

## Possible breaches of the TPA

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### Possible unconscionable conduct (ss. 51AA; 51AB)

Arguments as to whether transactions entered into by Indigenous consumers are unconscionable must take account of both Indigenous agency and the often heightened vulnerability of Indigenous consumers relative to other consumers. While Indigenous consumers do not constitute a class of ‘special disability’, in general Indigenous consumers, and particularly those in remote communities, are more likely to have lower levels of education, literacy and consumer awareness than non-Indigenous consumers, and be less able to access to independent legal advice (Amadio). In addition, Indigenous consumers in remote areas are likely to be more dependent on single providers of goods and services, such as community stores.

- **Overcharging for taxi services and alcohol**—The literature contains allegations that taxi drivers overcharge for services to town camps around Alice Springs (Commonwealth Ombudsman 1997). In addition, the Commonwealth Ombudsman (1997) also notes instances of Indigenous people being overcharged for alcohol. Further anecdotal evidence exists of the practice in the Northern Territory of the price of alcohol being increased dramatically to coincide with days on which welfare payment are made. Moreover, mechanical repairs for cars have also been identified as being priced at above market rates for Indigenous consumers (Cultural Perspectives 1998). It is recognised that while overcharging for goods and services is itself not a TPA issue, evidence that overcharging is directed towards Indigenous consumers may be suggestive of a relationship of vulnerability consistent with unconscionability (see Altman, McDonnell & Ward 2001: 10, and chapter 1 of this volume). The fact that these practices are directed towards Indigenous consumers, and are different to the services offered to non-Indigenous people may be indicative of an unconscionable practice. Such an interpretation would be consistent with s. 51AB(2)(e) under which ‘the amount for which, and circumstances under which, the consumer could have acquired equivalent goods or services from another party’ will be taken into account in assessing whether a transaction was unconscionable.

- **Used-car dealers**—during fieldwork a number of Indigenous and non-Indigenous people interviewed (including representatives of various consumer agencies) indicated that Indigenous people were often sold cars at significantly above market rates. In particular, a number of people gave accounts of car-dealers (both registered and unregistered) bringing cheap cars over the border in anticipation of royalty payments being made, and then selling these cars to Indigenous consumers at much more than their market value. In Alice Springs there were also accounts of a number of people, including art dealers, running small unregistered used-car businesses aimed at the Indigenous market as a means of supplementing their income. Two key consumer reports also note instances of cars being sold to Indigenous consumers at prices that are double, or triple their market value (Bell & Johnson 2001; Commonwealth Ombudsman 1997). In addition, in interviews conducted during fieldwork a number of people told of individuals who brought cars over the boarder into the Northern Territory to coincide with royalty payments being made to communities. These cars were then sold at rapidly inflated prices.

Cars are particularly prized possessions in remote communities. Elsewhere in this paper it has been argued that the value Walpiri men, for example, accord to cars is not constructed against that of the regional used car market, but in terms of their role in the primarily masculine pursuits such as hunting, attendance at ceremonies, and visiting kin across a huge region. Thus it may be that Walpiri males' demand for used cars is more inelastic than non-Indigenous consumers' demand for cars. While on the one hand the ability of used-car salespeople to exploit the more inelastic demand curve of Indigenous consumers could be considered good business practice, the fact that evidence exists of Indigenous people paying more for used cars may also be indicative of unconscionable conduct.

- **Book-up (or book-down) practices**—one interpretation of book-up practices is that they result in exploitation of Indigenous consumers' lesser bargaining position and as such may be unconscionable. For example, in accordance with the factors specified in s. 51AB(2) it could possibly be argued that an Indigenous consumer who enters into a book-up arrangement, who has low level of literacy and education (s. 51AB(2)(a)) and who is pressured into using book-up arrangements on the basis that there are no other financial services available to them and they were hungry and needed food (s. 51AB(2)(b)) and who is required to leave their key-card and PIN-number as security (s. 51AB(2)(c)) may be unconscionable. This is particularly the case if the fees charged for book-up are exorbitant compared with the fees charged for other financial services (s. 51AB(2)(d)). This last point however assumes that Indigenous consumers have access to credit from alternate financial sources, an assumption that can be problematic particularly in remote areas. Following on from this point, another possible interpretation of book-up is that it provides an essential service to Indigenous people who otherwise would not have access to credit. Thus it is possible that in some cases book-up has the potential to benefit Indigenous consumers (for a more detailed discussion of

book-up see Altman, McDonnell & Ward 2001: 12, and chapter 2 this volume).

- **Book-up and alcohol consumption**—a recent report (Martin 2002) indicates that in communities in Western Australia, publicans are taking key cards and PIN numbers in return for providing people with alcohol. Evidence exists of a single publican at Kookynie holding onto the cards of 200 Aboriginal people. Such transactions seem particularly unconscionable where people are alcohol dependent and thus particularly vulnerable to being pressured into using book-up arrangements in order to purchase alcohol. Finally, it should be noted that selling alcohol on credit may be in breach of the store's licence to sell alcohol, as is the case with many of the alcohol licences issued in the Northern Territory. Such matters however are more properly in the province of the relevant liquor licensing agency than that of the ACCC.

## Possible misleading and deceptive conduct and/or misrepresentation (ss. 52; 53).

The issues detailed below seem to indicate that many Indigenous people, and particularly those located in rural and remote areas, are vulnerable to misleading representations made during face-to-face transactions. This may be due in part to the high levels of illiteracy amongst the Indigenous population in rural and remote Australia.

- **Door-to-door sales**—TPA investigations to date seem to identify that Indigenous people may be particularly vulnerable to representations made by door-to-door salespeople (see Altman, McDonnell & Ward 2001, and chapter 2 of this volume). In addition, a recent Queensland Legal Aid report (2001) on Cape York Indigenous communities offers further examples of Indigenous consumers' vulnerability to representations made by door-to-door salespeople. Accounts within the report suggest that a travelling salesman sold vacuum cleaners on hire purchase agreements for \$3000 each to a number of women located in remote Indigenous communities. Payment for the vacuum cleaners was arranged through a finance company.
- **Mobile phones**—during fieldwork interviews a number of people gave accounts of mobile phones being sold to Indigenous people who, upon returning to the remote community in which they live, realise that the phone does not work as they have no coverage. For example, during interviews a number of Indigenous people commented that during trips to Alice Springs they had purchased mobile phones because of signs saying 'free phone' or because the salesperson had told them they did not have to pay for the phone. People were then asked to sign contracts. Problems with mobile phones are compounded when phones are paid for using automatic deductions from a

consumer's account. Thus a consumer may be having a service fee deducted from their account for a phone that they cannot use. A recent ACCC (2001) investigation against Total Communications details some of the problems that can arise in the purchase of mobile phones when the terms and conditions of the contracts are not fully disclosed (ACCC 2001). However, in the scenario detailed above even if the terms under which the phone was purchased are not considered a breach, it is likely that representations suggesting that the phone was free, if found to be inaccurate, would be.

## Possible abuse of market power

- **Monopoly selling**—where stores, retail outlets or taxis hold peoples' bank cards, as a form of book-up, this may create a monopoly (Commonwealth Ombudsman 1997; Westcombe 1998). This is because people whose cards are being held cannot purchase food or goods from other stores and thus become a captive market. Such a monopoly restricts competition and may be an abuse of market power in accordance with s. 46 of the TPA.
- **Market sharing agreements**—evidence gathered from one community suggested a market sharing arrangement such that one store sold sporting goods and clothing while another store sold petrol and goods to tourists. It is unclear how extensive such agreements are, whether they operate to the detriment of consumers, or whether examples of similar arrangements exist in other communities. If it could be established that market sharing arrangements were in operation then they may be in breach of s. 45 of the TPA.

## Possible breaches of specific provisions

- **Credit cards**—during interviews in two communities accounts were given of unsolicited credit cards being sent to people for amounts of money that they probably had no capacity to repay. We were told of one Indigenous couple who were receiving welfare payments and who had been sent a credit card with a \$1000 credit limit. The couple had quickly spent the \$1000 and were now trying to manage the debt on their welfare payments. This practice would seem to be in breach of s. 63A of the TPA.
- **Letter scams**—letters are being sent to Indigenous people in remote communities detailing winnings and asking for a payment to be sent. During fieldwork in Aurukun, David Martin was shown a letter that offered a prize in return for money sent overseas. These letters clearly involve misleading and deceptive conduct, and so would breach s. 52 of the TPA. In addition, letters that offer gifts or prizes with no intention of providing them breach s. 53C of the TPA.