THE IMPACT OF ELECTRONIC COMMERCE ON LITIGATION[1]

H G FRYBERG[2]

Mr Chairman, Mr Attorney, ladies and gentlemen. I am honoured to have been asked to deliver the keynote address today and I congratulate the Queensland Law Society and the TC Beirne School of Law for organising the conference. I was a little unsure of my qualifications to speak on such a newly developed theme as Electronic Commerce Law. However Alan Davidson did not ask and I wasn't telling. I was also unsure of how the theme should be defined. I shall explain my reasons for that at the end of the paper.

There are some topics which I shall not mention today. I thought of saying something about the impact of e-commerce on criminal litigation but I couldn't think of anything interesting to say. I invite you to enlighten me after the paper. I also considered investigating the areas of tax law and fiscal regulation, but time ran out and the paper was already too long. Finally I deliberately decided to leave out matters connected with doing business with the court since I know they will be covered by Jo Sherman and Karen Dean.

My remarks are divided into two sections: the law being applied in litigation and the law relating to the litigation process. The former is by far the larger section. The major part of it is concerned with the law of contract: offer and invitation to treat, the terms of the contract, infants and foreigners, acceptance and the *Statute of Frauds*. Then I shall look at negotiable instruments, particularly electronic cheques. After that I shall look at two tort-related topics: misrepresentation and passing off with particular reference to domain names and trespass to chattels. In the second section of the paper I shall refer to issues of

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1 Keynote Address to the Conference on Electronic Commerce Law (QLS/UQ), 28 March 2003.
2 Judge of the Supreme Court of Queensland.

jurisdiction and *forum non conveniens* in the light of *Dow Jones & Co Inc v Gutnick*[3]. Then I shall raise a few issues concerning the law of evidence. Then I shall subsist.

I shall not distract you with a PowerPoint presentation. I mean no disrespect for that program which in the right context is an excellent vehicle for illustrating a lecture. What I have to say is not particularly complex, its subject is not scientific and it has no pictures. The bare display of topic headings would simply mark me as an articulately challenged speaker. It would be justified only were I speaking in the after-lunch slot, which I am not. You will just have to concentrate on what I am saying!

My theme is that traditional common law concepts are applicable to the practicalities of e-commerce. E-commerce is not different, or at least not so different that special rules are needed to govern its operation. The impact of e-commerce on litigation will be minimal. Of course it is still early days. Experience may yet disclose a need for legislative intervention to a greater extent than heretofore. But I doubt that this will happen. Call that conservative if you like, but I cannot see why our existing doctrines are inapplicable to transactions effected electronically. There is no persuasive reason why the existing structure of our law should be unable to accommodate such transactions. There is one proviso: the legal profession and the judiciary must master the technology and locate the problems which it throws up in the correct legal pigeonholes. That will require a sound knowledge of the theory underpinning the law, but I am sure it is not a task beyond us.

There has been, on the whole, remarkably little litigation raising specifically e-commerce issues, even in America. This may be in part because much e-commerce is conducted between long-standing trading partners using EDI. In such situations, there are usually contracts made in advance which cover most situations. However, that is not the case in relation to consumer transactions on the Internet, nor in relation to trading transactions between parties who are strangers to each other and may have different languages and cultures. The general law must govern one-off transactions between strangers. The

[3] (2002) 77 ALJR 255.

volume of such transactions must be considerable[4] yet there has been very little litigation. I suggest that is because existing legal rules are dealing adequately with the problems which arise.

The absence of reported cases has meant that much of the debate has been hypothetical. That is not to denigrate it. Awareness of the issues on the part of practitioners will equip them to deal with problems if and when they arise.

A THE LAW BEING APPLIED IN LITIGATION

I begin my first section, the law being applied in litigation, with the law of contract and in particular, the rules of offer and invitation to treat.

Offer and Invitation to Treat

The distinction between an advertisement or "invitation to treat" and an offer is well established in contract law[5]. It is a distinction which is important in e-commerce, but it is not always easy to apply. The nature of and speed with which transactions are effected blur the boundaries. Take the example of a transaction carried out over the Internet. Typically, a trader will have its own Internet address. By typing that address or its associated domain name into a browser, any connected computer user will gain access to the trader's home page. From there links entitled, for example, "Products" take the visitor to a description of the merchant's stock in trade. More links to different pages will enable the visitor to specify the product which he or she wishes to buy. Eventually, the visitor will arrive at a page containing a button labelled "Submit". Clicking on the button will usually be the last thing which the visitor must do to enable the transaction. What is the legal effect of doing so? Has the visitor accepted an offer or made one? More importantly, does the framework of our existing law adequately cover the situation?

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4 In the 1999 report by the Department of Communications, Information Technology and the Arts entitled *E-Commerce: Beyond 2000* it was estimated that the value of Internet-based e-commerce would grow from $61 million in 1997 to $1.3 billion in 2001. That report forecast that e-commerce would increase Australia's GDP by 2.7% by 2007.

5 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1951] 2 QB 795.

In my judgment it does. The nature of the problem posed by the web site is not qualitatively different from that of the same problem encountered in print media, shop windows or ticket machines. It is simply a matter of analysing the various pages by reference to the language used and the activities performed on them. An express statement that the vendor is not making an offer would of course make the task of the lawyer simpler; but some merchants have an understandable reluctance to use legalese on their web sites. It should not be necessary. Care in the construction and wording of the site should be all that is needed to create the effect which the merchant desires. If, as will usually be the case, the merchant desires to place the visitor in the position of making the first offer, it should avoid using buttons with labels such as "I accept".

There are sound reasons for web sites to contain no more than an invitation to treat. Many sites are open to the public, so an offer placed on them is an offer to the public. Experience shows that such offers are replete with problems. Particular care and attention would be needed in the operation and management of a site containing an offer. For example, the public comprehends many people: how many acceptances can the merchant handle? For how long is the offer to remain open? The latter question can be important if the site is one which is not updated frequently. How should the ubiquitous "limited time only" offer be withdrawn if it really does constitute an offer? May a member of the public who has seen the offer accept it after its removal from the site? Can termination of the offer be effected only by posting a notice of withdrawal on the same site? All of these problems are avoided if the web site constitutes only an invitation to treat.

Different considerations may apply to sites not available to the public. Where access is restricted to subscribers, members or persons already parties to contracts, where access is gained by a password, the contents of the web page may more easily be construed as an offer than an invitation to treat. Indeed, that may be the desire of the merchant. In such cases there will normally be a covering contract entered into at the time the password is allocated. The nature of the contract can conveniently be spelled out, whether the contract be electronic or on paper.

Web sites are not the only electronic method by which merchants seek to attract custom. Solicitation of business by e-mail has reached alarming proportions. Spam is fairly obviously an example of an invitation to treat. Things may not be so obvious where e-mail is sent to a selected list of people. It will of course always be a matter of construing the document, but I suggest that courts will more readily construe an e-mail as an offer in such circumstances.

The terms of the contract

The identification of the terms of contracts made in this way should also be able to be done within the framework of the existing law. The principles are well known. Their application may turn out a little more difficult than normal, but the problems should not be insurmountable. There is a tendency when one finds a number of sheets of paper stapled to what is undoubtedly a contractual document to hold the entire bundle of contractual force. Otherwise, why would the documents be stapled together? An Internet transaction will rarely be effected at a different site from the one where the merchant's product is advertised and explained (and when it is it will seldom be made clear to the visitor that a move to a different site has occurred). One may expect some tendency for the courts to hold the merchant to what is said on every page of its web site. If it is desired to avoid this outcome care in the site design and wording will be needed.

No-one enters into a contract in the expectation or with the intention that it should result in litigation - at least, not normally. Litigation is a sign that the contract has gone wrong. The usual advice given by commercial lawyers is, see your solicitor at the time you make the contract. It is usually good advice. That is not to say that contracts drafted by solicitors never result in litigation; but one likes to hope that the incidence of litigation is lower. This suggests that there is scope for solicitors to become involved in the design work for commercial web sites. I wonder if anyone here today has been retained for such work?

The range of products available on the Internet is increasing rapidly. Not all are cheap, mass market products. It is probably unsurprising that one of the first products to be sold in this way was computer equipment. In transactions involving quite large sums of money merchants are more ready to engage a lawyer, if only to create a set of standard form contractual terms. The lawyer's creation, even if written in "plain English", will usually be fairly lengthy (at least to the eye of the consumer conditioned by the 15 second grab) and visually unappealing. There is a likelihood that a consumer faced with them would be deterred from the transaction. In paper transactions that problem is dealt with either by printing the standard terms in a tiny font on the back of the documentation or, more riskily, incorporating them by reference. How is it dealt with in e-commerce?

Three techniques appear to have been developed[6]. The least satisfactory is to set out the terms at length on the home page at the web site. That method is unsatisfactory unless it is impossible to bypass the home page when using bookmarks or hyperlinks. Even then it would probably be necessary to indicate at the top of the page that binding terms and conditions were set out below - otherwise a reader might not scroll down[7]. That makes for a fairly unattractive home page. The second is to include a prominent warning hyperlink to the conditions immediately adjacent to the mechanism by which the visitor dispatches his or her offer. The analogy here is to the ticket cases. The technique is probably effective but care is needed with the wording and placement of the warning. Reasonable notice of the conditions must be given. The third is the so-called "click wrap" technique. This involves the terms and conditions appearing in a mandatory dialogue box shortly before the visitor dispatches the offer. The appearance of the dialogue box disables further progress in the ordering process until the user has clicked on a button marked "I agree". A refinement of this technique is that the button will not become active until the visitor has scrolled through the conditions. The technique is

[6] Some of them are helpfully discussed on appeal in *Specht v. Netscape Communications Corp* 306 F 3d 17 (2000).

[7] Compare *Ticketmaster Corporation v Ticket.com Inc* 54 USPQ 2d 1344 (2000)

probably effective[8]. An additional advantage of it is that it facilitates proof of actual knowledge of the existence of terms and conditions.

Infants and foreigners

A major attraction of the Internet to merchants is that it enables them to trade with a huge number of customers at low cost. There is a corresponding disadvantage. It is very difficult to be selective about the customer. This can be a problem in relation to infants. The problem is not that the law will not enforce contracts against infants, except contracts for necessities. That is the law, but it is not a problem in practice, since merchants tend to be selling on the Internet, not buying, and they don't deliver until they are paid. Rather, the problem arises in relation to transactions with infants which are prohibited by statute: alcohol, tobacco, gambling and sex. Purveyors of such products will usually require the customer to certify as to age, but there is no way of verifying the accuracy of the certificate. Laws prohibiting such transactions often impose strict liability; but even if s 24 of the *Criminal Code* be available as a defence I doubt if a belief based on such a certificate would be held to be reasonable. A requirement for age to be checked at the point of delivery would probably make the business uneconomical and where delivery is effected electronically it would be impossible. I assume that, generally speaking, no-one issues credit cards to infants, and credit cards are the usual method of payment in such transactions. However, I doubt if that would be a sufficient defence for the supplier, since it is easy enough for an infant to supply the merchant with credit card details of a friend aged over 18. I suppose that merchants must simply run with the risk of prosecution.

Another potential difficulty for Internet traders is the inability to identify reliably the country of residence of their customers. This can be a problem when the transaction in question is embargoed in respect of certain countries by Australian law, but I suspect that it is not a major problem. It arises only when delivery of the product is effected electronically. While the merchant can check the IP address of the customer and can also identify the time zone set on the customer's computer, it is not difficult for these to be

8 Compare *Hotmail Corporation v Van Money Pie Inc* 47 USPQ 1020 (1998).

masked or changed. Potentially more troublesome is the situation that arises when the transaction is prohibited by the law of the customer's country or state. This is a problem only if the merchant is vulnerable to proceedings in that country or state and the enforcement authorities are active in respect of Internet trading. I have seen no sign that those conditions are met in this country.

Acceptance

Contracts are formed by the acceptance of an offer. An offer made electronically does not have to be accepted electronically unless it so specifies, although in the absence of any stated method of acceptance, electronic acceptance would usually be regarded as appropriate. Even if the merchant structures its web site so that it is the customer making the offer, problems may be expected if there are not standard terms defining the method and place of acceptance. There is no reason in principle why acceptance should not be automated, immediate, and communicated by the merchant's computer. However many, perhaps most merchants want to retain the right to accept or reject offers. Dell, the computer manufacturer, notifies acceptance by e-mail. Others specify their right to accept by conduct. Specifying a method of acceptance in the standard terms will be of particular importance where the merchant wishes to have each offer checked by a person before acceptance. This should always be done if the web site enables the customer to include non-standard terms in the offer. There is always a possibility that a customer will include such a term if the electronic dialogue by which the offer is created permits the insertion of free text - for example where there is a "Delivery instructions" or "Remarks" box available.

The problems likely to arise in litigation involving electronic acceptances are essentially the same as those arising when other methods of acceptance are used. I see no reason why existing doctrines should be unable to cope with them. Usually they will revolve around the identification of either the time or the place of acceptance.

Time of acceptance is important because it marks the moment when the contractual relationship comes into being. Until that time, the offer may be withdrawn, unless it specifies otherwise, ie is in effect an option. It may also be important where the merchant makes the offer, if there is an issue as to which of a number of acceptances is the first. A merchant's business system must be able to cope with such matters without incurring substantial losses, particularly where the product has a high unit value. However, the problems are from the legal point of view little different from those which arise in any mail order business.

Place of acceptance can be important because it determines the place where the contract is made. At common law this may affect the determination of the proper law of the contract, although usually in e-commerce one would expect to find a choice of law clause. More importantly, the place of the contract can affect the jurisdiction in which litigation may be conducted. Contracts made in Queensland, or to be performed in Queensland, may be the subject of litigation in the Supreme Court of Queensland, even if the merchant is in another country. Most countries assume a similar jurisdiction. This is convenient for the customer but not necessarily for the merchant. Any attempt to circumvent this jurisdiction by an express clause in the contract might be held invalid. However, it is possible to control the place of acceptance by specifying a method of acceptance which must be performed in a particular country.

In the absence of a provision to the contrary in the offer, acceptance must be communicated. Communication ordinarily occurs at the time when, and the place where the offeror receives the acceptance. As every law student knows, the great exception to this is the postal rule. It is now well-established that this rule does not apply to acceptances sent by fax or telex[9]. I would expect that by analogy a similar approach would be taken in respect of contracts accepted by instant communication via a web site. It is not so clear that the same rule would apply in respect of acceptances by e-mail. I know of no case on point, but it is very arguable that the uncertainties and delays associated with e-mail make the postal rule more appropriate in respect of it. It may be that the courts will evolve different rules for cases where the offeror has its own web site and continuous broadband connection from those where he or she receives e-mail only by

[9] *Brinkibon v Stahag Stahl und Stahlwarenhandelgesellschaft mbH* [1983] 2 AC 34.

occasionally dialling up an ISP. In resolving these questions, regard must be had to the *Electronic Transactions Act 1999* and its State equivalent; but I do not understand that legislation to solve the questions just discussed.

Statute of Frauds

An American writer has described social conditions in 17th-century England:

> "If there ever was a period in English history that paralleled the American West of the 19th century, it was England in the 17th century. Commerce was burgeoning and bargains were everywhere. Society was learning that those with money could obtain higher living standards - and making money was becoming a primary occupation. For many, life was ribald, if not downright wicked. A middle class was evolving and the arts were flourishing throughout the nation.
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> There was virtually no regulation of the rich mixture of financial interchange, property ownership, and agreements for every conceivable transaction from the bargains made at the back door of a bawdy house to butler services in Chelsea. For the tea being imported from distant ports to the horse carts being manufactured in the precursors of modern factories, virtually all bargains were made on the basis of a handshake and oral agreement. Imports of all manner of commodities across the channel and the oceans were sealed on the basis of verbal promises. Most people couldn't write."[10]

The legal response to this expansion of economic activity was the rise of the action of assumpsit, designed to enforce informal promises[11]. That in turn produced its own abuses. They were described by Hale CJ:

> "It is come to that pass now, that every thing is made an action on the case, and actions on the case are become one of the great grievances of the nation; for two men cannot talk together but one fellow or other, who stands in a corner, swears a promise and cause of action. These catching promises must not be encouraged."[12]

That was the problem which the *Statute of Frauds 1677* was designed to overcome.

As we all know that legislation was in due course copied in Queensland. Originally it covered cases of six types which were perceived to be problematic at the time of its

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10 Lloyd Rain: "The Statute of Frauds", *Purchasing Link*, November 2002.

11 D W Grieg and J L R Davis: *The Law of Contract* (1987), p 667.

12 *Buckridge v Shirley* (1671) Treby's Rep, Middle Temple MSS at p 651, cited in A W B Simpson, *A History of the Common Law of Contract,* (1975), p 603.

enactment. Changing social conditions and the perception that at times the statute was used as an instrument of fraud rather than as one to defeat it have seen four the six excluded from its operation. Two remain within the ambit of the current legislation[13]: guarantees and contracts for the sale or other disposition of land or any interest therein. The nature and importance of these contracts are such that is still thought appropriate that they should be evidenced in writing signed by or on behalf of the party whom it is sought to have bound.

The advent of e-commerce poses obvious difficulties in respect of contracts governed by the statute. They are however not insuperable. Under the *Acts Interpretation Act 1954*[14], " ‘writing’ includes any mode of representing or reproducing words in a visible form". That would seem to apply to an exchange of e-mails. The requirement for signature is more problematic. The same section defines "sign" to include "the attaching of a seal and the making of a mark". It is arguable that a person who types his name in an e-mail is making his or her mark[15]. It might also be argued that it would be sufficient to rely on s 14 of the *Electronic Transactions (Queensland) Act* 2001. This argument would be more difficult, given that s 14(c) seems to envisage the application of that section in circumstances where there exists a person to whom the signature is required to be given.

It is by no means certain that the courts would strive to achieve this result. The remaining provisions of the *Statute of Frauds* can be justified today on policy grounds quite different from those which led to their introduction. The New Jersey Law Reform Commission has reported:

> "In entitling this project, the Commission has deliberately avoided the use of the term ‘Statute of Frauds’ by way of underlining the fact that limiting opportunities for fraud is only one policy that may be served by imposing a writing requirement. The Commission identified two additional policy reasons that could support the imposition of a writing requirement in certain

13 *Property Law Act 1974*, s 59.
14 Section 36.
15 Compare *Shattuck v Klotzbach* 14 Mass L Rptr 360 (2001), Superior Court of Massachusetts.

> types of transactions: Protection of consumers, and protection of the interests of third parties in land transactions."[16]

One advantage of a requirement for writing is that it emphasises the seriousness of the occasion. Confronted by a printed contract, most people pause and think before signing. This contrasts with the readiness of e-mail users to click on "Send". There may be good reasons not to accept electronic documents as signed writings the purposes of the *Statute of Frauds*. I would be interested to hear the views of the audience.

Negotiable instruments

I have already referred to the widespread use of credit cards in web site transactions. In this context the use of the card is no different from its use in telephone transactions. Problems may arise in case of fraud or insolvency on the part of a party to the transaction but they are not problems unfamiliar to our law and I would not expect to see an impact on litigation. The same is true of other conventional methods of payment. There is however one method of payment which may evolve in the future which will have an impact. That is the electronic cheque.

Cheques are governed by the *Cheques Act 1986*. Two of the requirements in the definition of "cheque" are that the cheque be in writing and that it be signed. Under the Commonwealth *Acts Interpretation Act 1901* "*writing* includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form". I am not aware of any decision on the point, but it would seem that in this context, as in the context of the *Statute of Frauds*, an electronic document would satisfy that definition. The requirement for a signature is more problematic. The Commonwealth *Acts Interpretation Act 1901* has no definition of "sign". Some aspects of the requirement for bills of exchange to be signed were discussed by the Court of Appeal in *Commonwealth Bank of Australia v Muirhead*[17]. It is far from clear that a digital signature would answer the requirement. Cheques and bills of exchange are expressly excluded from the operation of the

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16 New Jersey Law Revision Commission, *Report and Recommendations Relating to the Statute of Frauds*, undated.

17 [1997] 1 Qd R 567.

Electronic Transactions Act 1999[18], so the signature provisions of that Act are of no assistance. Indeed, it is arguable that by excluding the application of that Act to the *Cheques Act 1986*, the regulations demonstrated a contrary intention.

Even if the signature problem could be overcome, there would be serious difficulties in the way of e-cheques. An important quality of a cheque is its negotiability. The payee must be able to transfer it to another person by endorsement or, if it be payable to bearer, by delivery. Once it has done so, it must no longer have the cheque itself. No doubt software could be devised which would enable both of those functions, but as far as I am aware, there is no way to prevent an e-cheque being copied. Unless the cheque is crossed "Not Negotiable" a holder in due course obtains a good title and can enforce it against the drawer regardless of any fraud by the payee or intervening holders. It is therefore vital that copying be extremely difficult or impossible. Hardware and software currently in business and private use do not provide the level of security needed to prevent such copying. It seems that the cost of providing it would be very high.

The banks have argued against the introduction of e-cheques on the basis that they would create undue administrative complexity and be excessively vulnerable to fraud. Demand for e-cheques seems to come from trading houses and others involved in business to business transactions, although there have been claims that an e-cheque system would provide consumers with faster processing, lower costs and reduced fraud[19]. Presumably, businesses see the system as creating an additional pool of credit, useful by reason of the negotiability of the instrument. It could also impede tax investigators. Otherwise, it is difficult to understand what benefits are seen in it. A cheque is an order to a financial institution to pay a certain sum of money on demand. If it is intended to be presented by the payee through its bank, its function would seem to be adequately served in the electronic world by a direct instruction to the drawer's bank to credit the payee's account at its bank. It is true that this system would not work where the payee did not have a bank account and wanted to exchange the cheque for cash at the drawer's bank. However

18 *Electronic Transactions Regulations 2000*, sched 1.

19 Alvin C Harrell, "Electronic Checks", (2001) 55 *Consumer Fin LQ Rep* 283 at p 286.

I have some difficulty seeing how such a payee could use an e-cheque in this way. Would he perhaps turn up at the bank with the cheque on a floppy disk? I would be interested in your views on the question of electronic cheques.

Similar problems to those already discussed arise in relation to electronic bills of lading. Various attempts to develop a system for such bills have been made over the past 15 years, but none has been successful. The best attempt was a set of rules developed by the Comité Maritime Internationale for incorporation into the contract of carriage. They were given statutory recognition in a number of countries[20] but failed due to opposition from shipowners and lukewarm support (to put at its highest) from major banks. The banks of also developed a hybrid system called Bolero, based on a central registry controlled by the banks and operating as a trusted third party. This has attracted some support, but it cannot really replace bills of lading.

Passing off and misrepresentation

Domain name misappropriation or "cyber squatting" is a significant and increasing problem. In this context I use the word "misappropriation" deliberately, notwithstanding the fact that in the usual case the cyber squatter has validly procured his registration in respect of the misappropriated name by the appropriate domain name authority. Indeed it is the very fact of his registration that constitutes the actus reus of the misappropriation. By procuring registration of a name identical or misleadingly similar to the name of another, the squatter deliberately seeks to confuse users of the Internet or least to create a situation of potential confusion. Often the squatter makes no use of the registered name, or no substantial use. His purpose is to force the person whose name has been appropriated to buy the registration from him. Until recently this form of extortion was permitted by the self appointed regulators of the Internet. In many cases it was facilitated by lax policies on the part of certain national domain name administrators. Because there was often no breach of the law involved and it was difficult to identify a cunning cyber squatter, few attempts were made to obtain relief from this practice in the courts.

That is now changing. An international arbitration organisation has been established to rule on conflicting claims for domain names. Registration requirements have been tightened in many countries, particularly in respect of registering names of known businesses or business persons. Squatters can be thrown off the register. I expect you will hear more of this during this afternoon's session on domain name disputes so I shall not elaborate on it. What I would like to do is say something of the relief available by litigation in our courts.

Two causes of action are potentially available to the injured party, though neither will be available in all, or even most, situations. The first is an action for passing off. That may be available if the defendant is carrying on business and there is the potential for confusion between its business and that of the plaintiff. It does not matter if the plaintiff itself does not operate on the Internet or run a web site. The second cause of action is under the *Trade Practices Act 1974*, ss 52 and 53(d). The jurisdictional requirements for the invocation of that act are well known. A recent example of the granting of an injunction requiring a defendant to do everything necessary to bring about the deregistration of a misleading domain name is *The Architects (Australia) Pty Ltd v Witty Consultants Pty Ltd*[21]. (Incidentally it is worth noting that this action went from commencement through trial to judgment in about three months.)

In that case the domain name in question issued out of the Australian registry. A more awkward problem arises when a United States name is used. The US registry does not require the registered owner of a name to be resident in that country, and it has in the past manifested little interest in verifying an applicant's entitlement to a proposed name. In *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd*[22], the defendants (or some of them) had procured the registration of the domain name www.purple-plates.com. It was found that the company had contravened s 52 in relation to products which it offered for sale. The defendants were ordered to cause the name to

20 In Australia see *Carriage of Goods by Sea Act 1991*, s 7(2) and sched 1(a).
21 [2002] QSC 139.
22 [2002] FCA 1487.

be transferred to the Commission, which intended to publish a corrective statement on the web site.

Two points of practical interest emerge from the case. First, it became apparent that one of the defendants, who was the registered administrative contact in respect of the domain name, had caused the registrar to disssociate the IP address from the domain name. This meant that anyone attempting to visit the address was met with the message "The required URL could not be retrieved". To achieve publication of a corrective statement on the web site it was first necessary for a new host computer to be registered. Simply transferring the domain name would not have been enough. Second, there could have been a problem caused by the failure of the defendant to obey court orders. The domain name registrar was Verisign Inc, an American company which had no presence in Australia and which may not have been amenable to Australian jurisdiction. However that company informed the Commission that it would recognise an order from the Federal Court that the domain name be transferred to the Commission so long as it, Verisign, was not named as a party in the order.

Trespass and nuisance

As far as I am aware there has been little application of existing tort law concepts to Internet-related conduct in Australia. There is however some potential for this to happen. That is evident from the course which litigation has taken in the United States. The best known case (and the one which gives an indication of whether law is going) is the decision in *eBay Inc v Bidders Edge Inc*[23]. The plaintiff ran a very large Internet-based auction site where members of the public could buy and sell property. The defendant operated an auction aggregation site where a number of auctions, including the plaintiff's, were linked, giving users the capacity to search them all at once rather than individually. It did not itself run auctions. It obtained information on its site by using a web crawler which accessed the plaintiff's site approximately 100,000 times a day. To put in perspective, the plaintiff added over 400,000 new items to its site every day. Such activity was explicitly prohibited by the plaintiff, as the defendant well knew. The

[23] 100 F Supp 2d 1058 (2000).

plaintiff established blocks on 169 IP addresses it believed the defendant was using but the defendant evaded them by using proxy servers. When the plaintiff's demands that the defendant desist were ignored it sought an interlocutory injunction. The court found that the defendant's activities consumed at least a portion of the plaintiff's bandwidth and server capacity and that if it were allowed to continue unchecked, other auction aggregators would be encouraged to engage in similar recursive searching of the plaintiff's system. As a result the plaintiff would suffer irreparable harm from reduced system performance, system unavailability or data losses. There would also be loss of customer goodwill.

In these circumstances the court found that the defendant had committed trespass to chattels. It held that although the site was open to the public the plaintiff was entitled to refuse access to web crawlers, likening the situation to that where the owner of a "bricks and mortar" auction house refused entry to individuals who had no intention of bidding. Holding that the quality or value of personal property may be diminished even though it is not physically harmed, the court granted the injunction sought. That decision has been followed at first instance in *Register.com Inc v Verio Inc*[24].

Although these cases have been subjected to some criticism[25], it seems to me that they are sound in principle. If that is so we may expect to see more like them. They point to a possible means of attacking the originators of spam, at least those who are known and who continue to carry on their activities after being told to stop. That will not solve the spam problem but it might do something to reduce it.

To return to my theme, it is interesting to observe the use of one of the oldest torts in this new context. Again it seems to me that existing legal concepts will be adequate to cope with the new factual situations thrown up by the development of the Internet[26]. I invite

24 126 F Supp 2d 238 (2000). The decision is said to be under appeal – see note 5.

25 ABA Journal, March 2003, p 18.

26 An outcome considered by some commentators to be inelegant: see L Gamertsfelder, R McMillan, A Handelsmann and P Hourigan: *E-Security* (2002), p 22.

you to consider how the torts of nuisance and deceit might be applied in the context of activities on the net.

B THE LAW RELATING TO THE LITIGATION PROCESS

I turn now from the law being applied by the courts to the law relating to the litigation process. Under this heading I shall refer to two topics: jurisdiction and the associated doctrine of *forum non conveniens*, and evidence.

Jurisdiction and *forum non conveniens*

Brian Fitzgerald will be speaking this afternoon about the decision of the High Court in *Dow Jones & Co Inc v Gutnick*[27]. It would be extremely discourteous of me to pre-empt his address. Nonetheless I do not think I can leave my topic without some reference to that case. This is after all the keynote address and "keynote", we're told by the Macquarie Dictionary, means "pertaining to or defining the main interest of a conference". *Dow Jones* is also an important decision. It was, according to news reports, the first decision on the applicability of defamation law to Internet publications by a final court of appeal anywhere in the world. But I shall endeavour to restrain my enthusiasm.

It might be argued that the decision falls within the theme of today's conference at best peripherally. There may not be many commercial organisations outside the press and television which publish on the Internet; or at least which publish potentially defamatory material, and to most media organisations the Internet is almost an afterthought. However one can understand their concern; they would be sufficiently wealthy to be worth suing. The list of interveners in *Dow Jones* makes interesting reading: Amazon.com, Inc, Associated Press, Association of Alternative Newsweeklies, BloombergLP, Cable News Network LP, LLLP, Guardian Newspapers Ltd, Knight Ridder, Inc, Media/Professional Insurance, The New York Times Company, News Limited, Online News Association, Reuters Group PLC, Time Inc, Tribune Company,

[27] (2002) 77 ALJR 255.

The Washington Post Company, Yahoo! Inc, Internet Industry Association, and John Fairfax Holdings Ltd.

It must be said at the outset that the result of the case was, on the law in Australia as it was understood when the case began, inevitable. The Victorian Court of Appeal thought so little of the defendant's arguments that it refused leave to appeal from the decision at first instance. When the Court of Appeal's decision was challenged in the High Court the principal argument advanced on behalf of the appellant was that as a matter of policy it was desirable that there be a single law governing the conduct of a person who chooses to make material available on the World Wide Web. That law, it was submitted, ought to be the law of the place where the publisher maintains its web servers. The court was urged to adopt the "single publication rule" applied in defamation law in the United States. Given the domination of the Internet by United States-based publishers, this was an overtly parochial argument. Moreover when one takes into account the differences in policy which underlie the law of defamation between Australia and United States, it was an overtly self-interested argument. It was dealt with politely in the majority judgment, but there is some force in the respondent's argument, accepted by Callinan J, that what the appellant sought to do was to impose upon Australian residents an American legal hegemony in relation to Internet publications[28]. The Court had no difficulty in upholding the existing law of defamation in this country.

Once that argument was rejected the issue became one of *forum non conveniens*. The dominant factor in resolving that issue was the determination of the country the law of which was to be applied. The court held that the place where a person downloads material from the Internet is the place where the damage to reputation may be done. Ordinarily that will be the place where the tort of defamation is committed. At first instance the plaintiff had undertaken to confine his claim to the damage he alleged was caused to his reputation in Victoria as a consequence of the publication that occurred in that state. That made it almost impossible to argue for the existence of any other discretionary factors outweighing the dominant one referred to.

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28 (2002) 77 ALJR at p 291.

The principal judgment convincingly dismissed the argument that a finding adverse to Dow Jones would force every Internet publisher to consider the defamation laws of every country from Afghanistan to Zimbabwe in respect of every article it published. It pointed out that claims for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. It also observed that identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort. Finally, with gentle irony, it observed that plaintiffs were unlikely to sue for defamation in a forum whose judgment would not be enforced in the place where the defendant has assets. The cases cited[29] left no doubt which place the judges had in mind.

My last point about the decision will by now not surprise you: it demonstrates that the problems thrown up by the Internet in this area are adequately dealt with by our existing law. It is true that better solutions could be devised, but, as Kirby J pointed out, only by international agreement[30]. I invite you to consider the chances that the United States would agree to any solution acceptable to the rest of the world.

Evidence

The advent of computers has without doubt necessitated some changes to the law of evidence. Most of these changes have been to overcome the difficulties created by an excessively rigid application of the rule against hearsay. Computerised business records are now admitted in our courts as a matter of course, in both civil and criminal cases. Most of the changes have been statutory and I will not bore you with the catalogue of them. You will find them yourselves easily enough if you look at the *Evidence Act 1977.*

Of more interest is the weight to be given to evidence of sophisticated processes carried out by computers under software control. With increasing frequency we are encountering

[29] *Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 145 F Supp 2d 1168 at 1178 (ND Cal 2001) and 169 F Supp 2d 1181 (ND Cal 2001); *Matusevitch v Telnikoff* 877 F Supp 1 (DDC 1995); *Bachchan v India Abroad Publications Inc* 585 NYS 2d 661 (Sup Ct NY 1992).

[30] (2002) 77 ALJR at p 285.

cases where parties use computers to demonstrate the effects of hypothetical scenarios. To give some examples: I have seen evidence led based on the output of computer modelling in three dimensions of water flows across flood plains; calculations based on projections of income earned by a damages award managed by one or other of two trustee companies for *n* years into the future; and calculations of the impact on the stock market price which the sudden sale of 800,000 options in a lightly traded public company would have had. In all cases the output was heavily dependent on the human input. In itself that is not a problem. The computer is not much different from an expert witness giving an opinion based on certain assumptions. The assumptions always have to be proved. Unfortunately it is not always evident where the assumptions are being made. It is not simply a matter of examining the data which the witness (or more frequently employees of the witness) fed into the computer. Sometimes it is necessary to examine the assumptions built into the software used to process that data. The flood plain software might make assumptions about the average coefficient of friction in soils found within 50 m of a river bank based on experience derived solely in South Africa, the home of the software writer. The income-prediction software might make assumptions about the relationship between bond rates and the Australian rate of inflation. The stock market software might make assumptions about the behaviour of options based on United States statistics. These assumptions might or might not be correct, but if they are built into the software they will seldom be exposed for scrutiny. They may easily be unknown to the expert who is using the software, as few writers of advanced programs make their source code or its logic readily available. Moreover the problem need not be restricted to programs used as part of the forensic process.

The expansion of e-commerce will see the courts increasingly confronted by such scenarios during litigation. It will be necessary for the lawyers involved in that process and the judiciary to develop a level of awareness of the problems which can arise.

Finally, a word about the use of computers to handle evidence during a trial - the so-called e-trial. The concept is wonderful. In a large case, which in practice means a commercial case, significant costs can be saved in relation to document handling, and documents can be made much more readily accessible to the court and the parties. But it's not here yet, not properly. If you don't believe me wander up to the Banco Court and watch the *Emanuel* trial for a while. You can't blame the failure of the barristers and the judge to use the system on them, at least not completely. There are numerous reasons why the two e-trials so far attempted by the Court have not produced high levels of satisfaction with the technology amongst the participants. I will not try to list them now as I have not analysed them in detail. Also it is early days. We are learning as we go along and someone has to play the role of the guinea pig.

Conclusion

In my view e-commerce has not had a large impact on litigation and it probably will not do so except perhaps in process-related areas. The problems which it throws up have been new manifestations of old conundrums. That raises the question: is there such a thing as our theme today, Electronic Commerce Law? At the risk of incurring the wrath of Brian and Anne Fitzgerald, I suggest there is not. I shall not enlarge upon that thesis now. It was the theme of an article by Joseph H Sommer more than two years ago[31]. Nothing much has changed. But you are entitled to ask: if there is no such thing, what have you been talking about for the last hour? I think it is time I sat down.

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[31] "Against Cyberlaw", (2000) 15 Berkeley Tech L J 1145.