

FAIR TRADING: MISLEADING OR DECEPTIVE CONDUCT, by Lindsay Trotman and Debra Wilson, LexisNexis NZ Limited, Wellington (2006) vii, 359pp. New Zealand price \$129.94

The advent of the Fair Trading Act 1986 was a milestone on the New Zealand statutory landscape. It was further testimony of the reality that contracts are increasingly being subject to an overlay of regulation by statute law. As Lord Wilberforce observed in *The New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1974] 1 All ER 1015 at 1020, it was a contradiction to adopt a technical approach to the doctrine of contract using the ingredients of offer, acceptance and consideration, when the legal environment that contracts were subject to was of far greater complexity.

The legal backdrop against which the law on fair trading needs to be considered was helpfully articulated by Professor Atiyah (*The Rise and Fall of Freedom of Contract* (1979) 726) when he opined:

the second sense in which contract has declined concerns the changing importance attached to free choice, consent, and promises as sources of rights and liabilities. During the past hundred years there has been a continuous weakening of belief in the values involved in individual freedom of choice, and this weakening *has been reflected in the law*. The legislation of the past century has carried to great lengths the circumstances in which the *individual's freedom of decision is overridden*, either in the direct interests of a majority, or to give effect to values which a majority believe to be of overriding importance. [Emphasis added]

Hugh Collins (*The Law of Contract* (1986) 10) stated:

the modern law of contract drops its premises that all market transactions may be conceived in the shape of simple exchange transactions. It draws upon principles of fair dealing to impose a normative framework around the parties. The introduction of legal principles designed to protect persons who rely upon others in pursuing their economic interests diminishes the priority afforded to liberty by the modern law of contract.

The purpose of the Act was reiterated by Hansen J in *Desmone Ltd v Auckland Senior Common Rooms Inc* (2002) 7 NZBLC 103,580 as follows:

Its underlying purpose is to protect the consumer and to encourage fair and honest dealings in commercial matters.

The authors make the point at para 1.7 of the text that since the Act is a consumer protection statute, there are few defences available.

It is indeed fortuitous that almost twenty years since the Act took effect this book should emerge as a comprehensive New Zealand treatise on how this important Act has been interpreted and applied in relation to misleading and deceptive conduct. The Preface to the book alerts the reader to the sheer scope of the work in stating that, "The purpose of this book, therefore, is to provide an in-depth analysis and discussion of cases argued under s 9 and its Australian counterparts, and to distil the principles that have emerged from the cases". The book comprises fourteen chapters with the first chapter serving as an introduction. The introduction includes a succinct survey of the context for the Act, an overview of the core provision in section 9 which prohibits misleading or deceptive conduct, the judicial approach to its interpretation and the role of the common law in influencing the jurisprudence that has developed.

The remainder of the text is divided into three parts. Part One comprises chapters two to six and deals with 'Misleading or Deceptive Conduct'. Part Two contains chapters seven to ten and is titled 'Procedure and Defences' while Part Three covers the remaining chapters of eleven through to fourteen which discuss the law regarding available remedies.

The book has a number of valuable features, including appendices containing a comparative table of statutes at the Australian Federal and State levels (as well as the Fair Trading Act 1986), relevant extracts from legislation and a detailed index. The authors' provide their commentary in clearly numbered paragraphs and sub-paragraphs. This numbering is an invaluable aid in digesting the detailed analysis of the law that the book provides. It has also been optimally used in the cross-referencing within the text.

In addition, the text features 'Conclusions' at the end of a number of chapters, including the second, third, twelfth and thirteenth chapters, and chapter eleven concludes with the heading 'General Principles'. These serve to draw together by way of summary the essence of the subject matter discussed. So for example, since the book is primarily directed at outlining the comprehensive state of the law in respect of section 9, the authors conclude chapter three on 'Misleading and Deceptive Conduct' by succinctly summarising the policy underpinnings of this provision.

Of particular interest is the commentary on the ambit of conduct subject to the prohibition in section 9. It is wide ranging and includes a discussion of the difficult situation where disclosure cannot be made as to do so would be in conflict with obligations of confidentiality. Chapter six examines whether the scope of section 9 extends to consideration of future conduct as well as post-contractual conduct, with the authors concluding that the legal position in New Zealand is unclear on the question of future conduct. Part Two of the book discusses a range of practical issues which are relevant to claims pursuant to section 9. The issue of whether a party will have standing to bring an action pursuant to the Act is raised although it is not considered in detail in the New Zealand context.

The authors candidly recognise not only the pervasive influence of the Australian Trade Practices Act 1974 (Cth) in the enactment of the New Zealand Act but throughout the text compare and contrast the jurisprudence that has developed in respect of similarly worded provisions on both sides of the Tasman. Even though the provisions may be similarly worded, where there is a subtle difference in the statutory wording, these are discussed. For example, the words "trade" and "business" in the Australian Act are defined in inclusive terms whereas the New Zealand definitions are expressed in exhaustive language. The Australian influence on the New Zealand Act perhaps explains why an analysis of Australian court decisions features so prominently throughout the book.

Where judicial analysis has been unduly influenced by the constraints of the common law, the authors have been forthright in highlighting this. Further, on a number of occasions they have proceeded to indicate how the law ought to be applied. A good example is the attempt to address the issue of whether section 9 requires misrepresentation in misleading or deceptive conduct, misrepresentation being a requirement for the tort of passing off. The authors trace the emergence of the misrepresentation requirement in the joint judgment

of Dean and Fitzgerald JJ in the leading Australian case of *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 and chart its influence on the jurisprudence until its firm rejection by the Australian High Court in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592. The authors, at paragraph 3.6.9, cogently argue why this requirement, clearly rejected in Australia's jurisprudence, should not be imported into the New Zealand jurisprudence. This view is consistent with that expressed by Cooke P in the first case to consider the New Zealand Act, *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 39. In *Taylor Bros Ltd*, the observation is made that because the whole New Zealand Act is largely derived from the Australian equivalent Act and because of the Closer Economic Relations Agreement between the two countries, consistency in the application of the legislation across both sides of the Tasman, "*should clearly be aimed at so far as reasonably practicable.*" (Emphasis added.)

The book's publication is a poignant reminder of the increasing importance of the growing body of New Zealand law on fair trading. It will certainly serve as an invaluable reference point for those seeking to get acquainted with the intricacies of this important though still developing branch of the law.

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