



Précis Paper

Misleading or Deceptive Conduct

This is an excellent programme on misleading and deceptive conduct with Dr Dempsey of Brisbane presenting with Sydney counsel Doran Cook who participates with his own opinions. It is a great presentation by two able and experienced lawyers.

Discussion Includes

- What does it mean for conduct to be "in trade and commerce"?
- What issues arise regarding statements of fact versus statements of opinion?
- When will statements of opinion be in trade and commerce?
- What relevance does it have that statements alleged to be in trade and commerce are made by a competitor?
- What is the difference between misleading or deceptive conduct, comparative advertising and defamation?
- What difficulties arise when statements are made on the internet, particularly on a website based overseas?
- What issues of free speech arise from the issues dealt with in this case? What are the implications for blogs and reviews posted on the internet?

Précis Paper

Misleading or Deceptive Conduct

1. In this edition of BenchTV, Dr Gillian Dempsey (Barrister) and Doran Cook (Barrister) discuss the recent decision of the Full Federal Court of Australia (Middleton, McKerracher & Davies JJ) in *Fletcher v Nextra Australia Pty Ltd* [2015] FCAFC 52 which considered misleading and deceptive conduct emanating from an internet blog post. Dr Dempsey was led by Varitimos QC in acting for the successful respondent, Nextra Australia Pty Ltd. Mr Cook is a very experienced counsel practicing primarily in the Equity Division of the Supreme Court and commercial matters in the Federal Court.
2. The representation that allegedly gave rise to a claim in misleading and deceptive conduct was an internet blog post commenting on an advertising flyer by Nextra, a newsagency franchisor. The flyer professed to the benefits of becoming a Nextra franchise newsagency through testimonials from business that had switched from another franchise to becoming a Nextra franchise. The blog post was written by Mr Fletcher, the director and shareholder of a rival newsagency franchisor, on a blog controlled by him. The post was entitled "Nasty campaign by nextra misleads newsagents" and instructed prospective franchises to ask Nextra a series of questions. The flyer and the blog post have been reproduced in the appendix below.
3. The particular question that was focused on in the dispute was item 5 on the blog post that suggested Nextra had not distinguished between people who had signed up for the full service 'Nextra' franchise and the cheaper, but more limited, 'News Extra' franchise i.e. they had not compared "like for like" franchises. The thrust of Mr Fletcher's complaint was that Nextra was engaging in misconduct to attract and entrap potential newsagents into an unfavourable relationship with the franchise. However, Mr Fletcher based his representations on a black and white photocopy of the flyer which obscured portions of the flyer. In one of the obscured portions, Nextra had clearly distinguished what level of franchise was being compared in each testimonial. Accordingly, his allegation that the flyer had not compared "like for like" was plainly wrong.
4. At first instance, the internet blog posts were found to have exhibited misleading and deceptive conduct. On appeal to the Federal Court, the central issues were (1) whether the representations were properly characterised as occurring "in trade or commerce" per s 18 of the *Australian Consumer Law* and (2) whether the representations found to have been misleading and deceptive by the trial judge had in fact been plead by the applicant.

Issue 1: "in Trade or Commerce"

5. Mr Fletcher conceded that even if the blog had been misleading and deceptive, the representation was not in trade or commerce.
6. The legislative provision prohibiting misleading and deceptive conduct is to be found in section 18(1) of the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)):

SECTION 18:

Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

7. At trial, Mr Fletcher sought to argue that the representations were merely opinions of his rather than expressions of facts and an opinion could never be "in trade or commerce". This argument was quickly disregarded by the Trial Judge. On appeal, Mr Fletcher argued that remarks made by an independent industry commentator, which he claimed to be, that are not intended to have an impact on trading or commercial activities will not be conduct in trade or commerce.
8. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, the issue of what could fall within the category of "in trade or commerce" arose with respect to a similarly worded provision of the *Trade Practices Act 1974* (Cth). The dispute arose in relation to a statement made by an employer to an employee that a certain activity was safe. Subsequently, the employee was injured performing the activity and made a misleading and deceptive conduct claim against the employer. The High Court determined that the representation made by the employer was not "in trade or commerce" given the understood meaning of those terms and their Honours placed importance on the word "in", when coming to this conclusion.
9. The relevance of *Concrete Constructions* to *Fletcher v Nextra* was that the High Court specifically considered that "promotional activities" would be "in trade or commerce". Nextra adduced evidence that Mr Fletcher's blog had indeed been used to promote News Express and another company in which he was involved, Tower Systems. At trial, it was also revealed that Mr Fletcher had received monies for google advertising. Furthermore, the Full Court considered that Mr Fletcher being a director of a competitor was also crucial to the Court characterising the blog post as promotional.

10. Two further cases that help to illustrate the outer limits of what is "in trade or commerce" and that are factually similar to *Fletcher v Nextra* are *Fasold v Roberts* (1997) 70 FCR 489 and *Madden v Seafolly* [2014] FCAFC 30.
11. The dispute in *Fasold* involved a lecture on finding Noah's Ark. The lecture was performed on premises leased by a corporation and the lecturer asked for monies to be paid for attendance. The claimant argued that the lecturer had mislead and deceived the audience given Noah's Ark was not real. The Court there held that any representations in the lecture were not in trade or commerce because it was just his opinion. Dr Dempsey comments that proving or disproving god is not a something you really want to be doing in a court setting.
12. In *Madden*, a swimsuit designer had looked at designs by Seafolly and formed the view that they were knockoffs of her own products. She exhorted her friends on Facebook to compare pictures of her swimwear with Seafolly's and essentially alleged a breach of copyright without commencing a claim. Her opinion was not based on facts because Seafolly had designed their swimwear prior to her designs. Therefore her representations were misleading and deceptive, and it was further found that this was in trade or commerce.
13. The Full Court's judgment in *SingTel Optus Pty Limited v Australian Football League* [2012] FCA 138 did not consider *Seafolly* but the Court there held that where comments were expressed honestly in a broader context and not in a purely promotional context then the representation was not in "trade or commerce". Further, if a user of a good or service makes a complaint that is backed up by facts they are not likely to be contravening s 18, but if they embellish the facts they might be exposing themselves to grave consequences. The decisions in *Fasold*, *Seafolly* and *Optus* illustrate that whether a representation was "in trade or commerce" will depend on the particular circumstances of the case.
14. In *Fletcher v Nextra*, the Full Court held that the representations were indeed in trade or commerce considering the promotional nature of the setting in which the representation was made, the author being a direct competitor of the subject of the representation and the purpose of the representation being to protect the author's own commercial interests.

Issue 2: Were the Representations Plead as Facts or Opinions and Does this Matter?

15. The second ground of appeal related to the plaintiff-applicant pleading at trial that the relevant representations were expressions of fact and, in the alternative, expressions of opinion. More specifically, it was the appellant's contention that the representations, as found by the Trial Judge, were not actually pleaded by the respondent.
16. The Full Court had no difficulty in concluding that Mr Fletcher had sought to express a fact rather than an opinion. What emerges from the judgment is that as long as a plaintiff has

successfully shown that there was a representation of fact that was false, it does not matter that the plaintiff has also plead the representation as an opinion, in the alternative

Implications

17. People tend to assume that things said on the internet are ephemeral but they are there forever for anyone to see. In light of the Full Court's decision in *Fletcher v Nextra*, even if you genuinely hold an opinion, but you express it as a statement of fact and it relates to a business competitor, you will likely contravene s 18 of the *Australian Consumer Law*, let alone being liable for defamation or comparative advertising claims. It might be said that this result is unreasonably disturbing a public benefit from people being able to comment on the goods and services of other business. But in *Fletcher*, it was a director of a competitor in a clearly promotional setting making a representation which was wrong, so the success of the claim in misleading and deceptive conduct is perhaps easier to swallow.
18. The case also serves to illustrate several practical considerations involved for parties litigating in this space. Firstly, a question will arise as to whether the abused party should seek damages or simply an injunction to remove the offending conduct. In *Fletcher*, Nextra simply sought an injunction to remove the blog post and Dr Dempsey explains that this was the preferred remedy given proving any particular prospective franchise of Nextra was turned away as a result of the blog post would be evidentially difficult to prove.
19. A second practical consideration is that these claims for misleading and deceptive conduct can often take a long time to be resolved. In *Fletcher*, it was a year from the commencement of the action that judgment in the appeal was delivered. After a delay such as that, it may be the case that the damage from the deceptive conduct has already been completely delivered. Dr Dempsey admits that she was surprised that Mr Fletcher did not remove the blog post on being made aware of his error in referring to a black and white photocopy of the flyer. Dr Dempsey notes that it is cases such as this that remind counsel to be mindful of a principled defendant. Similarly, it is important for counsel to consider the public image motivations that might be driving an action in misleading and deceptive conduct i.e. whether the abused party wishes to be seen as correct or is concerned about being seen to be heavy-handed.
20. Thirdly, and finally, Dr Dempsey notes that s 18 claims can be very expensive, even just at the stage of determining who exactly is responsible for an online post, and securities for costs should always be considered carefully before embarking on litigation.

Australia's Premier Newsagency Franchise Group

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news extra Bullsbrook - Geoff - Contact: (08) 9571 1213

We joined Nextra as a news extra store two years ago, after having been a member of two other national marketing groups. Nextra provides a wide range of product, good advice, excellent marketing materials and improved buying terms,

while allowing us to operate our store - our way. We cherry pick from what Nextra offers to suit our store and our customers. This flexible co-operative approach has resulted in our net profit increasing more than 120% in the last two years.

Nextra Shellharbour - Graham & Denise Grono, Carolyn & David Heath - Contact: (02) 4296 7124

We have been running our Newsagency for almost seven years. Last year we joined The Nextra Group after having been a member of another marketing Group. The original impetus to join was to be associated with a "brand"; shopping centres seem to prefer brands. However we have discovered a wide array of extra benefits. Business advice is readily available when needed. Also available is Nextra's expertise and knowledge in securing lease agreements; they have existing ongoing relationships with major shopping complexes. We know what a daunting job this is on your own. The team at Nextra supply us with eye catching point of sale and great marketing ideas. There are a number of "Roadshows" held throughout the year. The benefits of these are many fold. We have the

opportunity to have a hands on look at new product ranges and reap the monetary benefits of the great deals Nextra have secured.

Newsletters are emailed weekly to remind you of closing dates for deals, upcoming events new products and other points of interest. Nextra also organise shop visits and provide you with insight into shop layout, market trends, product integration and sales advice. This is all helpful and can be taken on board, but any decisions that are made are up to you. There is no pressure, just help and guidance to run your business better.

We would whole heartily recommend anyone to joining our Nextra group.

Nextra Crosslands - Mark - Contact: (08) 9721 5938

Nextra is a great fit for our business. Through the group, we benefit from being part of a nationally recognised brand, we get access to Point-of-Sale material that helps us continually refresh and rotate our store layout - and on top of that great product deals that have really improved our product margins. When we joined Nextra we didn't

have to compromise on the freedom that comes with operating as an individual store. We still make our own decisions on what products to buy and what marketing material to use in our store, but we always know that the support and expertise is available to us through Nextra Head Office when we need it.

See over for a list of contacts who have experienced other Groups

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For Further information on the Nextra Group Benefits please contact
Nextra Head Office on 07 3902 4500.

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Australia's Premier Newsagency Franchise Group

"SOMETIMES RUMOURS ARE TRUE . . ."

CONTACT SOME OF OUR MEMBERS WHO HAVE EXPERIENCED OTHER GROUPS

Contact some of our members who have experienced both Groups:

news extra Alexandra Hills
Phone: (07) 3824 7200

Nextra Crosslands News
Phone: (08) 9791 5938

news extra Bullsbrook Newsagency
Phone: (08) 9571 1213

**Nextra Cleveland Newsagency and
Nextra Express Cleveland**
Phone: (07) 3286 1206

news extra Wauchope Newsagency
Phone: (02) 6585 2039

Nextra Cannon Hill
Phone: (07) 3399 5848

news extra Capalaba Newsagency
Phone: (07) 3823 1230

Nextra Point Cook
Phone: (03) 9395 0427

**Nextra Shellharbour Square
News and Nextra Express
Shellharbour Square**
Phone: (02) 4296 7124

**news extra Upper Coomera
Newsagency**
Phone: (07) 5502 8546

Nextra Windsor
Phone: (02) 4587 9530

Nextra Balwyn Newsagency
Phone: (03) 9836 4206

**Nextra Mooloolaba Central and
Nextra Esplanade**
Phone: (07) 5452 5900

Nextra Albany Creek
Phone: (07) 3264 1997

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for contact details to other Nextra Group Members

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Nasty campaign from nextra misleads newsagents

Newsagency marketing group Nextra has embarked on a marketing campaign built on rumours. Newsagents approached by Nextra ought to ask the following questions in writing:

1. What are the rumours referred to in the nextra flyer?
2. Why is nextra concerned about the rumours?
3. Where has nextra heard about the rumours?
4. Why is nextra using these rumours to promote its business?
5. On the flyer nextra list newsagents who have switched from one group to nextra? When did they switch? This is important as the details provided on the flyer are misleading and deceptive. Did they switch like for like – i.e. to nextra or to the cheaper News Extra group?
6. On the flyer, nextra lists a store which has gone broke while under nextra membership. Why did the reported nextra GP not help this business?
7. What examples do you have of nextra growing newsagent GP as you state in your flyer?

While there are more questions I could suggest, this list is a good start as they go directly to the flyer being put about by nextra.

Newsagency marketing groups are competing to attract newsagents. This competition is good as newsagents should be the winners. The decision on which marketing group to join should be based on facts, provable facts. The nextra flyer I have seen is not about facts. Indeed it contains some false and misleading information. Further, it uses fear to try and generate interest in nextra. The nextra leadership team would be better off spending time making their group more appealing on results rather than trying to talk down a competitor.

Disclosure: I am a Director of newsXpress Pty Ltd.

BIOGRAPHY

Dr Gillian Dempsey

Barrister, Level 12 Barristers Chambers, Brisbane

Gillian Dempsey has practised at the Queensland Bar for over 15 years. Her practice is inter-jurisdictional and takes her often to NSW and the ACT. She holds a doctorate in law and economics and a first class honours degree in law from the ANU. Gillian has an active interest in forensic accounting and valuation (particularly of intangibles).

Doran Cook

Barrister, Blackstone Chambers, Sydney

Doran Cook has over 20 years' experience as a barrister. He commenced at the Johannesburg Bar in 1994, and practiced as a solicitor in Australia before returning to the Bar in 2005. Doran has held briefs for most major banks, ASIC, as well as foreign liquidators in cross-border insolvency matters.

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Focus Case

Fletcher v Nextra Australia Pty Ltd [2015] FCAFC 52

Benchmark Link

https://benchmarkinc.com.au/benchmark/html/benchmark_17-04-2015_weekly_civil_law_review.html

Judgment

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2015/52.html>

Cases

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594

Fasold v Roberts (1997) 70 FCR 489

Madden v Seafolly [2014] FCAFC 30

SingTel Optus Pty Limited v Australian Football League [2012] FCA 138

Legislation

Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth))

Trade Practices Act 1974 (Cth)