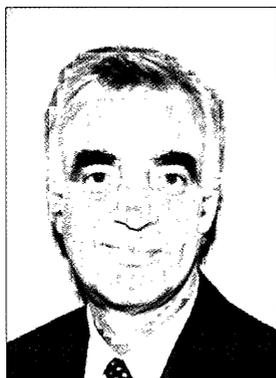


## The Internet: coming to grips with trade practices law



Following is a summary of a presentation given by Sam Di Scerni, the Commission's Regional Director in Western Australia, to the Connections Internet Conference 2001 of the Western Australian Internet Association, 15–16 October 2001.

The issue of competition and consumer protection in the new economy is controversial. In clarifying the role of the Commission it is helpful to consider:

- the special features of the Internet that pose challenges for regulators;
- the Trade Practices Act and the role of the Commission;
- regulating the Internet; and
- emerging consumer protection issues and international liaison.

### Special features

With new Internet and e-commerce-based services such as website hosting, email and online trading, the Internet has become an integral part of commercial life. Recent statistics from the National Office for the Information Economy (NOIE) indicate that:

- 56 per cent of employing businesses are now connected to the Internet of which:
  - 36 per cent use the Internet for online banking; and
  - 28 per cent for selling-related activities and 24 per cent for procurement;
- in 2000, the value of B2B e-commerce transactions in Australia was about \$4.5 billion.

As always, the regulator's role is to ensure the market remains competitive and consumers are protected. Although the types of conduct that may arise in the Internet sphere are generally those faced in the offline world the Internet poses special challenges for regulators.

These include the following.

- Competitors are able to share information easily and potentially engage in collusion.
- Its borderless nature means traders may have no physical presence in the jurisdiction in which they are trading. This also provides traders with a 'cloak of anonymity' and obtaining and enforcing judgments against wrongdoers can be difficult.
- Fast, cheap dissemination of information which helps consumers in their purchasing decisions — but also helps unscrupulous traders promote illegal pyramid selling schemes and other scams.
- Some companies may benefit unfairly from 'network effects' exhibited by the Internet (that is, a monopoly developing because people want to join a network that already connects many others, either physically or virtually). This can be likened to a 'snowballing' effect. (Network effects and the Internet are extensively discussed in *ACCC Journal* no. 36, pp. 18–32.)

### Role of the Commission

The first, and the one that I'll focus primarily on, is that of an enforcement agency whose job it is to make sure that those in the marketplace comply with the Act. The second is as an economic regulator overseeing those major infrastructure industries where it is sometimes difficult to establish and promote true competition.

### The relevant provisions of the Act

I now want to briefly touch on those provisions in the Act likely to be of most relevance to the Internet and e-commerce sector and will start with the restrictive trade practices and consumer protection provisions.

In the context of the Internet, the three major parts of the Act dealing with this objective are:

- Part IV which contains provisions prohibiting restrictive trade practices which lessen competition;
- Part V which deals with consumer protection; and
- from a regulatory perspective, Part IIIA which provides for third party access to major infrastructure facilities where those facilities are 'declared' by the minister; that is, the facilities are formally acknowledged as being too

uneconomic to duplicate (for example, some major pipeline and wire transmission systems) so some form of third party access has to be mandated.

The application of the Act to conduct other than that arising from networks effects will be discussed here. (See *ACCC Journal* no. 36, pp. 22–26 for a discussion of how the Act applies to network effects.)

#### *Emerging e-commerce consumer protection issues*

Enforcement of the Act in cyberspace is raising complex issues because of the increasing anonymity for perpetrators and jurisdictional issues arising in cross-border transactions. It appears that the Internet is giving a new lease of life to traditional scams, such as pyramid selling schemes and miracle cure claims, as well as raising new types of 'technology' scams.

The Perth office of the Commission has instituted court action against two globally based schemes: Greenstar, based in Perth and SkyBiz.Com Inc. based in the USA, alleging they are pyramid selling schemes. Both used the Internet extensively to promote their schemes.

Some of the newer technology scams include the following.

#### *Page jacking*

Page jacking is an unsuspecting consumer being lured to a website and finding that they cannot leave it, or that they are directed to similar sites. Page jacking also occurs when sites demand credit card details before allowing the user to leave. In 1999 the Commission helped the US Federal Trade Commission in breaking a global Internet scam with consumers being 'page jacked' to pornographic websites, and their web browsers disabled from exiting the sites.

#### *Dumping/modem jacking*

Another area of concern known as modem jacking or 'dumping' arises when consumers have been caught by websites that divert the user's modem to reconnect with another service provider via an international phone line. Consumers are then billed for costly international calls they had not authorised.

#### *Domain names*

Issues may also arise with the use of domain names. Within Australia, the Commission has a regulatory

role in advising the Australian Communications Authority (ACA) on electronic addressing but it has taken enforcement action on use of domain names that constitutes misleading and deceptive conduct. For Internic Technology, the Commission took action against the use of the domain name 'internic.com' alleging the name misled consumers into believing it was the official network information centre, 'internic.net', that allocates IP addresses.

#### *International liaison*

International cooperation can help agencies to:

- share enforcement techniques;
- share information on emerging trends and issues; and
- develop mutual assistance treaties and MOUs to coordinate their approach to cross-border enforcement issues.

The Commission has reached agreements with various countries and organisations including an agreement between it and the US Federal Trade Commission to facilitate law enforcement cooperation in consumer protection. It has liaised with jurisdictions including USA, Canada, New Zealand and the United Kingdom on specific enforcement matters that have cross-border implications.

The Commission also participates in international networks of consumer protection agencies including the International Marketing Supervision Network (IMSN) — the Commission will be the IMSN's president in 2002–03. As part of its work with the IMSN, the Commission has coordinated international sweep days for each of the past three years. (For a report on the 2001 sweep see *ACCC Journal* no. 32, pp. 39–40.)

The Commission has also established an e-commerce unit in Melbourne and helped provide an online complaints and information service, [econsumer.gov](http://www.econsumer.gov), which can be accessed at <<http://www.econsumer.gov>>. Further, the e-commerce unit provides information on rights and responsibilities of traders and consumers in e-commerce transactions generally.

#### **Conclusion**

To conclude, the proliferation of Internet services and e-commerce offers significant benefits for competition and consumers. For the Commission, the challenge is to strike the balance between

encouraging the uptake of services that promote competition, and protecting business and consumers from anti-competitive conduct and unfair trade practices. Important elements of this include:

- enforcing the Act;
- maintaining workable access regimes;
- developing effective compliance and educational materials; and
- liaising with agencies in other jurisdictions.

## Patents, substitution, imitation and competition — Amgen, TKT and the erythropoietin patents

The following paper was submitted by Dr Charles Lawson, Genomic Interactions Group, Research School of Biological Sciences, Australian National University.

Theoretically there is a disincentive to innovate in a competitive market because effective competition, together with market information, will favour competitors copying an innovation without having to pay out any of the development costs.<sup>1</sup> The statutory grant of a patent under the *Patents Act 1990* compensates this impediment to innovation (the market failure) and justifies the limited period of 'exclusive rights'<sup>2</sup> during which the innovator may exclude others while recovering the development

costs (confounding the free riders). Thus, in theory, the patent helps innovation by encouraging investment in new developments that produce economic benefit<sup>3</sup> while at the same time having minimal social costs.<sup>4</sup>

For patenting biological materials,<sup>5</sup> the Patent Office and courts set an extremely low threshold in applying the legislated requirements of invention<sup>6</sup> and non-obviousness.<sup>7</sup> This means the patentee's 'exclusive rights' are being granted to a wide range of products and processes for very limited contributions to economically useful innovation. Generally, these concerns may be of minimal consequence because, '[i]n practice ... a patent holder can rarely act as a pure monopoly, because of the availability of alternative and substitute products and processes, and also because some

<sup>1</sup> Trade Practices Commission, *Application of the Trade Practices Act to Intellectual Property* (Commonwealth of Australia, Canberra, 1991), p. 8; Industrial Property Advisory Committee, *Patents, Innovation and Competition in Australia* (Patent Office, Canberra, 1984), p. 12; Bureau of Industry Economics, *The Economics of Patents — Occasional Paper 18* (AGPS, Canberra, 1994), p. 13.

<sup>2</sup> '[D]uring the term of the patent, to exploit the invention and to authorise another person to exploit the invention': *Patents Act 1990* s. 13(1).

<sup>3</sup> With the added benefit of disclosure of the innovation: see generally Trade Practices Commission, op. cit. n. 1, p. 8; for a review of the policy objectives of patenting see T McCarthy, 'Intellectual property and trade practices policy: coexistence or conflict? The American experience' (1985) 13 *Australian Business Law Review* 198, pp. 200–203.

<sup>4</sup> See for example, Second Reading, *Intellectual Property Laws Amendment Act 1998* (Cth), House of Representatives, *Hansard*, 26 November 1997, p. 11274; but for some criticism of this view, see Industrial Property Advisory Committee, op. cit. n. 1, pp. 12 and 79; the social costs include higher prices, restricted outputs, subsidised foreign inventors and the administrative costs of the patenting scheme.

<sup>5</sup> Such as inventions involving non-human organisms, plants, bacteria, fungi, algae, viruses, nucleic acids, amino acids, cell organelles, enzymes, etc.: see IP Australia Pamphlet, *Australian patents for: microorganisms, cell lines, hybridomas, related biological materials and their use, genetically manipulated organisms* (IP Australia, Canberra, 1998), pp. 1–2; for recent analyses of the relevant patenting issues see D Nicol and J Nielsen, 'The Australian medical biotechnology industry and access to intellectual property: issues for patent law development' (2001) 23 *Sydney Law Review* 347; C Lawson and C Pickering, 'The conflict for patented genetic materials under the *Convention on Biological Diversity* and the *Agreement on Trade Related Aspects of Intellectual Property Rights* (2001) 12 *Australian Intellectual Property Journal*, p. 104.

<sup>6</sup> *Patents Act 1990* s. 18(1); reviewed in C Lawson, 'Patenting genetic diversity — old rules may be restricting the exploitation of a new technology', (1999), 6 *Journal of Law and Medicine* 373, pp. 377–84.

<sup>7</sup> *Patents Act 1990* s. 18(1)(b)(ii); reviewed in C Lawson and C Pickering, 'Patenting genetic materials — failing to reflect the value of variation in DNA, RNA and amino acids', (2000), 11 *Australian Intellectual Property Journal* 69, pp. 72–6.