

Misleading foreign websites not tolerated by Australian courts

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1 Introduction

The need to protect the public from exploitation and cross-border consumer fraud and deceit was a key factor in a recent Federal Court decision to grant declaratory relief and an injunction against a foreigner who registered and operated misleading websites outside Australia.

In *ACCC v Chen* [2003] FCA 897 (27 August 2003), Sackville J granted the ACCC declaratory relief and an injunction against Richard Chen, an individual located in the United States of America. Chen operated three web sites in contravention of sections 52, 53(c) and 55A of the *Trade Practices Act 1974* (Cth) (“the Act”) by misleading or deceiving the public into believing that these web sites were affiliated with the Sydney Opera House Trust (“the Trust”).

2 The facts

Chen is a resident of the United States who has no connection with Australia, other than via the websites that he operated. Despite obtaining an order for substituted service the ACCC were unable to find and serve Chen personally with any documents. The proceedings were not defended, however it appears from activity on the websites after proceedings were initiated that Chen was aware of the proceedings.

From early 2002 until at least October 2002, Chen operated three Internet web sites accessed by the domain names:

- sydneyopera.org (the “**Imitation Site**”);
- witestar.com (the “**Witestar Site**”); and
- worldsboxoffice.com (the “**WBO Site**”).

Internet users using a search engine to find information about the Sydney Opera House were directed to the Imitation Site. The front page of the Imitation Site was identical to the first page of the official Sydney Opera House site. The remaining pages on the Imitation Site were completely different to those on the official site.

Internet users could access the WBO Site via a “pop-up” window on the Imitation Site displaying the contents of the Witestar Site, or via a “Box Office” link on the Imitation Site. The WBO Site advertised for sale (by credit card) tickets to various opera house performances, including performances at the Sydney Opera House.

There was no connection between the Trust and Chen. The Trust had not authorised Chen to reproduce any part of its official web site, nor to sell tickets to any events at the Sydney Opera House.

During 2002, a number of persons (most from outside Australia but including at least one person from within Australia) used their credit card to purchase tickets to Sydney Opera House events via the Imitation and WBO Sites. Most people were directed to the Imitation Site via a search engine. These consumers thought they were viewing the official Sydney Opera House web site. Tickets were approximately twice the price of tickets purchased through the official web site. In most cases, the consumers never received tickets and found that no booking had been made.

3 Remedies sought by the ACCC

The ACCC claimed Chen had engaged in misleading and deceptive conduct to the detriment of Australian consumers. The ACCC sought declarations that Chen:

- had breached s. 52 of the Act by engaging in misleading or deceptive conduct, or conduct that was likely to mislead or deceive;
- had breached s. 53(c) and (d) of the Act by representing that Chen and the services (i.e. offering to provide booking facilities for events at the Sydney Opera House) had sponsorship or approval of the Trust; and
- had breached s. 55A by engaging in conduct liable to mislead the public in relation to services.

The ACCC also sought an injunction under s. 80 of the Act requiring Chen to:

- remove and prevent access to the web sites by Australian residents (even if the entire sites had to be removed); and
- stop publishing, operating or maintaining the web sites or any similar Internet web sites accessible by Australian residents where those sites are misleading and deceptive.

(The ACCC also sought an order requiring Chen to provide details of and to refund all Australians who had purchased tickets through the WBO Site. However this was not pursued by the ACCC and the court did not grant this order.)

The ACCC recognised that in America, there is no mechanism available for the registration or enforcement of an injunction granted under the Act. The ACCC accepted that there was a strong likelihood that if Chen ignored the orders, the injunction could not be enforced against him.

Despite these challenges and the fact that Chen had since removed from the web sites all references to the Sydney Opera House, the ACCC claimed it was still appropriate to grant

declaratory and injunctive relief the basis that:

- the public needs to be protected from cross-border consumer fraud or deception;
- it is in the public's interest for the court to indicate its disapproval of the conduct and to take all available measures to prevent misleading or deceptive conduct; and
- granting a declaration will increase the likelihood of foreign regulatory authorities co-operating in taking action to protect Australian consumers from cross-border fraud.

4 Declaratory relief

The court agreed with the reasons put forward by the ACCC as to why a declaration was justified. The court declared that Chen had breached sections 52, 53(c) and 55A of the Act. (The declaration did not extend to a breach of s. 53(d) due to a lack of evidence on this point.) The public interest in granting a declaration prevailed, despite the fact that:

- the web sites no longer contained any information about the Sydney Opera House and no longer purported to sell tickets to events at the Sydney Opera House; and
- there had been a change to the name of the registrant for the Imitation site and there did not appear to be a connection between Chen and the new registrant (although a connection could not be ruled out).

5 Injunctive relief

(a) The power to grant an injunction against a person outside Australia

The court has power under s. 80 of the Act to grant an injunction "in such terms as the Court determines to be appropriate". Section 6(2) of the Act extends the application of Part V to trade or commerce between Australia and places outside Australia.

It is possible for a person living outside Australia to breach the Act, such as by operating a website accessible by people in Australia which is misleading or deceptive. There is nothing which prevents the court from imposing a penalty, or awarding a remedy under the Act (such as a declaration or an injunction) against a person outside Australia who has breached the Act, requiring them to do something or to refrain from doing something outside Australia.

It was not necessarily a bar to the grant of injunctive relief that Chen lived outside Australia and that an order could be difficult or impossible to enforce against him. The court recognised that this is a material consideration to be weighed against other circumstances, such as the damage or inconvenience that the plaintiff will suffer if relief is not granted, however it is not fatal to the granting of an injunction.

(b) Terms of the injunction

The court awarded an injunction against Chen but the injunction granted was more limited in scope than that requested by the ACCC. The injunction restrained Chen from publishing on the web sites, or any similar Internet sites accessible in Australia, information or material relating to the Sydney Opera House that is misleading or deceptive, or likely to mislead or deceive.

(c) Grounds for granting an injunction

There were many reasons why a court may be reluctant to grant an injunction in these circumstances:

- Chen was located outside Australia and it would be difficult or impossible to enforce the orders against him;
- Chen had actually ceased the offending conduct (by removing all references to the Sydney Opera House from the web sites); and
- the domain name for the Imitation Site no longer appeared to be associated with Chen (it had been transferred to another person).

Despite all this, it was held the special circumstances of this case warranted an appropriate injunction to be granted. The court felt it was justified in granting an injunction for the following reasons:

- there was a risk that Chen could resume the offending conduct. The court could not be assured that Chen would not use the web sites, or create other web sites to communicate misleading information to consumers in Australia and worldwide about the availability and sale of tickets to Sydney Opera House events;
- cross-border fraud and misleading conduct, especially over the Internet, is a growing problem for the international community. The problem has prompted consumer protection and law enforcement agencies from many countries and international agencies to establish mechanisms for international co-operation to protect consumers;¹
- this recognition by the international community, the scale of the problem (particularly over the Internet), and the desirability to deter potential offenders are all factors that must be considered; and
- evidence presented by the ACCC suggested that granting an injunction would materially improve the chances of the ACCC obtaining the support of the Federal Trade Commission to take action to curb Chen's conduct, should it recur.

The court did not think that granting an injunction was futile, despite the fact that there will rarely be a direct means of enforcing an injunction granted by an Australian court extra-territorially. The likely response of administrative agencies in the foreign country is a relevant consideration. If for example, an agency such as the Federal Trade Commission in the USA is likely to take action to stop or prevent misleading and deceptive conduct affecting consumers because that conduct is the subject of an injunction issued by an Australian court, then it is not futile to grant an injunction (even though the injunction

cannot be enforced through American courts).

6 The moral of the story

As Australian consumers increasingly use the Internet as a way of transacting with entities from outside Australia, incidents of cross-border consumer fraud and misleading and deceptive conduct will become more and more prevalent. Australian courts have sent a clear message that registrants of domain names and operators of a web sites located outside Australia are not outside the reach of the Australian legal system. Consumer protection and law enforcement agencies around the world, including international agencies, are establishing mechanisms for international co-operation to protect consumers. Australian courts will continue to play their part by condemning conduct which infringes consumer protection laws in Australia. This decision demonstrates that Australian courts are not afraid to grant declarations or injunctions against these culprits. Whilst much more needs to be done to adequately protect Australian consumers against

fraud or misleading conduct perpetrated over the Internet, it is good to see Australian courts taking a stance, despite the practical difficulties that may exist in enforcing such remedies.

Protection Laws, or in facilitating the administration or enforcement of such Consumer Protection Laws." The agreement contemplates co-ordinating enforcement against transborder violations of consumer protection laws.

¹ The Council of the Organisation for Economic Co-Operation and Development ("OECD") adopted *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*. The ACCC, the Federal Trade Commission (USA) and agencies from 30 other countries are parties to the *Memorandum on the Establishment and Operation of the International Consumer Protection and Enforcement Network*, the main objective of which is "to encourage practical action to prevent cross-border marketing malpractice", and its long term goals include taking action to combat cross-border breaches of consumer protection laws and to facilitate effective cross border remedies. In July 2000 the ACCC and the Federal Trade Commission entered into an agreement on the *Mutual Enforcement Assistance in Consumer Protection*. This agreement recognises the "challenges posed by cross-border Internet fraud and deception" and states that "the Parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining evidence that could assist in determining whether a person has violated or is about to violate their respective Consumer