Re Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Limited [1988] FCA 183 (7 June 1988)

FEDERAL COURT OF AUSTRALIA

Re: AUSTRALIAN FEDERATION OF CONSUMER ORGANISATIONS INC.
And: **TOBACCO INSTITUTE OF AUSTRALIA** LIMITED
No. G253 of 1987
Trade Practices Act s.52

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Burchett J.(1)

CATCHWORDS

Trade Practices Act s.52 - advertisement asserting little evidence and no scientific proof of disease from "passive" smoking - corrective advertising - role of Trade Practices Commission - width of power given by s.8O to "any other person" to sue for an injunction - nature of wrong committed by breach of s.52 - Trade Practices Commission agreed not to sue upon publication of a corrective advertisement; but another applicant then sued, alleging a different misleading statement in the original advertisement - whether proceeding should be stayed - principles applicable - stay refused.

Trade Practices Act ss. 52, 8O

HEARING

SYDNEY
7:6:1988

Counsel for the Applicant: Mr D.M.J. Bennett QC Mr N.F. Francey

Solicitors for the Applicant: Messrs Slater & Gordon

Counsel for the Respondent: Mr B.S.J. O'Keefe QC Mr P.F. Esler

Solicitors for the Respondent: Messrs Clayton Utz

ORDER

Respondent's motion be dismissed.

Respondent pay the applicant's costs of the motion.

NOTE: Settlement and entry of orders is dealt with in Order 36
of the Federal Court Rules.

DECISION

On 1 July 1986, the respondent published in "The Australian Financial Review", "The Australian" and "The Sydney Morning Herald", an advertisement which bore the heading "A message from those who do ... to those who don't". The advertisement included the statement:
"(T)here is little evidence and nothing which
proves scientifically that cigarette smoke
causes disease in non-smokers."

The advertisement added:

"The London Times reported findings from the
Institute of Cancer Research in Surrey,
England, published in this month's edition of
the 'British Journal of Cancer', that
'passive smoking' for life-long non-smokers
carries no significant increase in the risk
of lung cancer, bronchitis or heart disease
(all allegedly associated with smoking).
The Institute's conclusions are based on a
wealth of statistical detail from a study
involving 12,OOO people."

2. The advertisement also referred to certain American research, and to an international conference held in 1984 in Vienna.

3. There was a prompt reaction from the applicant. It complained, in the same month, to the Trade Practices Commission. As a result of the applicant's complaint, a member of the Commission had discussions with the chief executive of the respondent, and on 8 August 1986, the then chairman of the Commission wrote to the respondent expressing concern as to whether the advertisement contravened the Trade Practices Act. He stated the view:

"that the overall impression intended to be
conveyed by your advertisement is that
according to reputable persons and
organisations the exposure of non-smokers to
cigarette smoke in the air exhaled by
smokers, does not place them at risk from a

health point of view. This would not appear
to accord with the facts." (Emphasis added)

He referred to s.52 of the Trade Practices Act, and to the fact that the Institute of Cancer Research of Surrey, England, and the World Health Organisation (which was also referred to in the advertisement as having co-operated in the Vienna conference) had each disputed the accuracy of the reference to its role made by the advertisement. The chairman sought a response to these matters. Consistently with the words I have emphasized in the passage quoted from this letter, and perhaps significantly in view of the attitude later taken towards what required correction in the advertisement, he added:

"I should say the Commission is not concerned
to engage itself in the subject of whether or
not passive smoking exposes non smokers to
health risks."

4. The respondent provided some material to the Commission for its consideration. On 18 September 1986, the chairman wrote again to the chief executive of the respondent, referring to that material. He stated:

"The Commission has concluded that the
advertisement contains a number of statements
which are misleading or are likely to mislead
and that the advertisement creates an
impression which overall is misleading as to
the substance of currently available evidence
regarding health risks associated with
passive smoking."

The Commission sought an undertaking that the respondent would not publish the advertisement in the future, and that it would forthwith publish a corrective advertisement, a draft of which the Commission enclosed with its letter. Failing the giving of these undertakings, the Commission threatened to take proceedings with a view to obtaining orders to the same effect.

5. There followed correspondence between the Commission and the respondent, in the course of which the Commission advised that a number of claims about the advertisement had been made to it by various bodies and individuals, some of which it had not taken up. Several complaints about the advertisement were referred to the respondent, and the Commission repeated its request for a corrective advertisement. It made clear, however, the fact that its concern about the overall impression of the advertisement did not relate to the direct assertion that there is little evidence cigarette smoke causes disease in non-smokers, but related to the effect of certain matters of detail allegedly mis-stated. On 7 October 1986, the respondent discussed at length the three complaints, which were matters of detail, that it took to be pressed, and declined to give any undertaking. The Commission responded on 14 October 1986, advising that it would institute legal proceedings in the Federal Court of Australia in order to seek injunctions which would involve corrective advertising. It specifically asserted that the reference in the advertisement to "a wealth of statistical detail from a study involving 12,OOO people" was misleading, since the study "was based on a much lesser number than 12,OOO." On 2O October, the solicitors for the respondent wrote back denying that the publication was misleading or likely to mislead in any respect, but adding:

"However, if it will serve to avoid useless and expensive litigation the Tobacco Institute will undertake to your Commission that it will not publish the 1 July, 1986 advertisement in the future.

We enclose a copy of an advertisement which the Tobacco Institute is now arranging to publish in the same newspapers and with similar prominence as the 1 July, 1986 advertisement.

Having regard to the undertaking now given and the action being taken by the Tobacco Institute, we would urge your Commission to reconsider its decision to institute legal proceedings against the Tobacco Institute in connection with the 1 July, 1986 publication. In all the present circumstances the enormous costs which would be involved in such proceedings are simply not justified."

6. There followed further discussion, and a letter from the Commission dated 25 November 1986, enclosing a redrafted corrective advertisement, and stating:
"If the Tobacco Institute is willing to publish this advertisement in the same newspapers as the 1 July advertisement and with equal prominence, the Commission will accept publication as a sufficient reason for it to take no action against the Tobacco Institute in respect of the 1 July advertisement. I confirm that it will agree to the matter being resolved on that basis.

The Commission also accepts the Tobacco Institute's undertaking that it will not publish the 1 July advertisement in the future."

7. There were yet further discussions about the form of the corrective advertisement, culminating in a letter, dated 11 December 1986, from the Commission to the respondent's solicitors. That letter included the statement:
"I confirm that publication of the advertisement now agreed between us and in the manner above-mentioned will be accepted by the Commission as a sufficient correction

of the concerns the Commission had in
relation to the 1 July advertisement, and
that the Commission will take no action
against the Tobacco Institute in respect of
that advertisement."

The respondent's solicitors wrote back referring to the Commission's letter, and stating:
"We confirm our client's agreement to and
acceptance of the settlement of this matter
on the basis set out in that letter."

The agreed corrective advertisement did thereafter appear. It should be noted that, by this advertisement, the respondent expressly declined to accept what was described in it as a "suggestion" that the previous advertisement was misleading, in its reference to the study reported by "The Times", "in that the study was based on a much lesser number than 12,OOO." The corrective advertisement contained no correction at all of the assertion that there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers.

8. The corrective advertisements came to the notice of the applicant. It took the view, which it expressed in a letter to the respondent dated 12 January 1987, that "the subsequent advertisement does not remedy the misleading impression conveyed in the first advertisement" in respect of the study alleged to have involved 12,OOO people. It requested a written undertaking that the respondent would not refer to the researchers' paper in future advertisements in the same or similar terms, and threatened legal action failing receipt of such an undertaking. On 22 January 1987 the respondent's solicitors wrote back:

"The Tobacco Institute will not provide AFCO
with the undertaking requested in your
letter."

9. A further letter was sent by the solicitors for the applicant to the solicitors for the respondent on 3 March 1987, which referred to the claim in the original advertisement that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers." The letter sought advice as to whether an undertaking would be given not, in future advertising or other promotional material, to make that representation or any similar assertion. The respondent's solicitors replied on 16 March 1987, making it clear that their client would not provide the undertaking sought, but adding:
"However we are instructed to inform you that
our client has no present plans to publish
the representation to which you refer in any
future advertisement."

The solicitors stated they were instructed to accept service of any process.

10. It was in this state of affairs that the present proceedings were commenced by a statement of claim filed 11 June 1987.

11. The statement of claim referred specifically to the two representations which I reproduced at the commencement of these reasons (though it quoted one of them inaccurately), and asserted that the publication of these representations amounted to engaging in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s.52 of the Trade Practices Act 1974. The statement of claim alleged that the study represented as involving 12,OOO people involved, for relevant practical purposes, and according to common understanding, only 7OO people. It also controverted the general proposition in the advertisement about the strength of the evidence that cigarette smoke causes disease in non-smokers.

12. The statement of claim proceeds to allege the applicant's complaint to the Trade Practices Commission, and that on 7 January 1987 it was advised the Commission had accepted the corrective advertisement as a sufficient correction. The statement of claim asserts that the second advertisement "did nothing to correct the misleading and deceptive conduct" alleged. The relief sought is an injunction restraining the respondent from engaging in conduct that is misleading or deceptive or is likely to mislead in the respects particularly identified in the statement of claim.

13. In its statement of defence the respondent denies that it has engaged in misleading or deceptive conduct, and puts in issue the question whether its conduct took place in the course of trade or commerce. It also sets up in defence that the Trade Practices Commission alleged the advertisement was misleading and deceptive, and that an agreement was made with the Trade Practices Commission that no proceedings would be taken by it against the respondent upon the respondent giving the undertaking which it gave and publishing the corrective advertisement which it published. The defence proceeds to allege that by reason of those matters:

"(a) These proceedings are barred and are not
maintainable against the Respondent;

(b) Alternatively, the Respondent claims the
benefit of the said matters as a basis
for the Court refusing the relief claimed
by the Applicant."

14. The defence to which I have referred was filed on 15 July 1987, but on 18 August 1987 the respondent took out a notice of motion seeking the following relief:
"1. The Statement of Claim of the Applicant be
struck out.

2. Such further or other orders as the Court
deems fit.

3. The Applicant to pay the Respondent's
costs of this Motion."

15. At the hearing of the motion, it was made clear what was really sought was a stay of the application on the basis that, in the circumstances, its issue was an abuse of process, and that in

fairness and convenience it ought not to be permitted to proceed. It was conceded no argument was available that the applicant was barred by res judicata or issue estoppel. The elements of the argument which was put are the following. In the first place, it was pointed out that the applicant sought to have its complaint pursued by the Trade Practices Commission, which, it was said, was the body specially set up under the Trade Practices Act as the guardian of the public interest protected by that Act. Then it was said that s.52 prescribes a norm of conduct, departure from which may result in both private wrongs and a public wrong; but the nature of the wrong is always single, at least so far as a public wrong is concerned. In this case, the wrong alleged is the act of misleading or deceiving constituted by publication of the advertisement.

16. Senior counsel for the Tobacco Institute (as I shall call it) then said that s.8O of the Trade Practices Act is designed to remove procedural problems, not to change the legal nature of the alleged wrong. But, he continued, the Trade Practices Commission is not confined to taking proceedings under s.8O. It may uphold the public interest, and remedy a wrong perpetrated against that interest by reaching a resolution such as was reached in the present case. Senior counsel then said that once this was done, there would be an inherent jurisdiction in the court to control later proceedings which, he said, would savour of abuse of process, being in the circumstances not fair and convenient. The principle is based on public policy, as expressed by the maxims "nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa", and "interest reipublicae ut sit finis litium". The argument asserted that the principle was not restricted to a second curial proceeding, but could be applied in a case where an administrative act was inconsistently followed by a later proceeding.

17. Just because of the special functions of the Trade Practices Commission under the Act, it is impossible to regard the fact that the applicant made complaint to the Commission about the advertisement as indicating that it constituted the Commission in any sense its agent to bring proceedings against the respondent. The Commission had discretions of its own to exercise. What the applicant did was to call upon it to exercise them. Nothing in the evidence suggests that the Commission ever advised the applicant what it was proposing to do at any time prior to taking the decision to accept the respondent's undertakings. It acted quite independently. If it had referred the proposed corrective advertisement to the applicant, prior to reaching agreement about the matter, there seems little doubt the applicant would have protested that such a "correction" was more like a repetition of the original wrong. And if there was no actual authority to compromise the complaint in this way, it is hard to see how the making of the complaint to the Commission could in itself confer any implied or ostensible authority.

18. Yet unless, when the Commission compromised the matter, it did so on behalf of the applicant, there is difficulty in accepting the proposition that the applicant is in some way bound by what occurred, so as to make its institution of proceedings an abuse of process. Section 8O(1) of the Act relevantly provides:

"Subject to sub-sections (1A) and (1B)
(sub-sections which are irrelevant to the
present situation), where, on the application
of the Minister, the Commission or any other
person, the Court is satisfied that a person

has engaged, or is proposing to engage, in
conduct that constitutes or would constitute -

(a) a contravention of a provision of
Part IV or V;
...

the Court may grant an injunction in such
terms as the Court determines to be
appropriate."

By this provision, an independent power is given to "any other person" to seek injunctive relief in a case of this kind. That power seems expressly designed to avoid problems of standing of the kind which proved fatal to the plaintiff in Australian Conservation Foundation Inc. v. The Commonwealth of Australia (198O) 146 CLR 493. In The Queen v. The Judges of the Federal Court of Australia ex parte Pilkington ACI. (Operations) Pty.Ltd. [1978] HCA 60; (1978) 142 CLR 113 at 128, Mason J.said of the power to grant relief on the application of "any other person":
"The class is expressed as widely as it can be
and it would require considerations of very
great strength to warrant a reading down."

In the same case, at p.131 Murphy J. said:
"There is no reason for reading the words,
'any other person', down and strong reason
for giving the words their natural breadth.
A qualification such as suggested would lead
to frequent investigations and arguments,
resulting in waste of public time and
resources (as has occurred elsewhere) in
determining who was and who was not
aggrieved. There is no hint of such
qualification of the plain words. Also,
experience shows that enforcement agencies in
environmental and consumer protection (as
well as those in occupational safety and
health) often become unable or unwilling to
enforce the law (because of inadequate
resources or because they tend to become too
close to those against whom they should be
enforcing the law). Section 8O expresses the
policy that such tendency to non-enforcement
or limited enforcement should be overcome by
providing that the Court may grant an
injunction restraining a contravention of
Pts.(sic) IV or V on the application of the
Minister, the Trade Practices Commission or

(except in relation to s.5O) any other
person."

19. It seems quite inconsistent with the view of the Act expressed by Murphy J., and with the breadth of the right to take proceedings which Mason J. asserted, to hold that an arrangement entered into with a view to persuading the Trade Practices Commission not to take proceedings could effectively bar some other person also possessed by virtue of the statute of a right to institute similar proceedings. That would be to read a very significant qualification into the section. The claimed consequence would be even less in keeping with the policy of s.8O if it were to apply in a case, such as the present, where the complaint relates to a complex representation, some parts of which were the subject of proceedings threatened by the Trade Practices Commission, withheld upon the respondent's undertakings, while a further part of it is now asserted by the applicant to constitute misleading conduct in respect of which it seeks relief. Even if the principle of Port of Melbourne Authority v. Anshun Proprietary Limited [1981] HCA 45; (1981) 147 CLR 589 could prevent the Trade Practices Commission, had it proceeded upon the aspects of the advertisement of which it complained, from subsequently launching proceedings in respect of another aspect of the advertisement, of which the applicant complains, that can hardly be the situation where separate proceedings are launched by different applicants, in respect of separate conduct, in reliance upon the mandate conferred by the statute upon both the Trade Practices Commission and also any other person. Of course, in the present case there has been only one proceeding, the threatened proceeding having been averted by an agreement which, it should be noted, did not purport to affect any substantive liability incurred, but was an agreement by the Trade Practices Commission not itself to sue.

20. Furthermore, if the Tobacco Institute is correct in contending that "any other person" can be barred by a compromise by the Trade Practices Commission of a claim for relief, what about the converse situation? Could the Commission be barred where an "other person" had claimed first, and then compromised, perhaps for private reasons? The wide language of s.8O cannot easily be reconciled to such consequences.

21. So far as the Tobacco Institute's argument depends upon the proposition that the publication of its advertisement constituted but a single wrong to the public interest, not only is it confronted by the difficulty that more than one representation was made within the advertisement, but also the argument requires a construction of s.52 of the Act quite different from that which was given to similar legislation in the United Kingdom by the decision of the Court of appeal in Regina v. Thomson Holidays Ltd. (1974) 1 QB 592. That case was concerned with a provision of the (U.K.) Trade Descriptions Act (1968) which provided:

"It shall be an offence for any person in the
course of any trade or business ... (b)
recklessly to make a statement which is
false; as to any of the following matters,
that is to say, ... (v) the location or
amenities of any accommodation so provided."

A handbill issued by the appellant having recklessly made false statements as to a relevant matter, several prosecutions were launched in respect of the making of the statement to each of several persons who acted upon it to their detriment. The appellant's argument, as recounted by

the Court at p.596, was entirely similar to that presented to me on behalf of the Tobacco Institute. It was said:
"The fact that a statement when made was
communicated to two or more million people
did not affect the act of making it. There
was still only one act, even though its
effect might be felt over a wide area and for
a long time."

The Court rejected that argument, stating at p.598:
"As the object of the Act of 1968 is to
protect members of the public as individuals,
in our judgment two prosecutions in respect
of false statements in the same brochure
cannot be said to be either an abuse of
process or oppressive. No case was made out
for staying proceedings on the indictment."

22. In a significant respect, the applicant's argument from this case is a fortiori, since the several prosecutions relied on the one statement in the handbills, not on different representations.

23. The solution to the problem posed by this case depends essentially upon the true construction of s.8O. If, as I think, that section gives an independent right of action to "any other person", that right cannot be lost merely because the Trade Practices Commission agrees not to sue. At least this must be true of the matter of the alleged misrepresentation about the strength of the evidence that cigarette smoke causes disease in non-smokers, which was not a subject dealt with in the corrective advertisement, and was not taken up by the Trade Practices Commission as in itself constituting a misrepresentation.

24. There is no doubt of the existence of a discretion to stay proceedings on the ground that they are oppressive and an abuse of the process of the court: Barton v. The Queen (198O) [1980] HCA 48; 147 CLR 75 at 96: Phelps v. Western Mining Corp. Ltd. (1978) 2O ALR 183 at 187. But in Stephenson v. Garnett (1898) 1 QB 677 at 682 Chitty LJ. warned that "the jurisdiction, which is a summary one, ought to be exercised with great caution." Similarly, in the context of criminal law, Lord Edmund-Davies, in Director of Public Prosecutions v. Humphrys (1977) AC 1 at 55, said "judges should pause long before staying proceedings which on their face are perfectly regular". In the same case, at p 46, Lord Salmon said:

"(A) judge has not and should not appear to
have any responsibility for the institution
of prosecutions; nor has he any power to
refuse to allow a prosecution to proceed
merely because he considers that, as a matter
of policy, it ought not to have been brought.
It is only if the prosecution amounts to an
abuse of the process of the court and is
oppressive and vexatious that the judge has
the power to intervene."

25. Insofar as Barton's case (ubi cit. supra) emphasizes that the granting of a stay is a matter of discretion, there is a further difficulty in acceding to the motion. The application made against the Tobacco Institute is, in substance, grounded upon the basis that the advertisement gives rise to a fear of further allegedly misleading conduct occurring. (This is so despite s.8O(4).) The only relief sought is a restraining order. Assurances by the Trade Practices Commission that it will not sue, cannot make that conduct legal, if it would be in breach of the Act. If the Court is called upon, by a party given standing by s.8O, to enforce obedience in the future to a law passed in the public interest, and a case is made out, why should assurances given by another party (even the Commission) prevent the making of an order to protect the public? See the observations of Mason CJ in Richardson v. Forestry Commission [1988] HCA 10; (1987) 73 ALR 589; Richardson v. Forestry Commission (1988) 77 ALR 237 at 25O; Associated Minerals Consolidated Ltd. v. Wyong Shire Council 1975 AC 538 at 56O.

26. In my opinion, this is not a case in which an order should be made staying the application. Although I have reached this decision for the reasons set out above, I should point out that the Tobacco Institute has expressly declined to give two assurances which the applicant sought. The first related to the reference in the advertisement to the study alleged to have involved 12,OOO people. That reference the Tobacco Institute has already, in the corrective advertisement, treated as requiring clarification. It is therefore difficult to see why it cannot undertake not to refer to that matter in the same or similar terms in future advertisements. An undertaking has been given to the Commission not to republish the entire advertisement, but, strictly, that undertaking might not be thought to cover publications of the particular part only which is the subject of this objection. The more substantial matter is, presumably, the applicant's request for an undertaking not in any future advertising to represent that there is little evidence, and nothing which proves scientifically, that cigarette smoke causes disease in non-smokers. As to this, the Tobacco Institute has refused to give the undertaking sought, but has stated it has no present plans (as at 16 March 1987) to publish that representation. There is simply no evidence whether or not there has been a change of mind since. No argument was put, or could on the existing state of the evidence have been maintained, that the issue is entirely academic.

27. I dismiss the respondent's motion, and order it to pay the applicant's costs.