

**SIRWAY ASIA PACIFIC PTY LTD V COMMONWEALTH OF AUSTRALIA [2002] FCA**

Federal Court of Australia – 18 September 2002

**FACTS**

Sirway submitted a tender to the Department of Defence to supply chinaware under a standing offer agreement for a three-year period. The chinaware was to meet a Specification, which involved testing the chinaware for water absorption, chipping and thermal shock.

Sirway's tendered samples did not meet the specification and the Department of Defence held meetings with a director of Sirway, Mr Giammario (Giammario) regarding the failure. Despite the nonconforming samples, Sirway was the successful tenderer and signed a Standing Offer Agreement (SOA) in August 1997.

The Department of Defence raised two purchase orders. Several meetings were held over the next year regarding Sirway's inability to provide the chinaware according to Specification. Eventually, Giammario wrote to the Department of Defence informing them the manufacturer was unable to meet the Specifications. The Specifications were reviewed by the Department and a testing laboratory, which concluded the Specifications were not too extreme.

The SOA was cancelled at a meeting in December 1998, as Sirway was unable to meet the Specifications. Sirway alleged, among other claims, that the Department had represented that it would accept chinaware that did not meet the specified standard.

**ISSUES**

Was the Commonwealth carrying on a business for the purposes of the Trade Practices Act 1974?

If so, was the Commonwealth liable for misleading and deceptive conduct under the Trade Practices Act 1974?

**FINDING**

Sirway claimed the Department managed a business of trading in chinaware in industrial quantities to bring an action under the Trade Practices Act for misleading and deceptive conduct. Their claim was based on the Department being aware that the chinaware did not meet the Specifications when they were granted the SOA.

Under the Trades Practices Act, Sirway had to prove that the Department was in trade or commerce. Therefore, it attempted to demonstrate that the Department was carrying on a business of trading or acquiring chinaware in industrial quantities. The Court held that the Department's core function was the defence of Australia and there was limited evidence of a "business". As acquiring chinaware related to a government function in the community's interests, therefore the Department was not in business. The Trade Practices Act was then unavailable for further claims.

The Court also found that if the Department has been engaging in business its conduct would not have been misleading and deceptive as it never represented that the tendered samples had complied with the specification or that acceptance of samples not meeting the specification would be satisfactory to the Department.

## QUOTE

*“Although the applicant focuses on its interaction with the respondent as the business operator, that is the applicant’s participation in the tender process and the conclusion of the SOA, it must first establish that the respondent was carrying on a business when it engaged in such activities. It is not sufficient that it establish the commercial nature of the respondent’s behaviour and the transaction; such behaviour must relate to the respondent’s carrying on of the alleged business.”*

## IMPACT

A tenderer when submitting tenders should make sure that they understand and are able to comply with the specifications. A Principal should be careful to ensure that it is careful about negotiating with a tenderer that may not meet the specification as it risks the tenderer later alleging that the commencement of negotiations means that strict compliance with the specifications is not necessary. Finally, the mere fact a government body is undertaking to operate in a certain field does not mean that it is operating a business in that field.

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