

# TRADE PRACTICES LAW JOURNAL

Volume 16, Number 1

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## EDITORIAL

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## ARTICLES

### **Casting the first stone: Lawyers' liability under section 52 – Natalie Skead**

Section 52(1) of the Trade Practices Act 1974 (Cth) – and the State and Territory analogues – establishes a general standard of trading and/or commercial conduct by prohibiting conduct that is misleading or deceptive, or conduct that is likely to mislead or deceive. This article examines the scope of the prohibition and, in particular, the extent to which the professional activities of legal practitioners may fall within the prohibition. It deals with the application of the prohibition to individual and unincorporated legal practitioners; the requirement that the proscribed conduct must be engaged in “in trade and commerce”; and the substantive “misleading and deceptive” requirement, specifically in the context of professional legal practice. It concludes that while the extent of lawyers’ liability for misleading and deceptive conduct is far from certain, fears of faultless liability are unfounded. Suggestions are made for striking a balance between keeping lawyers in check while ensuring continued full public access to legal services. .... 6

### **Understanding “understandings” under the Trade Practices Act – an enforcement abyss? – Ian Wylie**

How can it be that petrol retailers with well-synchronised and upwardly mobile pricing behaviour have repeatedly been found not to have any “understanding” about prices sufficient to contravene ss 45/45A of the *Trade Practices Act 1974* (Cth)? There is no direct guidance on the issue from Australia’s highest court, but one aspect of it, the (in)sufficiency of parallel conduct to prove collusion, has recently been considered by the Federal Court of Australia in *ACCC v Leahy Petroleum Pty Ltd* and the United States Supreme Court in *Bell Atlantic Corp v Twombly*. The objective of this article is to divine what is, and is not, an “understanding” under ss 45/45A, and to explore how Australian law might develop in this regard. .... 20

**The (almost) redundant civil accessorial liability provisions of the Trade Practices Act – Joachim Dietrich**

The *Trade Practices Act 1974* (Cth) imposes civil accessorial liability on parties “involved in the contravention” of parts of the Act, defined in s 75B. Litigation and commentary on this section shows that it is difficult to prove accessorial liability and many claims have failed. This is because, problematically, the scheme of accessorial liability adopted means that an accessory must be shown to have actual knowledge of the misleading or deceptive nature of the principal’s conduct. Yet, in most circumstances in which, historically, the accessory provisions have been relied upon, it is not necessary to establish accessorial liability at all. Instead, it is easier to pursue claims against natural persons for direct contravention of State Fair Trading Act provisions. This conclusion is supported by the recent High Court decision in *Houghton v Arms*. ..... 37

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