

1. Discuss ... concerning the meaning of "in trade and commerce" under s.18 of the ACL?

#### Introduction

Section 18 of the ACL may be used by those who have been induced to enter into a contract due to misrepresentation made during the negotiation leading up to the contract. S18 states "A person shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Section 18 of the ACL refers to matters that are "in trade and commerce". The meaning behind in trade or commerce can be broken down into a broad and narrow construction. The broad connection confers anything that is "in connection" with trade and commerce, while the narrow meaning confers conduct that was engaged as "part of" trade and commerce.

#### Nelson v Concrete Constructions

The meaning behind these words with both constructions are discussed in the case of Nelson v Concrete Constructions. In this case, the worker sued his employer's foreman, who wrongly informed him that the grates at the entry points of the air-conditioning shafts were fixed by three bolts on each side and that it was safe to remove them in the manner explained by the foreman. He claimed this statement was untrue and he was hurt as a result of it by falling off the shaft and sustaining injuries. The court using the narrow construction held that there was no misleading or deceptive conduct through the foreman as the conduct was not in trade and commerce. They came to this decision by deciphering what constitutes "trade" or "commerce". They stated "the words, "trade" or "commerce" are not terms of art but terms of common knowledge of the widest import". Section 52 of the TPA (now s18 ACL), "wasn't intended to encompass all conduct of corporations in course of its overall business. It is rather concerned with the conduct of corporation towards persons with whom it has or may have dealings in course of those activities which of their nature bears trading or commercial character". "Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public".

Thus, their honors Mason CJ, Deane, Dawson and Gaudron JJ's made a very understandable conclusion of what constitutes trade and commerce and what does not. They do this by comparing a person driving a truck for delivery of goods to a consumer, and the person simply driving the company truck with no destination. The latter would not be in trade and commerce. Thus, their honors concluded that the interpretation of "in trade or commerce" includes activities, which are undergone in the course of "carrying on some overall trading or commercial business".

#### O'Brien v Smolonogoy

Therefore, the meaning of in trade and commerce should be construed more narrowly because the words "in trade and commerce" have a restrictive operation. This means that it qualifies prohibition against engaging in conduct of a specified kind. For example, property transactions are not considered in trade and commerce. This is because sales of properties are private and the conduct of a private vendor is not covered in trade and commerce. This is seen in the case of O'Brien v Smolonogoy, where it was stated that private sales of property between individuals is not considered an activity in trade or commerce.

#### Argy v Blunts

However, there are some cases where aspects of property transactions can be considered to be in trade and commerce, such as the case of Argy v Blunts. In this case, one might think that the vendor would be liable for misleading and deceptive conduct, however due to the fact that the vendor was

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**David Baud**



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