Holding Advertising Accountable for Misleading Statements: Principal or Accessorial Liability under the *Trade Practices Act 1974* (Cth)?

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Introduction

On 15 March 2004, National Consumers' Day, the Australian Competition and Consumer Commission (ACCC) launched a major campaign to bring to account those involved in the preparation and publication of misleading or deceptive advertising content.[1] Sending a clear message to advertising agencies in particular, the ACCC warned that anyone who developed misleading or deceptive advertisements was in potential breach of s 52 of the *Trade Practices Act 1974* (Cth) (*TPA*), which prohibits misleading or deceptive conduct.[2]

Graeme Samuel, Chairman of the ACCC, summed up the ACCC's concern in blunt terms:

> The community depends on the advertising industry … to provide it with crucial information to inform buying decisions. It has every right to expect that the industry take all reasonable efforts to maintain a high level of compliance with the [*Trade Practices Act 1974* (Cth)]. In the Commission's view, this requires the maintenance of proper systems and procedures designed to prevent the publication of false, misleading or deceptive advertisements.[3]

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1 ACCC Media Release (MR 034/04), "Media outlets placed on notice about misleading advertising", 15 March 2004.

2 ACCC Media Release (MR 034/04), note 1.

3 ACCC Media Release (MR 034/04), note 1.

Samuel's comments echoed those made by von Doussa J six years earlier in *ACCC v Nissan Motor Company (Australia) Pty Ltd*:[4]

> In the advertising industry, advertising agents are 'gatekeepers' who have a responsibility to consider whether advertising material prepared by them for their clients, complies with consumer protection legislation.[5]

These forceful statements imply that it is incumbent upon advertising agencies to ensure that the advertisements they devise are not misleading or deceptive in contravention of s 52 of the *TPA*[6] (or equivalent provisions in other statutes). The characterisation of advertising agencies as 'gatekeepers' embodies the argument that, for consumer protection laws to operate effectively, responsibility for accurate advertising rests not only with advertisers but also with those actively involved in the creative design process. This contention gains cogency from the fact that the development and production of an advertisement is essentially a "collaborative venture"[7] between advertisers and advertising agencies, with the latter contributing recognised skills in areas such as marketing and communications. Whether or not one endorses the term 'gatekeeper', arguably, either as a co-principal or an accessory, a level of responsibility to avoid misleading messages goes with an advertising agency's role.

Interestingly, to date advertising agencies have rarely featured in cases involving breaches of consumer protection laws.[8] However, consistent

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4 *ACCC v Nissan Motor Company (Australia) Pty Ltd* [1998] ATPR 41-660.

5 *ACCC v Nissan Motor Company (Australia) Pty Ltd*, note 4, at 41, 354.

6 The focus in this article is on s 52's consumer protection role, although it is well established that the section has a wider application: see *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 and *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

7 Sweeney B, "Advertising Agencies: Are They Really the Gatekeepers for Consumer Protection?" (2003) 10 *Competition & Consumer Law Journal* 265, p 279.

8 Typically, action has only been taken against the advertiser, ignoring the role played by the advertising agency in the alleged contravention. Exceptions to this include *Guthrie v Dolye Dane & Bernbach Pty Ltd* [1977] ATPR 40-037 and *ACCC v Nissan Motor Company (Australia) Pty Ltd*, note 4. Likewise, apart from Sweeney, note 7, little academic consideration has been given to any legal obligations on advertising agencies to protect consumers.

with its current 'crackdown' on misleading advertising, there have been two recent attempts by the ACCC to hold advertising agencies accountable for misleading or deceptive advertisements.[9] In both cases, *Cassidy v Saatchi & Saatchi Australia Pty Ltd*[10] (*Saatchi*) and *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*[11] (*Bevins*), the ACCC's arguments were rejected by the Full Federal Court, reinforcing fears that "far from being the 'gatekeeper', an advertising agent may be little more than an occasional doorman"[12] for consumer protection in Australia.

This article examines the decisions of the Full Federal Court in *Saatchi* and *Bevins*, and the important principles they established governing the liability of advertising agencies for misleading or deceptive advertisements. The analysis distinguishes between liability incurred as a principal and liability incurred as an accessory. The article then outlines the "proportionate liability" reforms of the *TPA* and their impact on the arguments previously advanced, and concludes by confirming that, based on the current law, only in limited circumstances will advertising agencies be likely to face principal or accessorial liability for misleading advertising. Although contrary to the expectations of the ACCC, this result realistically positions the potential 'gatekeeper' capabilities of advertising agencies within the existing parameters of the consumer protection regime of the *TPA*.

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9 In each instance, the ACCC sought declaratory and injunctive relief against the respondent advertising agency. In relation to injunctive relief, the orders sought included requiring the respondent to conduct compliance programs, preventing it from engaging in similar conduct in the future, and compelling it to undertake corrective advertising.

10 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] ATPR 41-980.

11 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy* [2003] ATPR 41-971.

12 Sweeney, note 7, pp 265-266. Sweeney's concern, voiced prior to the appellate decisions in *Saatchi* and *Bevins*, was that any responsibility on the part of advertising agencies to ensure compliance with consumer protection legislation might be "more moral than legal".

Liability as a Principal for Misleading or Deceptive Conduct

Strict liability under statute

An advertising agency's obligation not to engage in misleading or deceptive conduct arises, as it does for the wider business community, from s 52(1) of the *TPA*. The well known text of that provision states:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.[13]

Cast in ostensibly plain terms, the proscription in s 52(1) necessitates two preliminary points of clarification:

(1) Section 52 is directed to corporations but, like other provisions of the *TPA*, it extends to individuals as well.[14]

(2) Section 52 does not purport to create liability: rather, it establishes a "norm of conduct",[15] the contravention of which may give rise to a range of remedies set out in Part VI of the *TPA*; for example, injunctions (s 80), damages (s 82), and a variety of other orders (s 87).

More substantive issues concerning the appropriate methodology for applying s 52 found resolution in the Full Federal Court's seminal decision in *Taco Company of Australia Ltd v Taco Bell Pty Ltd*.[16] In a joint judgment, Deane and Fitzgerald JJ explained that whether conduct is misleading or deceptive, or likely to mislead or deceive, is "a question of fact to be decided by considering what is said and what is done against the background of all relevant surrounding circumstances."[17] At a practical level, their Honours' expectation was that the courts, in judging the capacity of conduct to mislead or

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13 In cases involving misleading advertising, the conduct alleged to contravene s 52 will comprise misrepresentations contained in a particular advertisement.

14 See s 6 of the *TPA*.

15 *Brown v Jam Factory Pty Ltd* [1981] ATPR 40-213, 42,928 (Fox J).

16 *Taco Company of Australia Ltd v Taco Bell Pty Ltd* [1982] ATPR 40-303.

17 *Taco Company of Australia Ltd v Taco Bell Pty Ltd*, note 16, at 43,751.

deceive, would assess the effect of the conduct on those within its target audience, including "the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations."[18]

Subsequent decisions have sought to narrow the span of this inquiry by focusing on a representative member of the group exposed to the conduct.[19] Entirely consistent with this approach was the High Court's ruling, in *Campomar Sociedad, Limitada v Nike International Ltd*,[20] that where representations are made to the public – for example, in the form of advertisements – it is necessary to consider "the reactions or likely reactions of the 'ordinary' or 'reasonable' members of the class of prospective purchasers."[21]

The test is an objective one. That is to say, the subjective intention of the party engaging in the particular conduct is irrelevant to the assessment of principal liability under s 52. There is no requirement that the party know or suspect that the conduct has the capacity to mislead or deceive, or that the conduct may amount to a contravention of s 52.[22] Any belief that the party was acting honestly or reasonably is similarly beside the point.[23]

Clearly, in cases where principal liability under s 52 is sought to be imposed on an advertising agency, the applicant bears the onus of establishing, on the objective test outlined above, that the impugned advertisement contained representations which were misleading or deceptive, or likely to mislead or deceive. Moreover, and this appears

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18 *Taco Company of Australia Ltd v Taco Bell Pty Ltd*, note 16, at 43,752.

19 Following Gibbs CJ's comment, in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, at 199: "Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class."

20 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45.

21 *Campomar Sociedad, Limitada v Nike International Ltd*, note 20, at [105].

22 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre*, note 6, at 228; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*, note 19, at 197.

23 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre*, note 6, at 228; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*, note 19, at 197.

to be the real stumbling block, the applicant must show that the advertising agency itself made those representations. These points are amply demonstrated by the Full Federal Court's recent decision in *Saatchi*.

Saatchi

The central issue before the Full Federal Court in *Saatchi* was: Is an advertising agency liable as a principal for the misleading statements conveyed by advertisements it has prepared? In bringing this appeal, the ACCC sought to reverse the decision of Jacobson J in *Cassidy v NRMA Health Pty Ltd*,[24] holding the advertising agency Saatchi & Saatchi Australia Pty Ltd not liable as a principal under s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASICA 2001*). Apart from applying only to conduct in relation to financial services (including health insurance), s 12DA(1) of *ASICA 2001* corresponds with s 52(1) of the *TPA*. Significantly, the ACCC did not seek to establish that Saatchi should be accessorily liable.

The facts of the case were straightforward. NRMA Health Pty Ltd (NRMA) ran a series of newspaper advertisements, created and developed by Saatchi & Saatchi Australia Pty Ltd (Saatchi), for a new health insurance product. The substance of the advertisements was that NRMA would meet the full costs of pregnancy-related hospital and medical services for its women members, regardless of how advanced their pregnancy was at the time when they joined the fund. However, provisos in small print at the bottom of the advertisements stated that a pregnant woman was fully covered only after payment of any policy excess or 'co-payment', and that women who were pregnant at the time of joining the fund were required to have completed a twelve month waiting period with NRMA or their existing fund.

NRMA did not dispute that the advertisements contained misleading or deceptive representations. Indeed, NRMA consented to declarations that it had breached s 12DA(1) of *ASICA 2001*.[25] Saatchi also formally admitted that the advertisements contained representations

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24 *Cassidy v NRMA Health Pty Ltd* [2002] ATPR 41-891.

25 In effect, this amounted to an admission as to the inadequacy of the provisos. As the ACCC alleged, the provisos were unlikely to come to the attention of the target audience, and failed to detract from the overall impression of the advertisements.

contravening the section. What Saachi disputed, however, was that it had made the representations.

In examining this issue on appeal, Stone J confirmed that NRMA's own liability did not preclude Saatchi from also having made the same representations as a co-principal.[26] In their joint judgment, Moore and Mansfield JJ agreed, noting: "There clearly can be more than one publisher of misleading information."[27] That point clarified, the Full Federal Court judges proceeded to consider the ACCC's two alternative arguments as to how Saachi might have made the misrepresentations in this case.

First, the ACCC submitted the fact that Saatchi's name was mentioned in the advertisements was sufficient to identify Saatchi as a co-publisher of the representations made by NRMA. However, the court roundly rejected the argument that the mere appearance of the name Saatchi at the bottom of the advertisements converted them into a joint representation by NRMA and Saatchi.[28] That implication, their Honours explained, was negatived by the relative proportions of the message of the advertisements *vis-a-vis* the reference to Saatchi.[29] In the absence of anything else in the advertisements that might support the claim, the court was not prepared to find that Saatchi had adopted the representations made by NRMA.[30]

Second, the ACCC submitted that the act of creating the advertisements was itself misleading or deceptive conduct. In response to this submission, Stone J said:

> The question is whether, in merely preparing the advertisement, Saatchi engaged in conduct that was misleading or deceptive or likely to mislead or deceive. The answer to that question must be no. Quite simply, Saatchi's conduct, absent steps being taken

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26 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [62], citing *Global Sportsman; Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

27 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [31].

28 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [28] per Moore and Mansfield JJ; at [65] per Stone J.

29 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [28] per Moore and Mansfield JJ; at [65] per Stone J.

30 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [28] per Moore and Mansfield JJ; at [65] per Stone J.

> by NRMA, could never, on any analysis, have misled or deceived anyone.[31]

Similarly, Moore and Mansfield JJ held that it was the publication of the advertisements that perfected the contravention of s 12DA(1) of *ASICA 2001*, and it was abundantly clear in this case that Saatchi was not involved in publishing the advertisements but merely with their preparation.[32] Accordingly, the court was unanimously of the view that merely by preparing an advertisement an advertising agency does not engage in conduct that is misleading or deceptive, or likely to mislead or deceive. Some additional step is required, such as the advertising agency actually disseminating the advertisement.[33]

In the result, the Full Federal Court found no basis for overturning Jacobson J's conclusion at trial that anyone viewing the advertisements would have understood that the representations conveyed were those of NRMA and not those of Saatchi.

In the aftermath of *Saatchi*, actions seeking to hold advertising agencies principally liable for misleading or deceptive advertising would seem to have a low probability of success. No prudent advertising agency will actively involve itself in the publication of an advertisement, or identify itself in or otherwise associate itself with the content of an advertisement, so as to be reasonably regarded as adopting any misleading or deceptive representations therein.

This does not imply that advertising agencies should bear no responsibility for the products they help to develop. Rather, it suggests that theoretically the liability of advertising agencies for misleading or deceptive advertising is more properly based on their involvement as

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31 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [68].

32 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [36]. NRMA engaged a separate corporation, Zenith Media Pty Ltd, to decide in which publications the advertisements should appear, and to purchase the necessary space in those publications on behalf of NRMA.

33 *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [39] per Moore and Mansfield JJ; at [68] per Stone J.

accessories.[34] However, establishing accessorial liability is a difficult matter in practice.

Accessorial Liability under the *Trade Practices Act 1974* (Cth)

The remedies provided by the *TPA*[35] are available not only against the party principally liable for contravening s 52, but also against those "involved in" the contravention as accessories. Pursuant to s 75B(1) of the *TPA*, such involvement arises where a person:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

The High Court has confirmed that the provisions of s 75B import the requirements of the criminal law. In *Yorke v Lucas*[36] (*Yorke*), the leading case on accessorial liability under the *TPA*, the High Court stated:

> Notwithstanding that s 75B operates as an adjunct to the imposition of civil liability, its derivation is to be found in the criminal law and there is nothing to support the view that the concepts which it introduces should be given a new or special meaning.[37]

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34 See the pointed observations that the ACCC had not sought to hold the advertising agency accessorily liable: *Cassidy v Saatchi & Saatchi Australia Pty Ltd*, note 10, at [10] per Moore and Mansfield JJ; at [45] per Stone J.

35 These include injunctions (s 80), damages (s 82) and a range of other orders (s 87).

36 *Yorke v Lucas* (1985) 158 CLR 661.

37 *Yorke v Lucas*, note 36, at 669 per Mason ACJ, Wilson, Deane and Dawson JJ. At 673, Brennan J agreed that s 75B "governs civil liability but it is couched in the language of the criminal law."

Relying heavily on its earlier analysis of accessorial liability in the criminal sphere in *Giorgianni v The Queen*,[38] the High Court held in *Yorke* that to establish liability under the various paragraphs of s 75B(1), the alleged accessory must "intentionally participate" in the relevant contravention by the principal.[39] Invoking the different phrasing used by the High Court, the alleged accessory must have had knowledge of the "essential matters" making up the contravention, *or* the "essential facts" constituting the contravention, *or* the "essential elements" of the contravention.[40] For convenience, these three expressions can be reduced to two, since it is clear from *Yorke* that the term "essential matters" embraces matters of fact that must be known to the alleged accessory before liability arises.[41]

Accordingly, *Yorke* stands for the principle that a person sought to be made accessorily liable under s 75B must have knowledge of the essential facts or elements constituting the relevant contravention, although knowledge that these amount to a contravention is not necessary.[42] The requisite knowledge may be constructive in the sense that it may be possible to show wilful blindness on the part of the person concerned.[43] However, absent a finding of wilful blindness, it must be established that the alleged accessory had actual knowledge of the essential facts or elements comprising the contravention.[44]

Consider the situation in *Yorke* itself. The respondent, Lucas, was the managing director of a corporation that had acted as the vendor's land agent during the sale of a business. The vendor gave misleading information about the weekly turnover of the business to Lucas who, not knowing that the figure was incorrect, passed it on to the purchaser. In holding that Lucas was not liable as an accessory under s 75B of the *TPA*, the High Court said:

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38 *Giorgianni v The Queen* (1985) 156 CLR 473.

39 *Yorke v Lucas*, note 36, at 670 per Mason ACJ, Wilson, Deane and Dawson JJ. At 676-677, Brennan J reached the same conclusion.

40 *Yorke v Lucas*, note 36, at 667 and 670 per Mason ACJ, Wilson, Deane and Dawson JJ. Their Honours noted at 668 that it was held in *Giorgianni v The Queen* that secondary participation requires intent based upon knowledge, notwithstanding that the statutory provision creating the principal offence imposes strict liability.

41 *Yorke v Lucas*, note 36, at 667.

42 *Ridgway v Consolidated Energy Corporation Pty Ltd* [1987] ATPR 40-754, [18].

43 *ACCC v IMB Group Pty Ltd* [2003] ATPR (Digest) 46-231, [135].

44 *ACCC v IMB Group Pty Ltd*, note 43.

> Upon the findings of the trial judge … Lucas lacked the knowledge necessary to form the required intent. A contravention of s 52 involves conduct which is misleading or deceptive or likely to mislead or deceive and the conduct relied upon in this case consisted of the making of false representations. Whilst Lucas was aware of the representations … he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention.[45]

It appears that the decision in *Yorke* makes it more difficult to establish liability for misleading or deceptive conduct as an accessory than as a principal. It is now settled law that accessorial liability under s 75B requires proof of intent based on knowledge, whereas s 52 imposes strict liability on a principal.

However, the degree of further difficulty involved in sheeting home accessorial liability is still an open matter. Insofar as cases of misleading or deceptive conduct are concerned, it remains to be authoritatively determined whether, as a precondition to liability under s 75B, the *Yorke* principle requires an alleged accessory to know that the proscribed conduct of the principal was misleading or deceptive, or likely to mislead or deceive.

There is a clear division of judicial opinion on this issue in the Federal and State Supreme Courts. For every judgment stipulating that liability under s 75B does not require an accessory to know that the conduct of the principal has a misleading or deceptive character,[46] there seems to be another insisting that accessorial liability depends on such knowledge.[47] Ironically, both approaches claim to be based on the High Court's ruling in *Yorke*.[48]

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45 *Yorke v Lucas*, note 36, at 667-668 per Mason ACJ, Wilson, Deane and Dawson JJ.

46 For example, *Wheeler Grace and Pierucci Pty Ltd v Wright* [1989] ATPR 40-940, 50,257; *Paper Products Pty Ltd v Tomlinsons (Rochdale) Pty Ltd* [1994] ATPR 41-315, 42,204; *Dimension Data Australia Pty Ltd v Kepper* [1999] FCA 1446, [7]; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, 149-150; *Adler v ASIC* (2003) 46 ACSR 504, [331]-[342].

47 For example, *Chan Cuong Su t/as Ausviet Travel v Direct Flights International Pty Ltd* [1999] ATPR 41-677, 42,666; *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 599, [40]; *Fernandez v Glev Pty Ltd* [2000] FCA 1859, [18];

In a fortuitous development, however, unifying principles of accessorial liability appear to have emerged in the Full Federal Court's recent decision in *Bevins*.

Bevins

Bevins, an appeal from the decision of Hill J at first instance in *Cassidy v Medical Benefits Fund of Australia (No 2)*,[49] required the Full Federal Court to direct its attention to the application of ss 12DA(1) and 12GD(1) of the *Australian Securities and Investments Commission Act 1989* (Cth)[50] (*ASICA 1989*). These provisions effectively replicate ss 52(1) and 75B(1) of the *TPA*, although only in respect of conduct in relation to financial services (including health insurance).

In *Bevins*, the Full Federal Court agreed with Hill J that the health fund insurer MBF, by certain television and billboard advertisements, had engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of *ASICA 1989*. The advertisements in question suggested that a pregnant woman transferring to MBF from another health fund would be immediately covered for pregnancy-related expenses, when in fact this was not correct. At the same time, however, the court overturned the trial judge's decision that John Bevins Pty Ltd (Bevins), the advertising agency responsible for designing the offending advertisements, was accessorily liable under s 12GD(1) of *ASICA 1989*.

In the leading judgment, Stone J held that a person could not form an intention to participate in conduct proscribed as misleading or deceptive without prior knowledge of that which made the conduct misleading or deceptive in character.[51] Accordingly, although Bevins' employees obviously knew the specific content of the advertisements, the trial judge's finding that they did not subjectively appreciate the

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ACCC v IMB Group Pty Ltd [2003] ATPR (Digest) 46-231, [135]; *Quinlivan v ACCC* [2004] ATPR 42-010, [10].

48 See the cases cited in notes 46-47.

49 *Cassidy v Medical Benefits Fund of Australia (No 2)* [2002] ATPR 41-892.

50 Now superseded by the *Australian Securities and Investments Commission Act 2001* (Cth).

51 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [78].

advertisements were misleading or deceptive[52] should have led to the conclusion that Bevins was not accessorily liable.[53]

Neatly merging the High Court's references to "essential facts" and "essential elements" in *Yorke*, Stone J stated:

> [T]he conduct in question [must] be accurately described as 'misleading or deceptive' or 'likely to mislead or deceive'. This misleading or deceptive character is a question of fact that must be decided in the context of all the surrounding circumstances … That *'fact' is an essential element* of the contravention. It follows that to be liable as an accessory one must have knowledge of the misleading and deceptive character of the relevant conduct. (Emphasis added.)[54]

Justice Stone was careful to point out this does not mean that to be liable as an accessory to misleading or deceptive conduct it is necessary to know that the conduct of the principal is unlawful, or indeed to have any knowledge of the provisions of consumer protection statutes.[55] However, her Honour explained that it is necessary to know the essential elements of the contravention. That is, to know what makes the conduct a contravention: in the instant case, its misleading or deceptive character.[56] Only then, she concluded, can a person intentionally participate in conduct of that character.[57]

Justice Moore, with whom Mansfield J concurred, also found that the advertising agency was not accessorily liable. His Honour reasoned that MBF's conduct was characterised by three "essential facts".

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52 At first instance, Hill J accepted that no officer or employee of Bevins had formed the view that the advertisements were misleading or deceptive: *Cassidy v Medical Benefits Fund of Australia (No 2)*, note 49, at [73].

53 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [78].

54 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [80].

55 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [82].

56 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [82].

57 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [82].

First, the publication of advertisements that, second, might lead members of the public to believe that certain benefits would be enjoyed or rights conferred by taking out insurance with MBF when, third, in fact they would not.[58] Since Bevins' employees knew that waiting periods applied, but did not appreciate that the advertisements might be understood as indicating waiting periods did not apply, it followed they were not aware of the second of the three "essential facts.[59]

Although Moore J reached the same conclusion as Stone J, he took issue with Stone J's finding that knowledge of the misleading or deceptive character of the representations is a precondition to liability as an accessory. In his view:

> [L]iability as an accessory (in circumstances where the contravening conduct of the principal was making false or misleading representations) does not depend on an affirmative answer to the question whether the alleged accessory knew the representations were false or misleading.[60]

Further reflecting on this theme, Moore J stated that in a situation where representations have been made to the public, it was 'inapt' to consider whether the alleged accessory knew in a subjective sense that the representations were misleading or deceptive.[61] Instead, he thought it more appropriate to ask whether the alleged accessory knew that the

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58 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [13].

59 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [14].

60 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [15]. At [10], Moore J categorically rejected any suggestion that the High Court's decision in *Yorke v Lucas* imposed such a precondition. However, with due respect to his Honour, Stone J is more persuasive in putting the opposite view. Her Honour, at [85], reasoned that in *Yorke v Lucas* the High Court interpreted the accessory liability provisions in s 75B "not as requiring that the accessory know the essential elements of the contravening *conduct* but that he or she know the essential elements of the *contravention* … [T]his involves knowing, in addition to what happened, the fact that the relevant conduct is misleading or deceptive or likely to mislead or deceive."

61 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [16].

conduct of the principal might lead members of the public to assume a state of affairs that was not in fact true.[62]

With due respect to Moore J, the claimed differences with Stone J's reasoning are more illusory than real. While Moore J requires an accessory to know the representation conveys a meaning contrary to the facts, Stone J requires an accessory to know the representation is misleading or deceptive. Essentially, the substance of these requirements is the same.[63] This is evidenced by the weight ascribed by both judges to the trial judge's finding that Bevins' employees did not appreciate the misleading nature of the advertisements they prepared.

Of course, the net effect of the judgments of Moore and Stone JJ in *Bevins* is to promote a restricted view of an advertising agency's liability as an accessory for misleading or deceptive advertising. According to this view, accessorial liability arises only if the advertising agency *knew* that the advertisement it created was misleading or deceptive.

This result is at odds with a robust 'gatekeeper' function on the part of advertising agencies,[64] and will cause disappointment in some quarters. However, Stone J helped to put the matter in perspective with these comments in *Bevins*:

> Imposing the role of 'gatekeeper' on an advertising agent who knows that an advertisement is misleading and is careless or reckless in ensuring that the problem is corrected before publication is quite different from imposing on advertising agents an obligation to act as gatekeeper in respect of advertisements that they do not believe are misleading or deceptive or likely to be so.[65]

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62 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [16].

63 Indeed, at [16], Moore J acknowledged that there is "not a large step" between them.

64 See the remarks of von Doussa J in the text accompanying note 5.

65 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy*, note 11, at [92].

In other words, even as 'gatekeepers', advertising agencies must satisfy the legal requirements of accessorial liability under the *TPA*.

Proportionate Liability Reforms

The new regime

Pursuant to Schedule 3 of the *Corporate Law Economic Reform Program (Audit Reform and Public Disclosure) Act 2004* (Cth), "proportionate liability" reforms have been introduced into the *TPA*, and equivalent changes have been made to *ASICA 2001*,[66] with effect from 26 July 2004. In cases where they apply, these reforms are intended to ensure that the damages awarded against a defendant are *proportionate* to the defendant's degree of responsibility for the plaintiff's loss. For convenience, the discussion in this part of the article focuses on the amendments to the *TPA*, but the same points can be made in respect of the proportionate liability provisions enacted elsewhere.[67]

The *TPA*'s proportionate liability regime applies to actions for damages under s 82 for economic loss or damage to property caused by misleading or deceptive conduct in breach of s 52. Essentially, the regime allows a defendant in such an action to claim contributory negligence by the plaintiff,[68] and contribution from other wrongdoers.[69] As ss 87CB and 87CD make plain, where two or more "concurrent wrongdoers" jointly or independently caused the plaintiff's loss, the damages awarded against any one wrongdoer will be limited to the proportion of the total loss (after any reduction for contributory negligence) for which that wrongdoer was responsible.

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66 The *Corporations Act 2001* (Cth) has also been similarly amended.

67 Although there has been minimal discussion of the proportionate liability reforms to date, useful overviews of the *TPA* amendments are provided in Morgan J and Skinner M, "Civil Liability Reform: Recent Commonwealth Legislation – Finishing Touches?", 4 August 2004, <http://aar.com.au> and O'Neill J, "Apportioning Blame: Proportionate Liability Reforms to the Trade Practices Act", 29 October 2004, <http://www.lawyersweekly.com.au>.

68 See s 82(1B).

69 See Part VIA (ss 87CB-87CI), entitled "Proportionate Liability for Misleading and Deceptive Conduct". Note, however, that the regime does not apply to wrongdoers who intended to cause, or fraudulently caused, the loss or damage that is the subject of the claim: s 87CC.

In apportioning liability between concurrent wrongdoers, the court will determine what is 'just', having regard to the extent of each defendant's responsibility.[70] Significantly, the court may also take into account the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.[71]

Should the court attribute responsibility to a concurrent wrongdoer who is not a party to the proceedings, the plaintiff may pursue such person seeking to recover the balance of the plaintiff's loss.[72] However, pursuing such a claim in subsequent proceedings exposes the plaintiff to substantial risks. While the reduced award against the defendant(s) in the initial proceedings is final and conclusive,[73] that court's finding as to the degree of responsibility of a concurrent wrongdoer who was not a party to those proceedings is not. The court hearing the subsequent action may conclude that any such concurrent wrongdoer had a lesser or greater responsibility than that decided by the first court. If, for example, compared to the first court's finding, the second court holds any such concurrent wrongdoer less responsible for the plaintiff's actual loss, the plaintiff will be under-compensated.[74] Yet there is no corresponding possibility that the plaintiff will be over-compensated: the regime precludes any award of damages that would result in the plaintiff's total compensation exceeding "the loss actually sustained".[75]

Clearly, in cases where the proportionate liability regime applies, a plaintiff can no longer simply target one particular defendant.[76]

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70 Section 87CD(1).

71 Section 87CD(3) and (4).

72 Section 87CG(1).

73 The regime expressly protects the defendant from any subsequent claim for contribution and from being joined in any future proceedings in respect of the claim: ss 87CF and 87CH, respectively.

74 The plaintiff also faces the hazard of the concurrent wrongdoer's insolvency or elusiveness.

75 Section 87CG(2).

76 Compare the system of joint and several liability, whereby the full amount of the plaintiff's loss can be recovered from a single defendant provided that defendant's conduct was *a* cause of the loss.

Instead, plaintiffs wishing to recover 100 percent of their losses should join all potential wrongdoers in the same action.[77]

To this end, the regime obliges the defendant to assist the plaintiff in identifying other possible wrongdoers. A defendant who has reasonable grounds to believe that a person may be a concurrent wrongdoer must notify the plaintiff "as soon as practicable" of the identity of that person, and of the circumstances that may make that person a concurrent wrongdoer.[78] If the defendant fails to do so, and as a result the plaintiff unnecessarily incurs costs in the proceedings, the court may order that the defendant pay all or any of the costs of the plaintiff, on an indemnity basis or otherwise.[79]

Even as defendants welcome the proportionate liability regime, it seems probable that plaintiffs will be averse to it. If so, the very fact that the regime is limited to s 82 damages claims arising from a contravention of s 52 suggests a way around it. The regime does not apply, for instance, to actions for breach of s 53 (which proscribes various specific types of misleading representations in connection with the supply of goods or services), or claims for monetary compensation under s 87.[80] Plaintiffs may well seek to avoid the proportionate liability regime by bringing their claims under such alternative provisions where possible.

The impact on misleading advertising cases

After duly considering its scope and aims, the author predicts that the *TPA*'s proportionate liability regime will have an insignificant impact on cases of misleading advertising.

The regime only applies where an individual consumer alleges a contravention of s 52 by virtue of being misled by a particular advertisement, and commences an action under s 82 for damages for economic loss arising from such contravention. Such actions are certainly possible, but they are by no means commonplace.

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77 The court may give leave for one or more persons to be joined as defendants in proceedings to which Part VIA applies: s 87CH(1).

78 Section 87CE(1).

79 Section 87CE(2).

80 It is important to note, however, that s 87 relief is discretionary, whereas s 82 provides a direct cause of action.

Importantly, the regime has no application at all to proceedings instituted by the ACCC against advertisers and/or advertising agencies seeking declaratory or injunctive relief for misleading advertising.[81]

In any event, there is every likelihood that consumer plaintiffs will avoid the regime altogether by basing their claims on those provisions of the *TPA* which present a reasonable alternative to ss 52 and 82. For example, instead of relying on s 82, plaintiffs could seek monetary compensation under s 87.

A plaintiff commencing a s 82 damages claims for a contravention of s 52, a claim activating the proportionate liability regime, would be well advised to join all potential wrongdoers as defendants in the proceedings. In the misleading advertising context, this would mean joining both the advertiser and its advertising agency as defendants. Of course, under the regime, a defendant advertiser would be obliged to notify the plaintiff of the potential concurrent wrongdoing of its advertising agency, thus bringing the latter party to the plaintiff's attention.

However, the decisions in *Saatchi* and *Bevins* reveal the limited circumstances in which advertising agencies will be held liable for misleading advertisements they have developed. In light of these decisions, it is difficult to envisage the courts attributing any responsibility to advertising agencies as concurrent wrongdoers, except in the clearest of cases. To do otherwise would hardly be 'just'.

Conclusion

Advertising is a pervasive element in Australian society, and there can be little doubt about the power of advertisements to inform as well as to mislead.[82] Amidst prevailing concerns about the conduct of the advertising industry, advertising agencies have been warned that they must act as 'gatekeepers' for their clients, or face principal or accessorial liability under s 52 of the *TPA* (or equivalent provisions in other statutes) for misleading advertisements.

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81 See note 9 for details of orders typically sought by the ACCC in such cases.

82 *Re Media Council of Australia* [1996] ATPR 41-497, 42,243.

The recent decisions of the Full Federal Court in *Saatchi* and *Bevins* recognise that advertising agencies may be held principally or accessorily liable for misleading advertising. However, the practical effect of these decisions is that principal or accessorial liability will only be imposed on advertising agencies in limited circumstances. This conclusion is not displaced by the recent proportionate liability reforms.

To be liable as a principal, the advertising agency must do more than merely prepare the advertisement. It must also, for example, arrange for the distribution or publication of the advertisement, or the advertisement itself must be in terms that reasonably identify the advertising agency as one of its publishers. However, prudent advertising agencies can be expected to conduct their activities so as to avoid such pitfalls.

Alternatively, to be liable as an accessory, the advertising agency must know that the advertisement contains representations that might cause members of the public to be misled or deceived. This should be a straightforward matter to establish where the claims are blatantly false or clearly contrary to generally known facts. Anything less, however, leaves scope for the advertising agency to argue that it did not appreciate that the advertisement might have been misleading or deceptive.

Contrary to inflated expectations, these conclusions reflect the reality of the term 'gatekeepers' as it applies to advertising agencies. Advertisers beware!