

provisions rigorously but even-handedly, in relation to mandatory codes of conduct, unconscionable conduct in business transactions, and the misuse of market power against small businesses by large businesses.

In all of these areas the Commission is committed to pursuing opportunities to test the law. It is also committed to minimising enforcement actions by encouraging the development and use of ADRs and promoting compliance with the Act.

Small business has obligations as well as rights under the Act following its extension to cover unincorporated businesses. There is a heightened need to educate small business about its obligations now that the Act applies universally, and this is a substantial Commission activity.

Although the boundaries of acceptable commercial conduct for business dealings between small business and big business cannot be specified with precision, it is clear that the recent amendments have shifted the boundaries to benefit small businesses. The changes are designed to induce behavioural change in the way big business deals with small business. The challenges for some of the key players are, in my view, as follows:

- for professional advisers — to understand the changes so that they can properly advise their business clients (and to be aware of the impact of the changes in their own business dealings);
- for small businesses — to become aware of the changes in the law and the potential benefits for their future commercial dealings (with big businesses in particular); and
- for big businesses — to become aware of the changes in the law and to modify their dealings with small businesses in a way that eliminates conduct that may have been towards the extreme end of the legally acceptable in the past.

Contract, tort or neither? — the measure of damages under the Act

This is the first in a series of articles by Commission investigation staff about current issues in establishing liability and securing appropriate remedies to achieve effective enforcement outcomes.

The Commission is always concerned to be fully informed about the state of the law relevant to its operations. Indeed, as a statutory authority serving and protecting the public interest in promoting competition and fair trading, it has a role in bringing proceedings to clarify the law and to test its boundaries for the benefit of the community generally.

The Commission's enforcement policy is proactive and directed to securing effective outcomes; it is neither process-driven nor subjectively reactive. The Commission focuses upon priority and emerging issues. It works to a hierarchy of outcomes in pursuing enforcement matters:

- *stopping the offending conduct;*
- *securing redress for victims of offending conduct;*
- *preventing recurrence; and*
- *deterrence.*

To produce these outcomes through strategic case development and litigation, investigation staff are always mindful of legal requirements in establishing cases and remedies available at law to address contraventions.

In this issue, Bronwyn Fursey of the Commission's Brisbane office comments upon the recent decision of the High Court of Australia in Marks & Ors v GIO Australia Holdings Limited & Ors (1998) ATPR 41-665. The case is of particular relevance to the Commission's objective of securing redress for victims of offending conduct as it concerns how damages payable to affected parties ought to be measured. Bronwyn has

recently completed a Bachelor of Laws at QUT, and will graduate with first class honours in April 1999.

The views expressed here are not necessarily those of the Commission.



Bronwyn Fursey

Introduction

One consequence of contravening the *Trade Practices Act 1974* is that the offender may have to pay damages to victims of its conduct. In November 1998 the High Court clarified how the amount of such damages might be determined.

Statutory provisions

A person who has suffered loss or damage as a result of the conduct of another which contravenes a provision of either Part IV or Part V of the Act can seek to recover the amount of the loss or damage sustained under s. 82. An action must be commenced within three years of the date on which the cause of action accrues (s. 82(2)).

Section 87(1) allows a person who has suffered, or is likely in the future to suffer, loss or damage as a result of conduct which contravenes Part IV, IVA or Part V to seek a range of remedies designed to compensate for or reduce that loss or damage.

Section 87(1A) enables the Commission to bring a representative action on behalf of

persons who have suffered loss or damage as a result of contravening conduct, but only for contravention of Parts IVA or V.

Various orders are provided for by s. 87(2), including an order to pay damages. Time limits under s. 87 are two years for Part IVA cases, or otherwise three years, from the date on which the cause of action accrues.

The Commission does not have standing under the Act to seek damages in Part IV cases. Section 83 may, however, be of assistance; it allows a party seeking damages under ss 82 or 87(1A) to rely upon findings of fact made in actions brought by the Commission. The Commission is currently seeking to clarify whether it can secure damages awards outside the Act for parties subject to anti-competitive conduct.¹²

Marks & ors v GIO Australia Holdings Limited & ors¹³

The High Court of Australia recently considered the correct approach to the award of damages under the Act.

Facts

A number of borrowers obtained loan facilities from GIO. Prior to entry into the relevant contracts, GIO made representations that interest would be charged at a 'base rate' plus a margin of 1.25 per cent. However, the contracts as signed allowed GIO to raise the interest rate margin, and on 21 April 1992 GIO advised the borrowers that it proposed to do so as from 1 August 1992. At that time, GIO also offered the borrowers the opportunity to withdraw from the contracts without penalty.

Decisions in the Courts below

The trial Judge found that GIO had engaged in misleading and deceptive conduct in contravention of s. 52 of the Act.

Misrepresentations as to the margin were contained in a promotional brochure which stated that the margin was 'set' at 1.25 per cent and another document provided to the borrowers entitled *Calculation of Prime Rate* which identified the margin as 1.25 per cent. There was also evidence of statements by GIO

representatives, who apparently also believed that the margin was fixed.

The borrowers' preferred order was one under s. 87 varying the loan contracts so as to effectively hold GIO to the misrepresentation. The order made, however, was for damages under s. 82, for those borrowers who elected not to refinance or withdraw from the contract, based on the difference between the increased interest rate and the original rate as initially represented. For those borrowers who elected to refinance, damages at the same rate were awarded for a further 60 days to enable them to do so.

GIO appealed to the Full Court of the Federal Court, arguing that by his order the trial Judge had awarded damages for expectation loss, which was not allowed by the approach of the High Court in *Gates v The City Mutual Life Assurance Society Ltd.*¹⁴

The Full Federal Court agreed and set aside the trial Judge's order for damages.

[As with *Marks*, *Gates* concerned pre-contractual misrepresentation. Mr Gates purchased insurance including total disability cover. He was told this extra cover would be effective if he became unable to carry on his usual occupation. However, when he suffered an injury and was unable to continue his usual work, he discovered that the additional cover applied only if he was unable to undertake any employment.

In the absence of guidance from the Act as to the appropriate measure of damages, the Court considered there was a choice between the contract measure (expectation and reliance loss — designed to put a plaintiff in the position they would have been if the contract had been performed) and the measure in tort (restitutionary — designed to put a plaintiff in the position they would have been if the tort had not been committed).¹⁵

In a joint judgment, Mason, Wilson and Dawson JJ said:

The courts are not bound to make a definitive choice between the two measures of damages so that one applies to all contraventions to the exclusion of the other. However, there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all,

Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement.¹⁶

This finding meant that 'expectation loss' or damages for loss of bargain were not available — which precluded the making of an order for damages in the amount which would have been payable under the policy as represented to Mr Gates. Mr Gates, like the plaintiffs in *Marks*, was unable to prove that he would have acted differently, for example by using another insurer, if he had known that the representations complained of were inaccurate.]

The High Court decision

The High Court granted special leave to appeal the Full Federal Court decision. The major point of the High Court decision can be simply stated — all members of the Court found that the assessment of compensation under ss 82 and 87 of the Act is not limited by the measure of damages in common law contract or torts cases.

In a joint judgment, McHugh, Hayne and Callinan JJ made five points which summarise in part the approach of the Court to the limitation drawn from the *Gates* case.¹⁷

- The application of ss 82 and 87 is not limited to cases of misleading and deceptive conduct, but extends to cases as varied as misuse of market power and unconscionable conduct. Not all of these will be comparable to common law causes of action.¹⁸
- Section 82 does not, by its terms, limit the kinds of loss or damage which may be recovered by any analogy with common law actions. On the contrary, the meaning of 'loss or damage' may be extended by s. 4K which provides:
 - (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.

The section requires actual loss or damage, already suffered, and ascertainable.¹⁹

The other limitation found in the section is that the loss or damage must be suffered 'by conduct of' another person done in contravention of the relevant Part.

- These comments apply equally to s. 87, save that that section also allows for the recovery of loss or damages 'likely' to be suffered²⁰ in the future, and therefore not necessarily ascertainable. In particular, the power granted in ss 87(2)(a) and (b) to vary contracts and thereby potentially affect the interests of third parties is an indication that the relief available under the section should not be limited by analogy with common law or equitable causes of action.²¹
- The Court is entitled under s. 87 to make 'such order or orders as the Court thinks appropriate', where those orders will compensate for, or reduce, the loss or damage suffered. This is the discretionary element.
- The orders available under s. 87 include an order for damages.

It follows that causation is the real limitation upon any award of damages — the loss or damage suffered, or likely to be suffered, must arise 'by conduct of another person' in contravention of the Act. The Judges found nothing in the Act which necessitates the importation of any other limitation on damages found in the common law, contract, tort or equity.

Parties seeking damages under the Act will not be confined by the attachment of some legal 'label' such as 'expectation loss'. The question will be what loss, damage or injury, economic or otherwise, was suffered, or is likely to be suffered in the future, as a result of the contravention.

The High Court also considered whether the borrowers were entitled to relief. The Judges differed on whether damages ought to be awarded.

McHugh, Hayne and Callinan JJ said:

A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or

refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted.²²

The loan contracts, while less favourable than the borrowers initially believed, and even taking into account the higher interest rate, were more advantageous than any other product available at the time. Further, there was no evidence — which may have been relevant for s. 87 in respect of loss or damage 'likely to be suffered' — that GIO would have varied the margin in the future so that the interest rate would be higher than for any comparable product. The borrowers were no worse off because of this misrepresentation, and so there was no need for compensation.

Potential applicants for damages should not be unduly concerned by the outcome in this case. As the Court said:

It will be rare that the difference between what was represented and what was given will not be reflected in some difference in value or other manifestation of actual loss to the party that was misled either now or in the future.²³

Gaudron and Gummow JJ held that no ascertainable damage had been suffered and declined to exercise discretion to grant relief under s. 87. Gummow J, with whom Gaudron J agreed, was prepared to accept that the borrowers may have suffered loss when the margin rate increase became effective and found that time would run from that point. However, as the parties had been offered the opportunity to withdraw from the contracts without penalty before that date, any damage was not caused by GIO but by the borrowers refusing that opportunity. Similarly, an order limiting the margin to that represented was not allowed under s. 87 because to do so would not reduce loss or damage suffered or likely to be suffered 'by reason of' the contravention.

Kirby J considered the borrowers were entitled to relief, and would have remitted the matter to the Full Federal Court to determine the appropriate form.

Damages as a deterrent to contraventions

Both Gummow J and Kirby J referred to the necessity of construing the Act to ensure that its remedial purposes are achieved.²⁴ Kirby J's

view was that those purposes would be thwarted if the perpetrators of a “serious” misrepresentation, solemnly found’ were to ‘walk away scot-free’.²⁵

It was pointed out by McHugh, Hayne and Callinan JJ that contravention of s. 52 is not a criminal offence and does not attract pecuniary penalty. They saw no inconsistency with the objects of the Act that a plaintiff should be required to prove that it had suffered a detriment before relief is available. Gaudron J points out that ss 82 and 87 contain no punitive element, their purpose being to provide for compensation.²⁶

To address the concerns expressed by Kirby J, it would be necessary to extend the current law to allow the Court to deter offenders by awarding punitive damages to victims of prohibited conduct.

Another option would be to provide for the imposition of pecuniary penalties for contravention of Part V including s. 52, and which could be sought by any person e.g. persons who have been misled, the Commission, interest groups etc. (The current position is that no fine or pecuniary penalty may be imposed for contravention of s. 52; criminal fines may be imposed for breaches of other Part V offences.)

NOTES

1. (1956) 99 CLR 362.
2. (1983) 151 CLR 447.
3. (1982) 142 ALR 527.
4. (1982) 142 ALR 546.
5. (1988) 165 CLR 489 at 526-527.
6. See (1997) ATPR (Digest) 46-163 at 54,305 and 54,306.
7. (1996) 142 ALR 177.
8. *id.* at 188.
9. *Finding a balance: towards fair trading in Australia*, Report by the House of Representatives Standing Committee on Industry, Science and Technology, May 1997, at p. vii.
10. House of Representatives Hansard, 30 September 1997, p. 8880.
11. House of Representatives Hansard, 30 September 1997, p. 8801.
12. *ACCC v Construction Forestry Mining & Energy Union*, WAG157/97, Federal Court of Australia.
13. (1998) ATPR 41-665.
14. (1986) ATPR 40-666.
15. (1986) ATPR 40-666 at 47,366-7.
16. (1986) ATPR 40-666 at 47,368.
17. (1998) ATPR 41-665 at 41,410-41,411.
18. See also (1998) ATPR 41-665 at 41,420 per Gummow J and 41,430 per Kirby J.
19. (1998) ATPR 41-665 at 41,430 per Kirby J.
20. See also (1998) ATPR 41-665 at 41,430 per Kirby J.
21. (1998) ATPR 41,665 at 41,430 per Kirby J and 41,408 per Gaudron J.

22. (1998) ATPR 41,665 at 41,413.
23. (1998) ATPR 41,665 per McHugh, Hayne and Callinan JJ.
24. (1998) ATPR 41-665 at 41,420; 41,431-41,333.
25. (1998) ATPR 41-665 at 41,432.
26. (1998) ATPR 41-665 at 41,406.