

Limitations

Section 51AC will apply only if:

- the relevant supply or acquisition of goods or services are for the purposes of trade or commerce;
- the supply is to, or acquisition is from, a person other than a publicly listed company (that is, a publicly listed company cannot commence an action under s. 51AC); or
- the price of the goods or services supplied or acquired, or possibly supplied or acquired, does not exceed \$1 million.

The monetary limit has already created considerable uncertainty, as have references in the legislation to 'possible supply' and 'possible acquisition'. In introducing the legislation the Commonwealth Government stated that the \$1 million limit related to 'transactions', but this word is not used in s. 51AC. While the courts may interpret the legislation in this way there is some uncertainty as to what amounts to a transaction. By way of example, will businesses which acquire goods or services over a period of time fall outside the operation of s. 51AC if their 'possible' purchases over the total period are likely to exceed the \$1 million monetary limit? The \$1 million limit can, however, be changed by regulations to the Trade Practices Act.

Implications

Given that s. 51AC aims to provide greater protection for small business in dealings with big business, it may be that suppliers will have to make a careful assessment about the extent to which they are prepared, if asked, to offer special terms and conditions negotiated with one customer in a particular transaction, to another customer in a similar transaction. Suppliers will need to be careful as, in light of sub-s. 51AC(3), if they do not negotiate they may be acting unconscionably.

Similarly, s. 51AC may also have the effect of reintroducing the prohibition against 'price discrimination' insofar as a refusal to give the same discounts, allowances or rebates to small businesses in similar circumstances may be found to be unconscionable. Again, in choosing to offer special prices or deals to one customer, suppliers should also make a careful assessment as to whether they are also prepared, if asked,

to make the same offer or deal to another customer in a similar transaction.

In addition, 'services' is defined very widely and includes any 'rights ... benefits, privileges or facilities that are, or are to be provided, granted or conferred in trade or commerce'. Thus, s. 51AC may apply to a refusal to renew a distribution agreement or to renew a lease if it could be said that the supplier has acted inconsistently in renewing other distribution agreements or leases.

However, each of the scenarios presented above are likely to be of concern only if the customer (or lessee, as the case may be) is in a position of some disadvantage and the supplier knows this and takes advantage of the situation when it would be unconscionable (or unfair) to do so.

Conclusion

As far as the latest amendments to the unconscionable conduct provisions of the Trade Practices Act are concerned, s. 51AC is still new and thus clearly untested. Therefore, it is difficult at this stage to gauge what the likely consequences of s. 51AC will be and, until there is a body of case law dealing with this amendment, the general view seems to be that there will be considerable uncertainty in the business community about the effect of this section.

The fact that there is a series of additional 'factors' to which the court may have regard in determining whether conduct has been unconscionable under s. 51AC indicates that the courts are being encouraged to extend the traditional concept of unconscionable conduct to business conduct which, effectively, is 'unfair'. To this extent, therefore, there has been a 'watering down' of the principles of unconscionable conduct which have previously been established by the courts.

NOTES

1. *ACCC Journal* No. 19, February 1999, at p. 19.
2. Part IVA was inserted by the *Trade Practices Legislation Amendment Act 1992*.
3. Also as a result of these amendments, s. 52A became s. 51AB in Part IVA of the Trade Practices Act.
4. *ACCC Journal* No. 19, February 1999, at p. 22.
5. *ACCC Journal* No. 19, February 1999, at p. 22.
6. Consumer Protection Notice No. 5 of 1998 in *Commonwealth of Australia Gazette* No. GN 35, 2 September 1998.
7. *ACCC Journal* No. 19, February 1999, at p. 22.

Purchasing on the Internet: jurisdictional issues



The following article by Jody Marshall of the Commission's Brisbane office continues the series of articles by Commission staff on current issues in establishing liability and securing appropriate remedies to achieve

effective enforcement outcomes. It discusses the jurisdictional issues that arise from Internet commerce and the application of the Trade Practices Act to address conduct by businesses operating overseas.

You have just purchased a new computer game for your PC from a United States company as advertised on their web page. A package arrives with a different game from the one you ordered. Will you be able to recover the cost of the game from the United States company?

Jurisdiction

The concept of jurisdiction refers to a court's ability to hear a dispute in the circumstances. When buying from overseas over the Internet, the jurisdiction of the *Trade Practices Act 1974* and the courts is crucial if consumers have a problem with the goods or services provided.

For private consumers considering taking action against an Internet trader, and for the Commission looking to enforce the Act, the jurisdictional coverage of the Act is the first issue to be examined. The questions which must be asked are these.

- Does the Trade Practices Act cover the conduct alleged to be a contravention (legislative jurisdiction)?¹
- Does the court have the power to enforce the outcomes which are sought (enforcement jurisdiction)?²

This paper will examine the first of these questions.³

Why does the Internet create new issues relating to jurisdiction?

Problems with the local court system adjudicating in disputes between international parties are not new. What is new is the number of transactions between consumers and international businesses as Internet sales become more prevalent. Such transactions have grown exponentially since the advent of the Internet.⁴ Businesses previously needed local bases to deliver their package of goods and services. Increasingly the Internet has obviated the need for a local physical presence as a website can operate as a showroom at much lower cost.

Many of the problems relating to the growth of the Internet are similar to those occurring when there is a surge in the number of mail order companies operating. Without the physical presence of a seller within the country, the ability of a consumer to recover from a seller is greatly reduced because of the high cost of recovery. The cost of recovery is key to the number of actions which are pursued privately by consumers.

From a trader's perspective the emerging ability to trade globally highlights many new issues. There is the potential to be subject to litigation in another jurisdiction, involving costs to the business which may be totally unexpected. Unfortunately, it is out of the reach of most businesses to explore the laws of each jurisdiction before making sales.

Evidential problems can also be quite unique when dealing with representations made over the Internet. The temporary nature of web pages means that it is difficult for the Commission or consumers to capture representations before a company changes its site and removes the evidence. It is also often

difficult to identify the company or person who operates a website. This becomes more difficult when the site disappears.

Legislative jurisdiction of the Trade Practices Act

Interpretation — general rules

In interpreting the extra-territorial application of laws the courts apply a presumption that:

a statute is to be construed as limited in its operation to the territory or the nationals of the state which enacts it.⁵

However, that presumption must be viewed in the terms of the interpretation of the legislation at hand. Windeyer J in *Meyer Heine* said that the question was:

whether the prima facie presumption, that the Act does not extend to penalize acts done outside Australia, by foreigners, has been displaced.⁶

The provisions of the Trade Practices Act

The Trade Practices Act expressly provides for application outside Australia in s. 5(1), which states:

Parts IV and V extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

This clearly expresses the legislative intent regarding extra-territorial jurisdiction.

Justice Wilcox of the Federal Court in *Re: Trade Practices Commission and Australia Meat Holdings Pty Limited* analysed the application of the mergers provision of the Act to a company alleged to be knowingly concerned in the breach.⁷ Australia Meat Holdings Pty Limited acquired Thomas Borthwick & Sons (Australasia) Limited. The vendors of the shares were Thomas Borthwick & Sons (Pacific Holdings) Limited, Thomas Borthwick & Sons (UK) Limited and the parent of those two companies, Borthwicks plc. The

vendors were not registered in Australia and were not trading here. However, the company acquired, Thomas Borthwick & Sons (Australasia) Limited, did trade in Australia.

The only relevant activities that had occurred in Australia were that the vendors had sent a representative to discern the attitude of the then Trade Practices Commission to the sale, and a representative had provided daily updates to the vendors on the acquisition.

On the basis of those activities Wilcox J concluded that the foreign vendors of the shares had engaged in conduct within Australia which answered the description of being 'knowingly concerned' in the acquisition by Australia Meat Holdings. However, on the basis of the potential harshness of the order, Wilcox J said that the company should not be subject to an order declaring the acquisition void.

The decision in *Australia Meat Holdings* appears to indicate that only a minor connection to Australia would be required to satisfy the requirements of s. 5(1). His Honour's reasoning may also indicate that a judge would take a similarly wide view of the application of the Act to a transaction where a consumer buys goods over the Internet.

However, as a contrary argument s. 5(2) states that extended operation is specifically provided to ss 47 and 48 of the Act. Conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia is caught by this extension. By implication it is arguable that conduct involving mere supply of goods or services to a person within Australia, and not meeting the requirements set out in s. 5(1) is not caught by the Act.⁸

Carrying on a business?

Without meeting the test set out in s. 5(1) above, it is necessary to examine when conduct would be regarded as 'carrying on of business' within Australia as required by s. 5. In terms of assessing whether a company is carrying on business in Australia, Wilcox J noted that the activity must be 'substantial activity' within Australia.⁹

Meltz argues that the phrase 'carrying on of business' 'presupposes some degree of continuance or repetition'.¹⁰ In *Luckins v Highway Motel (Carnarvon) Pty Ltd*¹¹ the court states that a 'succession of acts to advance some enterprise pursued by the company with a view to pecuniary gain' was sufficient to amount to the 'carrying on of business' in the absence of a place of business in Australia. On this analysis it appears that a number of sales delivered into Australia by an international company would be necessary before a consumer could argue that this definition was satisfied. However, for the average consumer it is likely to be difficult to gain evidence of the number of Australian sales made by an international company for this to be assessed.

In *Tycoon Holdings Ltd v Trenchor Jetco Inc* (1992) ATPR 41-183 Wilcox J examined whether an American company which placed an advertisement in an Australian magazine, and whose representatives made a number of visits to Australia to support an Australian distributor, was carrying on business in Australia. The issue arose in the context of a motion to set aside service. Wilcox J said that he interpreted the advertisement as an invitation to trade with the American company in that country rather than Australia. Likewise he also concluded that the visits to Australia were not sufficient evidence of the continuance necessary for the Trade Practices Act to apply. Service was set aside on the basis of these conclusions. It was not discussed whether direct sales had occurred between the American company and Australian consumers.

Where does an international misrepresentation occur?

The courts have looked at where conduct occurs when it involves misrepresentations communicated to someone in Australia from someone overseas. One such case was *Voth v Manildra Flour Mills Pty Ltd* where an Australian company sued an American accountant for negligent acts and omissions.¹² In particular, the claim was that the accountant failed to draw to the attention of the Australian company that it was liable to pay withholding tax. Mason CJ, Deane, Dawson and Gaudron

JJ at 568 said:

If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff there is no difficulty in saying the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff, even if it is brought to attention in some third place. But in every case the place assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where in substance, the act took place.

In that case the judges said that the act of providing accounting advice was completed in Missouri and therefore occurred in Missouri.

In *Paper Products Pty Ltd v Tomlinsons (Rochedale) Ltd* French J applied *Voth* to a Trade Practices Act representation.¹³ French J accepted that the making of representations by telephone and fax by a company incorporated in the United Kingdom constituted conduct by it in Australia. He relied on Lord Denning's conclusion in similar circumstances in *Diamond v Bank of London and Montreal Ltd* where he stated that fraudulent misrepresentation is committed at the place the message is received.¹⁴

Similarly, in a motion to set aside the application and statement of claim in *Bannerton Holdings Pty Ltd v Sydbank Soenderjylland A/S*, Nicholson J concluded that it was a tenable argument that the acts in question took place in Australia and the court thereby had jurisdiction.¹⁵ The case involved an alleged contravention of s. 52 where it was claimed that the overseas company did not intend to perform certain activities as agreed in a telephone conversation between Australia and Denmark. The motion was ultimately refused.

It is likely on the basis of the conclusions in these cases that the Australian courts may find that conduct directed to Australia, relating to the sections found in Part V, Division 1 of the Trade Practices Act, is within their jurisdiction. However, the jurisdiction regarding contractual provisions is not as certain.

Additional specific section requirements of the Act

Aside from the general application of the Act, some sections of the Act include requirements that affect international transactions.

Part V, Division 1 and Part IVA

Corporation

Each relevant section in Part IVA and Part V of the Act requires that the trader be a corporation, which is defined in s. 4(1) as:

- a foreign corporation; or
- a trading or financial corporation formed within the limits of Australia.

The requirement for a 'corporation' only applies where it is not possible to rely on the expanded operation of the Act. The State Fair Trading Acts apply to 'persons', which encompasses many businesses not caught by the extended application of the Trade Practices Act.

Trade or commerce

Under the Trade Practices Act, another potential issue relating to international traders is the definition of the phrase in 'trade or commerce'.¹⁶ The main sections which do not require the conduct to be in 'trade or commerce' in this Division are ss 53B, 61, 64(2) and 64(3).¹⁷

Section 4 states that 'trade or commerce' means trade or commerce within Australia or between Australia and places outside Australia. The application of the Act does not extend to Australian firms with overseas operations where the conduct occurs only overseas.¹⁸ Section 6(2) specifically states that trade or commerce between Australia and places outside Australia is caught by the Act.

Some connection with Australia is therefore necessary for the Act to apply. Prohibited conduct originating in Australia, aimed only at overseas consumers, was held to be a sufficient

connection in *Wells v John R Lewis (International) Pty Ltd.*¹⁹ On the wording of s. 6(2) it is clear that conduct between overseas traders and Australian consumers is covered by the phrase. With respect to interstate traders it is also clear that their conduct is caught by the phrase 'trade or commerce' in Australia.

Part V, Division 2

There is no right to exclude the operation of the implied conditions and warranties provisions.²⁰ In an effort to avoid choice of law clauses overcoming this restriction, s. 67 of the Act applies Part V, Division 2 to contracts whose proper law (apart from the operation of the choice of law clause) would have been Australian law. A detailed exploration of the application of the conflict of laws doctrine is beyond the ambit of this paper.²¹

Though the Division requires a 'corporation' trader, the Fair Trading Acts mirror the provisions to catch persons or unincorporated businesses who are not caught by the extended operation of the Trade Practices Act.

Part V, Division 2A

The requirement for a 'corporation' is also set out in Part V, Division 2A relating to warranty actions against manufacturers. Section 6(2)(c) applies to give extended operation to this Division where interstate or international trade or commerce is involved.

In an effort to overcome issues associated with overseas manufacturers with no presence in Australia escaping liability, the Division deems the corporation that imported the goods to be the 'manufacturer' for the purposes of the Division.²² This substantially overcomes the difficulty in pursuing overseas respondents. However, if goods are ordered directly from an overseas company, issues regarding the application of Australian legislation to overseas residents remain.

Part VA

The extra-territorial operation of the Act as set out in s. 5(1) does not specifically mention Part VA, in contrast to Parts IV, IVA and V. The

sections themselves in this part require that there is a 'corporation' and 'supply in trade or commerce'. Though caught by s. 6, it is arguable that the omission in s. 5 indicates that only supply in Australia is covered by this part.²³ However, the position is not certain.

Conclusion

Unfortunately there are no simple answers to the problems posed.

In relation to our hypothetical computer purchaser, it is likely that a reputable business would provide an exchange of the computer game for the correct title at no cost. Businesses which are concerned about consumers returning to their site are not likely to rely on the black letter of the law to provide a refund.

When purchasing from companies with no established reputation for dealing with customers fairly, it would be wise for consumers to make only small purchases from a site initially, to determine the level of service provided. Consumers should be aware that the costs involved in pursuing a refund on a purchase (such as in the computer game example) may be more than the consumer is willing to spend. This risk should be considered when deciding to purchase from an international supplier.

Ministers Alston and Hockey recently issued a media release warning consumers to be wary about purchasing over the Internet when buying from overseas. The media release, which links to some fact sheets discussing purchasing on the Internet, is found at http://www.dcita.gov.au/nsapi-graphics?Mlval=dca_dispdoc&ID=3878&template=Newsroom. The Commission has also published a discussion paper outlining strategies relating to enforcement on the Internet called *The global enforcement challenge: enforcement of consumer protection laws in a global marketplace*. This publication is available from Commission offices.

NOTES

1. *Australian Trade Practices Reporter* at ¶14-650.
2. *Australian Trade Practices Reporter* at ¶14-650.
3. It is not possible to cover the second question in this brief article.

4. United States Government 'Emerging Digital Economy' at <http://www.ecommerce.gov/emerging.htm> gives numerous statistics on the growth of the Internet to support this conclusion.
5. Windeyer J in *Meyer Heine Proprietary Limited v The China Navigation Company Limited* (1965–1966) 115 CLR 10 at 43.
6. *ibid*.
7. (1988) ATPR 40-876 at http://www.austlii.edu.au/au/doi/displ/au/cases/cth/federal_ct/unrep3345.html
8. A conclusion also drawn at ¶14720 of the *Australian Trade Practices Reporter*.
9. *Re: Trade Practices Commission and Australia Meat Holdings Pty Limited* (1988) ATPR 40-876 http://www.austlii.edu.au/doi/displ/au/cases/cth/federal_ct/unrep3345.html at paragraph 216.
10. Dr D. Meltz, 'The Extraterritorial Operation of the Trade Practices Act — a Time for Reappraisal?', (1996) 4(4) *Trade Practices Law Journal* 185.
11. (1975) 133 CLR 164 at 178.
12. (1990) 171 CLR 538.
13. (1993) ATPR 41,665.
14. (1979) 1 QB 333.
15. www.austlii.edu.au/au/cases/cth/federal_ct/unrep8115.html
16. The *Fair Trading Act 1989* also includes references to 'trade or commerce'. However, the definition is not the same as that in the *Trade Practices Act 1974*. It is defined to include 'any business or professional activity'.
17. Section 6(2)(b) extends the operation of these sections to conduct which takes place in the course of, or in relation to, trade or commerce between Australia and places outside Australia.
18. S. Corones, *Consumer Protection and Product Liability Law: Commentary and Materials* (1997), Sydney: LBC Information Services, at 48.
19. (1975) ATPR 40-007.
20. *Trade Practices Act 1974*, s. 68.
21. As this paper is focused on consumer rather than commercial sales, I merely note the application of s. 66A to override this Division to the extent of inconsistencies with the Vienna Convention in such sales.
22. Section 74A(4).
23. Dr D. Meltz, 'The Extraterritorial Operation of the Trade Practices Act — a Time for Reappraisal?', (1996) 4(4) *Trade Practices Law Journal* 185.