

THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTY-THIRD REPORT

A.C.T. MISREPRESENTATION ORDINANCE 1975

MEMBERS OF THE COMMITTEE

Senator I. A. C. Wood (Chairman)
Senator W. W. C. Brown
Senator S. J. Collard
Senator D. M. Devitt
Senator P. D. Durack
Senator S. M. Ryan
Senator R. C. Wright

Function of the Committee Since 1932, when the Committee was first established, the principle has been followed that the function of the Committee is to scrutinise regulations and ordinances to ascertain -

- (a) that they are in accordance with the statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTY-THIRD REPORT

The Standing Committee on Regulations and Ordinances has the honour to present its Fifty-third Report to the Senate.

A.C.T. MISREPRESENTATION ORDINANCE 1975

- 2 This committee stands charged with the duty of scrutinizing all regulations and ordinances as subordinate legislation on certain specific grounds. Two of such grounds are relevant, namely
- (a) that the ordinance should not give effect to substantive amendments of the law which, if they are to be enacted at all, should appropriately be enacted by Parliament as a Statute and not by the Executive as an ordinance;
 - (b) that the ordinance should not unduly invade the individual rights of citizens.
- 3 The Misrepresentation Ordinance of the Australian Capital Territory (no. 40 of 1975) is under scrutiny. It is hereinafter referred to as the Ordinance and is attached "A".
- 4 This committee has rigidly abstained from involving itself in any consideration of policy. Its criteria are strictly limited to the grounds above.
- 5 The ordinance was accompanied by the usual explanatory memorandum. It is unfortunate for this document that it affords a startling instance of misrepresentation. It is attachment "B".

6 Misrepresentation is a factor applicable to a very wide area of legal operation. It emerges in relation to contracts of all sorts, including sale or lease of land, sale of goods, sale or mortgage of shares, insurance (including life and marine), hire purchase, and contracts for services (e.g. plumbing and painting) and, if fraudulent, it may be a tort irrespective of contract.

7 Misrepresentation is "an active mis-statement of fact or at all events such a partial and fragmentary statement of fact as the withholding of that which is not stated makes that which is stated absolutely false". (Lord Cairns : Peek v. Gurnoy LR 6 HL p. 403.)

It is (a) a representation by statement or conduct;
 (b) of a fact as distinct from a promise or opinion;
 (c) with intention that the other party to the contract should act on it;
 (d) a material mis-statement, actually inducing the other party to enter into the contract.

If it is made with knowledge of its falsity, or a reckless disregard whether it is true or false, it is fraudulent. Otherwise, it is innocent misrepresentation, e.g. by mistake or negligence.

8 But the law does not concern itself with artificialities. It is concerned with actual truth or falsity.

For instance, every word and sentence in a prospectus taken seriatim may be perfectly true. But if, by the omission of material facts, the substantive effect of the prospectus is misleading, that document is one which is "false in a material particular". (Rex v Kylesant, 1932)

So too, if a prospectus states that the company may carry on the business of tramways by steam, and the fact is that the company is authorised to carry on that business by steam only with the consent of the Board of Trade, the partial statement is false by reason of the omission of reference to the requirement of the Board of Trade's consent. (Dorry v Peck, 1890)

9 It is into this world that the Governor-General has enacted the Ordinance.

- 10 (i) A natural misrepresentation if fraudulent entitles the representee to rescind any contract induced thereby provided:
- (a) the contract has not been affirmed
 - (b) restitution of all money and property received is possible
 - (c) third parties have not acquired rights in the contract property.

He is also entitled to damages whether he exercises his right of rescission or not.

(ii) If misrepresentation is not fraudulent, but is negligently made it has been said by the House of Lords (Byrnes' case decided in 1964) that in special relationships (as yet undefined, and as to which great division of judicial opinion exists) damages may be recovered not for misrepresentation but for negligence.

(iii) If a material misrepresentation is not fraudulent, but innocent, i.e. made by inadvertence, error, mistake or negligence, by a person who honestly believes the same to be true, a representee who has been induced thereby to enter into a contract may rescind the contract, returning what he has received and recovering what he has paid. He is entitled to rescission, provided

- (a) he has not affirmed the contract
- (b) restitution of the property he has received is possible
- (c) a third party has not acquired an interest in the contract property
- (d) and provided also
 - (i) the misrepresentation has not become a term of a contract, of the nature of a warranty as distinct from a condition
 - (ii) the contract has not been performed (but query)
 - (iii) in a case of sale or lease of land, the

contract has not been completed by conveyance, transfer or executed lease.

But the representor in a case of innocent misrepresentation is not liable for damages.

11 In 1962 the Law Reform Committee of England published its 10th Report. Most of its recommendations were enacted into law in the United Kingdom by a Misrepresentation Act 1967. The recommendations (summarised) were

- (a) that a court should have authority to order rescission for innocent misrepresentation although (i) a misrepresentation had become a term of the contract (ii) the contract had been performed; but the Committee recommended that a representee should still continue not to be entitled to rescission in a case where a contract for a sale or lease of land had been completed by conveyance or transfer or executed lease (except in cases of certain short term leases)
- (b) that the court should have authority to award damages for innocent misrepresentation.
- (c) that the court should have authority to refuse to order rescission for innocent misrepresentation, and instead, award damages only.

There was a delay of 5 years before the Committee's report was enacted into legislation in 1967.

In the meantime the House of Lords had in Byrnes' case produced in 1964 an entirely new doctrine, that for negligent misrepresentation damages were recoverable in special relationships.

The Parliament adopted the Committee's report and enacted:

- (a) that a court should have authority to order rescission for innocent misrepresentation although (i) a misrepresentation had been a term of a contract
 - (ii) a contract had been performed whether it concerned real property or not.
- (b) that a court should have authority to award damages for innocent misrepresentation
- (c) that a court should have authority to refuse rescission for innocent misrepresentation and award damages only.

It is this legislation that the ordinance adopts.

12

A sample criticism of the legislation was published by P. S. Atiyah, M.A., B.C.L. and G. H. Treitel, M.A., B.C.L. in Volume 30 of the modern Law Review in July 1967. Its opening paragraph is -

This Act, which is based on the Law Reform Committee's Tenth Report,¹ makes some improvements in the law as to the effect of misrepresentation on a contract and as to certain more or less closely related matters. To this extent, the Act may be welcomed, but it is also open to serious criticism. Some of the reforms are enacted in a manner which is quite extraordinarily tortuous and obscure. Others are based on policy decisions which are at any rate questionable and seem to have been reached without adequate discussion. And the Act has altogether failed to simplify the law. It has left in force many of the distinctions which existed before and has superimposed its own structure upon them. The resulting state of the law is almost incredibly complex. It is indeed fortunate that the Act will be largely superseded when the Law Commission codifies the law of contract.

This is typical of the majority of comment on the Act.

- 13 (a) The other source of inspiration for the Ordinance in question is South Australia. The Attorney General of that state referred to the Law Reform Committee of South Australia a question whether or not it was expedient to adopt Section 14 of the Trade Descriptions Act 1968 of the United Kingdom. The Committee criticised the English legislation, and recommended the enactment of a section newly drafted by the Parliamentary Counsel of South Australia.

The English Trade Descriptions Act 1968 is an Act

to replace the Merchandise Marks Acts 1887 to 1953 by fresh provisions prohibiting misdescriptions of goods, services, accommodation and facilities provided in the course of trade; to prohibit false or misleading indications as to the price of goods; to confer power to require information or instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements; to prohibit the unauthorised use of devices or emblems signifying royal awards; to enable the Parliament of Northern Ireland to make laws relating to merchandise marks; and for purposes connected with those matters.

and section 14, referred to, provides

- 14.—(1) It shall be an offence for any person in the course of any trade or business—
- (a) to make a statement which he knows to be false; or
- (b) recklessly to make a statement which is false;
- as to any of the following matters, that is to say,—
- (i) the provision in the course of any trade or business of any services, accommodation or facilities;
- (ii) the nature of any services, accommodation or facilities provided in the course of any trade or business;
- (iii) the time at which, manner in which or persons by whom any services, accommodation or facilities are so provided;
- (iv) the examination, approval or evaluation by any person of any services, accommodation or facilities so provided; or
- (v) the location or amenities of any accommodation so provided.
- (2) For the purposes of this section—
- (a) anything (whether or not a statement as to any of the matters specified in the preceding subsection) likely to be taken for such a statement as to any of those matters as would be false shall be deemed to be a false statement as to that matter; and
- (b) a statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false.
- (3) In relation to any services consisting of or including the application of any treatment or process or the carrying out of any repair, the matters specified in subsection (i) of this section shall be taken to include the effect of the treatment, process or repair.
- (4) In this section "false" means false to a material degree and "services" does not include anything done under a contract of service.

False or misleading statements as to services etc.

By Section 24 mistake and certain other matters constitute defences. But there is no provision which we have been able to find in the English Act reversing the onus of proof.

The Section it will be noted is confined to provision in the course of "any trade or business" of any services, accommodation, or facilities.

But the provision drafted by the Parliamentary Counsel of South Australia was generalised and applied to misrepresentation in the course of "a" trade or business for the purpose of inducing another person to enter into any contract or for the purpose of inducing any other person to pay any pecuniary amount or transfer any property to the representor.

It provided that the person by whom "the" trade or business is conducted, and the person by whom the representation is made, should each be guilty of an offence and liable to a penalty not exceeding \$200 - Misrepresentation Act 1971 - 72.

The purpose was to be presumed in the absence of proof to the contrary. That means the onus of disproving purpose was on the defendant.

It was also provided that it was a defence if the defendant proved that he believed on reasonable grounds that the statement was true, or where the defendant is not a person by whom the misrepresentation was made, that the defendant took all reasonable precautions to prevent the commission of offences against this Section by persons acting on his behalf or in his employment.

(b) It will be seen that the Ordinance incorporates the substance of the South Australia legislation and thereby takes up legislation making a false description of accommodation and services and facilities an offence and applies it to misrepresentations of all sorts.

But the ordinance goes further. The South Australian offence occurs only where a misrepresentation is made in the course of "a" trade or business; but the Ordinance transfuses that so as to make any misrepresentation in the course of trade or commerce (sc commerce) an offence, so that under the ordinance, not only the conductor of a business and his employee are liable, but any hapless vendor of, say, a solitary obsolete traction engine or a student selling his used books is the subject of an offence.

- 14 The foregoing amply demonstrates that the English and South Australian Acts of Parliament made substantial and novel alterations to the law - and the Ordinance of the Governor-General, not enacted by the two House of Parliament, but by the Governor-General with the advice of the Executive Council, made at least the following substantial amendments to the law - which if they are appropriate for enactment as law at all, in the opinion of the Committee, could only be appropriately enacted by Parliament.

We refer to alterations as follows -

- (a) that an innocent misrepresentation should be a basis of an action for damages
- (b) that a court should have authority to refuse a person to whom a misrepresentation had been made of his right to require rescission of a contract and substitute, in the Court's discretion, damages
- (c) that in a case of innocent misrepresentation a Court should have authority to order rescission after the completion of the contract, even in a case of land, and even under a registered system of title

- (d) that the defendant should have a defence to the action for damages, if he had reasonable grounds to believe it was true.
- (e) (i) That an innocent misrepresentation made for the purpose of inducing a contract or payment should create an offence, if made by any person in the course of trade or his employee or person acting on the employer's behalf.
 - (ii) that such a purpose should be presumed until the defendant proved the contrary
 - (iii) that it should be a defence to prove that a representor believed upon reasonable grounds that a representation was true or that he had taken all reasonable precautions to prevent the commission of an offence.

Those alterations infringe the principle that substantial alterations of the law should be enacted by Parliament and not the Executive. They also infringe the principle that regulations and ordinances should not unduly trespass on individual rights - one of the most precious of which is to be presumed innocent until proved guilty, and not to be liable to imprisonment or fine for mistakenly making a statement which is honestly believed to be true but as to which it may be adjudged the grounds for belief were unreasonable.

and difficult set of rules which are the very antithesis of clarity and simplicity which should be the achievement of law reform.

For Example -

- (a) Section 3 refers to a contract "after" a misrepresentation. Does this mean a contract induced by the misrepresentation? Must the misrepresentation still be material and is it actionable only when it has induced a contract?
- (b) Where under S. 3(a) the misrepresentation has become a term of the contract, and that term is a condition of the contract (as distinct from a warranty), does Section 4(4) entitle the Court to deny rescission and award damages only?
- (c) Section 3(c) obviously refers to sale or lease of land in the Territory, and includes such a contract in its provisions. Yet the Law Reform Committee of England (para. 27(1)) stated that contracts for the sale or disposition of an interest in land should not be capable of being rescinded after execution - except in cases of short leases. The Statute introduced and passed as the Misrepresentation Act 1967 in the United Kingdom rejected the English Committee's recommendation and enacted a provision which is intended to apply to contracts for sale or lease of land - making conveyances and leases

capable of rescission despite the fact that they have displaced the contract with instruments usually containing new covenants both express or implied.

- (d) Although Section 4(1) refers to a contract being entered into "after" a misrepresentation, it does make the operative part of the clause depend upon the person entering into the contract suffering loss "as a result" of so entering into the contract - but this may not be equivalent of "being induced" to enter into the contract by misrepresentation.
- (e) In equipping innocent and fraudulent misrepresentation in Section 4(1) the Ordinance confers the right of action for damages upon the representee of an innocent misrepresentation - but it is a defence under subsection (2) to prove that the misrepresentation was made "on reasonable grounds" and was in fact believed. The resultant case of liability is called "negligent" misrepresentation in the explanatory memorandum.
- The language of "culpa" pervades the English Committee report: "Culpably misled"; "at fault"; "innocent of any desire to mislead". All this is a substitution of negligence for fraud in this contractual field when many are advocating the abolition of fault for tort liability or family law.

- (f) It is considered that the analogy of Slacks case (1924) AC 851 referred to in the English Law Reform Committee Report at para. 12 is difficult of application to subsections (4) and (5) of Section 4. No guide is given as to the grounds upon which the court might substitute damages for rescission.
- (g) By the exclusion of rescission in the case of fraudulent misrepresentation from the court's discretionary power to substitute damages for rescission, it will in many cases be material to prove fraud. In this respect the observations of the English Law Reform Committee in para. 22 that actions of fraud will fall into disuse may indicate a misconception.
- (h) Difficulties may arise in the application of a declaration under Section 4(4) after a party has exercised his right of rescission. Those difficulties are not elucidated in the ordinance by the omission therefrom of part of Section 2(2) of the English Misrepresentation Act 1967.
- (i) In para. 14 of the English Committee's report it is said that "any alteration of the law relating to rescission for an innocent misrepresentation will make it necessary to re-examine the statutory provisions governing the sale of goods", and it is suggested (para. 15) that the two together will produce a "serious anomaly". Yet so far as appears the alterations

to the Sale of Goods Act in the United Kingdom and South Australia have no counterpart in the Ordinance. It does not appear from the ordinance or the explanatory memorandum that any corresponding alteration has been made to the Australian Capital Territory law as to sale of goods. In both the United Kingdom and South Australia such alterations were contemporaneously made by Statute.

- (j) In the English Committee's report the difficult and unsatisfactory case of hire purchase is referred to. In such case where a dealer misrepresents the transaction and the actual legal sale is carried through between the finance company and the purchaser by way of hire purchase agreement, the finance company is not liable for the dealer's fraud of misrepresentation. The Committee recommended that the dealer be treated as a finance company's agent. It does not appear that any express enactment has been made to this effect. In the Ordinance it may have been intended to cover the case by making (S. 4(1)c) "a person who receives any direct or indirect consideration or material advantage as a result of the formation of the contract" liable for misrepresentation. But if this was the intention, the result is very obscure.

- 16 The Committee requested comments from the Minister.
A copy of the Minister's reply is Attachment "C".

 Upon that the Committee's legal adviser, Dr Anthony Andrey, QC, has commented as in Attachment "D".

- 17 In the Australian Capital Territory, although there is now a fully elected Legislative Assembly, it is itself established by ordinance and not by Act of the Parliament. It has no statutory powers to enact legislation for the territory; such legislation in the form of ordinances is still formally made by the Governor-General with the advice of the Executive Council. Such ordinances are still subject to disallowance by either House of the Parliament. The practice of the government has been to refer draft ordinances to the Assembly for debate, but its opinions are advisory only.

 Therefore unless and until the Senate resolves otherwise, the Committee is of the opinion that Australian Capital Territory ordinances stand referred to this Committee for consideration on the basis of subordinate legislation made by the Executive Government.

- 18 The Committee recommends the disallowance of the Ordinance.
- 19 Dissents by Senator Durack and Senator Ryan are attached.

IAN WOOD
Chairman

29 April 1976

DISSENT BY SENATOR DURACK

- 1 I agree that one of the criteria followed by the Committee in scrutinising Regulations and Ordinances is to ascertain that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment. However, in my opinion this principle should be applied with discretion and with regard to the particular circumstances of each piece of subordinate legislation.
- 2 In regard to Ordinances the Committee has already modified the application of these principles in regard to certain Territories and indeed has altogether withdrawn from the scrutiny of Ordinances of some Territories, e.g. the Northern Territory.
- 3 So far as the Australian Capital Territory is concerned, the vast majority of its substantive laws are made in the form of Ordinances and if the majority opinion of this Report prevailed all such laws would have to be made by Act of Parliament. This would add a considerable burden to the Parliament's legislative work.
- 4 The Territory now has a fully elected Legislative Assembly, and although its powers are advisory only it is nevertheless designed to provide a measure of self-government for the Territory.
- 5 It would seem to be a contradiction of this development that any Ordinance which changes the substantive law of the Territory has to be passed as an Act of Parliament. It may well be that some Ordinances could be of such paramount influence in the laws of the nation as a whole that they should be enacted only after full debate in the Parliament. The changes made in the law of contract by this Ordinance are not, in my opinion, of such a character.

6 I agree that the Committee should scrutinise ordinances with regard to its other principles and if a major offence is done to those principles, disallowance of the ordinances should be recommended to the Senate.

7 In my opinion Section 6 of the Misrepresentation Ordinance offends the principle that subordinate legislation should not unduly trespass upon individual rights. The section creates a criminal liability for misrepresentation whether it be fraudulent or innocent. It provides a defence if the representor can establish that he had reasonable grounds for believing that his representation was true. It is not a sufficient defence for him simply to prove that he believed it was true. This does great violence to our basic notions of criminal responsibility.

The section also places upon the defendant the onus of proof of reasonable grounds for his belief and in my opinion this reversal of the onus of proof is not justified and is a serious invasion of individual rights.

P. D. DURACK *

DISSENT BY SENATOR RYAN

I dissent from the Report for the reasons given in Senator Durack's dissent.

S. M. RYAN

ATTACHMENT A

AUSTRALIAN CAPITAL TERRITORY

No. 40 of 1975

AN ORDINANCE

To amend the Law relating to Misrepresentation.

I, THE GOVERNOR-GENERAL of Australia, acting with the advice of the Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910-1973*.

Dated this thirtieth day of October, 1975.

JOHN R. KERR
Governor-General.

By His Excellency's Command,
GORDON M. BRYANT
Minister of State for the Capital Territory.

MISREPRESENTATION ORDINANCE 1975

1. This Ordinance may be cited as the *Misrepresentation Ordinance* Short title.
1975.*
2. In this Ordinance, unless the contrary intention appears, "court" Definition.
includes an arbitrator.
3. Where a person has entered into a contract after a misrepresentation has been made to him, the person shall, if otherwise he would be entitled to rescind the contract without alleging fraud, be entitled, subject to this Ordinance, to rescind the contract notwithstanding that—
Removal of certain bars to rescission.
 - (a) the misrepresentation has become a term of the contract;
 - (b) the contract has been performed; or
 - (c) a conveyance, transfer or other document has been registered under a law of the Territory as a result of the contract.
4. (1) Where a person enters into a contract after a misrepresentation has been made to him by—
Damages for misrepresentation.
 - (a) another party to the contract;
 - (b) a person acting for, or on behalf of, another party to the contract; or

* Notified in the *Australian Government Gazette* on 31 October 1975.

(c) a person who receives any direct or indirect consideration or material advantage as a result of the formation of the contract,

and as a result of so entering into the contract he suffers loss, any person (whether or not he is the person by whom the misrepresentation is made) who would be liable for damages in tort in respect of the loss had the misrepresentation been made fraudulently, shall, subject to this section, be so liable, notwithstanding that the misrepresentation was not made fraudulently.

(2) It is a defence to an action under sub-section (1) that the person by whom the representation was made had reasonable grounds to believe, and did believe up to the time the contract was made, that the representation was true.

(3) Sub-section (2) does not apply to or in relation to an action against a party to a contract arising out of a misrepresentation by a person acting for or on behalf of that party where—

(a) the defence specified in sub-section (2) would be available to that person; and

(b) the reasonable grounds for belief held by that person that the representation was true arose out of an act or omission by that party,

unless the defence specified in sub-section (2) would be available to that party if he were the person by whom the misrepresentation was made.

(4) Where in proceedings arising out of a contract it is proved that a person has rescinded, or is entitled to rescind, the contract on the ground of misrepresentation other than fraudulent misrepresentation, the court, after consideration of the consequences of the rescission, and the consequences of a declaration under this sub-section, in the circumstances of the case, may, if it considers it just and equitable to do so, declare the contract to be subsisting and award such damages as it considers fair and reasonable in view of the misrepresentation.

(5) Damages may be awarded against a person under sub-section (4) whether or not he is liable for damages under sub-section (1) but—

(a) a court shall, in assessing damages under a provision of this section, take into account any award of damages under any other provision of this section, or of damages or compensation under any other law; and

(b) in assessing damages or compensation in proceedings under any other law relating to a contract, the court shall take into account any award of damages under this section.

Exclusion
clauses.

5. If an agreement contains a provision that would exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of a misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation, that provision shall be of no effect except to the extent (if any) to which, in any proceedings arising out of the contract, the court may allow reliance on it as being fair and reasonable in the circumstances of the case.

6. (1) Where in the course of trade or commerce a person makes a misrepresentation—

Misrepresentation in trade or commerce an offence.

- (a) for the purpose of causing or inducing another person to enter into a contract; or
- (b) for the purpose of causing or inducing another person to pay any pecuniary amount, or to make over or transfer any real or personal property, to the person by whom the misrepresentation is made or to any other person,

the person by whom the misrepresentation is made is guilty of an offence against this Ordinance punishable, on conviction, by a fine not exceeding \$1,000.

(2) Where the misrepresentation referred to in sub-section (1) is made—

- (a) by a person acting in the course of his employment—his employer; or
- (b) by a person duly authorized to act on behalf of another person—that other person,

is also guilty of an offence against this Ordinance punishable, on conviction, by a fine not exceeding \$1,000.

(3) Where in proceedings under this section it is proved that a misrepresentation in fact acted as a material inducement to a person—

- (a) to enter into a contract; or
- (b) to pay any pecuniary amount, or to make over or transfer any real or personal property, to the person by whom the misrepresentation was made, or to any other person,

and that, in consequence, the person by whom the misrepresentation was made derived any direct or indirect consideration or material advantage, it shall be presumed, unless the contrary is otherwise established, that the misrepresentation was made for the purpose of inducing the person to whom it was made to enter into that contract, to pay that pecuniary amount, or to make over or transfer that property, as the case requires.

(4) It is a defence to a prosecution for an offence under this section that—

- (a) the person by whom the representation was made believed upon reasonable grounds that the representation was true; or
- (b) where the defendant is not the person by whom the representation was made—
 - (i) the defendant took all reasonable precautions to prevent the commission of offences against this

section by persons acting on his behalf or in his employment; or

- (ii) the defendant did not know, and could not reasonably be expected to have known, that the representation had been made, or that it was untrue.

(5) A person convicted of an offence under this section is not liable to prosecution under another law of the Territory for an offence arising out of the same facts.

Application. 7. Nothing in this Ordinance applies to or in relation to a misrepresentation, or an agreement, made before the commencement of this Ordinance.

ATTACHMENT 8

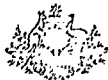
AUSTRALIAN CAPITAL TERRITORY MISREPRESENTATION ORDINANCE 1975

EXPLANATORY MEMORANDUM

This Ordinance gives effect to certain recommendations of the English Law Reform Commission regarding the existing law relating to misrepresentation. The Ordinance extends a party's right to rescind a contract induced by innocent misrepresentation, confers on that party a right to recover damages for negligent misrepresentation, empowers a court to award damages instead of ordering the rescission of a contract, and limits a party's right to exclude by contract his liability for misrepresentation. In this regard the Ordinance accords with similar legislation introduced in the United Kingdom in 1967 and South Australia in 1971.

The Ordinance also implements a recommendation of the Law Reform Committee of South Australia that civil remedies are not of themselves sufficient to protect the public against exploitation in commercial dealings. It will be an offence to make a misrepresentation, in trade or commerce for the purpose of causing or inducing another person to enter into a contract to pay any pecuniary amount or to transfer any real or personal property. The onus is placed on the defendant of proving that such a misrepresentation was not made for the purpose of inducing the entering into of the contract. It is a defence to such a charge to prove that the representor believed the statement to be true, or took all reasonable precautions to prevent the commission of the offence.

ATTACHMENT C



PARLIAMENT OF AUSTRALIA

MINISTER FOR THE CAPITAL TERRITORY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

19 MAR 1979

My dear Senator,

I refer to your letter of 4 March 1976 concerning the Misrepresentation Ordinance 1975.

It is essential to impose criminal sanctions on those who use misrepresentation as a method of business to cheat the public. The enforcement of this legislation will do much to improve the standards of honesty and integrity in business and will give the public much needed protection against unscrupulous business methods. The enactment of provisions of a similar effect in England in the Trade Descriptions Act 1968 greatly reduced the incidence of fraudulent trade propaganda.

While I agree that the onus of proof of the elements of a criminal offence should normally be upon the prosecution, I cannot agree that reversal of the onus of proof is always "an objectionable interference with the right of accused persons". I am fortified in this opinion by the words of Lord Reid in *Sweet v Parsloey* (1970) A.C. 132 at page 150 that:

"... there are many kinds of case where putting on the prosecution the full burden of proving *mens rea* creates great difficulties and may lead to many unjust acquittals ... Parliament has not infrequently transferred the onus as regards *mens rea* to the accused, so that, once the necessary facts are proved he must convince the jury that on the balance of probabilities he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method".

In the same case Lord Pearce (at page 157) referred to this method as "a fair and sensible course". It was the view of Lord Pearce that the High Court of Australia had adopted this very method by its development of the defence to statutory offences of honest and reasonable mistake. The same view of the High Court's decisions was taken in the third edition of Halsbury's *Laws of England* (Vol. 10 page 283) and by Professor Colin Howard in his article "Strict Responsibility in the High Court of Australia" (1960), 76 L.Q.R. 547 at page 566.

The reversal of the onus of proof is certainly not without substantial precedent in Australia. Section 47 of the Uniform Companies Act provides criminal liability for any untrue statements or non-disclosures in a prospectus inviting persons to subscribe for shares or debentures in a company, unless the person who authorised or caused the issue of the prospectus proves either that the statements or non-disclosures were immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe the statements were true or the non-disclosures immaterial. A provision to this effect is contained in the A.C.T. Companies Ordinance 1962-1974.

Section 6 of the Misrepresentation Ordinance is based upon a number of English and Australian authorities. The reversal of the onus of proof was recommended by the United Kingdom Committee on Consumer Protection in its Final Report presented to Parliament in July 1962 (paragraphs 624-629). Those recommendations were themselves based on precedents in legislation dealing with Weights and Measures and Food and Drugs. The recommendations were enacted in sections 14 and 24 of the Trade Descriptions Act 1968 (U.K.). The Law Reform Committee of South Australia in its Nineteenth Report (1971) approved the principle of reversal of onus of proof but, because of a number of defects in the English sections, recommended the adoption of a provision substantially in the form of section 6 of the Ordinance. That recommendation was adopted and enacted in section 4 of the Misrepresentation Act 1971-1972 (S.A.) with the approval of all parties in the House of Assembly.

It is my opinion that there is good reason for the reversal of the onus of proof in section 6 of the Ordinance. The only person who would have knowledge of the belief of the accused or the purpose for which the representation was made, would be the accused. The absence of those provisions would place very heavy burdens on the prosecution. Indeed, unless the misrepresentation was so manifestly absurd that no trader could have believed it, or there was very substantial objective evidence that the trader knew it to be false, a prosecution under section 6 would seldom, if ever, succeed.

On the other hand, an honest trader would not be disadvantaged by the reversal of onus, for he would not make an assertion about his goods or services without cause. He need only demonstrate that cause and thereby show that it was more probable than not that he reasonably believed his assertion to be true, or indicate that his purpose in making the assertion was not to induce the other party into entering the contract. All other elements of the offence must be proved beyond reasonable doubt by the prosecution.

The effect of the requirements that the belief be reasonable would be to render liable a person who negligently makes a misrepresentation in the course of trade or commerce. The magistrate would naturally differentiate negligent and wilful misrepresentations in deciding the sentence to be imposed. Innocent misrepresentations would otherwise be within the ambit of the defences in sub-sections (3) and (4) of section 6.

After consideration of the matters raised and the issues involved, I am of the opinion that a major area of the policy of the Ordinance could not be achieved effectively without the provision in its present form.

In civil matters, neither in issues arising under statute nor at common law, is there a universal rule that the onus of proof is upon the plaintiff. More usually the onus lies upon the party asserting a proposition of fact to prove that proposition for he would be the party most able to produce the best evidence to the Court.

By section 46 of the Companies Ordinance a person responsible for the issue of a prospectus containing untrue statements or with non-disclosure of material matter is civilly liable unless he proves an affirmative defence. At common law the onus of the defence of contributory negligence lies on the defendant (*Williams v Commissioner for Road Transport* (1933) 50 C.L.R. 258; *Alford v Magee* (1952) 85 C.L.R. 437 at page 463). Similarly the onus is upon the defendant to prove truth and public benefit in a defamation action or consent or self-defence in actions for assault or battery. In an issue related to the provisions of the Misrepresentation Ordinance, the common law imposes on a defendant, who has made a material representation calculated to induce a person to enter into a contract, the onus of proving that the representation did not, in fact, induce that person to enter into the contract (*Redgrave v Hurd* (1881) 20 Ch.D. 1 at page 21; *In re Commonwealth Homes and Investment Company Ltd* (1943) S.A.S.R. 211, at page 222).

By sub-section (2) of section 4 of the Misrepresentation Ordinance the onus of proof of honest and reasonable belief in the truth of a representation lies on the person making the representation. The onus of proof of all other elements of the action lies upon the plaintiff. The reversal of onus of proof in such matters was recommended in the Tenth Report of the Law Reform Committee (U.K.) the membership of which included Lord Justice Diplock, Lord Justice Donovan, Mr Justice Ashworth and seven Queens Counsel, amongst them

Professors Goodhart, Parry and Wade. The recommendation was enacted in the Misrepresentation Act 1967 (U.K.), and the speakers in favour of the provision in the House of Lords included Lord Gardiner (then Lord Chancellor), Lord Reid, Lord Denning, Lord Upjohn and Viscount Colville of Culross. The Law Society of South Australia recommended that the English legislation be enacted in that State, and the provisions were incorporated in the Misrepresentation Act 1971-1972 (S.A.).

The desirability of these provisions, I believe, can be best expressed in the words of the Law Reform Committee (at page 9):

"If neither party has culpably misled the other, there is everything to be said for holding the parties to their bargain when the deal can no longer be undone. In such a case the loss should rest where it falls. On the other hand, we think that where one of the parties was at fault in making the representation, the other ought to be entitled to damages as of right. We also think that the onus should be on the representor to satisfy the court that he was not at fault. He will normally be in a better position to know the true facts than the other party. For instance, a vendor should know the likely defects in the articles he sells from his specialised knowledge of the trade. If he was truly innocent of any desire to mislead, he will suffer little hardship by being put to the proof of his innocence but if he cannot establish this, the loss should fall on him rather than on the other party."

The provisions of section 4 are essential to this Ordinance and I am certain that the removal of sub-section (2) in its present form would be disastrous both to the policy of this legislation and to the consumer misled and injured by an unscrupulously false representation.

I trust that these observations will be satisfactory to your Committee.

Yours sincerely,


(A.A. STALEY)

Senator I.A.C. Wood,
Chairman,
Senate Standing Committee on
Regulations and Ordinances,
Australian Senate,
CANBERRA. A.C.T. 2600

ATTACHMENT D

A.C.T. Misrepresentation Ordinance 1975 (No. 40 of 1975)

- (1) This Ordinance differs in two important respects from the Misrepresentation Act 1967 of the United Kingdom -
- (a) the English Act contains no provisions constituting misrepresentation a criminal offence;
 - (b) the English Act contains no such provision as Section 4(1)(c) of the ACT Ordinance.
- (2) Since misrepresentation is not a criminal offence in the United Kingdom, the references by the Minister to English authorities on the question of reversal of the onus of proof are out of context and in my respectful submission, are largely irrelevant.

- (3) The High Court of Australia has always shown a critical attitude to legislation attempting to reverse the onus of proof. The policy of the High Court to restrict and if possible, negate the operation of such legislation, has extended not only to criminal but also to civil proceedings. In Darling Island Stevedoring Lighterage Co. Ltd. v. Jacobsen (1945) 70 C.L.R. 635, a case arising under the New South Wales Workers' Compensation Act and involving civil liability only, Sir Owen Dixon said (at p. 644):- "It is a general principle that absence of default or wrongdoing is presumed."
- (4) The assertion by the Minister that "Section 6 of the Misrepresentation Ordinance is based upon a number of English and Australian authorities", is incorrect. As already stated, there is no English precedent for Section 6. The only Australian precedent is the South Australian legislation referred to by the Minister which has not been adopted by the other Australian States.
- (5) The connection between South Australia and the Australian Capital Territory is not immediately obvious. It seems far more preferable for the law of the Capital Territory, especially in matters pertaining to the common law and its statutory modifications, to follow the law of the State of New South Wales of which the Capital Territory, forms part both geographically and in its economic activities.
- (6) The Minister states that "an honest trader would not be disadvantaged by the reversal of onus, for he would not make an assertion about his goods or services without cause. He need only demonstrate that cause and thereby

show that it was more probable than not that he reasonably believed his assertion to be true, or indicate that his purpose in making the assertion was not to induce the other party into entering the contract." Firstly, the reference to "an honest trader etc." seems hardly appropriate in a democratic country such as Australia. The concept involved that an honest person has nothing to fear from criminal prosecution, is contrary to all notions of justice, British or otherwise. Secondly, the assertion made by the Minister is quite incorrect. The defence allowed by Section 6 (which the accused must prove) is that "the person by whom the representation was made believed upon reasonable grounds that the representation was true." Consequently, if a person makes a representation quite innocently and in good faith but on grounds which the Court finds not to have been reasonable - e.g., because he was too gullible or stupid or rash in believing the statement made by him to be true - he will be still guilty of a criminal offence. In my submission, any legislation which brings about this result is contrary to the standards of justice accepted in Australia.

- (7) The Minister further asserts that "in civil matters, neither in issues arising under statute nor at common law, is there a universal rule that the onus of proof is upon the plaintiff." In the present context, both this assertion and the examples cited in support of it are misleading. At common law, there are already well-established causes of action for misrepresentation which is made fraudulently or, in certain circumstances, negligently. In such actions which in my opinion furnish the closest parallel to the

cause of action created by the Ordinance, the onus of proof is on the plaintiff to prove both that the representation was false and that it was made by the defendant fraudulently or negligently. It is therefore not for the defendant to prove his innocence at common law, although the argument of the Minister that "he would be the party most able to produce the best evidence to the Court" is equally applicable. Consequently, the reversal of the onus of proof embodied in the Ordinance is contrary to clearly established common law principles even in civil proceedings.