

This material has been reproduced on this webpage by or on behalf of the University of Adelaide under licence from the Attorney-General for the State of South Australia. The material is reproduced for academic and educational purposes only. Any further reproduction of this material by you may be the subject of copyright protection under the Copyright Act 1968.

SOUTH



AUSTRALIA

**NINETEENTH REPORT**

of the

**LAW REFORM COMMITTEE**

of

**SOUTH AUSTRALIA**

to

**THE ATTORNEY GENERAL**

—

**RELATING TO THE ADOPTION OF  
SECTION 14 OF THE TRADE  
DESCRIPTIONS ACT 1968 OF THE  
PARLIAMENT OF THE UNITED KINGDOM**

1971

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:—

The Honourable Mr. JUSTICE ZELLING, C.B.E., Chairman.

B. R. COX, Q.C., S.-G.

K. P. LYNCH.

\*R. G. MATHESON.

JOHN KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

\*NOTE:—Mr. R. G. Matheson was on leave overseas when this Report was signed.

**NINETEENTH REPORT OF THE LAW REFORM COMMITTEE  
OF SOUTH AUSTRALIA RELATING TO THE ADOPTION  
OF SECTION 14 OF THE TRADE DESCRIPTIONS ACT, 1968,  
OF THE PARLIAMENT OF THE UNITED KINGDOM**

To:

The Honourable L. J. King, Q.C., M.P.,  
Attorney General for South Australia.

Sir,

Following on the decision of the Supreme Court in *Athens-MacDonald Travel Service Proprietary Limited v. Kazis* you referred to the Committee the question of whether or not it would be expedient to adopt Section 14 of the Trade Descriptions Act, 1968, of the Parliament of the United Kingdom as part of the law of South Australia or to enact some similar legislation.

The facts, stated very shortly, in the case which provoked the reference, were that a Cypriot migrant to Australia having saved up sufficient to take him and his family back on a three months' trip to Cyprus was grossly "defrauded" (and that is the word used by the Special Magistrate who heard the case at first instance) by a travel agency as a result of which instead of getting the type of holiday together with the return to his native land for which he had planned over many years, he got a very different kind of holiday, less in time, full of worry and generally not at all what he had been told he would obtain.

Similar cases were referred to during argument in that case which had occurred in England prior to the enactment of the Trade Descriptions Act in 1968 and there have been very few cases since. It appeared from a perusal of English newspapers that the enactment of this Section had very substantially prevented the fraudulent propaganda which had previously been used by unscrupulous travel agencies in England and elsewhere to deceive the unwary. Overseas travel is an important part of the world scene today and Australians have further to travel to get to many of the places they want to see than any other place on earth except New Zealanders, and the costs of travel are correspondingly high. Accordingly, if it is possible in any way to minimize the risk of fraudulent or other improper dealing in relation to such contracts of travel, it is wise to do so. On the other hand it is also important that if the criminal law is to be used as a sanction, that such use does not itself protect the defaulter in a civil action.

As was recently said by Haines J. of the Supreme Court of Ontario in *Ranger v. Herbert A. Watts (Quebec) Ltd.* (1970) 10 D.L.R. 3rd 395 at 405—

"To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser. Should such a manufacturer or sales agency be permitted to create public confidence, promote their sales, and then plead that the criminal law precludes delivery of the premium? By newspaper, radio and television every home has become the display window of the manufacturer, and the stand of every pitchman. By extra-ordinary skill the printed and spoken

word together with the accompanying art form and drama have become an alluring and attractive means of representation of quality and confidence. Honesty in advertising is a concept worthy of re-examination."

The Trade Descriptions Act 1968 is Chapter 29 of the Statutes for that year. It contains many sections which deal with mis-statements other than false representations as to the supply of goods or services and it may be that at some stage a more general examination of the Act would be wise but for the purposes of this paper it is necessary only to deal with Section 14, the Section that is referred to us, and to Sections 24 and 25 which provide defences to a charge under Section 14.

The three Sections read as follows:—

"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;

and 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 (1) 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.

24. (1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—

- (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(2) If in any case the defence provided by the last foregoing subsection involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

(3) In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

25. In proceedings for an offence under this Act committed by the publication of an advertisement it shall be a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under this Act."

Regrettably the English sections seem to us to have some defects, a number of which are apparent from the decided cases. If they are to be used, and we do not recommend this, then—

- (a) Section 14 (1) (b) (iv) should be expanded to include a body corporation organization or the like:
- (b) Section 14 (2) (a) is badly worded and should be redrafted:
- (c) Section 24 (1) (b) is simply the negative of the concept of recklessness in 14 (1) (b) and as drafted is not strictly an additional defence at all and would need complete redrafting.

Instead of this course we recommend that the draft Section annexed to this Report which was prepared for us by Mr. Hackett-Jones, Assistant Parliamentary Counsel, be added to the proposed Misrepresentation legislation either as an amendment or by separate Act. We are most grateful to Mr. Hackett-Jones for his assistance.

We cannot see that our recommendations will impinge in any way on federal legislation such as the Trade Marks Act or the Designs Act because these deal not with oral or written representations but rather with the property in a given trade mark or a given design which is a matter of industrial property, not a matter of contract.

We accordingly recommend that a Section or Sections in terms of the annexed draft with such other modifications as may be dictated by government policy, should be enacted as part of the law of South Australia.

We have the honour to be

HOWARD ZELLING

B. R. COX

K. P. LYNCH

JOHN KEELER

The Law Reform Committee of South Australia

mits  
1 course  
2 of  
5.

(1) Where, in the course of a trade or business, a false statement or representation is made by the person by whom the trade or business is conducted, a person duly authorized to act on his behalf, or a person acting in the course of his employment—

(a) for the purpose of causing or inducing any other person to enter into a contract;

or

(b) for the purpose of causing or inducing any other person to pay any pecuniary amount, or to make over or transfer any real or personal property, to the person by whom the statement or representation is made or any other person,

the person by whom the trade or business is conducted, and the person by whom the statement or representation is made, shall each be guilty of an offence and liable to a penalty not exceeding two hundred dollars.

(2) Where in any proceedings under this section it is proved that a false statement or representation in fact acted as a material inducement to any 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 statement was made, or any other person,

and that, in consequence, the person by whom the statement or representation was made, or a person on whose behalf, or in whose employment, that person was acting, derived any consideration or material advantage, it shall be presumed, in the absence of proof to the contrary, that the statement or representation 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 real or personal property, as the case may require.

(3) It shall be a defence to a prosecution under this section—

(a) that the person by whom the statement or representation was made believed upon reasonable grounds that the statement or representation was true;

(b) where the defendant is not the person by whom the statement or representation 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;

or

(c) where the offence was committed by publication of an advertisement and the defendant is a person whose business is to publish or arrange for the publication of advertisements, that he received the advertisement in the ordinary course of business and did not know, and had no reason to suspect, that its publication would result in an offence against this section.

(4) For the purposes of this section a statement or representation is false if it is false in any material particular.

(5) Where a body corporate is guilty of an offence under this section, each member of the governing body of the body corporate who knowingly authorizes, permits or suffers the commission of the offence shall be guilty of an offence and liable to a penalty not exceeding five hundred dollars.

(6) Nothing in this Section shall affect any civil remedy which any person would otherwise have arising out of such false statement or representation.