diction against which it could enforce the judgement for costs, so that the respondent would not bear the risk of the uncertainty of enforcement in the foreign country and the time and complexity of the action which might be necessary. On the other hand, the mere circumstance that an applicant is resident outside the jurisdiction does not necessarily invite an exercise of the discretion to order security, the question being how justice would be best served.

Despite the applicant's prima facie case, there was no certainty that it would be successful in recovering damages.

The case was held to be an appropriate one to order security for costs.

- John Tyrril

27. Product Liability

As has been reported in earlier Issues of the Newsletter, there has been a great deal of concern in the business community at the Law Reform Commission's product liability proposals.

In its discussion paper, the Commission stated that the current product liability laws are inefficient and unfair, as they do not place the risk associated with goods on those who obtain economic benefit from manufacturing them and that by imposing unnecessary costs they deny people access to their legal rights.

A matter of particular concern to the business community is the proposed shift in onus of proof to the manufacturer. As Justice Elizabeth Evatt, Commission President, has stated:

> "The fundamental principle is once a person injured shows this good caused loss or damage, the onus shifts onto the (manufacturer) to show that the user should have known the good would act in that way or contributed to the way the good acted."

Whilst the battle over the Commission's product liability proposals continues, with major business groups questioning the role of the Law Reform Commission, a recent case against a manufacturer is interesting reading, as the plaintiff attempted to shift the onus onto the manufacturer.

In *Beard v Abrasiflex Products (WA) Pty Ltd*, Full Court of the Western Australian Supreme Court 15 March 1989, a farmworker was unsuccessful in relying upon the doctrine of res ipsa loquitor (the thing speaks for itself) in a negligence action against the manufacturer of a cutting disk, which injured him when it disintegrated. The manufacturer produced evidence that the accident could have occurred without negligence on its part.

- John Tyrril

28. Promise To Keep Offer To Sell Building Open For A Week - Whether Actionable Under Section 52 Of The Trade Practices Act

In *Milchas Investments Pty Ltd v Larkin* (1989) ATPR 40-956 application was made in the New South Wales Supreme Court to have a caveat removed, which a prospective purchaser of a property at Kings Cross had lodged, when its acceptance of the owner's offer to sell the property had been rejected. The acceptance had been communicated on the last day of a seven day period in which the owner (a company) had stated the offer would be kept open.

The prospective purchaser cross claimed for specific performance of contract made by correspondence or, alternatively, a declaration that by the principles of equitable estoppel, equitable quasi contractual rights were created compelling the owner to transfer the property for the $10.2m sale price or, alternatively, that pursuant to sections 52, 80 and 87 of the Trade Practices Act, the same owner was compelled to transfer the property for the sale price.

Section 52 provides that a corporation shall not in trade or commerce engage in conduct that is misleading or is likely to mislead or deceive.

Young J. ordered that the caveat be withdrawn and dismissed the prospective purchaser's cross claims.

Young J. held that the director of the company who had made the offer lacked actual or implied authority to make the offer - "I cannot see how it can be said that making a contract to sell a company's principal asset is in the ordinary run of things for even the most senior partner or principal of a company"; the company had not held the director out as its agent to contract. The correspondence and conversations contemplated a formal exchange of contracts and did not constitute a binding contract, even in a provisional sense. Furthermore, there was no writing signed by the vendor sufficient to satisfy the requirements of section 54A of the Conveyancing Act (NSW) 1919.

The cross claim based upon equitable estoppel failed, as the evidence did not establish that the owner knew that the prospective purchaser was relying to his detriment upon any representations that it would sell the property.

The evidence tended to suggest that the director of the company had changed his mind, rather than that there had been any falsity in the statement; a statement that is misleading or deceptive within the meaning of section 52 ordinarily relates to a statement as to the past or the present. To find that a statement of future conduct falls within section 52 as misleading or deceptive, it must be shown that it was false at the time that it was made.

Even if a breach of section 52 had been established, this was not a case where the Court should exercise its discretion under section 87 of the Trade Practices Act or under section 23 of the Supreme Court Act to make an order virtually equivalent to specific performance; there is power in section 87 to make such an order, but damages is the ordinary remedy for breach of section 52.

- John Tyrril

29. Severance Pay - Commission Decision

On 19 October 1989, Commissioner Grimshaw in the Australian Industrial Relations Commission handed down his decision on applications to vary various building, metal and civil construction awards in respect of redundancy/