

A Background Paper

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‘FROM A DISTANCE’

**CONSUMER PROTECTION FOR INTERNATIONAL E-
COMMERCE AND CYBER SCAMS**

Introduction

You have just won the holiday of a lifetime. This is a “once off” promotion so you must act quickly to secure the package. All we need now is your credit card number!!!

Does this sound familiar? Add to this children screaming with excitement at their luck coupled with the pester power of the representative on the phone and the \$5000 available credit on your new credit card and for some this may be a situation of great pressure at the mercy of an anonymous presence.¹

Methodology

Discussion within this paper stems from an anonymous case example (Case X) dealt with by the author as a student lawyer in Clinical Legal Education at the West Heidelberg Community Legal Service. It is supported by Australian and international literature review and other case examples.

This paper discusses the specific issue of credit card payment over the internet with a focus on consumer protection and will be addressed in the context of e-commerce with a particular interest in cyber scams and fraud.

The legal protection available for credit card use over the internet will be discussed within the context of domestic redress available for transactions of a domestic and international nature.

¹ Experience of Case X at West Heidelberg Community Legal Centre

Project Aims

This analysis aims to answer the question 'how does one fashion more affordable and accessible consumer remedies for low value transactions, such as online purchases of goods and services procured by fraud?'

It will briefly discuss international objectives but aims to narrow the focus to the more pressing domestic redress avenues required.

Throughout this paper will be several recommendations to address this important policy issue.

The Internet

The Internet world is accessible, untested and limitless. It has helped shape a new economy and is changing how traditional business is done and how disputes are resolved. Business in the form of selling goods and services from a website or electronic location on the Internet (distance selling) is now common place and e-commerce transactions can be conducted by users and consumers worldwide.

For the on-line consumer this virtual world has many characteristics which make it different from shop-front purchases. These give rise to issues for consumers, including: increased uncertainty about the identity and address of the seller, the inability to inspect goods prior to purchase, payment in advance of receipt of goods, uncertainty about delivery arrangements, and redress difficulties where purchases are made across borders.² This facility of operating at a distance seems a popular one with potential fraudsters.

These characteristics all require initial trust of the consumer that the business they are dealing with will fulfill their obligations. This trust is often granted with little or no reasonable grounds for the belief and it follows then that this trust is often exploited.³

It also means that heavy reliance is placed on the payment card mechanism known as the credit card.

² These core characteristics are inherent in commercial transactions of this type. Consumer Affairs Victoria Response to Review of Best Practice Model. December 2003, p8

³ Van Rafelghem, M. *Plastic and the internet: rights of consumers in Australia*, Commercial Law Quarterly Sept-Nov 2005, p 4

The Susceptible Consumer

A Web site able to reach millions of people can be set up, moved or closed down in minutes, leaving little or no trace of its prior existence.⁴ For this reason, the internet is a low cost medium which can be exploited by unscrupulous and fraudulent individuals endeavoring to procure payment with no intention of supplying any goods in return. Given that it can be difficult to locate website operators and that e-business can easily cross national boundaries, significant accountability and enforcement issues are created.

The borderlessness of the internet can make it easy for fraudulent marketing to deceive vulnerable consumers who often do not appreciate the extent of the internet's size and capacity to support anonymity. The risks become even higher in international transactions.

Consumers engaged in e-commerce are vulnerable to a range of misleading or unconscionable activities or 'scams', such as get rich quick schemes, pyramid schemes, misleading business opportunities and phoney prizes and lotteries.⁵

The main e-consumer violations relate to undelivered goods and services.⁶

⁴ Dickie, J. *Producers and Consumers in EU E-Commerce Law*, Oxford and Portland, Oregon 2005, p8

⁵ The Treasury Expert Group on Electronic Commerce *Review of Building Consumer Sovereignty in Electronic Commerce: A best practice model*. Discussion paper 2003, p17

⁶ See, n28

What Regulatory Issues Apply?

From a local legislative perspective, that is a consumer dealing with a local (Australian) trader, the remedies available are those under the *Trade Practices Act 1974* (Cth). It is the global and cross-jurisdictional nature of much e-commerce or cyber scams that provides the key regulatory issue from a consumer protection perspective.⁷

Redress for Transactions within Australia

Part V of the *Trade Practices Act 1974* (Cth) prohibits misleading and deceptive conduct, false or misleading representations and other specified unfair practices. Part V also implies into all consumer contracts specified conditions and warranties and provides for direct rights of action against manufacturers or importers. Part IVA, broadly speaking prohibits unconscionable conduct in commercial and consumer contracts.⁸

Any cyber scam will almost invariably be caught under ss52 and 53 of the TPA.

Section 58 of the TPA also prohibits accepting payment where there is an intention not to supply goods or services, or to supply goods or services materially different from the goods or services in respect of which payment is accepted.

⁷ Smith, Lisa. *Global online shopping: how well protected is the Australian consumer?* Competition and Consumer Law Journal Vol 12, p163 (2004) p3

⁸ Sorensen, A & Webster, M. *Trade Practices and the Internet*, Lawbook Company, 2003, p25

Consumer Protection for International Transactions

As mentioned earlier it is the global and cross-jurisdictional nature of much e-commerce or cyber scams that provides the key regulatory issue from a consumer protection perspective.⁹

Risks may be higher with international transactions because:

1. The consumer may be unable to contact the merchant

In case X¹⁰ the client became the victim of an online scam by a US company claiming she had won a holiday. A telephone call was required to claim the prize and credit card details were required to 'secure the deal'. After her credit card was subsequently debited for a total of over \$1000 she sought redress through the particular merchant. To her surprise she was unable to contact them after several attempts.

2. The consumer may be entitled to bring an action against the merchant however the potential high financial cost of doing so and the issues of unenforceability make it impossible.

In the case of *ACCC v Chen* [2003] ATPR 41-948 the ACCC alleged that a website run by Chen, a resident of the United States reproduced the official website of the Sydney Opera House and used it to secure ticket bookings from unsuspecting consumers.

The ACCC brought proceedings in the Federal Court for declaratory and injunctive relief against Chen, on the basis that Chen had contravened s52 *Trade Practices Act 1974* (Cth) by engaging in misleading and deceptive conduct.

⁹ Ibid, n7

¹⁰ Anonymous case dealt with by the author on clinical placement at West Heidelberg Community Legal Centre

It was held that through s6 of the *Trade Practices Act 1974* (Cth) the operation of the other provisions in the Act were extended to trade or commerce ‘between Australia and places outside Australia’,¹¹ in relation to conduct involving the use of ‘telephonic services’¹² and to take the effect of making any references to ‘corporations’ in the section references to ‘individuals’.¹³ It followed from this that Chen’s conduct constituted a breach of s52 of the Act.¹⁴

In terms of relief a declaration was granted to convey the court’s disapproval of Chen’s conduct and an injunction was granted under section 80 *Trade Practices Act 1974* (Cth).

It was mentioned that there was no facility in the US to enforce such an injunction, however Sackville J held that it was warranted for three reasons:

- (a) It would prevent Chen from engaging in the relevant conduct in the future;
- (b) The growing problem of cross-border misleading conduct meant that it was desirable to “[fashion] remedies that can reasonably be expected to discourage, if not entirely prevent such activities”¹⁵; and
- (c) “the Federal Trade Commission (US) is more likely to institute action against [Chen] to curtail misleading or deceptive conduct in the [US] which affects Australian consumers (should such conduct be repeated) if an Australian court grants injunctive relief than if it does not.”¹⁶ Here Sackville J also referred explicitly to the principles for international law enforcement co-operation developed in the OECD Council *Guidelines*

¹¹ s6(2)(a)(i)

¹² s6(3)(a)

¹³ s6(3)(b)

¹⁴ Sackville J at [47,410]

¹⁵ At [47, 405]

¹⁶ At [47, 405]

*for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders.*¹⁷

So, it is clear from this case that the extraterritoriality of the case coupled with its unenforceability will not prevent an order being made under the *Trade Practices Act 1974* (Cth). This however provides little satisfactory redress for the consumer and this too was noted by Sackville J in the case:

While domestic courts can, to a limited extent, adapt their procedures and remedies to meet the challenges posed by cross-border transactions in the Internet age, an effective response requires international co-operation of a high order ... [c]learly enough, much more needs to be done if Australian consumers are to be adequately protected against fraud or misleading conduct perpetrated over the Internet.¹⁸

The Australian Government as a Member country of the Organisation for Economic Cooperation and Development (OECD) has adopted several key instruments in seeking to achieve protection for Australian consumers engaged in e-commerce.

In May 2000 the *Australian E-commerce Best Practice Model* (the BPM) was released based on the OECD's 1999 *Guidelines for Consumer Protection in the Context of Electronic Commerce*. These Guidelines provided both a framework and a set of principles that inform businesses and consumers of types of information disclosure and fair trading practices expected of businesses engaged in e-commerce.¹⁹

In June 2003, the OECD *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* were introduced which built on the 1999 Guidelines with a focus on bi-lateral agreements.

¹⁷ Adopted in 2003, these Guidelines are intended to foster international law enforcement co-operation in the fight against cross-border fraudulent and deceptive practices.

¹⁸ At [47, 406]

¹⁹ The Treasury Expert Group on Electronic Commerce *Review of Building Consumer Sovereignty in Electronic Commerce: A best practice model*. Discussion paper 2003, p14

The BPM was replaced in March 2006 by the *Australian Guidelines for Electronic Commerce*.²⁰

Two of the key OECD Guidelines were that of:

1. EDUCATION AND AWARENESS

*Governments, businesses and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision making by consumers participating in electronic commerce and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.*²¹

The Australian Competition and Consumer Commission (ACCC) is responsible for providing information and advice on consumer protection matters in Australia and it is evident that there have been strategies introduced to address this issue. For example, the booklet entitled *The Little Black Book of Scams*. This is a consumer guide to scams, swindles, rorts and rip-offs developed by the Australian Competition and Commission (ACCC).²²

Other examples include the ACCC website SCAMwatch which is a site to help consumers recognise, report and protect themselves from scams²³ as well as the Ministerial Council on Consumer Affairs Consumers Online Website which can help consumers find resources and assistance on a wide range of consumer issues.²⁴

²⁰ Available at

http://www.treasury.gov.au/documents/1083/PDF/australian_guidelines_for_electronic_commerce.pdf

²¹ Guideline VIII OECD's 1999 *Guidelines for Consumer Protection in the Context of Electronic Commerce*.

²² A copy is available at <http://www.accc.gov.au/content/index.phtml/itemId/727809/fromItemId/653988>

²³ <http://www.scamwatch.gov.au/content/index.phtml/itemId/693900>

²⁴ http://www.consumersonline.gov.au/welcome_message.asp

These initiatives are however not as effective as they should be due to their limited availability apart from on-line searches. The Guidelines suggest the use of media and educational institutions in conveying this information

Recommendation 1:

It is recommended that this information not only be available on-line but that it is freely available in Legal Aid Commissions and Community Legal Centres throughout Australia rather than just online. These should be reproduced in financial institutions as they provide the payment method.

2. ALTERNATIVE DISPUTE RESOLUTION AND REDRESS

Consumers should be provided meaningful access to fair and timely dispute resolution and redress without undue cost or burden.

This has somewhat been provided for in the Code of Banking Practice to which all the major banks in Australia are party.²⁵

The Code of Banking Practice sets out the banking industry's key commitments and general obligations as well as disclosures and principles of conduct to customers.²⁶

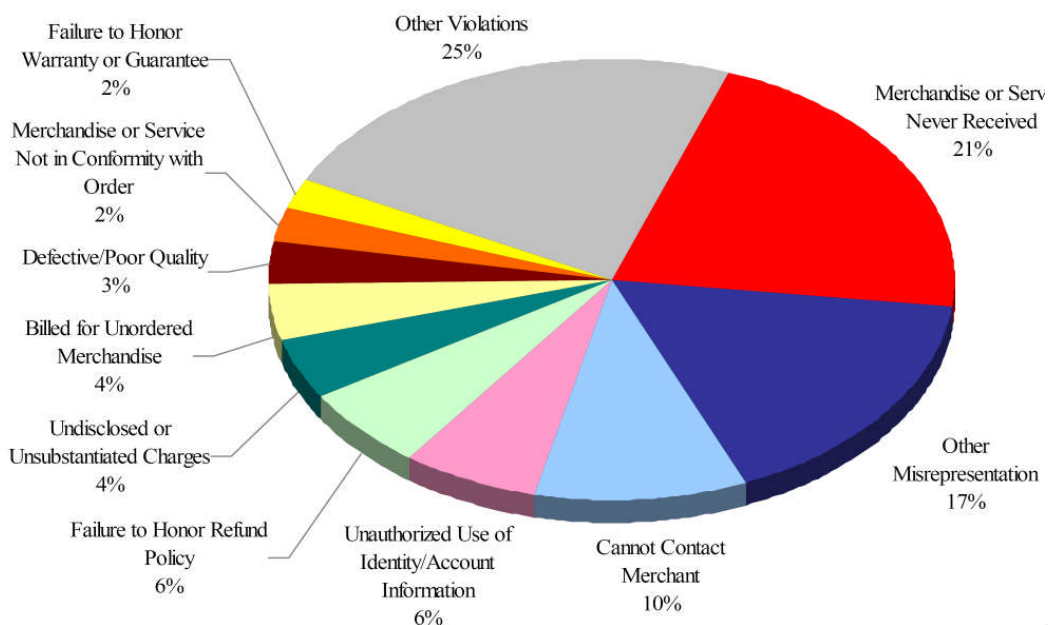
Although the Code is voluntary for banks, once its provisions are adopted the bank is required to reflect that they comply with the Code in their terms and conditions.²⁷

²⁵ Available at the Australian Bankers' Association website: www.bankers.asn.au

²⁶ See Parts B, C, D Code of Banking Practice

²⁷ Van Rafelghem, M. *Plastic and the internet: rights of consumers in Australia*, Commercial Law Quarterly Sept-Nov 2005, p 6

It is important for the consumer to have access to swift, inexpensive and effective avenues for redress should a problem arise post-transaction, which can deal with the transaction regardless of its international nature. When looking at the top violations consumers' experience, it seems evident that financial institutions may be in the best position to provide this.²⁸



Th

e Role of Chargebacks

Financial institutions are providing this by a chargeback process which is facilitated through the Code of Banking Practice. By clause 20 the card issuing bank promises to claim a chargeback right if one exists and if the customer has notified the bank of the disputed transaction in time.

²⁸ Econsumer Complaints Top Violations, January 1 – June 30, 2006. This is provided by the econsumer.gov website which is administered by the US Federal Trade Commission. <http://www.econsumer.gov/english/contentfiles/pdfs/PU15%20Jan-June%202006.pdf>

A chargeback is a right which may be exercised in certain situations by a cardholder's bank against a merchant's bank. It is a right to charge back responsibility for a credit card transaction from the cardholder bank to the merchant bank.²⁹

Although this process is not the consumer's strict legal right, the Banking and Financial Services Ombudsman considers this as so common that it is good banking practice to chargeback.³⁰ In the case of non-compliance, the Banking and Financial Services Ombudsman provides a mechanism for redress between a bank and an individual and therefore the customer may seek the assistance of the Ombudsman to get the charge back exercised.³¹

Chargebacks are now the most common and most certain means for consumers to obtain redress when involved in e-commerce. As they operate as a product of the dispute resolution process of each credit card scheme (Visa or Mastercard) even though the rights and requirements for charge backs are detailed in the operating rules of the relevant credit card schemes they remain confidential and unavailable for public use. Therefore, the only information a consumer is provided in relation to this charge back right is usually a general paragraph which is included in each bank's terms and conditions of credit card use.³²

For example: *"This process sets out specific circumstances and timeframes in which a member of the scheme can claim a refund in connection with a disputed transaction on a cardholder's behalf. This is referred to as a 'chargeback right'.*³³

²⁹ Banking and Financial Services Ombudsman Bulletin #26 p4

³⁰ Ibid

³¹ Van Rafelghem, M. *Plastic and the internet: rights of consumers in Australia*, Commercial Law Quarterly Sept-Nov 2005, p 7

³² Under s20(d) Code of Banking Practice a bank is required to include general information about charge backs with credit card statements at least once every 12 months.

³³ Extracted from the authors' credit cards terms and conditions

The author believes that although general disclosure is required, it does not guarantee consumer understanding.

In seeking to access a right the consumer knows nothing about, how is it possible to know if that right is being properly represented? In a perfect world it may be desirable to rely on the efficiency of banking practices. However, when a customer is turned away and told there is nothing that can be done when seeking redress,³⁴ without knowing specifically what she is seeking redress for, then how can they enforce it?

Recommendation 2:

It is recommended that credit card scheme information in relation to charge backs is made available to the public in all credit card terms and conditions. This includes the specific guidelines for which a bank may or may not be able to claim a charge back and the exact time frames in which to do so.

This will increase consumer confidence in the battle against cyber scams and will empower them to approach their financial institutions with purpose and authority.

The U.S and EU experience

In the United States of America the market is oriented towards consumer satisfaction and there are no major differences between the possibilities of charge backs existing at the US domestic level and at the cross-border level for American cardholders.³⁵

In America, the chargeback is a de facto right for the cardholder and many of the protections provided through charge backs are mandated through Federal law.³⁶ It has been said that a key difference between countries that provide charge backs as legal

³⁴ As was the situation with Case X at West Heidelberg Clinic when she attended the bank branch the day after realizing she had been misled.

³⁵ The European Commission Working Document – Payment card chargeback when paying over Internet (pg 8)

³⁶ Truth and Lending Act Reg Z

protection and those that rely on contractual arrangements with card companies is the level of consumer awareness of payment card rights and protections.³⁷

The European Union has also regulated charge backs through the European Distance Contract Directive.³⁸

Recommendation 3:

It is recommended that to improve the certainty in relation to charge backs and to make the chargeback right one of the consumers', the charge back provisions need to be contained in legislation.

A cooling-off period?

The European Union Directive on Distance Contracts³⁹ protects consumers' interests by providing the right to a cooling-off period. This means consumers can check that goods and services supplied correspond with information given about them.

The Directive provides for a cooling-off period of seven days; in the case of goods running from the date of receipt; and in the case of services it runs from the conclusion of the contract.⁴⁰

³⁷ Trans Atlantic Consumer Dialogue , *Payment Card Redress and Protections*. Available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=95>

³⁸ Directive 97/7/EC on the protection of consumers in respect of distance contracts.

³⁹ Directive 97/7/EC

⁴⁰ Article 6

This is somewhat reflected in Victorian contact sales legislation ⁴¹ which provides a cooling-off period of 10 days.

Recommendation 4:

It is recommended that the Australian Government looks into providing a similar cooling-off period in relation to distance selling e-commerce transactions in Australia. This may provide a positive redress mechanism in a domestic sense, however as reflected earlier, the enforceability of such a provision to cross-border transactions may prove difficult.

The Government may need to consider subsidising Banks for this change of mind facility.

Conclusion

In light of the above discussion, this paper has highlighted the significant need for further consumer education about fraudulent misuse of the internet as well as the need for easier accessibility to this and already invaluable information in circulation.

It has also shown that although mechanisms are in place for consumer redress in relation to e-commerce transactions and cyber scams, currently they either leave the consumer without the facilities to pursue an action or at the mercy of the banks to exercise their rights for them. It follows that these rights are not strictly consumer rights at all and therefore consumers are left with no specific information about avenues which may help them.

⁴¹ A contact sales agreement is typically a 'door-to-door' sale, whether at a consumer's home or workplace and is reflected in Part IV Division III of the *Fair Trading Act 1999* (Vic)

As a result the author believes that the recommendations provided need to be thoroughly considered.

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