCC v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73.

[46] *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87, referred to with apparent approval in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 by Gleeson CJ, Hayne and Heydon JJ at 626 [112]; *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569 at 585 [60] per Nettle JA, Warren CJ and Cavanough AJA agreeing at 577 [33].

[47] *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 per Stephen J at 228 (with whom Barwick CJ and Jacobs J agreed) and per Murphy J at 234; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 per Gibbs CJ at 197; *Google Inc v ACCC* (2013) 249 CLR 435 per French CJ and Crennan and Kiefel JJ at 443 [6].

[48] *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 per Deane and Fitzgerald JJ at 202; *Puxu* per Gibbs CJ at 198; *Google* per French CJ and Crennan and Kiefel JJ at [6].

[49] *Taco Bell* per Deane and Fitzgerald JJ at 202; *Puxu* per Gibbs CJ at 198 and per Mason J at 209-210; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 87 [106]; *Google* per French CJ and Crennan and Kiefel JJ at 443 [8].

(7) Where the impugned conduct is directed to the public generally or a section of the public, the question whether the conduct is likely to mislead or deceive has to be approached at a level of abstraction where the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful.[50]

23. These propositions can all be regarded as settled but the final proposition continues to cause difficulties in application. It is to these difficulties that this paper is directed.

3. The target audience test

24. In many cases concerning ss 18 and 29 of the ACL (and their predecessors and analogues) there is no need to consider the target audience of the impugned conduct where that audience comprises an identified individual or confined number of individuals. In those cases the question is whether a reasonable person in the position of the individual or individuals would be misled or deceived by the impugned conduct.[51] But where the impugned conduct is advertising or other promotional material directed to the world at large or at least to a large audience it is necessary to consider the characteristics of the target audience and apply the test stated at (7) above.

(a) High Court authorities

25. The High Court first considered this question in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*.[52] A furniture manufacturer complained that a rival had copied its designs and sued for damages and injunctions alleging that the rival had engaged in misleading or deceptive conduct contrary to s 52 of the TPA. The High Court by majority rejected the claim. Gibbs CJ said that the effect of the rival's conduct was to be judged from the

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[50] *Campomar* at 84-87 [101]-[105]; *Google* per French CJ and Crennan and Kiefel JJ at 443 [7]; *ACCC v TPG Internet Pty Ltd* (2013) CLR 640 per French CJ, Crennan, Bell and Keane JJ at 656 [53]; per Gageler J at 660-2 [71] – [81]; *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 408 ALR 195 at 217-8 [83].

[51] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 per Gleeson CJ, Hayne and Heydon JJ at 604-5 [37] and 608 [50].

[52] (1982) 149 CLR 191.

perspective of the "ordinary person",[53] that s 52 must be regarded as contemplating the effect of the impugned conduct "on reasonable members of the class" of potential purchasers of the furniture and that its protection did not extend to people who fail to take care of their own interests.[54] Mason J said the impugned conduct must be judged from the perspective of "an ordinary purchaser".[55] Murphy J, in dissent, followed American precedents in respect of the *Federal Trade Commission Act 1914*,[56] and said s 52 protected the prudent and the imprudent purchaser, the shrewd and ingenuous, the educated and uneducated and the ignorant and unthinking and credulous, the trusting as well as the suspicious.[57] Brennan J said that s 52 did not protect a consumer who had an erroneous preconceived belief that a manufacturer has a monopoly on a certain design.[58]

26. In *Campomar Sociedad, Limitada v Nike International Ltd*[59] the well-known sportswear manufacturer sued a perfume and cosmetics maker which used the name Nike for its products. In upholding claims for misleading or deceptive conduct and passing off, the High Court in unanimous reasons for judgment said:[60]

> *"Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense,* ***it is necessary to isolate by some criterion a representative member of that class. The inquiry thus is to be made with respect to this hypothetical individual*** *why the misconception complained has arisen or is likely to arise if no injunctive relief be granted."* [Emphasis added.]

27. This passage focuses on a single hypothetical member of the class but later the Court said:[61]

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[53] At 197.
[54] At 199.
[55] At 210.
[56] 15 U.S.C. §§ 41-58.
[57] 149 CLR at 214-5.
[58] At 225.
[59] (2000) 202 CLR 45.
[60] At 85 [103].
[61] At 86 [105].

> *"[I]n an assessment of the reactions of the 'ordinary' or 'reasonable' **members** of the class of prospective purchasers of a mass-marketed product for general use, such as athletic sportswear or perfumery products, the court may well decline to regard as controlling the application of s 52 [of the TPA] those assumptions by persons whose reactions are extreme or fanciful."* [Emphasis added.]

28. The Court also referred to:[62]

> *"[T]he question whether the misconception complained of would be suffered by that **hypothetical individual** who would have been a member of that ordinary or reasonable class of **purchasers** …"* [Emphasis added.]

29. There is an ambivalence apparent in the reasons for judgment in both *Parkdale v Puxu* and *Campomar v Nike* between a test based on a single hypothetical or representative individual and one based on multiple ordinary or reasonable members of the class. That ambivalence has not been resolved by later decisions of the High Court.

30. In *Google Inc v ACCC*[63] the regulator challenged the arrangements Google makes with advertisers to promote their advertisements when people using the Google search engine type in certain keywords. The Court held that the advertisements were misleading but that Google itself was not responsible for the advertisements and so had not engaged in misleading or deceptive conduct. In the joint reasons of French CJ, Crennan and Kiefel JJ the target audience test was stated in the plural as one of what "ordinary and reasonable users of the Google search engine would have understood".[64] Hayne J, on the other hand, stated the test in the singular: "how the ordinary or reasonable member of the class of persons to whom the publication was directed would understand what was published"[65] and whether "the reader or viewer of the advertisement" would be misled or deceived.[66] The fifth member of the Court, Heydon J, recorded the test stated both by the trial judge and the Full Court as one of whether

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[62] At 87 [106].
[63] (2013) 249 CLR 435.
[64] At 460 [70].
[65] At 472 [118].
[66] At 472 [119].

"ordinary and reasonable members of the relevant class" would be misled without taking issue with it.[67]

31. In *ACCC v TPG Internet Pty Ltd*[68] the regulator challenged advertisements by an internet provider which promised a low monthly rate but less prominently disclosed the low rate was only available if certain other services were bundled together with the internet service. The High Court held by majority that the advertisements were misleading or deceptive. The majority (French CJ, Crennan, Bell and Keane JJ) in a passage in their reasons under the heading "*The knowledge base of the target audience*" accepted that if the "hypothetical reasonable consumer" is taken to know that internet services may be sold as part of a bundle of services, and "if he or she brings that knowledge to bear" in scrutinising the advertisements in question then "he or she" might be less likely to form the impression that the offer of the low monthly rate was for an unbundled internet service. However, "the circumstance that many consumers" might know of bundling was not apt to defuse the tendency of the advertisements to mislead.[69] Gageler J, in dissent, stated the test expressly in the singular as one of whether "the hypothetical ordinary and reasonable consumer" would be likely to be misled.[70]

32. Most recently in *Self-Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd*[71] the High Court unanimously rejected a claim by the manufacturer of the injectable pharmaceutical product Botox that the supplier of a topical cream engaged in misleading or deceptive conduct by advertising it as an alternative to Botox. In joint reasons the Court said:[72]

> *"Where the conduct was directed to the public or part of the public, the [inquiry] must be undertaken by reference to the effect or likely effect of the conduct on the* ***ordinary and reasonable members*** *of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest.* ***It is necessary to isolate an ordinary and reasonable 'representative member'***

[67] At 478 [139].
[68] (2013) 250 CLR 640.
[69] At 656 [53]
[70] At 662 [81]; see also at 661 [76], [77], [79].
[71] (2023) 408 ALR 195.
[72] At 217-8 [83], omitting citations.

> ***(or members) of that class**, to objectively attribute characteristics and knowledge to **that hypothetical person (or persons)**, and to consider the effect or likely effect of the conduct on **their state of mind**. This hypothetical construct 'avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful'. The construct allows for a range of reasonable reactions to the conduct by the **ordinary and reasonable member (or members) of the class**."* [Emphasis added.]

33. In disagreeing with the Full Court of the Federal Court, which had overturned the trial judge and had held the conduct to be misleading or deceptive, the High Court said:[73]

> *"The Full Court should not have overturned the factual findings of the primary judge as to the knowledge of the reasonable consumer without identifying and explaining the error made. Further, the Full Court's statement that the target market 'would have included' reasonable consumers who had that knowledge demonstrated a misunderstanding of the relevant test. The **ordinary and reasonable consumer** is a hypothetical construct to whom the court attributes characteristics and knowledge in order to characterise the impugned conduct. The class in fact will always have reasonable consumers with varying levels of knowledge; the question was whether the knowledge should be attributed to **the hypothetical reasonable consumer** in this case."* [Emphasis added.]

34. After summarising the context of the advertisements, the High Court stated its basic conclusion as follows:[74]

> *"Taking into account that broader context, it is difficult to conceive why **the reasonable consumer** in the target market would think that a topically self-applied cream obtained from the pharmacy at a relatively low cost and worn in the course of the usual activities of life (including bathing and exercise) would have the same period of efficacy after treatment as an injectable anti-wrinkle treatment that is only available to be administered by healthcare professionals at a higher cost."* [Emphasis added.]

35. These are the latest statements of the High Court on the subject and they perpetuate the ambivalence present from its earliest statements about whether the target audience

[73] At 220 [90].
[74] At 222 [101]. See also 225 [113].

test is a singular test based on the hypothetical individual who is representative of the audience or a plural test based on ordinary and reasonable members of the audience.

(b) Federal Court authorities

36. Each of the High Court cases considered above has been an appeal from a decision of the Full Court of the Federal Court whose judgements, while they have met varying fates in the High Court, have been influential in shaping the High Court's views. Unless inconsistent with High Court authority, they are binding on the trial division of the Federal Court and should usually be followed by other courts in Australia.

37. In the early cases considering s 52 of the TPA a test developed in the Federal Court of whether a significant number or section of the target audience had been misled. This test, adapted from the tort of passing off, was applied in *Taco Company of Australia Inc v Taco Bell Pty Ltd*[75] and in *Pacific Dunlop Ltd v Hogan*.[76] In *10th Cantanae Pty Ltd v Shoshona Pty Ltd*[77] Wilcox J stated a test of "a significant proportion" of the target audience[78] and Gummow J adopted the test from earlier cases of "whether a reasonably significant number of potential purchasers would be likely to be misled or deceived."[79] In *Siddons Pty Ltd v The Stanley Works Pty Ltd*[80] a similar test was adopted of whether "a significant number of persons affected might take the words in a meaning which amounted to a false representation."

38. After *Campomar v Nike* the test of a significant number or section of the target audience re-emerged in the Federal Court though in reformulated terms. At first, the Full Court rationalised the test from *Campomar v Nike* as being in substance the same as the test of a significant number or section of the target audience.[81] Then the test was

[75] (1982) 42 ALR 177 per Franki J at 181, 182, per Deane and Fitzgerald JJ at 205.
[76] (1989) 23 FCR 553 per Beaumont J at 581.
[77] (1987) 79 ALR 299.
[78] At 302.
[79] At 315.
[80] (1991) 29 FCR 14 per Wilcox and Heerey JJ at 20 and 21, cf per Burchett J at 23 "a significant section of the public."
[81] *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 per Dowsett J at 375 [23], per Jacobson and Bennett JJ at 383-4 [67] – [69]; *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) FCR 215 per Wilcox, Heerey and RD Nicholson JJ at 222 [28].

reformulated in double negative terms as a test of whether a "not insignificant" number or section of the target audience was misled. This formulation appears to have first emerged in *Hansen Beverage Company v Bickfords (Australia) Pty Ltd*[82] where the issue whether the advertising of an energy drink could be misleading or deceptive was held by two judges to depend on whether "a not insignificant number of persons in the Australian community" would be misled.[83] This formulation was then applied to the target audience in *Peter Bodum A/S v DKSH Australia Pty Ltd*[84] and in *Global One Mobile Entertainment Pty Ltd v ACCC*,[85] where it was said to be the same test as the test stated in *Campomar v Nike*.

39. This double negative formulation was adopted by the Federal Court in the face of warnings by grammarians of the pitfalls of negatives[86] and outright hostility to the use of double negatives.[87] It is not clear that it is the same test as the positive formulation as it may be possible for something to be neither significant nor insignificant, in which case it would satisfy the "not insignificant" test although not the "significant" test. As if in fulfilment of warnings against the use of double negatives, one Federal Court judge, unpersuaded that the "not insignificant" test had been satisfied, was driven to a triple negative conclusion: "I am not persuaded that a not insignificant number of consumers have or were likely to have been misled or deceived in the manner here considered."[88]

40. Whether because of stylistic misgivings or, more likely, because of the lack of any sanction by the High Court, this reformulated test has now been abandoned in the Full Court along with the positive formulation. Two differently constituted Full Courts have held that the test, whether stated in positive or double negative terms, is inconsistent with High Court authority and should not be applied.[89] The only test that should be

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[82] (2008) 171 FCR 579.
[83] Per Tamberlin J at 589-90 [46], [47]; per Siopsis J at 594 [66].
[84] (2010) 280 ALR 639 per Greenwood J at 680-1 [205] - [209], with whom Tracy J agreed at 693 [272].
[85] [2012] FCAFC 134 at [108].
[86] H W Fowler, *A Dictionary of Modern English Usage* (Omega Books, 1984) pp 373-5
[87] William Safire, *On Language* (Times Books, 1981) p 187: "Most often 'not un-' is effete affectation used by people who know what they are not but not what they are."
[88] *REA Group Ltd v Real Estate 1 Ltd* (2013) 217 FCR 327 per Bromberg J at 362 [167].
[89] *ACCC v TPG Internet Pty Ltd* (2020) 278 FCR 450 at 458-9 [23] – [24]; *Trivago NV v ACCC* (2020) 384 ALR 496 at 548-9 [191] – [193].

applied is the test stated in *Campomar v Nike*. In *ACCC v TPG Internet* the Full Court described the "significant/not insignificant" test as "at best superfluous to the principles stated by the High Court in *Puxu, Campomar* and *Google* and, at worst, an erroneous gloss on the statutory provision."[90] They added:[91]

> *"Whether or not speaking of a reasonable member of the class implies as a matter of strict logical necessity that one is speaking of a significant proportion of that class … nothing in the language of the statute requires the court to determine the size of any such proportion. … In our view it does not require any attempt to quantify, even approximately, the hypothetical reasonable individuals who have a particular response."*

(c) The shortcomings of the target audience tests

41. The Full Court decisions abandoning the "significant/not insignificant" test were vindication for one member of the Court, Finkelstein J. He had held that any test based on a significant or not insignificant number or section of the target audience was inconsistent with the decisions of the High Court but had been overturned by, or outvoted in, the Full Court.[92] In *Hansen Beverage v Bickfords*, where the majority stated the "not insignificant" test, Finkelstein J reviewed the Full Court decisions applying the earlier "significant number" test and said:[93]

> *"The Full Court said that even in a s 52 case it was necessary for the plaintiff to show that a significant proportion of the persons to whom the misleading conduct was directed were misled. Regrettably the Full Court did not explain why (and I have yet to work out how) a representation that misleads, say, 70 people is not misleading but is misleading if it misleads, say, 7,000 people. The answer does not seem to be found in s 52."*

42. Yet the *Campomar* test does not supply a ready answer to this question either, as Finkelstein J himself had recognised at first instance in *ASIC v National Exchange.*

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[90] 278 FCR 459 [23].
[91] At 461 [23](f).
[92] See *ASIC v National Exchange Pty Ltd* (2003) 202 ALR 24 at 28 [10] - [11] (Finkelstein J at first instance); on appeal *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 per Dowsett J at 375-6 [20] – [25], per Jacobson and Bennett JJ at 383-4 [67] – [71]; *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521 at 529 (Finkelstein J at first instance); on appeal *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215 at 222 [26], [28].
[93] (2008) 171 FCR 579 at 591 [55].

Speaking of how the *Campomar* test of the hypothetical individual might accommodate a diverse target audience, he said:[94]

> *"The inquiry thus is to be made with respect to this hypothetical individual. No guidance is given about the selection of the criteria which this hypothetical representative will have. And it is by no means easy to determine what that criteria might be. As we are looking at the effect of conduct on the mind of the hypothetical individual, presumably the criteria must relate to the individual's capacity to understand and assimilate information. Rarely then will the sex of the individual be a consideration. On the other hand, the individual's knowledge of language, level of education, type of employment and so on are likely to be extremely important. But it is difficult to work out just how one is to go about identifying those criteria in the case of an extremely diverse group when the selection is being made for attribution to only one hypothetical individual, which is what the High Court seems to have mandated. Indeed, the mere fact that one will often be confronted with a diverse group suggests that the task is nigh on impossible."*

43. Perhaps the ambivalence in the High Court's formulations of this test between the hypothetical individual representative (singular) and ordinary and reasonable members (plural) of the target audience is intended to accommodate a diverse group. But if the test is satisfied where only some ordinary and reasonable members of the target audience are likely to be misled or deceived, what number or what proportion would have to be misled or deceived to find the conduct misleading or deceptive? This is the question the "significant/not insignificant" test sought to answer but it has now been abandoned in the Full Court. Does this now mean that the test is satisfied if only a small number of ordinary and reasonable members of the target audience are likely to have been misled although most were not?

44. That result would appear to be consistent with the recent Full Court decision in *Mayfair Wealth Partners Pty Ltd v ASIC.*[95] This was a financial services case and so the allegations were of misleading or deceptive conduct and false representations contrary to s 1041H of the *Corporations Act* and ss 12DA and 12DB of the *Australian Securities and Investments Act*. It concerned the promotion of promissory notes as alternatives to bank term deposits at a time of low interest rates. The regulator alleged, among other things,

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[94] 202 ALR 24 at 28 [10].
[95] [2022] FCAFC 170. The author was counsel for the unsuccessful appellants.

that the promotional material represented that the notes were of comparable risk to bank term deposits although the material made clear the issuer was not a bank and the interest rates for the notes were significantly higher than for bank term deposits. It was held at first instance[96] and unanimously on appeal[97] that the defendants engaged in misleading or deceptive conduct because the promotion of the notes did represent that they were of comparable risk to bank term deposits.

45. The target audience of the promotion was persons who qualified under the financial services legislation as "wholesale clients" or "sophisticated investors", namely people with net assets worth at least A$2.5 million (approx. €1.5 million) or annual income of at least A$250,000 (approx. €150,000) or who proposed to invest at least A$500,000 (approx. €300,000).[98] Such investors have more limited protections under the financial services laws than investors who fall below those thresholds. The defendants argued, in reliance on the *Campomar* test, that the hypothetical representative member of that class had above average financial literacy and would not have been misled into thinking that the promissory notes were of comparable risk to bank term deposits.

46. The Full Court rejected this argument and held the promotion to be misleading or deceptive because the class included ordinary and reasonable people who did not have knowledge or experience in respect of financial products and who would have been misled by the promotional material into thinking the notes had the same risk profile as bank term deposits.[99] The Full Court did not address the hypothetical representative member test or estimate what number or proportion of the class were likely to have been misled. It is likely the proportion of members of this class who would have been misled was small, having regard to the qualifications for membership of the class. That would mean that the test is satisfied even if the hypothetical representative member of the class would not have been misled. Whether that is consistent with *Campomar* is

[96] *ASIC v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247
[97] [2022] FCAFC 170.
[98] See *Corporations Act* ss 708(8) and 761G(4).
[99] [2022] FCAFC 170 at [83], [86].

unclear and may never be known because the High Court refused special leave to appeal from the Full Court.[100]

47. An interesting aspect of the *Mayfair* litigation is that the promotional material the subject of the case had all been vetted by the defendants' lawyers.[101] The result that four judges of the Federal Court came to a different view might cast some doubt on the reliability of the legal advice but the forgoing review of the target audience test demonstrates the considerable challenges of providing reliable advice on this subject. That impression is reinforced by the disagreements among the judges in the key cases.

48. The early case of *Siddons Pty Ltd v The Stanley Works Pty Ltd*[102] concerned whether a tool manufacturer engaged in misleading or deceptive conduct by stamping the word "AUSTRALIA" on its tools when the tools were for the most part manufactured outside Australia. The trial judge held this was not misleading or deceptive but this was overturned on appeal by a 2:1 majority. This meant that, on a basic question about the application of s 52 of the TPA, the Federal Court judges divided evenly and the result was determined by the fortuitous rostering of the judges in the Court.

49. In *Peter Bodum A/S v DKSH Australia Pty Ltd*[103] the question was whether the manufacturer of coffee plungers engaged in misleading or deceptive conduct by selling plungers which resembled those of a well-known brand without taking steps to distinguish its plungers from the well-known brand. The trial judge dismissed the claim but his decision was overturned on appeal again by a 2:1 majority.

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[100] *Mayfair Wealth Partners Pty Ltd v ASIC* [2023] HCATrans 51. There is no automatic right of appeal to the High Court. Appellants must first obtain special leave to appeal in a preliminary application to the High Court: s 35A of the *Judiciary Act 1903* (Cth). The criteria for special leave under s 35A include whether the case raises a question of national importance and whether the interests of the administration of justice require a grant of leave. A refusal of leave therefore does not necessarily imply that the case was correctly decidedial leave is only granted in approx. 10% of cases: Stuhmcke & Stewart "Special leave to appeal to the High Court: which applications are most likely to be granted" at https://opus.lib.uts.edu.au/rest/bitstreams/898802f2-7609-470d-9c2d-e5913385b840/retrieve.

[101] *ASIC v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630 at [63](c), (g), [64], [214] – [216].

[102] (1991) 29 FCR 14.

[103] (2010) 280 ALR 639.

50. In *ACCC v TPG Internet Pty Ltd*[104] the trial judge had upheld claims of misleading or deceptive conduct against an internet service provider who advertised a low monthly rate for providing an internet service though the advertisement less prominently disclosed that the low rate was only available if the internet service were bundled with other services. The Full Court unanimously overturned this finding. The High Court by a 4:1 majority overturned the decision of the Full Court and restored the judgment of the trial judge. The overall score was thus 5 judges for and 4 against.

51. It is of course artificial to tally the scores of judges for and against in this fashion because the argument on appeal is usually more focussed and, in theory at least, the quality of the adjudication improves as you ascend the judicial ladder. But losing parties must inevitably feel some sense of injustice in finely balanced results of this kind. That sense is not alleviated by the disagreements among the judges as to the reasoning process that should be employed.

52. An illustration of this is *Self Care IP Holdings Pty Ltd v Allergan Pty Ltd*[105] (the Botox case) where the trial judge held that the target audience was people who were interested in treatments for the reduction of the appearance of wrinkles and who would therefore know something about anti-ageing and anti-wrinkle treatments; the ordinary and reasonable member of that class would therefore know that Botox was injectable by health professionals while the rival products were less-expensive, self-administered topical creams.[106] The Full Court found that the trial judge had erred in the assessment of the evidence because, although he considered the advertising material in its broader context of surrounding circumstances, he failed to consider it in its immediate context of the words used on the packaging and the website.[107]

53. The High Court held that the Full Court was correct in identifying this error by the trial judge but that the Full Court then made a number of errors in its own assessment of the

[104] (2013) 250 CLR 640.
[105] (2023) 408 ALR 195.
[106] At 218-9 [86].
[107] At 219 [88].

evidence. In particular it misdescribed the ordinary and reasonable member of the target audience in a way that infected its subsequent reasoning. The misdescription of the ordinary and reasonable member of the target was caused by the Full Court's finding that the target audience would have included reasonable consumers who considered the rival products had a common trade origin because of the use of the "Botox®" trade mark on the packaging for the topical cream. This contradicted the trial judge's unchallenged finding that ordinary and reasonable members of the target audience would not have drawn this connection between the rival products.[108] The Full Court also misstated another unchallenged finding of the trial judge when it said that the target audience would include some consumers who understood that Botox has effect for *about* 4 months after injection whereas the trial judge's finding was that it had effect for *up to* 4 months after injection.[109] Most importantly, the Full Court misdescribed the relevant test by considering what some ordinary and reasonable members of the class would have known instead of considering the hypothetical construct of what the ordinary and reasonable consumer would have known.[110]

54. These errors led the Full Court to the false conclusion that the statement on the packaging and website that the topical cream was an "instant Botox® alternative" was misleading or deceptive because it conveyed the false impression that the cream had the same long-lasting effect as Botox injections. When regard is had to the knowledge of the hypothetical ordinary and reasonable member of the target audience and the immediate and broader contexts in which the words "instant Botox® alternative" were used, they could not be regarded as misleading or deceptive.[111]

55. This detailed reasoning of the High Court appears to support a singular test of the hypothetical representative of the target audience rather than a plural test of the ordinary and reasonable members of the class. But if that is correct then why did the High Court hedge its bets in three places in its reasons by referring to the "ordinary and

[108] At 219 [89].
[109] At 220 [90].
[110] At 220 [90].
[111] At 220-25 [94] – [113].

reasonable 'representative member' (**or members**)" of the class, the "hypothetical person (**or persons**)" and "the ordinary and reasonable member (**or members**) of the class"? [Emphasis added.][112] Furthermore, why did the High Court refuse special leave to appeal in the *Mayfair* case, in which a rival but different product was described as an alternative and where the Full Court appears to have made the same error as in *Self Care* in considering the knowledge of some ordinary and reasonable members of the target audience instead of the knowledge of the hypothetical representative member of the class?

4. Reform of the target audience test

(a) The need for reform

56. The beguiling simplicity of the statutory prohibition of misleading or deceptive conduct in trade or commerce has been confounded by almost 50 years of experience. It is probably the most litigated statutory prohibition in Australia, at least in the civil law,[113] and yet, because of uncertainties concerning the target audience test, it is often impossible to know whether particular conduct contravenes the prohibition. The consequences of contravention can be draconian. In the *Mayfair* case, where the defendants had acted in accordance with legal advice and the Full Court probably applied the wrong target audience test, though the High Court refused special leave to appeal, pecuniary penalties totalling A$30 million (approx. €18 million) were imposed on the defendants.[114] Something needs to be done.

(b) Reform options

57. The most obvious option for reform is legislative. Section 18 of the ACL and its analogues could be amended to provide more certainty about the target audience test. It could clarify whether the test is singular or plural and whether it is satisfied if only a small number of ordinary and reasonable members of the target audience are likely to be

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[112] At 217-8 [83].

[113] Searches in the Lexis Advance database for cases which have referred to the key legislative provisions produce the following statistics: for s 18 of the ACL: 289 cases; for s 52 of the TPA: 6,528 cases; for s 1041H of the *Corporations Act:* 402 cases; for s 12DA of the *Australian Securities and Investments Act*: 418 cases; for s 42 pf the *Fair Trading Act 1987* (NSW): 804 cases; for s 9 of the *Fair Trading Act 1999* (Vic): 155 cases.

[114] *ASIC v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630; upheld on appeal *Mayfair Wealth Partners Pty Ltd v ASIC* [2022] FCAFC 170.

misled. It could do this, for example, by legislating for the "significant" or "not insignificant" test abandoned by the Full Court. However, amendment of the ACL is cumbersome as it is a uniform law of the Commonwealth, State and Territory legislatures. If uniformity is to be preserved it would require co-ordinated action of all those legislatures. Furthermore, legislative proscription would prove inflexible and not easily adaptable to changing and varied circumstances and would again be subject to judicial interpretation.

58. It might therefore be preferable to allow the Courts to continue to develop principles of interpretation to guide the application of the statutory provisions in the hope that more clarity emerges. However, 50 years of such development has led to the current unsatisfactory state of the law. Business people, who have to operate in this legal environment, are entitled to expect greater certainty in the law and should not have to wait longer for clarity.

59. There is another option which might be worth considering: jury trials. In a jury trial the jury decides questions of fact and the judge decides questions of law. In a trial by judge alone, the judge decides both sets of questions. Jury trial is only guaranteed in Australia for serious criminal offences against Commonwealth law.[115] Most State criminal trials are by jury and juries are available upon application in certain civil matters. They are common in State personal injury and defamation trials but rarely ordered in commercial matters. In the Federal Court, where most misleading or deceptive conduct cases are tried, s 39 of the *Federal Court Act 1974* provides that the normal mode of trial is by judge alone but s 40 gives the option of trial by jury.

60. As far as the author is aware, there have not been any jury trials conducted in the Federal Court, where most misleading or deceptive conduct trials are conducted. A jury trial was ordered in the defamation matter of *Ra v Nationwide News Pty Ltd,*[116] because the trial judge considered defamation involved quintessential jury questions. However, the case was settled before trial. As Middleton J observed in *Verrocchi v District Chemist*

[115] Constitution, s 80.
[116] (2009) 182 FCR 148.

Outlet Pty Ltd,[117] the question whether conduct is misleading or deceptive is also a quintessential jury question. Usually, the target audience will be the public at large or at least a sufficiently large section of it so that juries would be reliable adjudicators of whether the conduct in question is misleading or deceptive. However, in *Verrocchi,* although the judge himself had raised the possibility of a jury trial, he declined to order it when both parties opposed that course.

61. The traditional reluctance to try such matters before juries has been attributed to cost and the complexity of the factual and legal issues which arise. However, the basic question whether conduct is misleading or deceptive is not intrinsically complex and the question can be isolated for consideration by the jury. Furthermore, jury verdicts can rarely be challenged on appeal and, when the costs of appeals and the delay in waiting for judgment are factored in, jury trials might be less expensive overall. There is also the hidden cost to the business community of having to operate in a legally uncertain environment. Litigants, especially the losers, are more likely to be accepting of jury verdicts than of decisions by judges. It is a fair question to ask whether the losing party in *Self Care v Allergan* (the Botox case) would have preferred a terse jury verdict that the conduct was not misleading or deceptive to the intricate reasoning of the High Court for so concluding, delivered almost 4 years after the conclusion of the trial and after the expense of two appeals.

62. In the early case of *Taco Bell* concerning s 52 of the TPA in the Full Court of the Federal Court, Deane and Fitzgerald JJ said this:[118]

> *"The question whether particular conduct of which complaint is made is misleading or deceptive or likley to mislead or deceive is, in the ordinary case, a question of fact to be answered in the context of the evidence as to the alleged conduct and as to relevant surrounding facts and circumstances. If the resolutoin of the question were entrusted to a jury, the question whether the respondent had engaged in conduct of the type described in s 52 would be susceptible of a simple monosyllabic answer without disclosure or record of reasoning processes. Where resolution of the question is entrusted to a court constituted by a judge without a jury, however, it is incumbent upon the court to indicate the process of reasoning*

[117] (2015) 228 FCR 189 at 192 [325] citing Gyles J in *ACCC v Telstra Corporation Ltd* (2004) 208 ALR 459 at [49].
[118] (1982) 42 ALR 177 at 199-200.

> *which has led to the answer given. It is inevitable that the process of reasoning will tend to be worded in the language of the lawyer and that the path to decision of the factual question will be paved with generalizations which, particularly when enshrined in volumes of law reports, bear a superficial resemblance to formulations of legal principle but which are, in truth, no more than part of an exposed process of reasoning in the course of deciding the question of fact."*

63. The forgoing review of the law of misleading or deceptive conduct in Australia shows that this warning given back in 1982 about confusing the reasoning process of judges in reaching their factual findings with legal principle has not been heeded. Furthermore, it shows that those reasoning processes have not over time produced a satisfactory test for the target audience. The assessment whether conduct is misleading or deceptive is largely a matter of impression and even instinct. That explains why verbal formulae to inform the process of reasoning in such assessments have proved elusive and why judges have disagreed whether particular conduct is misleading or deceptive. This is why it is a quintessential jury question. Entrusting the factual findings to juries is unlikely to produce less clarity in principle and less certainty in outcomes. It could well prove less expensive both in the costs of litigation and overall for the cost of doing business. It is likely to enhance respect for the law and resolve many of the seemingly intractable difficulties associated with deciding whether particular conduct in trade or commerce is misleading or deceptive.