

Inconsistency in the Trade Practices Act



To what extent should common lawyers trespass in a field more frequently associated with their commercial brethren?



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Winter 1997 was a rather ordinary time for Joseph Baukes. He was a diesel mechanic with many years experience, but starting out on his own after some other ventures had suffered financial reverses. He attended at the premises of the one company every day performing diesel mechanical work, but as a contractor rather than an employee. Accordingly,

he purchased his own equipment, including an engine stand from the local tool shop in May 1997. This stand appeared to him to be adequate for his needs, since it had marked on it the notation '1,000 pounds', it was marketed as an engine stand, and the salesman





assured him it would be fine for his job.

A week later, in early June 1997, he had the chance to try out his new engine stand, loading an \$80,000 Porsche engine onto it in order to carry out maintenance work. As he was working upon it, the stand suddenly gave way

and the engine, all 650 pounds of it, crashed to the concrete floor, striking Joe's hand on the way as he instinctively tried to save this extremely expensive engine. His hand was bruised and sore, and he subsequently developed carpal tunnel syndrome in the wrist, which

despite surgery, has effectively prevented him returning to his diesel mechanical work or similar work for which he is trained.

Being a deemed contractor within the meaning of the *Accident Compensation Act (Vic) 1985*, he discovered he was entitled to weekly payments which he subsequently received until he turned 65 years of age when, pursuant to the Act's provisions, those payments ceased.

In order to seek compensation for the losses he sustained as a result of this injury, including his pain and suffering and continuing loss of earning capacity beyond age 65, he consulted legal advice.

He received advice that, being a deemed worker within the meaning of the ACC Act, he was prohibited by Section 135A from commencing a proceeding to recover damages in respect of his injuries unless he first received a serious injury certificate. Predictably, the Workcover Authority refused to certify that he had sustained a serious injury. Nor could it be certain that a court would grant him leave, as his claim for serious injury, insofar as it depended upon interference with working capacity, depended upon a judge accepting Mr Baukes' desire to continue working beyond 65 years of age.

However, it appeared that he had a straightforward claim under the Trade Practices Act on two bases:

1. Pursuant to Section 71, he had purchased goods as a consumer (purchase price was less than \$40,000) from a corporation and those goods were not of merchantable quality, nor fit for the particular purpose for which they were acquired; and
2. Pursuant to Section 52, it appeared well arguable that the corporation when offering this product for sale had made a representation that it could withstand weights of up to at least 1,000 pounds, and that it was fit for use as an engine stand. Given the obvious deficiencies of the product, it appeared that the corporation had engaged in trade or

commerce that was misleading or deceptive or was likely to mislead or deceive, following which the plaintiff should be entitled by Section 82 to recover damages for a contravention of this provision (s.52).

Accordingly, a claim was commenced in the County Court of Victoria seeking damages for a breach of the implied warranty, and also for recovery under his statutory right of action. A defence was filed pleading that his action was barred by Section 135A of the ACC Act, since he had not received any serious injury certificate.

The matter came on for trial earlier this year and his Honour, Judge Morrow, in a decision dated 29 March 2001, ruled that the defence was inapplicable and should be struck out. The defendant was granted leave to appeal to the Court of Appeal, but abandoned the appeal one week prior to the hearing date.

Accordingly, the observations that follow must be treated with some caution, as this field of law is somewhat novel and not fully tested.

Inconsistency of Principle

Section 109 of the Constitution provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

Inconsistency has been held to occur when a state law would, if valid 'impair, alter or detract from the operation of a law of the Commonwealth Parliament, then to that extent [the State law] is invalid.'

This principle has continued to the present unchanged and was reinforced by Barwick CJ in *Ansett v Wardley*²:

'The paramourcy given to Federal law over inconsistent State law is universal and without exception.'

Inconsistency of State Law with the Trade Practices Act

The *Queensland Carriage of Goods Act* had provisions that limited the liability of a carrier in respect of loss or

injury to goods under a contract of carriage. Section 9 of that Act deemed there to be incorporated in every contract of carriage the provisions of the section imposing this limitation of liability. Section 9(2) purported to invalidate any contract that sought to exclude, modify, alter or avoid any provision of the Act.

However, Section 74(1) of the Trade Practices Act stipulates that in a contract for the supply of services to a consumer there is an implied warranty that the services will be rendered with due care and skill. Section 68 of the Act further provides that no such warranty shall be excluded, restricted or modified, and any term of a contract seeking to do so shall be void.

"The circumstances in which the provisions will apply in the case of injured plaintiffs are fairly narrow."



The High Court in *Wallis v Downard-Pickford*³ had little difficulty in holding that the two provisions were inconsistent, and accordingly the Queensland Act to the extent of the inconsistency was invalid. The plaintiff was entitled to exercise his rights for damages pursuant to Section 74, untrammelled by the Queensland Act restrictions.

Misleading and Deceptive Conduct

The other provision relied upon by Mr Baukes was Section 52 TPA. He alleged that the retailer had engaged in misleading and deceptive conduct by representing that the engine stand was

safe to withstand up to 1,000 pounds in weight. Such a contravention entitles one to damages for loss sustained by reason of the contravention, pursuant to Section 82 TPA. This is clearly a broader provision, and more likely to be of benefit to employees injured as a result of representations, express or implied, that a particular item of equipment or machinery is safe to be operated.

There is an important restriction that must be borne in mind. The Commonwealth's power to pass the TPA is found in clause 51(XX) which confers upon the Federal Government power to legislate with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the

Commonwealth.'⁴ Thus one must ordinarily look for a corporation or, if that fails, for the conveying of a representation by way of the postal or telephone services or, finally, by conduct of individuals in trade or commerce among the states or outside Australia supplying services to the Commonwealth.⁵

Despite the apparent breadth of this provision, and its initial attractiveness, there is an important proviso within the section. This was emphasised in *Concrete Constructions v Nelson*⁶. Mr Nelson was an employee of Concrete Constructions. He alleged that he had been given misleading information as to the manner in which a door to a liftwell on a building under construction was attached. As a result of this alleged misleading conduct, he fell down the shaft and suffered injury. He alleged a breach of Section 52 of the Trade Practices Act. His action failed in the High Court upon a demurrer.

The majority noted that the section could be read extremely broadly, citing as examples an incorrect signal by a truck driver in the course of his employer's haulage business, or the giving of inaccurate information by one employee to another in the course of the building

activities of a commercial builder. However, the majority preferred to limit it to activities coming within the 'central conception' of 'trade or commerce' and not to the immense field of activities in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business⁷.

Brennan, Toohey and McHugh JJ also ruled against Mr Nelson, but on a slightly different basis, that the representation was not made to him in his capacity as a consumer of goods or services.

Speaking generally it is, therefore, unlikely that an employee would suffer injury by reason of conduct by his employer in trade or commerce that was misleading or deceptive. However, there would seem to be more scope for the section to operate in cases where an employee suffers injury by reason of some third party's misleading conduct, such as by supplying a machine with an implied or express representation that it is safe to use.

In *Pritchard v Racecase*⁸, the Full Court of the Federal Court considered a claim by the widow of a race official who was killed in the course of a 'Cannonball Run' in the Northern Territory. She had received the maximum sum allowable under the *Northern Territory Motor Accidents (Compensation Act)*. She sought to recover losses sustained as a result of her husband's death. The Full Court refused to strike out the Statement of Claim, thereby allowing the appeal of the widow against the decision of O'Loughlin J at first instance.

The Court, in so doing, observed that the claim was not in respect of the negligence of the driver of the motor vehicle. Implicitly, that driving could in no way be seen as conduct 'in trade or commerce'. Rather, the claim relied upon representations by the organisers that the race would be organised in a safe fashion (speaking generally), so that it was safe for persons to participate as marshalls and officials. Thus the Territory Insurance Office, as insurer of the vehicle, was not being sued; rather, it was the organisers for their promo-

tional activities in relation to the event.

Whether such representation and consequential loss could be made out had not been determined; this was a pleading point. The court held there was no need to consider Section 109 of the Constitution, as there was no conflict between the laws.

If it could be said in some way that the conduct of a motor vehicle driver did constitute conduct in trade or commerce which caused a loss so that the elements of Section 52 TPA were satisfied, the court appeared to contemplate that such a right would prevail over any restricting state or territory legislation.⁹

Defective Product Provisions

Although the Trade Practices Act does have provisions specifically entitling a person to bring action in respect of defective goods, regardless of whether that person was a party to the contract and, therefore, has privity to bring an action under ordinary contractual principles, those provisions specifically exclude cases where the injured person is or could be entitled to benefits under a law of the Commonwealth, a state or a territory that:

- (a) Relates to workers compensation; or
- (b) Gives effect to an international agreement.¹⁰

In the case of *Baukes v Alltools*, his Honour Judge Morrow did express the opinion that this restriction did not apply to the ACC Act, as the latter Act, in seeking to restrict a worker's rights to recover damages, strayed from the traditional concept of workers' compensation legislation which gave benefits to a worker. However, it should be noted that this opinion was obiter, not having been strictly raised or relied upon by the plaintiff. It is obviously somewhat contentious, and would no doubt face challenge if relied upon.

Conclusion

The prohibition on misleading or deceptive conduct in trade or commerce contained within Section 52, and the warranty as to merchantable quality and

fitness for purpose of goods and services provided by Section 71 and 74 of the TPA, can in certain limited circumstances provide potent ammunition for injured plaintiffs, particularly in circumstances where local state or territory legislation otherwise precludes or limits their rights to compensation.

There is no limit on the amount that can be recovered by way of damages; the discount figure for calculating future economic loss will be 3 percent rather than any alternative statutory figure.¹¹ The leave of the court or of any authority, commission or body is not required to commence a proceeding. However, it must be remembered that the limitation period prescribed by Section 82 has, until recently, been only three years, as opposed to the longer period available in some jurisdictions, and, from 1 July 2001, under the Act. There is no power to extend time. The circumstances in which the provisions will apply in the case of injured plaintiffs are fairly narrow. Nevertheless, it is always worth considering whether the Act may offer relief in a case where a plaintiff might otherwise be precluded from recovering adequate compensation for his or her loss. **PL**

Footnotes:

- ¹ Per Dixon J *Victoria v Commonwealth* (1937) 58 CLR 618 at 630.
- ² (1980) 54 ALJR 210 at 211, 142 CLR 237
- ³ (1994) 68 ALJR 395; 179 CLR 388.
- ⁴ see *Fencott v. Muller* (1983) 152 CLR 570 at 600-602.
- ⁵ *The Law of Misleading or Deceptive Conduct*, Colin Lockhart, Butterworths 1998 pages 2-3; *R. v. Industrial Court, Ex Parte CLM Holdings* (1977) 136 CLR 235 at 244-45, per Mason J.
- ⁶ (1990) 169 CLR 594.
- ⁷ *op. cit.* page 603, Mason CJ Deane, Dawson, Gaudron JJ.
- ⁸ (1997) 72 FCR 203.
- ⁹ see per Spender, J, page 206 F; Branson J. (Olney J. concurring) at 215D; but see Branson J. at 215 B.
- ¹⁰ Section 75A TPA.
- ¹¹ *Todorovic v Waller* (1981) 56 ALJR 59.