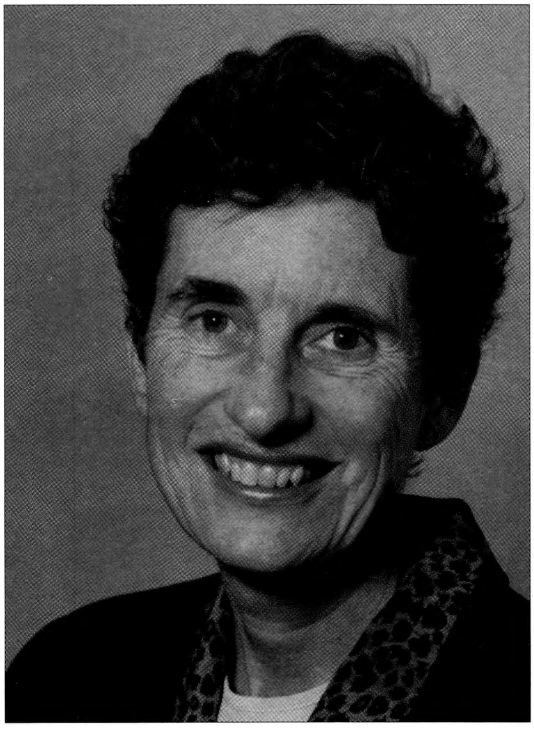
Forum

Consumer welfare and the Trade Practices Act

The following is an edited version of a presentation by Glen Barnwell, the Commission's New South Wales Regional Director, to the Australian Plaintiff Lawyers Association National Conference at Surfers Paradise.

Glen first outlined the work of the Commission and the Trade Practices Act and described the Act's product liability provisions and the representative action options available to the Commission. She then illustrated these options with case studies.



Glen Barnwell

Part VA of the Trade Practices Act

The principal operational section of part VA is s. 75AD which states that if a company in trade or commerce supplies goods which have a defect, and because of the defect an individual suffers injuries, the company is liable to compensate the individual for the loss suffered from the injuries.

Section 75AQ of the Act provides that:

1. The Commission may, by application, commence a liability action on behalf of one or more persons identified in the application who has suffered the loss for whose amount he action is commenced.

2. The Commission may only make an application under this section if it has obtained the written consent of the person, or each of the persons, on whose behalf the application is being made.

The impact of 75AQ is to preclude the Commission from bringing an action under part VA — even if it were to raise serious public concerns or a case that could provide valuable precedent for the future — in cases of the injured parties not wishing the Commission to be a party to the proceedings.

What is a defect?

The scope of the term 'defect' has proved to be a broad one, although it is not intended to place an absolute burden on manufacturers. The level of safety required has generally been interpreted to be that which the community is entitled to expect, as opposed to the expectation of any particular individual.

The key features of the law were enunciated by Senator the Hon. Michael Tate (second reading speech):

> A manufacturer or importer of goods is to be strictly liable for defects in those goods. Goods are defective when they do not provide the degree of safety which persons generally are entitled to expect, taking into account all the circumstances including the way the goods were marketed or labelled, and the likely uses to which the goods will be put. This is an objective test: it is the objective knowledge and expectations of the community which determine whether a product is defective, not the subjective

knowledge and expectations of the claimant. The claimant will not have to prove negligence. The difficulty in proving negligence is one of the factors identified in existing law which can lead to injustice.

Despite legislation imposing a system of strict liability there are exceptions. These include a defect arising after a good left the manufacturer's control; compliance with a mandatory Commonwealth, State or Territory standard that was the sole cause of the defect; and cases of contributory negligence.

It is unlikely a manufacturer will avoid liability because of compliance with a standard being the sole cause of the defect. This would apply to relatively few mandatory standards. Most specify minimum performance that the manufacturer is free to exceed, and are not considered mandatory within the meaning of this part of the Act. Only where the standard mandates how compliance is to be effected, and is itself defective, will this defence apply.

When a defect arises that could not have been discovered at the time the manufacturer supplied the goods — because there was insufficient scientific or technical knowledge at that time — the manufacturer may not be held liable for damage caused by the defect. This is an objective test, so that it is not open to the manufacturer simply to show that it was unable to discover the defect; it must show that no one could have discovered it.

An assertion of contributory negligence is likely to be successful in cases of abuse or reckless use of a product. However, if the misuse was a common one which the manufacturer should have foreseen, then special attention must be paid to labelling and other warnings. A failure to warn against the consequences of foreseeable misuse may nullify any argument that the injury was caused solely by the misuse.

It is important to note the time limits that exist in relation to this part of the Act. A plaintiff must bring an action within three years of the time at which they became aware, or ought to have become aware, of the alleged loss, the existence of a defect in the goods and the identity of the manufacturer of the product.

This action must be brought within 10 years from the supply of the goods by the manufacturer.

Representative actions under part IVA of the Federal Court Act (FCA)

Representative proceedings under the FCA are possible when seven or more persons have claims against the same person about similar or related circumstances. A proceeding may be commenced by one or more of them representing some or all of them and the consent of the other group members is not required to initiate the action.

The procedures under the Trade Practices Act are all 'opt in procedures'. This means that only people who are known to the Commission and who have given their signed consent to an action by the Commission may be members of the class represented by the Commission. If it is not possible to identify the members of a class of possible applicants the 'opt out procedures' used in part IVA of the FCA would be preferable. These provisions operate by including in the action as an applicant every person who is within a class defined in the statement of claim. People are included until they opt out.

The opt-in provisions apply only to cases being run by the Commission under the Trade Practices Act. Subject to there being at least seven members of the class there is nothing stopping a part VA matter being brought as a representative proceeding under part IVA of the FCA by either the Commission or private parties. Cases brought under part IVA of the FCA require a party to opt-out of the proceedings if they do not want to be bound by the result.

The Commission's standing in other representative proceedings has been questioned in some cases. The Federal Court has, however, adopted a flexible approach and held that the Commission does have a role in such proceedings. For instance Branson J of the Federal Court in *ACCC v Chats House Investments* accepted the argument put by the Commission that part IVA of the FCA authorised the bringing of representative proceedings by the Commission despite the Commission not being directly subject to the unlawful conduct in the matter. She held that as long as the interests, although not identical, arose out of the same or similar circumstances, then that was enough for a representative action.

Lindgren J of the Federal Court in *ACCC v Giraffe World Australia Pty Ltd & Ors* (unreported) 14 July 1998 differed from Branson J in *ACCC v Chats House Investments* and O'Loughlin J in *ACCC v Golden Sphere International Inc* (unreported) 1 June 1998 on the Commission's standing to act as a representative party under part IVA of the FCA. Lindgren J indicated that when the Commission had no claim or interest of its own to protect beyond that of the public interest it had no standing to take a representative proceeding. However, Lindgren J considered that the views of both Branson J and O'Loughlin J were 'not plainly wrong and may be accepted by a Full Court in preference to (his) own'. He therefore followed these earlier views.

The judicial view on the Commission's role in representative proceedings is broad, recognising that the Commission serves a special function as an independent regulatory body.

It is interesting to note that notwithstanding changes in Australia expected to encourage litigation — such as the legalisation of some contingency fee arrangements, the removal of restrictions on advertising by lawyers, and the introduction of strict liability into product liability law — the number of cases going to trial under part VA of the Act has not increased. This might be because lawyers, conservatively, prefer forms of remedy other than part VA.

Litigation by the ACCC

During the first three years of part VA's existence there were apparently no cases brought under it. However, in the past five years cases include Wallis Lake Oysters contaminated with hepatitis A, peanut butter contaminated with salmonella, injuries arising from the use of caustic soda, contaminated salami and the contamination of Sydney's water supply.

A notable case brought by the Commission under part VA is *ACCC v Glendale Chemical Products Pty Ltd* on behalf of Mr Michael Barnes. Judgment was delivered on 27 February 1998. Mr Barnes had purchased Drano, a brand of caustic soda to clear out a blocked drain in his shower recess. Having poured two lots of 1.8 litres of boiling water down the drain he then sprinkled Drano down the drain. Immediately after, Mr Barnes heard a whirring noise after which he was struck in the top half of the face with a column of water at a height of approximately 600 millimetres above the floor of the shower recess, causing severe burns.

The label on the product advised the user to dissolve the product in water before pouring it down the drain. It did not contain a warning not to use hot water. The key issues involved the question of whether the instructions to 'use cold water' would have been sufficient or should there have been a warning stating 'do not use hot water'. Emmett J found at page 40,971–72 that:

> Glendale was marketing the product for the purpose for which it was in fact used by Mr Barnes. While there may be no prior evidence of an incident such as this, it is quite foreseeable that caustic soda may have been poured down a drain which had hot water in it. I consider that the possibility of reaction with hot water was one which was sufficiently well known for a conclusion to be drawn that it was not safe for caustic soda to be marketed in a package for the purposes of use such as that described without a warning against using it in hot water in a confined space.

Emmett J found the label to be defective within the meaning of s. 75AC(2). The essence of his reasoning was (at 40,972):

> Persons generally are entitled to expect to be warned of a danger or lack of safety in respect of a use to which goods might reasonably be expected to be put. The description of the method for using caustic soda to make a cleaning liquid for the removal of grease from drain pipes and gully traps contains no hint of warning that caustic soda should only be used in that way for cleaning drains. While there is a warning that the contents of the container are corrosive and that contact with eyes and skin should be avoided, that is not adequate having regard to the nature of caustic soda and the purpose for which it was marketed.

His Honour's reasoning is equally applicable to proving a misleading or deceptive representation in contravention of s. 52 of the Act. In relation to this alternative s. 52 claim, his Honour stated that, even if there was conduct contravening s. 52 he was not satisfied that Mr Barnes had suffered loss or damage by that conduct. There was no evidence that Mr Barnes understood the label as constituting a representation such as had been pleaded. And there was certainly no evidence that he had relied on such a representation in doing what he did.

His Honour added that:

> Of course, one might be able to draw the inference that if there had been a warning in express terms against use of the Product with hot water in a confined space, Mr Barnes may well not have done what he did. That, however, is a different question from whether Mr Barnes was induced to act as he did in reliance upon an implied representation in the label.

Glendale appealed to the Full Court of the Federal Court (see *Glendale Chemical Products Pty Ltd v Australian Competition & Consumer Commission* (1999) ATPR ¶41-672).

The appeal was dismissed, principally on the ground that Emmett J had not erred in relation to part VA. The Full Court (Wilcox, Tamberlin and Sackville JJ) cited the passage quoted from Emmett J's judgment and added:

> The instruction [on the label] said, 'Always wear rubber gloves and safety glasses when handling caustic soda'. We think the conjunction of rubber gloves and safety glasses, especially when limited by the words 'when handling', would cause the average reader to understand that the relevant risk was that of dry caustic soda coming into contact with the handler's skin; the words would not alert a reader to the extreme inadvisability of allowing any part of the body to be in the vicinity of hot water to which caustic soda had been added. The lack of such a warning was a 'defect' in the Product, within the meaning of section 75A of the Act.

The Commission was successful in its claim. But why did the Commission decide to represent Mr Barnes? It was because Drano was easily accessible to a wide range of consumers through its marketing via Woolworths. Its constituent, sodium hydroxide, had long been commonly used as drain or gully trap cleaner, was a cheap commodity and was known by industry to be inherently dangerous. The principle that led the Commission to take enforcement action is that consumers have the right to be provided with information to make an informed choice to acquire or not to acquire a product (or service), and once the decision has been made to purchase a product they are entitled to be informed of its safe use.

McDonald's McMatch & Win promotion

Between June and September of 1999 the Commission and various State and Territory Consumer Affairs bodies received approximately 1000 complaints from dissatisfied McDonald's customers about the 1999 'McMatch & Win Monopoly' promotion.

Consumers participated in the promotion by peeling game stamps from the packaging and affixing those stamps to a game board. The rules of the promotion specified that a customer would be entitled to a nominated prize by collecting all game stamps of one particular property set. The conditions required customers who believed they had won a prize to mail their completed property set to a McDonald's agent for verification.

McDonald's also ran the McMatch & Win promotion in 1998. Although the 1998 and the 1999 promotions were in all material respects identical, a golden arches watermark was printed on all 1999 stamps so that McDonald's staff and the game promoter (as a security verification) could differentiate 1999 game stamps from 1998 stamps. In addition, there were several other distinguishing features.

In 1999 the game's promoter rejected approximately 6000 prize entries, claiming that customers used 1998 game stamps to claim a prize in the 1999 competition. The disgruntled McDonald's customers who approached the Commission were adamant that their rejected stamps were acquired during the 1999 competition.

During July 1999 representative proceedings were filed against McDonald's in the Federal Court Brisbane Registry by the law firm Shine Roche & McGowan. The representative action pleaded causes of action in contract, tort and under s. 52 of the Act.

On 24 September 1999 the Commission instituted proceedings against McDonald's. The Commission alleged that McDonald's breached the misleading or deceptive conduct provisions and unconscionable conduct provisions of the Act by:

- representing that all game stamps distributed to customers during the 1999 promotion were valid game stamps and eligible to be submitted in support of a prize claim;

- making a false or misleading representation about the existence of a customer's right to claim a prize in the competition; and
- refusing to honour prize claims from customers who received game stamps from McDonald's stores during the 1999 promotion, which appear to be intended for use in the 1998 game.

On 8 October 1999 Beaumont J transferred the Commission's proceedings from the Sydney Registry to the Brisbane Registry on the grounds that they raised similar issues to a representative action currently before Dowsett J in Brisbane *(Hurley v McDonald's Australia Limited*, matter Q194 of 1999).

On 14 October 1999 the Commission appeared before Dowsett J in Brisbane and applied to join the representative proceedings. Dowsett J expressed concerns that the Commission, by joining the proceedings at such a late stage, would cause the hearing to be delayed significantly. It was his view that as the Commission's evidence was essentially the same as the evidence filed by the representative applicants, the Commission's intervention would have very little or no utility.

Dowsett J made the following remarks:

> ... I just wonder what role you are going to play in this trial. What role do you see you playing in the trial that won't be adequately fulfilled by those who are here and can I say this to you too, may it be that the circumstances in which there is an action of this kind on foot, that perhaps the Commission doesn't have to do quite what it might have done if there wasn't an action on foot.
>
> and
>
> ... I'm not suggesting that I even suspect this is what happened, but can I ask, has the Commission considered the possibility that some people looking at its action might see it as using its position to put unfair commercial pressure on the respondent in its conduct of this litigation rather than pursuing its legitimate objectives? It could be seen by some people in that light...given what I perceive to be the rather vague nature of the benefit to be derived of these new proceedings it's something that should be kept in mind by the Commission.

Dowsett J's comments regarding the Commission's role in the representative proceedings were not necessarily a negative outcome for the Commission or consumers, because the private representative action is safeguarding the legal interests of consumers, thus allowing the Commission to utilise its resources in other areas. This outcome is therefore consistent with the Commission's primary objective of enhancing the welfare of all Australians through the provision of consumer protection.

The private action trial has been completed and judgment is awaited. The Commission's proceedings will be heard some time in 2001.

Internic Technology Pty Ltd

The case against a company called Internic Technology Pty Ltd had an international dimension. The US Federal Trade Commission brought to the attention of the Commission complaints received by US residents about the activities of this company.

It was alleged that Internic and its director Mr Peter Zmijewski had misled consumers by using an almost identical domain name to the then exclusive registrar of top level domain names in the .com, .net, .org, .gov, .edu, domain names (the InterNIC) and by operating a website at <http://www.internic.com>.

Consumers who wanted to register an Internet domain name — an Internet address — applied to InterNIC, a service of Network Solutions, which had an exclusive contract with the US Government to issue Internet domain names. Many individuals and organisations apply by contacting InterNIC at their Internet address <http://www.internic.net>. Internic Technology and Peter Zmijewski operated a copy-cat Internet site, internic.com, which offered to register domain names also. InterNIC charged between US$70–100 for registration; Internic charged between US$220–250. The company would forward approximately US$100 to Network Solutions and pocket the difference.

The Commission alleged that:

- onsumers looking for InterNIC often entered 'internic' or 'internic.com' into their web browser and ended up at the site operated by the respondents who deceptively acted as brokers in the sale of domain name registration services;

- the use of the name 'internic.com' was likely to create the false impression that the respondents' business was, or was affiliated with, InterNIC;
- onsumers used the respondents' website to register a domain name directly with InterNIC; and
- onsumers used the respondents' services believing they were using services provided by InterNIC as a result of the respondents' misleading and deceptive conduct.

Before May 1998 the respondents had registered about 13 000 domain names to consumers from all over the world.

Internic Technology and Mr Zmijewski gave undertakings to the court to no longer use the name 'internic' or any similar name. They also agreed to place A$250 000 in an Australian trust fund to be used to refund consumers who were misled by the conduct. Consumers throughout the world who registered a domain name at the internic.com site before May 1998 were emailed a notice telling them how to claim a refund.

Clarendon Homes

The Commission received complaints from some Clarendon NSW customers who claimed that Clarendon sales staff had advised them in mid-1999 to early-2000 that the contracts for the construction of new homes were GST-inclusive. The customers alleged Clarendon subsequently invoiced them for an additional amount for GST.

The Commission was concerned that such conduct might breach the misleading and deceptive conduct provisions of the Act. When these concerns were raised with Clarendon the company agreed to waive the charges totalling about $1.09 million for 208 new home buyers.

Clarendon also offered the Commission court enforceable undertakings to write to all 208 customers advising them that their GST had been waived and also to enter into a trade practices education program. A good result for consumers was achieved without court proceedings.

Conclusion

The Commission's education and enforcement policy is guided by its aim to enhance the welfare of all Australians through the provision of consumer protection. This is served by taking a broad view of an alleged offence in terms of its impact on society. This will often lead to a different approach to representative actions than that taken by private lawyers, and this means their activities may complement the role of the Commission.

Pricing

Fuel prices and the retail import parity indicator

Under the New Tax System (NTS), the Commission is responsible for monitoring the prices of goods including fuels.

In October, the Commission released a report on the movement in fuel prices in the September quarter 2000. The report monitored prices of unleaded petrol, automotive distillate (diesel) and auto liquefied petroleum gas (LPG) in Australia.

The report concluded that fuel prices had not increased as much as expected, taking into account the key underlying factors that affect fuel prices (such as international prices, the Australian/US dollar exchange rate and taxes).

To assess price changes for unleaded petrol and diesel the Commission developed a retail import parity indicator (RIPI). Actual price movements were then compared with movements in the RIPI.

The RIPI is a retail version of the import parity indicator (IPI), which was used by the Commission before deregulation on 1 August 1998 to determine maximum endorsed wholesale prices for petrol and diesel. The IPI included a local component reflecting local costs and wholesale margins. Over time, this local component did not necessarily accord with actual costs and margins.

The Commission developed the RIPI by comparing actual retail prices of unleaded petrol and diesel from August 1998 to May 2000 with the IPI, less the local component. The difference represents the actual local gross wholesale and retail margins. Taking the average gross and retail margin over the period, and using it in the IPI methodology instead of the former local component, gives the RIPI.

There are four components of the RIPI:

- the import parity component, which is a 'landed cost' for fuel derived from the prices for bulk ex-refinery petrol and diesel stock in Singapore — the formulae incorporate 7-day rolling averages of spot prices and take into account international freight rates, insurance and loss, local wharfage costs and the US/Australian dollar exchange rate;
- excise and State subsidies — the prevailing rate of Federal excise (including the State surcharge) less any State subsidies;
- gross wholesale and retail margins; and
- GST — imposed on the preceding items.

Use of the RIPI is consistent with the net dollar margin rule applied generally to the assessment of NTS changes. It is more rigorous than the IPI approach formerly used to determine wholesale prices.

Given the volatile nature of fuel prices, movements of actual prices above the RIPI would be expected. However, the Commission would be concerned if actual prices were above the RIPI for an extended period.

The Commission will continue to monitor and analyse average fuel prices with the RIPI.

The fuel report is available from the Commission's website.