

BAR SPEAK



with Andrew Lyons

section 52 now "a paltry thing of little real protection"

S. 52 of the Trade Practices Act has been reduced "to a paltry thing of little real protection for the multitude of persons whom the Parliament intended to protect" says Kirby J. "Henceforth, ... the Act may not operate to protect the ordinary recipient of the representations of corporations engaged in trade or commerce." "[The] Court might just as well fold up the Act and put it away so far as dealings between real estate agents and purchasers are concerned." This has been done, he writes, by the High Court majority in the recent decision in *Butcher v Lachlan Elder Realty Pty Limited*.

A purchaser of residential waterfrontage land sued the vendor and agent for common law misrepresentation and contravention of s. 52. The misrepresentation was said to arise from a promotional brochure prepared by the agent and given to the purchaser prior to contract. The brochure reproduced a 1980 survey plan which showed a position for the mean high water mark that was inaccurate.

In the lower Courts, the purchaser won against the vendor but lost against the agent. The High Court majority about

whom Kirby J complained also found for the agent.

The agent relied upon 2 similar disclaimers found on each side of the single sheet of paper that was the brochure. The disclaimers were in a common form: "All information contained herein is gathered from sources we deem to be reliable. However we cannot guarantee it's (sic) accuracy and interested persons should rely on their own enquiries."

The agent obtained the survey plan from a draft contract prepared by the vendor's solicitors.

The majority joint judgement (Gleeson CJ, Hayne and Heydon JJ) said that in the circumstances of this transaction the agent's brochure simply meant that the plan records what a particular surveyor found in 1980; we did not do the survey; that we believe it is reliable but cannot guarantee it; rely upon your own enquiries. It said that one does not look at the conduct divorced from the disclaimers about that conduct; both are considered together. Thus the agent did not make any representation of any kind beyond stating the information the vendor wished to

communicate to purchasers. It did not endorse or adopt that information.

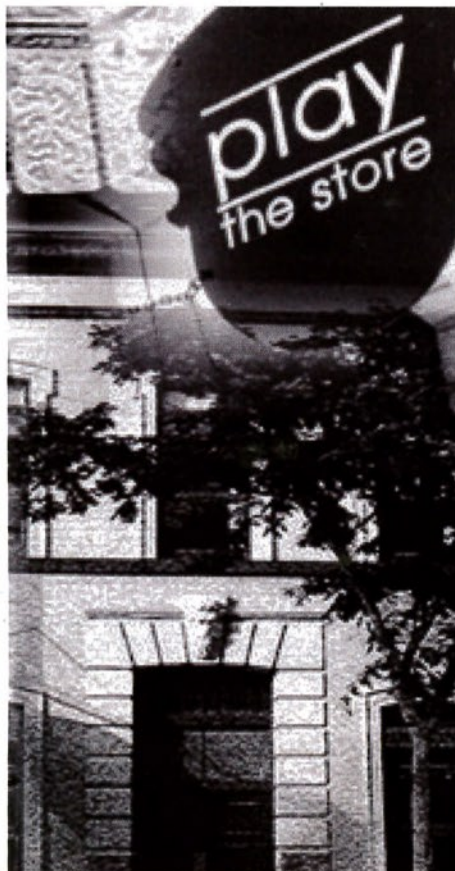
Kirby and McHugh JJ dissented. Kirby J rejected the argument that the agent did no more than convey representations being made by the vendor. That "would impermissibly erode the operation of the Act which, by its terms, applies to corporations for their own conduct. The agent chose to convey the representations that it did. For that conduct, it must accept accountability" The agent did not have to include the plan in its promotional literature.

His Honour wrote that it "requires a large measure of judicial self-deception to say that the purchaser should have read the written disclaimers invoked here." "By holding that the printed disclaimer in this pamphlet was effective to exclude liability under the Act, this Court, ... strikes a blow at the Act's intended operation. ... Many such corporations will be encouraged by this decision to believe that they can avoid the burdens of the Act by the simple expedient of tucking away in an obscure place in minuscule typeface a disclaimer such as now proves effective."

Conclusion. The decision is a trend to discount disclaimers in cases by demonstrating that they are not useful in preventing a violation of s. 52. That does not mean one should "fold up the Act" and the disclaimers were accompanied by factors that made it plain to the purchaser that the agent was the source of the information and not misleading. Those factors included the nature of the parties (shareholders v agent known to be in surveying), the character of the transaction (expensive investment in property transaction entitling to professional advice) and the contents of the brochure (that looked like one done by a surveyor agent). Disclaimers in other contexts need to be similarly evaluated.

S. 52 has not become "a paltry thing of little real protection."

Andrew Lyons LL.B.(Hons)
Brisbane barrister.



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