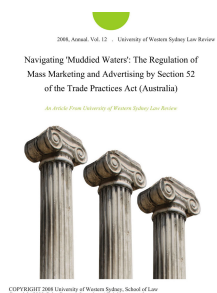


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NAVIGATING MUDDIED WATERS THE REGULATION OF MASS MARKETING AND ADVERTISING BY SECTION 52 OF THE TRADE PRACTICES ACT AUSTRALIA EBOOKS 2019



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This article is concerned with the regulation of mass marketing by the Trade Practices Act 1974 (Cth), in particular s 52, which prohibits conduct that is 'misleading or deceptive', or 'likely to mislead or deceive'. (1) Determining whether s 52 of the Trade Practices Act 1974 (Cth) has been breached in situations where the conduct complained of is directed at a diverse group (mass marketing), rather than an individual, presents particular problems. When conduct, such as advertising, is widely disseminated, as opposed to being tightly targeted, the likelihood of it misleading or deceiving some members of the general public exponentially increases. But at what stage can it be said that the conduct has overstepped the boundaries of fair play and become misleading? How does one measure the likelihood or propensity of the conduct to mislead? In particular, what members of the general public do we use as a benchmark to determine if conduct is misleading (the criterion issue)? The criterion issue is a longstanding one (2) and has troubled courts, not only in Australia, (3) but in the United States (4) and Europe. (5) In spite of the adoption of the 'ordinary or reasonable' consumer test by the High Court in *Campomar Sociedad, Limitada v Nike International Ltd* ('Campomar'), (6) a test that is problematic in itself, a question that still remains unresolved is the standard of care that consumers themselves need to employ when assessing mass advertising or marketing claims. Do the courts resort to the 'reasonable person' test employed in contract and tort law, (7) the 'gullible' or 'credulous' (8) consumer, or some other standard? Or, to put it another way, what is the test to apply in determining whether a person is engaging in misleading or deceptive conduct? As Gummow J recently stated in a special leave application to the High Court, (9) this still remains 'a very large question'. (10)

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