CASE NOTE*

ACCC V INTERNIC TECHNOLOGIES: CLASS ACTIONS AND THE INTERNET

As protocols and standards for electronic commerce are set and as consumers become more comfortable with doing business over the Internet, an increasing proportion of our commercial dealings will take place on the web. It is part of the nature of web-based commerce that many customers will enter into transactions which are practically identical. Where a customer suffers damage because an on-line vendor has not met its legal obligations, say, in relation to Part V of the *Trade Practices Act* 1974 (Cth) (TPA), it is very likely that many other customers will be in the same situation. Accordingly, the way in which the courts and the Australian Competition and Consumer Commission deal with class actions is of particular interest in the context of electronic commerce.

In the recent case of *Australian Competition and Consumer Commission v Internic Technologies*[2] the ACCC commenced a class action under Part IVA of the *Federal Court Act* 1976 (Cth) (FCA) on behalf of a group of consumers who claimed they had been misled by a website. The website was run by Internic Technologies (IT), a company that provided the service of setting up Internet domain names. IT itself did not have authority to register the domain name; that function was performed exclusively by the United States Government sanctioned Internet Network Information Centre, which we know as InterNIC.

A consumer could register a domain name with InterNIC through its site at <www.internic.net>. IT operated a site at <www.internic.com> and effectively acted as an intermediary charging up to US$ 150 more than InterNIC to set up a domain name. The group of consumers who were represented by the ACCC, had paid the higher fee for domain name registration and were seeking a refund of the price difference.

The ACCC alleged that the use by IT of the business name 'Internic' in the context of domain name registration, and the use of the domain name <www.internic.com> was misleading and deceptive because IT was representing that it was the Internet Network Information Centre, or was sanctioned or sponsored by InterNIC. As the name InterNIC was well known in the context of domain name registration, the ACCC argued that the representations induced consumers to use the IT site. The great irony of the case is that the party in the

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2 *Australian Competition and Consumer Commission v Internic Technologies* (unreported, Federal Court of Australia, Lindgren J, 14 July 1998).

best position to stop IT from the outset was InterNIC, who granted IT their domain name in the first place.

The decision of Lindgren J arose from an interlocutory application that raised several issues, including the contention by IT that the ACCC was not entitled to be the representative party. IT argued that because the ACCC could run class actions under s 87(1A) of the TPA, it could not bring such an action under the FCA. This submission was rejected by his Honour who referred to his own reasoning in the case of *ACCC v Giraffe World Australia*[3] which was handed down on the same day.

IT then argued that the Court should exercise its discretion under s 33N of the FCA to disallow the representative proceedings as not being in the interest of justice. Section 33N lists the grounds under which the Court may order that the action cease to be a representative proceeding. These include instances where the relief sought can be obtained through other proceedings, and where it is otherwise inappropriate that the claims be pursued by means of a representative proceeding. The Court held that the representative proceedings were inappropriate as it was likely that each consumer would have to give evidence in order to prove his or her individual reliance. The finding was not based on the proposition that the relief claimed could be obtained under other proceedings. His Honour did however note that the ACCC had the right under the TPA to seek compensation on behalf of the consumers.

This finding is likely to have a considerable impact on electronic commerce. As more of our commercial dealings are carried out over the Internet, the number of misleading and deceptive conduct claims that relate to Internet commerce will increase. There is no doubt that web technology provides considerable scope for conduct that is in breach of Part V of the TPA.[4] Using frames to incorporate another publisher's content in a site,[5] using techniques such as META in tags to misleadingly direct search engines to a site,[6] and the use of Javascript or 'Jscript' pop up boxes and banners to confuse users and trick them into visiting particular sites, are all likely to be actionable under the TPA. However, these are all examples of deceptive practices where there are likely to be a large number of complainants and the damages in each case are likely to be relatively small. Individual users who have relatively small losses are unlikely to coordinate a self-funded class action against the offender. The development and maintenance of acceptable electronic commerce practices depends largely on the ACCC brining these actions on behalf of aggrieved consumers.

One of the main differences between class actions brought under the FCA and class actions brought under the TPA is the way in which the class is defined. Under s 87 of the TPA, all members of the class must be identified and their

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3 (1998) ATPR 41-648.

4 M de Zwart, "Keeping Your Site Nice: Unfair Practices on the World Wide Web" (1997) 8 *Australian Intellectual Property Journal* 181; P Leonard and V Leong, "Advertising on the Internet: the Law of Links" (1998) 1 *INTLB* 44.

5 Such as occurred in *Shetland Times v Wills* [1997] FSR 604.

6 An example of this situation is the fact scenario in *Playboy Enterprises Inc v Calvin Designer Label* Civ. No. C-97-3204 (ND Cal 8 Sep 1997).

written consent obtained. However, under s 33E of the FCA, the consent of a person is not required for them to be part of the class.

The normal practice of the ACCC in instigating class actions is simply to advertise and invite consumers to opt into the group. In some cases, the ACCC simply defines a class and advertises (with the Court's consent) that members of the class may opt out if they wish to do so.[7] The administrative procedures involved in instituting class actions under the TPA are far more burdensome. If his Honour's decision to disallow the representative proceedings in *ACCC v Internic* and in *ACCC v Giraffe World Australia* is the start of a trend, the likelihood is that the ACCC will stop running these types of actions. The only option for consumers may be to fund the actions themselves; a course which is unlikely to be taken regularly. Unless the providers of commercial websites face the likelihood of significant financial penalties for unfair commercial practices, the incidences of deception and passing off will reach an intolerably high level.

The facts of this case come before the Court again early next year and Lindgren J will decide on claims of misleading and deceptive conduct and s 87(1A) compensation. The IT site now carries a comprehensive disclaimer at the top of the site which should be sufficient to ensure that no further consumers are misled. Much of the submissions will no doubt concentrate on the unique nature of the representations. It will be interesting to note whether it is shown that consumers selected a site with a *.com* domain in the belief that it was more authoritative than a *.net* domain. His Honour's findings will be a useful guide as to how the courts will deal with misleading conduct on the web.

7 Such as with the recent ACCC action against Swiss Slimming and Health Institute (trading as Swisslim): see ACCC, Media Release, 22 April 1998 and ACCC Journal No 10 at 61.