

**SUBMISSION TO THE STANDING COMMITTEE
OF OFFICIALS OF CONSUMER AFFAIRS**

**AUSTRALIAN CONSUMER LAW
CONSULTATION**

**THE CASE FOR AMENDING SS 51A(2) OF THE
TRADE PRACTICES ACT 1974 (CTH)**

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1. Overview

The way in which representations as to the future are treated will significantly affect the effectiveness of the various provisions that prohibit parties from making misleading representations. Currently s 51A of the TPA and provisions in the various State and Territory fair trading statutes facilitate proof in misrepresentation cases involving representations as to future matters (Facilitating Provisions).¹ However, these provisions are not uniformly worded. Furthermore, the recent Full Federal Court case of *McGrath v Australian Natural Products Pty Ltd (McGrath)*² suggests that the provisions contained in the TPA and the fair trading legislation in the Australian Capital Territory, South Australia and Tasmania is of less assistance to those seeking to prove that a representation as to the future was misleading than the provisions contained in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia.

The differences between the TPA provision and the provision contained in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia does not appear to have been recognised by those involved in recommending and overseeing the design and introduction of the Australian Consumer Law. The information and consultation paper released on 17 February 2009 does not discuss or seek opinions as to the appropriate form the Facilitating Provision in the Australian Consumer Law should take. This is most likely because a report summarising material differences between the substantive provisions contained in Commonwealth, State and Territory consumer laws prepared for the Productivity Commission stated that '[e]very jurisdiction has a provision reversing the onus of proof for future matters. Each of these is drafted in substantially similar terms'.³ Although this statement was consistent with almost all of the case law at the time this report was published, the *McGrath* decision has revealed that although the terms of these provisions are 'substantially similar', the provisions in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia operate differently to s 51A.

This submission argues that there is a need to amend s 51A of the TPA to ensure the proposed Australian Consumer Law provides adequate protection against misleading representations as to future matters. It summarises the case law that has interpreted the provision to date and concludes that, unlike the equivalent provision in the fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia, sub-section 51A(2) does not place the legal burden of proving

¹ Section 51A applies to the civil provisions in Division 1 of Pt V of the TPA. Section 75AZB of the TPA applies to the criminal provisions in Division 2 of Pt VC of the TPA; *Fair Trading Act 1992* (ACT) s 11; *Fair Trading Act 1987* (NSW), s 41; *Consumer Affairs and Fair Trading Act* (NT), s 41; *Fair Trading Act 1989* (Qld), s 37; *Fair Trading Act 1987* (SA), s 54; *Fair Trading Act 1990* (Tas) s 11; *Fair Trading Act 1999* (Vic), s 4; *Fair Trading Act 1987* (WA), s 9. These provisions do not establish a norm of conduct applicable to those who make representations as to the future. Rather, they facilitate proof in cases involving misrepresentations about future matters brought under the various provisions that prohibit misleading practices.

² (2008) 165 FCR 230.

³ Stephen Corones and Sharon Christensen, *Comparison of Generic Consumer Protection Legislation* (4 September 2007), 75. Available at http://www.pc.gov.au/_data/assets/pdf_file/0008/73691/consumerprotectionlegislation.pdf.

reasonable grounds on the representor. An argument is then made that s 51A should be amended so that it does in fact place the legal burden of proof on the representor.

2. The Facilitating Provisions

(a) Common attribute: representation as to the future is misleading unless based on reasonable grounds

Sub-section (1) of the Facilitating Provisions in the TPA and all the State and Territory fair trading statutes provides that a representation as to the future shall be taken to be misleading unless the representor had reasonable grounds for making the representation.⁴ The representee is therefore relieved of the requirement to prove that the representation was misleading and instead the focus of the breach inquiry is on the degree of care exhibited by the representor.⁵

As a result of the introduction of the Facilitating Provisions, the inquiry as to whether a representation as to the future is misleading is no longer limited to considering whether implied representations of past or present fact are false,⁶ although it is still open to the applicant to argue that representations as to the future are misleading in this way.⁷

The addition of the Facilitating Provisions introduced an additional way to prove that a representation as to the future is misleading.⁸ The representation will be misleading if it was made without reasonable grounds and is therefore deemed to be misleading.

⁴ See *Trade Practices Act 1974* (Cth), s 51A(1) (which applies to the civil provisions in Division 1 of Pt V of the TPA), s 75AZB(1) (which applies to the criminal provisions in Division 2 of Pt VC of the TPA); *Fair Trading Act 1992* (ACT) s 11(1); *Fair Trading Act 1987* (NSW), s 41(1); *Consumer Affairs and Fair Trading Act* (NT), s 41(1); *Fair Trading Act 1989* (Qld), s 37(1); *Fair Trading Act 1987* (SA) s 54(1); *Fair Trading Act 1990* (Tas) s 11(1); *Fair Trading Act 1999* (Vic), s 4(1); *Fair Trading Act 1987* (WA), s 9(1). Note: The TPA provision (like the prohibitions in the TPA) applies to corporations and the State and Territory provisions (like the prohibitions in the state statutes) apply to persons.

⁵ Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (2nd ed, 2003), [4.33].

⁶ In fact, some have argued that the inquiry should never have been limited in this way. For example, in *Adelaide Petroleum NL v Poseidon Ltd* (1988) ATPR 40-901, 49,699 French J stated that '[t]o the extent that the exclusion of "mere" unfulfilled promises or predictions from the scope of sec. 52 rests upon the absence of a statement of past or existing fact it may be suspect. And in so far as that limiting requirement derives from the common law, it may yet be shown to be an unjustifiable gloss on the words of the statute'. See also D W Greig and J L R Davis, *The Law of Contract* (1987), 814-5; R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250, 260.

⁷ It has been suggested in some cases that where the representor had reasonable grounds for making the representation as to the future, the representation is not to be treated as misleading (see, eg, *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 240). However, section 51A does not provide for this conclusion in its terms (see Lockhart, above n 29, [4.30]). See also Peter Gillies, 'Representations as to the Future: Section 51A of the Trade Practices Act 1974 – Plaintiff's Sword or Defendant's Shield?' (2005) 7 *University of Notre Dame Australia Law Review* 99.

⁸ See *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 209, 239; *Hatt v Magro* [2007] WASCA 124, [38].

(b) Substantial difference: when will the representor be deemed not to have had reasonable grounds

Sub-section (2) of the Facilitating Provisions in the TPA and all the State and Territory fair trading statutes further assists the representee. The representor is deemed not to have had reasonable grounds in certain circumstances. However these deeming provisions are worded differently in different jurisdictions. Furthermore, the *McGrath* decision suggests that the different wordings produce substantively different outcomes.

(i) NSW, Vic, NT, Qld, Vic and WA (reversal of onus deeming provision)

The fair trading legislation in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia expressly provides that the onus of establishing reasonable grounds for making a representation about a future matter is on the representor in both civil and criminal cases.⁹ Thus in these jurisdictions, it is clear that where a representation as to the future is made the representor bears the legal onus of proving reasonable grounds. If this onus is not discharged, the representor will be deemed not to have had reasonable grounds and, in turn, her representation will be taken to be misleading.

(ii) TPA, ACT, SA and Tas (adducing evidence deeming provision)

The situation is less clear under the TPA and the fair trading legislation in the Australian Capital Territory, South Australia and Tasmania. This legislation provides that the representor is deemed not to have had reasonable grounds for making the representation 'unless it adduces evidence to the contrary'.¹⁰ These words do not, in terms, place the onus of proving reasonable grounds on the representor.

3. Section 51A: the case law

(a) Overview

Contrary views have been expressed about the effect of the adducing evidence deeming provisions (such as s 51A of the TPA). On one view, a party who has made a representation about a future matter will only avoid the deeming effect if she is able to establish, on the balance of probabilities, that she had reasonable grounds for making the representation.¹¹ If the representor is unable to discharge this burden, the representor will be deemed not to have had reasonable grounds for making the representation and the representation will be taken to be misleading. On the other, the deeming provision does not have the effect of placing the legal burden of proving reasonable grounds on the representor. Rather, provided the representor adduces

⁹ See *Fair Trading Act 1987* (NSW), s 41(2); *Consumer Affairs and Fair Trading Act* (NT), s 41(2); *Fair Trading Act 1989* (Qld), s 37(2); *Fair Trading Act 1999* (Vic), s 4(2); *Fair Trading Act 1987* (WA), s 9(2).

¹⁰ See *Trade Practices Act 1974* (Cth), s 51A(2) (which applies to the civil provisions in Division 1 of Pt V of the TPA), s 75AZB(2) (which applies to the criminal provisions in Division 2 of Pt VC of the TPA); *Fair Trading Act 1992* (ACT) s 11(2); *Fair Trading Act 1987* (SA) s 54(2); *Fair Trading Act 1990* (Tas) s 11(2).

¹¹ For a review of the relevant authorities see Allsop J's judgment in *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230, 277-283.

some evidence that she had reasonable grounds for making the representation, the deeming provision will not operate. In order for the representee to rely on the Facilitating Provision to establish that the representation was misleading, he will need to establish, on the balance of probabilities, that the representor lacked reasonable grounds for making the representation.

(b) Early case law

The view that sub-section 51A(2) placed the burden of proving reasonable grounds on the representor found favour in the early case law: see *Adelaide Petroleum NL v Poseidon Ltd* (1988) ATPR ¶40-901; *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) 15 NSWLR 679; *Ting v Blanche* (1993) 118 ALR 543; (cf *Kellcove Pty Ltd v Australian Motor Industries Ltd* (Unreported, Federal Court of Australia Victoria District Registry, Woodward J, 6 July 1990)).

(c) Cases 2000 - 2007

Earlier this decade, judges began paying increased attention to the wording used in sub-section 51A(2). In *Blacker v National Australia Bank Ltd*¹² Katz J noted that ‘in spite of its reference merely to the adducing of certain evidence by the [representor] corporation’, it has been accepted in the cases that the effect of the sub-section is to impose on the representor the burden of proving that he or she had reasonable grounds for making the representation.¹³ Katz J did not explore the issue further because the representor did not argue for a different construction of sub-section 51A(2).

The fact that sub-section 51A(2) does not expressly state that the representor bears the onus of establishing reasonable grounds was directly brought to court’s attention in *City of Botany Bay Council v Jazabas Pty Limited (Jazabas)*.¹⁴ Jazabas sought to rely on s 51A of the TPA and the equivalent provision in the NSW FTA (s 41) to establish that the representations in question were misleading. Mason P concluded that ‘despite the language of s 51A(2) of the *Trade Practices Act*, which refers merely to the adducing of evidence [of reasonable grounds], the effect of s 51A(2) is likewise to impose on the representor the burden of persuading the trier of fact that there were reasonable grounds for making the representations’.¹⁵

*Australian Competition and Consumer Commission v Universal Sports Challenge Ltd (Universal Sports)*¹⁶ was the first case in which serious attention was paid to the possibility that sub-section 51A(2) does not place the legal burden of proving reasonable grounds on the representor. Emmett J noted that:

¹² [2000] FCA 681.

¹³ *Ibid*, [83].

¹⁴ (2001) ATPR (Digest) ¶46,210.

¹⁵ (2001) ATPR (Digest) ¶46,210, 52,315 (Beazley JA agreed with Mason P). *Ting v Blanche* (1993) 118 ALR 543 and *Blacker v National Australia Bank Ltd* [2000] FCA 681 were cited in support. This approach is consistent with Cooper J’s observation in *Cummings v Lewis* (1993) 41 FCR 559, 571 that ‘ss 41 and 42 of the *Fair Trading Act* are effectively the same as the provisions of, respectively, ss 51A and 52 of the *Trade Practices Act 1974* (Cth); the latter applying to corporations, the former to persons.’

¹⁶ [2002] FCA 1276

Another question concerning the effect of s 51A(2) is whether the provision does no more than require a corporation to go into evidence. That is to say, it does not ultimately reverse the onus but simply provides that the deeming takes effect **unless** the corporation adduces some evidence to the contrary. Once such evidence is adduced, it is for the Court to make a judgment, on the balance of probabilities, having regard to all the evidence, as to whether the corporation had reasonable grounds for making the representation. If an applicant elects to adduce no evidence as to that question, then the only evidence before the Court would be that adduced by the corporation. Whether that is adequate to establish that the corporation had reasonable grounds for making the representation is a matter for the Court. However, once the corporation has adduced some evidence, there is no deeming arising from s 51A(2).¹⁷

Emmett J's interpretation of sub-section 51A(2) in *Universal Sports* was not followed in several subsequent cases, with judges preferring to follow the weight of authority: see *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363; *Australian Competition and Consumer Commission v Emerald Ocean Distributors Pty Ltd* (2006) ATPR ¶42-096; *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199.

In *Lewarne v Momentum Productions Pty Ltd* (2007)¹⁸ Stone J was 'not inclined to accept [Emmett J's] interpretation of s 51A(2)'.¹⁹ Stone J stated:

I would read the phrase 'evidence to the contrary' as meaning evidence adduced by the person making the representation that, to the satisfaction of the Court, establishes that there were reasonable grounds for making the representation. In other words, I interpret the subsection as providing that the person making the representation can only avoid the deeming provision by establishing on the usual balance of probabilities that there were reasonable grounds for making the representation.²⁰

However, in *Fubilan Catering Services Limited v Compass Group (Australia) Pty Ltd*,²¹ a decision handed down just two days after *Lewarne*, French J reached the exact opposite conclusion. French J acknowledged that there are authorities which say that sub-section 51A(2) casts a burden of proof on the representor.²² However, his Honour lent his support to the interpretation of sub-section 51A(2) advocated by Emmett J in *Universal Sports* and held that:

[Sub-section 51A] certainly casts the "evidential burden" on the respondent in the sense of an obligation to adduce evidence on the issue of whether there were reasonable grounds for making the representation. It does not impose on the representor the legal or persuasive burden to prove that it has reasonable grounds for making the representations alleged. As Emmett J said of s 51A in ... *Universal Sports* ..., the section does not reverse the onus of proof when it applies. It merely requires the alleged representor to "adduce evidence to the contrary".²³

¹⁷ [2002] FCA 1276, [46] (emphasis in original)

¹⁸ [2007] FCA 1136.

¹⁹ *Ibid*, [82].

²⁰ *Ibid*.

²¹ [2007] FCA 1205.

²² *Ibid*, [545]. *Ting v Blanche* 118 ALR 543 and *Phoenix Court Pty Ltd v Melbourne Central Pty Ltd* (1997) ATPR (Digest) 46,179, 54,432 were cited.

²³ *Ibid*.

(d) McGrath

The operation of s 51A was recently considered by the Full Federal Court in *McGrath v Australian Naturalcare Products Pty Ltd.*²⁴ Although they disagreed in outcome, Emmett J and Allsop J agreed that sub-section 51A(2) of the TPA did not place the legal onus of proof with respect to reasonable grounds on Pan.

Emmett J repeated the opinion he expressed in *Universal Sports* about the effect of sub-section 51A(2):

Under s 51A(2), the maker of the representation with respect to any future matter is to be deemed not to have had reasonable grounds for making the representation unless it adduces evidence to the contrary. However, if evidence is adduced by the representor to the effect that the representor had reasonable grounds for making the representation, the deeming provision will not operate. Where the representor adduces such evidence, it is then a matter for the Court to determine, on the balance of probabilities in the ordinary way, whether or not the representor had reasonable grounds for making the representation.²⁵

Allsop J agreed with Emmett J that sub-section 51A(2) does not effect a reversal of the onus of proof, Allsop J then explained how he believes sub-section 51A(2) operates:

If evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary ... If it is, the deeming provision will cease to operate ... [I]f evidence “to the contrary” is adduced by the representor, and if the representee itself adduces evidence tending to the lack of reasonable grounds, the matter might be equally poised ... Section 51A(2) does not, in my view, mean that in those circumstances the representor has not met an onus. The section does not cast the legal or persuasive onus, in such a case, on the representor. Its terms do not say so. The enactment history makes clear that the terms were deliberately chosen not to say so.²⁶

The third judge was Stone J. Less than six months earlier in *Lewarne* her Honour rejected Emmett J’s suggestion in *Universal Sports* that sub-section 51A(2) did not reverse the onus of proof, did not reach a final conclusion about the operation of sub-section 51A(2). Her Honour noted:

At least one aspect of the effect of the (sic) s 51A(2) appears to be uncontroversial, namely that a representor who adduces no evidence to support a defence of reasonable grounds is deemed to have made a misleading representation...

There is, however, disagreement as to the effect of the section where the representor adduces *some* (relevant) evidence that there were reasonable grounds for making the representation. This raises the question of what is evidence “to the contrary”. Among the issues thrown up by this question is whether it is evidence which, taken

²⁴ (2008) 165 FCR 230.

²⁵ (2008) 165 FCR 230, 242.

²⁶ *Ibid*, 283.

by itself, is sufficient *to establish* reasonable grounds or merely *to raise* the question...

[W]hen the section was introduced there were different views as to the desirability of imposing the persuasive rather than the evidentiary burden of proof on the representor ... I am not entirely persuaded that a clear intention of the legislature can be discerned.²⁷

Despite the solid reasoning underpinning Allsop J and Emmett J's judgments in *McGrath*, the interpretation they gave to sub-section 51A has not been consistently adopted in subsequent trial court decisions. In *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No. 7)*²⁸ Collier J noted Emmett J's suggestion in *Universal Sports* that sub-section 51A(2) does not place the onus of proving reasonable grounds on the representor. However, on the basis of the weight of authority,²⁹ her Honour held that the onus is on the representor to establish that he or she had reasonable grounds for making representations as to future conduct.³⁰ Despite referring to the *McGrath* case in another context,³¹ Collier J did not refer to the discussion in that case about whether sub-section 51A(2) reverses the onus of proof. However, one month later in *Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd (No. 2)*,³² Flick J held that '[t]he construction given to s 51A(2) by Emmett and Allsop JJ in *McGrath*, it is respectfully considered, should now be applied'.³³

4. Section 51A: enactment history

Section 51A's enactment history supports the conclusion reached by Allsop J and Emmett J in *McGrath*.

The introduction of s 51A was originally proposed by clause 21 of the Trade Practices Amendment Bill 1985 (Cth) (**1985 Amendment Bill**). In the form originally proposed by the 1985 Amendment Bill, sub-section 51A(2) provided as follows:

The onus of establishing that a corporation had reasonable grounds for making a representation referred to in sub-section (1) is on the corporation.³⁴

The Explanatory Memorandum accompanying the 1985 Amendment Bill therefore stated that '[t]he onus is on the corporation to establish on the balance of probabilities that it had reasonable grounds'³⁵ for making the representation.

²⁷ (2008) 165 FCR 230, 247 (emphasis in original)

²⁸ [2008] FCA 1364.

²⁹ *Lewarne v Momentum Productions Pty Ltd* [2007] FCA 1136, [82], *Ting v Blanche* (1993) 118 ALR 543, 552, *Bowler v Hilda Pty Ltd* (1998) 153 ALR 95, 108 and 117, *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, 513–514, *Adelaide Petroleum NL & Ors v Poseidon Ltd & Ors* (1988) 10 ATPR 40-901, 49,700 and *Phoenix Court Pty Ltd v Melbourne Central Pty Ltd* (1997) ATPR(Dig) 46-179 were cited.

³⁰ [2008] FCA 1364, [278].

³¹ *Ibid*, [97].

³² [2008] FCA 1480.

³³ *Ibid*, [99].

³⁴ Trade Practices Revision Bill 1986 (Cth), cl 21.

³⁵ *Ibid*, 21.

The Senate Standing Committee for the Scrutiny of Bills (**Senate Committee**) expressed concerns about sub-section 51A(2) in the form outlined above. In 1985, criminal prosecutions could be brought against a party that contravened many of the provisions in Division 1 of Part V of the TPA (to which s 51A applies).³⁶ The Senate Committee felt that it would be inappropriate to place the onus of proof on defendant corporations in criminal proceedings. Rather, such defendants should merely be required to bear an evidential onus, that is the onus of adducing evidence of the existence of reasonable grounds. In the criminal context, the Senate Committee thought it appropriate that the burden of proving absence of reasonable grounds remain with the prosecution.

The 1985 Amendment Bill was never passed. However, clause 21 of the Trade Practices Revision Bill 1986 (Cth) (**1986 Revision Bill**) was precisely the same as clause 21 of the 1985 Amendment Bill. The explanation of clause 21 in the Explanatory Memorandum accompanying the 1986 Revision Bill was also the same as that contained in the Explanatory Memorandum accompanying the 1985 Amendment Bill.

When the 1986 Revision Bill came before the Senate a new sub-section 51A(2) was proposed, in terms identical to those in which sub-section 51A(2) is currently expressed. Senator Haines, who proposed the change stated that the change was designed to overcome the concerns expressed by the Senate Committee and to ensure that sub-section 51A(2) only places an evidential onus on the defendant corporation, rather than reversing the onus of proof.³⁷ When the 1986 Revision Bill was returned to the House of Representatives, the Attorney-General stated that:

[t]he amendment to sub-section 51A(2) places an evidential burden on the defendant to adduce evidence that it had reasonable grounds for making its prediction. This amendment arose as a result of the concern of the Senate Standing Committee for the Scrutiny of Bills. Whilst the Government would prefer that the proposed section be not altered, it considers that this amendment does not derogate significantly from the protection sought.³⁸

In *McGrath* Allsop J noted that:

[t]his immediate enactment history ... does temper any assumption that Parliament intended s 51A(2) simply to reverse the onus of proof, without regard for the specific words used by it for the effect of the provision on the onus of proof.³⁹

There seems to be much merit in Allsop J's observation. A provision that expressly placed the onus of establishing reasonable grounds on the corporation who made a representation with respect to any future matter was replaced with one that simply

³⁶ Before it was repealed by section 260 of the *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001* (Cth), sub-section 79(1) created criminal offences in relation to the provisions contained in Part V (except for section 52).

³⁷ Commonwealth, *Parliamentary Debates*, Senate, 17 April 1986, 1863 (Senator Haine).

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1986, 2989 (the Hon Lionel Bowen).

³⁹ (2008) 165 FCR 230, 277.

requires the representor to adduce evidence of reasonable grounds to avoid being deemed not to have had reasonable grounds for making the representation.

5. Conclusion: operation of sub-section 51A(2)

The interpretation given to sub-section 51A(2) by Emmett J and Allsop J in *McGrath* appears to be correct. Thus, provided a person who has made a representation as to the future leads evidence that they had reasonable grounds for making that representation, the representation will not be taken to be misleading under s 51A unless the representee is able to establish, on the balance of probabilities, that the representor did not have reasonable grounds for making the representation.

6. Conclusion: section 51A should be amended

It is submitted that s 51A(2) should be amended so that it explicitly imposes the legal burden of proving the existence of reasonable grounds on the person who makes a representation as to the future.

Section 51A(2) should take the same form as the Facilitating Provisions in the New South Wales, the Northern Territory, Queensland, Victoria and Western Australia fair trading legislation.⁴⁰ Such an amendment is consistent with the aim of modifying the existing consumer protection provisions in the TPA based on best practice in state and territory consumer laws and will ensure the effective operation of the Australian Consumer Law.

The proposed amendment would:

- remove the current uncertainty about the operation of sub-section 51A(2);
- accord with the original motivation behind introducing s 51A;
- place the burden of proof on the party who is best placed to evidence of reasonable grounds before the court;
- increase the effectiveness of the Australian Consumer Law by overcoming difficulties faced by those seeking to establish that a representation as to the future is misleading;
- reinstate what many believed to be the law before the true nature of sub-section 51A(2) was revealed in *Universal Sports* and *McGrath*;
- only result in liability for those who make representations as to the future who cannot prove that they had reasonable grounds for making such representations;
- not conflict with the concerns raised by the Senate Committee as s 51A no longer applies to the criminal prohibitions.

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⁴⁰ See *Fair Trading Act 1987* (NSW), s 41; *Consumer Affairs and Fair Trading Act* (NT), s 41; *Fair Trading Act 1989* (Qld), s 37; *Fair Trading Act 1999* (Vic), s 4; *Fair Trading Act 1987* (WA), s 9. Section 51A would of course refer to corporations although the schedule version of the provision would, like the provisions in the States and Territories listed, refer to persons.