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Abstract

This short article discusses a number of matters which arise in the assessment of damages under the Trade Practices Act that are of current importance. Authority has prescribed general guidelines for this assessment. Recent cases, discussed below, make clear that many issues are still at large. This article attempts to provide both a focus on, and a point du' appui for further discussion of, that assessment.

Keywords

Trade Practices Act, loss, damage

'LOSS OR DAMAGE' UNDER SECTION 82 OF THE TRADE PRACTICES ACT



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This short article discusses a number of matters which arise in the assessment of damages under the Trade Practices Act that are of current importance. Authority has prescribed general guidelines for this assessment. Recent cases, discussed below, make clear that many issues are still at large. This article attempts to provide both a focus on, and a point du'appui for further discussion of, that assessment.

Sub-section 82(1) of the Commonwealth Trade Practices Act¹ provides that a person who suffers loss or damage² by an act of another done in contravention of either the trade practices or the consumer protection part of the Act³ may recover the amount of that 'loss or damage'. As Donald and Heydon presciently remarked in 1978:⁴ 'Section 82 confers the right of recovery in simple terms, but its application will not be simple.' The growing body of authority which attempts to elucidate the section confirms the accuracy of that forecast.

The High and Federal Courts have suggested various approaches on the proper method of quantifying the amount recoverable by an aggrieved applicant pursuant to s 82. This article will examine these decisions and

1 Section 82 provides: (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention.

(2) An action under sub-section (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

(3) Sub-section (1) does not apply in relation to conduct done in contravention of Section 52A.

2 Section 4K of the Act provides: In this Act—(a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and

(b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

3 It is necessary for reasons which will appear to distinguish the cases which arise under Pt IV and Pt V. In *City Mutual Life Assurance Society Ltd v Gates* (1983) 5 TPR 1, 4 the Full Federal Court noted that: '....there has not been a universally applicable definitive statement of the appropriate measure of damages recoverable in connection with the breach of a provision of Pt IV. Probably it is better that some flexibility is maintained.' On Pt IV damages see *Cool and Sons Pty Ltd v O'Brien Glass Industries* (1980) 35 ALR 445; *Hubbards Pty Ltd v Simpson Ltd* (1982) 44 ALR 695.

4 Donald and Heydon, *Trade Practices Law* (1978) Vol 2, 827.

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the reasoning which underlies them. Because of the breadth and complexity of the topic, and its relative novelty, the approach adopted in this article will be necessarily synoptic. It is intended only to sketch the boundaries of potential heads of recovery, since the inchoate nature of many of the problems in the area makes any thematic treatment difficult.

The article will also consider briefly a number of complex questions which may arise in any discussion of the assessment of loss and damage recoverable under the Act. Such matters include the operation of the new cross-vesting legislation,⁵ the application of the Commonwealth Judiciary Act⁶ and the relevance of the accrued jurisdiction of the Federal Court to a claim for loss and damage.⁷

Some questions

- 1 What, as a matter of statutory interpretation, does the phrase 'loss or damage' mean? Is the meaning in s 82 different from that in other sections of the Act where the same phrase occurs?
- 2 On what analogy, contract, tort or otherwise, should the Federal Court award damages under the Act?
- 3 Must the conduct of the defendant which contravenes the Act *cause* the loss or damage? If so, what degree of causal nexus is necessary to entitle the applicant to relief?
- 4 Do the usual concepts of remoteness and mitigation apply?
- 5 How does the range of additional remedies available under s 87 interrelate with the recovery of damages under s 82?
- 6 What is the relevant limitation period for prosecuting a claim for the recovery of loss or damage sustained through a contravention of the Act?

'Loss or damage' or 'damages'?

Traditionally, the law of tort has distinguished between 'damage' and 'damages'. It is a question whether this well-established distinction is of any relevance in the interpretation of s 82, which is headed, 'Actions for damages'.

A tentative conclusion would be that the draftsman did not intend to rely upon the usual meaning of the terms at common law to control the interpretation of the section. Of course, "Loss" is a generic and relative term; it is not a word of limited, hard and fast meaning.⁸ Conventional

5 s 86A permitting the transfer of claims from Federal to the State Courts; see, for example, *Edwins v Buderim Imports Pty Ltd* (1987) 76 ALR 157; *Kinna v National Australia Bank Ltd* (1988) 82 ALR 410.

6 In particular, s 79 directing a Federal Court to look to the relevant State legislation in considering claims of a procedural nature as, for example, for interest: *Milner v Delita Pty Ltd* (1985) 61 ALR 557 and s 51A of the Federal Court Act which commenced on 22 November 1984.

7 As, for instance, in *Musca v Astle Corporation Pty Ltd* (1987) 80 ALR 251 where the accrued jurisdiction allowed exemplary damages to be awarded for an action for deceit which arose on the same facts as under the s 82 claim. Such damages could not be recovered under s 82 because they do not *compensate* for loss nor under s 87 since 'the orders that may be made under that section are essentially compensatory in nature': per French J at 262.

8 *Black's Law Dictionary* 1094.

legal terminology distinguishes between the concepts of 'damage' and 'damages'. 'Damage' is to be distinguished from its plural "damages"—which means a compensation in money for a loss or damage'.⁹ 'Damage is where one person has done a wrongful act for which the person injured may obtain compensation in an action'.¹⁰ As Street has noted in *Foundations of Legal Liability*, the technical term for that element which is inseparably associated with a right of action is injury (*injuria*). Where the injury is absent no action lies. The term 'damage' is in one way broader and in one way narrower than injury. It is broader in that it includes certain harms or detriments which do not amount to injury, and narrower in that there are harms which amount to legal injury though actual damage is not present. 'Damages', conceived as a monetary equivalent of the various elements of harm which are present in a given case, is an inseparable incident of every action. '*Legal theory is evidently much embarrassed here by the fact that the 'damage' not only has a fluctuating and uncertain sense in the singular form, but has in the plural a meaning entirely different from any that attaches to it in the singular.*'¹¹

It appears unlikely that the draftsman was embarrassed by any such subtlety. He appears to have intended to use the terms 'damages' and 'damage' interchangeably. It is, for instance, odd to speak of the 'amount' of 'damage' as opposed to the 'quantum' of 'damages'. The drafting provokes the question whether the mere suffering of legal harm, ie damage *stricto sensu*, will support an action under s 82. The plaintiff will have suffered 'damage' but will he be bringing an action for damages? He will, *ex hypothesi*, have suffered no 'loss'. Since any person, even one not misled or deceived in terms of s 52, may seek an injunction under s 80 of the Act, it is arguable as a matter of statutory construction that a claim would also lie under s 82 for the merely nominal loss and damage which has been suffered by such a plaintiff.

In considering whether mere disappointment and distress is compensable under s 82 it is useful to consider the recent decision in *Baxter v British Airways*.¹² There the applicants had purchased an around-the-world ticket from British Airways which was advertised as making provision for a flight to Tel Aviv. Subsequently, it became clear that it was not possible to arrange an itinerary which included Tel Aviv without 'back-tracking' on the route which was not permitted under the terms of the ticket. The applicants accordingly purchased separate tickets to Tel Aviv on an Israeli carrier which they subsequently cancelled after that carrier experienced terrorist attack.

The applicants sought damage for, *inter alia*, the distress and disappointment which they suffered when it became clear that they could not travel to Tel Aviv on the ticket as advertised.¹³

9 Ibid 466.

10 *Jowitt's Law Dictionary* (2nd edn) 542. As *McGregor on Damages* (14th edn) 7-8 comments: 'Before damages can be recovered in an action there must be a wrong committed, whether the wrong be a tort or a breach of contract. Even if a loss has occurred, no damages can be awarded in the absence of a wrong; it is *damnum sine injuria*.... At the other end of the scale from *damnum sine injuria* is *injuria sine damno*. Even if no loss has been incurred, nominal damages will be awarded if a wrong has been committed.'

11 Street, *Foundations of Legal Liability* (1906) Vol III (emphasis supplied).

12 (1988) 82 ALR 298 per Burchett J.

13 Ibid 305. The period of disappointment was necessarily brief since they were advised of the inability within a short time of seeing the misleading brochure in which the incorrect statements were contained.

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In denying relief for this aspect, Burchett J held that, although they did suffer disappointment, he was 'quite unable to see ... that any damage was sustained.' This decision strongly suggests that more than mere legal damage must be demonstrated. Damages may be recovered if there has been actual loss of enjoyment or distress and inconvenience which may be quantified. In *Steiner v Magic Carpet Tours Pty Ltd*¹⁴ Wilcox J had held that such distress was compensable under s 82. In so holding his Honour would appear merely to be following the trend at common law exemplified in cases such as *Jackson v Horizon Holidays*¹⁵ and *Jarvis v Swan Tours*.¹⁶

The view that s 82 does not intend to distinguish between 'damage' and 'damages' is strengthened by s 85 (6). That section permits the court to relieve a person 'either wholly or partly from liability to any ... damages' in certain circumstances. It is intended to exculpate a breach of Pt IV. Clearly, the draftsman felt that a court acting pursuant to s 82 awards 'damages' in doing so.

The phrase appears in other sections of the Act. For instance, s 45D(1) (a) speaks of 'substantial loss or damage', suggesting perhaps the existence of some de minimis category, and, inferentially, strengthening the argument that nominal damages may be recovered.

The analogy: tort or contract or a 'statutory measure'?

Most cases in which a claim for damages arises occur in the context of a breach of s 52 of the Trade Practices Act, which proscribes misleading or deceptive conduct. When considering the damages which might be awarded under Pt V of the Act, the Federal Court had a number of models which it could adapt and apply. It could, for instance, have used a contractual measure of damages in respect of a breach of s 52, ie treat the misleading or deceptive conduct as equivalent to a promise that a certain thing would occur and award the aggrieved applicant damages to put her in the same situation as she would have enjoyed had the representation been true. Alternatively, a tortious measure, by analogy with fraud or misrepresentation in tort, would put the applicant back in the same position as if the misleading or deceptive conduct had not occurred. Similarly, since the statutory provision in itself provided for recovery, it would have been possible to treat the issue as entirely at large and award 'statutory damages', building up the case law entirely independent of common law analogies.¹⁷

The early cases which discussed the operation of s 82 wavered between a tortious and a contractual analogy in assessing the relief available under the section. The difference between the two regimes is put most eloquently in *Gates v City Mutual Life Assurance Society Ltd*:¹⁸

Two established measures of damages, those applicable in contract and tort respectively, compete for acceptance. In contract, damages are awarded with

14 (1984) ATPR 45-639, 45-642.

15 (1975) 3 All ER 92.

16 (1972) QB 233.

17 Eg in *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 47 ALR 547, one of the earliest cases, Fitzgerald J (at 565) noted that the assessment is not to be confined to common law tests and that the Court must assess the damages to which the applicant is entitled under the Act.

18 (1986) 63 ALR 600 per Mason, Wilson and Dawson JJ.

the object of placing the plaintiff in the position in which he would have been had the contract been performed—he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss).

In *Gates* the appellant had been induced by the statements of an insurance salesman to enter an insurance policy which, he erroneously believed, entitled him to payment if he suffered an injury which prevented him from carrying out his usual occupation as a self-employed builder. In fact, he was only entitled to payment under the policy if he suffered an injury which effectively prevented him from carrying out any gainful occupation, profession or employment.

An expectation measure of damages would have given him the difference between the payment as he believed it would be and as it actually was. In the event, however, the High Court preferred to apply a tortious analogy to s 82.¹⁹ As a result, the appellant recovered only the difference in the premium payable for the total disability policy and the policy which in fact he obtained.²⁰ The appellant would have been entitled, under the tortious measure, to any consequential losses which he could demonstrate. On the evidence, however, he was unable to show that he would have taken out a different policy conferring the benefits foregone if the representations had not been made to him.²¹ The Court recognised the apparent injustice of denying any expectation loss but concluded that authority required such loss to be denied.²²

It does not follow from *Gates* that the measure of damages recoverable by a plaintiff will always be lower when a tortious analogy is applied. Suppose, for example, that the plaintiff would have made a good bargain if the representation made by the defendant had been true; eg the plaintiff has bought something for \$100 which would have been worth \$150 if the representation had been true, but which is actually worth only \$90. In tort, the plaintiff can recover \$10 and in contract \$60. Suppose, however, that the plaintiff would have made a bad bargain even if the representation were true. For example, he has bought something for \$100 which would have been worth \$50 if the representation had been true but is in fact worth only \$10. Here, applying a tortious analogy, the plaintiff can recover \$90 but in contract only \$40.

In *Gates*, then, the majority concluded that the tortious measure would be applicable 'in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements.'²³

Recent authority confirms the use of the tortious measure of damages. For example, in *Finucane v New South Wales Egg Corporation*²⁴ Lockhart

19 Following earlier Federal Court decisions: *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79, 88; *Mister Figgins v Centrepoint* (1981) 36 ALR 23, 59; *Brown v Southport Motors Pty Ltd* (1982) 43 ALR 183, 186.

20 At first instance, Ellicott J had managed to divine a collateral contract between the parties which gave the appellant his expectation loss as well, even though the oral contract relied on was inconsistent with the written contract: *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133; *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507.

21 See *Potts v Miller* (1940) 64 CLR 282, 297, 298; *Doyle v Olby (Ironmongers) Ltd* (1969) 2 QB 158; *Gould v Vaggelas* (1984) 56 ALR 31, 37.

22 *Gates* (1985) 63 ALR 600, 609 per Mason, Wilson and Dawson JJ.

23 *Ibid* 609.

24 (1988) 80 ALR 486.

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J held that 'the relevant question for the court in assessing damages is to determine how much worse off the applicant is as a result of his entering the transaction in reliance upon the misleading or deceptive conduct of the respondent, by comparison with his situation if the transaction had not taken place.' Similarly, in *Roymancorp (Australasia) Pty Ltd v Sau Wai Lau*²⁵ the full Federal Court²⁶ held that the applicant/respondent was entitled to 'recover a sum representing the prejudice or disadvantage he has suffered in consequence of altering his position under the inducement of the misrepresentation . . .'.²⁷

This general approach is, however, subject to the gloss suggested by certain cases which are wider in their approach and appear to adopt the independent 'statutory' test articulated in earlier cases. For example, in *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd*²⁸ Gummow J noted that the High Court in *Gates* had not made a 'definitive choice' between contract and tort as the appropriate measure of damages. His Honour observed:

Tort and contract today are separated by rather less than clear bright lines. This is true both of acts, statements and omissions preceding entry into contract and of the standard required in performance of contractual obligations.²⁹

Although the High Court in *Gates* treated tort and contract as exhausting the gamut of analogies available to it, this analysis failed to take into account the equitable relief which is available to enforce the performance of a promise.³⁰ As His Honour pointed out, it will not be sufficient to rely upon common law analogies where the Trade Practices Act 'evinces an intention to supplement the common law or, further, to travel into new fields.'³¹

Similarly, in *AMIEU v Mudginberri*³² the full Federal Court held that the assessment of damages was to be controlled by principles applying to the law of torts, 'or at least principles closely analogous thereto . . .'. While agreeing with *Gates*, the Court pointed out that 'what must ultimately guide any solution are the words of s 82(1) . . . with due regard for the nature of the conduct relied upon.'

In that case, the Court had to assess the damages payable by a recalcitrant union which had engaged in conduct in contravention of s 45 D of the Act over a long period of time. In such a case, unlike perhaps the usual s 52 action, the court is not concerned with 'loss of profit under any particular contract or contracts but with the measure of damage due to the disruption of a business'.³³

In such a case, the Court in assessing the damages is looking not to the loss which flows from any one transaction but from the loss which has accrued to the business through not making general profits over an extended period of time.³⁴ A number of cases have supported the view

25 (1987) 77 ALR 74.

26 Neaves, Beaumont and Gummow JJ.

27 *Ibid* 77.

28 (1987) 75 ALR 271, 281.

29 *Ibid*.

30 Per Gummow J at 284.

31 *Ibid* 280.

32 (1987) 74 ALR 7, 12.

33 *Ibid*.

34 *Ibid*. The Court had regard to statistical information and budgetary estimates to assess the measure of damages.

that loss which arises consequentially from the defendant's misleading or deceptive conduct may also be recovered by a plaintiff. For example, recovery has been allowed for loss arising from other contracts which were entered by a plaintiff as a natural consequence of the entry into the first contract on the basis of the deception.³⁵ Similarly, a plaintiff is not required to sell or dispose of a business which he had been importunately induced to buy merely because it trades at an initial loss. The loss flowing from the breach of the Act does not end as soon as the veil is lifted from the plaintiff's eyes. 'He may reasonably take the view that, rather than sell straight away at a considerable loss, his interests are better served by holding on in the hope of an improvement.'³⁶ It may often happen that the Court, in deciding the amount of damages recoverable, is obliged 'to take a broad view of the assessment of damages, which are not always capable of precise calculation.'³⁷

In *Bateman v Slatyer*³⁸ Burchett J made it clear that the applicants were not obliged to cease trading as soon as the unprofitable nature of the business which they had been induced to take under franchise became apparent. He held that 'the applicants should not be regarded as unreasonable in persisting for quite a substantial period in an attempt to trade their way out of trouble.'³⁹

It follows that, as the Full Court observed in *Enzed Holdings Ltd v Wynthea Pty Ltd*,⁴⁰ the trial court must do its best to estimate accurately the loss and damage which has been suffered by the applicant, even if this requires a degree of speculation and guess-work on the part of the Court.

Causation under s 82

Whether a plaintiff must demonstrate that the defendant's conduct caused the damage or loss of which he complains may be shortly answered. Although the section is less explicit than others, it is clear on the authorities that because the loss or damage must arise 'by' the conduct of another person a causal requirement is imported into the Act and is a prerequisite to recovery. Section 82, unlike other sections of the Act, is not explicit in requiring a causal link between the act of the defendant and the damage which accrues to the plaintiff.

As Fox J observed in *Brown v Jam Factory*: 'The sub-section does not refer to damage suffered "by reason of" the conduct (cf ss 74B and 74F) or "caused by" the conduct of another person.' In *Brown's* case, Fox J

35 *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 69 ALR 11.

36 *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302, 313 per Pincus J; *Corbridge v Bakery Fun Factory Shop Pty Ltd* (1984) 6 ATPR 45, 677,690 per Woodward J.

37 Per Burchett J in *Bateman v Slatyer* (1987) ALR 553, 565 citing *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79; *Yorke v Ross Lucas Pty Ltd* (1982) 45 ALR 299; *Chippendale Printing Co Pty Ltd v Spunaline Pty Ltd* (1985) 7 ATPR 47, 137; *A J Thompson Pty Ltd v KLK Manufacturing Pty Ltd* (1986) ATPR 47, 875; *Neilsen v Hempston Holdings Pty Ltd*, above n 25; *Remedios v Kentucky Homes Pty Ltd* (Pincus J, unreported).

38 (1986) 71 ALR 553, 567-568.

39 *Ibid.* His Honour considered the following factors relevant: first, there was little else that the applicants could do in the circumstances. The lease which they had taken over had a covenant restricting other use of the premises for five years. They had mortgaged their home to provide finance. They were encouraged to continue trading by the respondents.

40 (1984) 57 ALR 167, 183.

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attributed this lack of explicitness to the 'number and diversity of the provisions to which the section relates, and perhaps to the width of s 52'.

If, then, the conduct of the defendant does not cause 'loss or damage' to the applicant, no action will lie. In *Leo v Brambles Holdings Ltd*, for example, the plaintiffs had contracted with the defendant for the latter to move a front-end loader from one spot to another. To do so, a police permit was required. An employee of the defendant, in completing the application form for the permit, understated the height of the load. Subsequently, the load was damaged when it was carried under a bridge which was too low for it.

The plaintiffs alleged that the defendant had breached s 52 of the Act by incorrectly filling in the application form. In dismissing the action, Fitzgerald J held that the conduct of the defendant's employee in incorrectly filling in the form was not the cause of the loss. Rather, it was the negligence of the defendant which had caused the damage.

As Ellicott J pointed out in *Smolgonov v O'Brien*, it is not necessary for recovery under s 82 that the conduct be the sole cause of the loss: 'If it can be seen, in a material sense, to be part of the cause, that is sufficient for an applicant to claim loss or damage suffered by conduct contravening Pt V.'

The question of causation is intrinsically connected with the characterisation of the 'wrong' which s 82 is seeking to redress. A different standard of remoteness may be applicable depending on whether the court uses the analogy of contract, tort or strict liability to prescribe the parameters of recoverable loss.

As Donald and Heydon point out:

The statutory wrongs created by the Act are various. Some are wrongs of intention or purpose: monopolisation; secondary boycotts; exclusionary provisions: some of the offences in Pt V, Division 1: ss 54, 56 and 58. Some are wrongs of strict liability such as the offences created by s 53, but these are criminal offences. Other are mixed wrongs; for example, s 45 (2) (a) (ii) may be breached by conduct having the purpose or effect of substantially lessening competition. The same is true of s 47.

It may be difficult to differentiate between the need for varying standards of causation in relation to this pot-pourri of 'wrongs'. In an action under s 47 for resale price maintenance, *Hubbards v Simpson*, Lockhart J said: 'Although the section does not in terms require causal connection between the conduct constituting the contravention and the loss or damage, I agree ... that there must be some causal connection between the two.'⁴¹

The question of causation has recently been the subject of a detailed discussion by Gummow J in *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd*. The issue arose in the context of an application to strike out a statement of claim on the ground that it failed to disclose a cause of action. As His Honour pointed out:

It is the suffering of loss or damage which translates into a cause of action what otherwise would be no more than a contravention of the statute.⁴²

41 (1986) 63 ALR 600. The statement, which was misleading, related to the level of payments to which the appellant was entitled under the policy if he was prevented from carrying on his occupation as a self-employed builder rather than from any gainful profession, occupation or employment.

42 (1987) 75 ALR 271, 279 citing *Brown v Jam Factory Ltd* (1981) 35 ALR 79, 86-88.

The 'loss or damage' is the gist of the action. But that expression does more than identify an integer in the cause of action. By describing the subject-matter of recovery in that action as 'the amount of loss or damage', the legislature has marked out the measure of damages. Wrapped up within s 82 are thus concepts the common law would describe by the terms 'causation' and 'remoteness' and 'measure of damages'.⁴³

The nature of the causal connection which must be demonstrated to succeed in a claim depends, as Gummow J noted, 'on the nature or quality of the causation which is required by the use of the word "by".'

Since the cause of action arises pursuant to statute, it is not sufficient immediately to apply those rules which govern causation in contract or tort. The conduct in breach of Parts IV or V need not be the only cause of the loss or damage⁴⁴ and the presence of other operative causes is not fatal to the applicant's claim. However, the other 'causes' might be the 'real, essential, substantial, direct, or effective cause of the loss or damage.'⁴⁵

More recently, in *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd*,⁴⁶ Gummow J returned to the question of causation. The facts of the case were complex but one important issue was whether the applicant could demonstrate reliance upon a misleading and deceptive statement as the cause of its loss.

While acknowledging again that the conduct need not be the sole cause, His Honour recognised that a party is not necessarily to be fixed with liability under s 82 for loss or damage where the chain of causation is 'broken or dislocated' or it may properly be said that the real cause of the loss lies in 'a cause or causes arising from the acts or omissions of the applicant himself.'⁴⁷ It follows, to use conventional tort terminology, that the chain of causation may be broken by a *novus actus interveniens*.⁴⁸

In determining whether the requisite causal nexus has been shown, it is clear that the onus lies upon the applicant.⁴⁹

Remoteness, mitigation and the recoverability of interest

In *James v ANZ Bank*⁵⁰ Toohey J observed that different views had been expressed on the applicability of the principle of remoteness of damage to a s 82 claim. *Steiner's* case⁵¹ suggested that the test was one of foreseeability of the loss or damage sustained, but it may also be argued:

that the statutory right to damages is intended to have a broader ambit than common law actions so that applicants are entitled to those losses which are

43 Ibid.

44 Ibid 280.

45 Ibid 281 citing *Stapley v Gypsum Mines Ltd* (1953) AC 663, 681-682.

46 (1987) 78 ALR 193.

47 (1987) 78 ALR 193, 243 citing *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 54 ALR 337; *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367, 372; *Elna Australia*, above n 28.

48 In *James v ANZ Bank* (1986) 64 ALR 347, 394 Toohey J analysed the conduct of the applicant who had been induced to take a bank loan to determine whether it affected his right to recover. His Honour held that it made little difference whether the issue was regarded as one involving a *novus actus interveniens* or a failure to mitigate damages. See, too, *Milner v Delita Pty Ltd* (1985) 61 ALR 557, 572.

49 *Elders Trustee*, above n 46 at 242 citing *Pappas v Soulac Pty Ltd* (1983) 50 ALR 231, 238-239; *Jones v Acfold Investments Pty Ltd* (1985) 59 ALR 613, 623-624.

50 (1986) 64 ALR 347, 394.

51 (1984) ATPR 40-490.

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the immediate result of the offending conduct and also to consequential losses if sufficiently direct.⁵²

Whether interest is recoverable on the money foregone by the applicant is simply one aspect of remoteness. It is, however, of such common occurrence that it deserves to be examined separately from the general issue of remoteness. The general position is set out in the judgment of Lockhart J in *Milner v Delita Pty Ltd*,⁵³ where His Honour held that money which has been paid as a direct consequence of the conduct which causes the loss or damage may be recovered so long as the claim is supported by evidence.⁵⁴ In *AMIEU v Mudginberri*⁵⁵ the full Federal Court had to determine whether the applicant, which had been subjected to a lengthy union campaign in breach of s 45 D of the Act, was entitled to interest on money which it had borrowed to maintain its operation during the period of the illegality.⁵⁶ The Court made it clear that it was not 'concerned here with loss of profit under any particular contract or contracts but with the measure of damage due to the disruption of a business.'⁵⁷

Finally, it is clear that a party who has suffered loss or damage is under a duty to mitigate that loss or damage. As Lockhart J observed in *Finucane*,⁵⁸ 'There is an obligation upon the applicant under s 82 to take reasonable steps to mitigate his loss consequent upon the respondent's conduct, and the applicant cannot recover damages for losses which he could reasonably have avoided.'

The relevant limitation period

Section 82(2) requires any action to be commenced within 3 years after the date on which the cause of action accrued. In *James v Australian and New Zealand Banking Group Ltd*⁵⁹ Toohey J held that a cause of action accrues, not when there is a breach of s 52 of the Act but rather when loss or damage is suffered as a consequence.⁶⁰ It could be that there are several distinct losses which flow from the contravening conduct 'and the cause of action is not complete until those losses have occurred'.⁶¹

⁵² *James*, above n 50 at 394 citing *Frith v Gold Coast Mineral Springs Pty Ltd* (1985) 47 ALR 547.

⁵³ (1985) 61 ALR 557, 581.

⁵⁴ See, too, Lockhart J in *Finucane v NSW Egg Corp* (1988) 80 ALR at 518. It is also now important to consider the operation of s 51A of the Federal Court Act 1976, which commenced on 22 November 1984, which allows the Court to award interest in appropriate cases. Interest is not normally recoverable under the relevant State Supreme Court provisions, eg s 94 of the Supreme Court Act 1970 (NSW), because s 79 of the Judiciary Act does not make such provisions applicable: *Milner v Delita* (1985) 61 ALR 557, 577-580.

⁵⁵ (1987) 74 ALR 7, 39.

⁵⁶ The question of recoverability of interest has long been a subject of discussion at common law. For a long time such recovery was denied (*London, Chatham and Cover Railway Co v South Eastern Railway Co* (1893) AC 429) since it was presumed not to be within the contemplation of the parties. This position was swept away in *Trans Trust SPRL v Danubian Trading Co Ltd* (1952) 2 QB 297 where the Court held that the test to be applied was the usual one of remoteness.

⁵⁷ (1987) 74 ALR 7, 12.

⁵⁸ (1987) 80 ALR 519.

⁵⁹ (1986) 64 ALR 347, 392.

⁶⁰ Citing his own earlier decision in *Arcadi v Colonial Mutual Life Assurance Society Ltd* (1984) ATPR 40-473.

⁶¹ *Ibid.*

On the other hand, the cause of action does not persist so long as the loss or damage is being suffered: 'Once an applicant has suffered loss or damage relevant to his claim, time begins to run'.⁶² To summarise,⁶³ once an applicant has suffered loss or damage relevant to his claim, time will begin to run for limitation purposes. There may, however, be several distinct losses and distinct claims flowing from contravention of the Act.

Equally important, it is clear from the authorities that the Court tends to regard the question of limitation as a matter of defence to be raised by a respondent to an application, rather than a matter of positive averment for the applicant.⁶⁴ It follows that if the matter is not put in issue by the respondent it is not incumbent upon the Court to do so.

The interplay of ss 82 and 87

The relief available to an applicant under s 82 may be supplemented by additional orders of a wider scope under s 87 of the Act. Since the insertion of s 87 (1C) it is clear that an application under s 87 may be made independently of an application under s 82.⁶⁵

The cases decided under s 87⁶⁶ demonstrates the wide range of relief which the Federal Court may grant under s 87. For example, lessees have been held entitled to restrain a landlord from recovering outstanding rent because the lease was induced by conduct in contravention of s 52,⁶⁷ and a motor dealer has been required to restore a vehicle to an 'as new' condition after supplying it with minor defects.⁶⁸ Equally, the Court has not hesitated to avoid transactions induced by a breach of s 52.⁶⁹

An important difference between ss 82 and 87, discussed in several cases,⁷⁰ is that whereas s 82 confers a right in terms upon an applicant to recover the amount of the loss or damage she has suffered, s 87 confers only a discretion upon the Court. It follows that the Court has no discretion in quantifying the amount to be awarded under s 82 since the section 'makes no express provision for any discretionary element within that assessment'.⁷¹ On the other hand, the granting of relief under s 87 will always be in the Court's discretion.

62 Per Toohey J in *James* at 392.

63 Adopting Gummow J in *Elna v International Computers* (1987) 75 ALR 271, 281.

64 Toohey J at 396 in *James v ANZ Bank*, above n 59.

65 Section 87 is long and complex and it is not intended to discuss it in detail here. In brief, s 87(2) empowers the Court to declare contracts void, to vary a contract, to refuse to enforce a provision of a contract, to order restitution of money or property, to order provision of new goods or fresh services, and to order the variation of instruments affecting interests in land. In *Sent v Jet Corporation of Australia Ltd* (1986) 160 CLR 540 the High Court had held that the provision as it then stood was not capable of supporting a cause of action on its own and this ruling provoked the insertion of s 87 (1C) to make clear that such an independent claim could be brought.

66 See, generally, Miller, *Annotated Trade Practices Act* (9th edn 1988) 281-282.

67 *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340.

68 *Tompkin v Nossida (No 1) Pty Ltd* (1986) ATPR 40-662.

69 *Eg Dibble v Aldan Nominees Pty Ltd* (1986) ATPR 40-693 (underlease); *Supetina Pty Ltd v Lombok Pty Ltd* (1986) 11 FLR 563 (land purchase in a subdivision).

70 *Eg Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 47 ALR 547, 565 per Fitzgerald J; *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23, 56 per Northrop J; *Finucane v NSW Egg Corporation* (1988) 80 ALR 460, 519 per Lockhart J.

71 Per Lockhart J in *Finucane* at 519.

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It is clear that in granting relief under s 87 the court is not restricted by the limitations which the general law may apply to analogous situations. For example, the right to rescind for misrepresentation at general law does not constrain the relief available under the section, although the parties' conduct may affect its exercise of the discretion conferred by the section.⁷²

Similar relief to that available under s 87 may also be sought in the accrued jurisdiction of the Court in appropriate cases. In *Elders Trustees v Reeves*⁷³ trustees of a trust applied for rectification of an instrument in both the accrued equitable jurisdiction of the Court as well as pursuant to the relevant head in s 87. Gummow J pointed out that to succeed under s 87 it was not sufficient merely to satisfy the requirement of the purely equitable remedy; rather the applicant had to meet the requirements of s 52. Since the relevant causation had not been shown, no supplemental relief was available.

Conclusion

This article has been able to touch only briefly upon some of the more important aspects of damages under the Trade Practices Act. While authority supports the adoption of a tortious regime in most cases under s 52, it is clear that in appropriate circumstances wider relief may be claimed. With respect to other breaches of the Act, the question is even less clear and awaits elucidation by the Courts.

The flexibility conferred by s 82 and 87 allows the Federal Court much greater freedom in determining the relief appropriate to an applicant than that which exists at common law. If the Court so chooses, it has the opportunity to shape its remedy to the case before it. As the recent, innovative judgments of Justice Gummow demonstrate, the Federal Court has a wide range of options available to it in assessing the damages or other relief to which an aggrieved applicant is entitled. In eschewing a rigid adherence to either a tortious or contractual measure of damages, the Court has confirmed the importance of treating the causes of action conferred by the Act as *sui generis* and requiring an independent appraisal in the light of each individual case.

Thus, while the basic approach to damage assessment is now clearer, the jurisprudence controlling the measure of damages under the Trade Practices Act (in particular, those for breaches of Pt IV) may still be said to be at an embryonic stage and the appropriate award to be sought from the Court must be considered carefully by any practitioner litigating a breach of the Act.

⁷² *Henjo's case* at 102.

⁷³ (1988) 78 ALR 193, 256.