# Comment

*Cash for causes*

Observers of the ABA's cash for comment inquiry have been hearing a lot about "trust".

When the Titanic sank in icy Atlantic waters more than 80 years ago, it marked not only the end of a fantasy about human beings' conquest of the ocean, but the beginning of the end of another very human construction on the high seas - International Mercantile Marine.

IMM was "a vast trans-Atlantic combine", a "trust", formed by JP (Pierpont) Morgan through drawing together American, British and German shipping interests. It was inspired, like so many of his industrial consolidations, "by a sense of destiny rather than realism".

In a review of a recent biography of Morgan, Robert Skidelsky writes that the word "trust", for Morgan, had "a fine moral resonance":

> ...[P]roperty held in trust was burdened with duties, to its owners naturally, but also to the community. It was the moral face of business. His opponents did not see it that way. To them it meant restraint of trade, price fixing, monopoly profits. Senator John Sherman, author of the Sherman Antitrust Act of 1890, denounced trusts as a "kingly prerogative inconsistent with our form of government". Was it mere linguistic irony that the most famous piece of American business legislation renounced the idea of trust for that of law?[1]

It took nearly three quarters of a century after Sherman's legislation for Australia to give up on trust and ethics and get a Trade Practices Act.

## Misleading and deceiving

One of the things this new legislation did was create an offence of "misleading and deceptive conduct" in section 52. It's a very broad concept intended to catch a wide range of business conduct.

In the early 1980s, some lawyers saw an opportunity to catch the media in this new legislative trap.

Those representing Australian cricket captain Kim Hughes and fast bowler Jeff Thomson brought an action alleging both defamation and misleading and deceptive conduct in relation to articles which appeared in newspapers in 1983. They included headlines like "Mutinous elements threaten to destroy Australian cricket", "A team divided - gallows await yesterday's heroes" and included a cartoon caricature of Hughes playing cricket with a large knife through his back and a photograph of Thomson.

While the Full Federal Court did not feel it necessary to answer key questions in the case, it did find that the publication of statements, including statements of opinion, in the ordinary course of the publication of news in those parts of a newspaper which are not advertising material, could constitute conduct which is misleading and deceptive or likely to mislead or deceive.[2]

A second case[3] confirmed this view of the Trade Practices Act. The MS Dalmacija, which had been on a "Far East Christmas Cruise" in December/January 1981-82, was greeted in Fremantle by media representatives. They'd received information from passengers who had got off the cruise in Hong Kong. After speaking with a number of passengers, journalists wrote stories over the next few days which were variously headlined "Nightmare, say ship passengers", "Nightmare voyage say passengers", "Criticism, praise for cruise ship", "Cruise passenger: Drill 'inadequate'".

Passengers were quoted saying "Christmas Day was a joke. There was not even Christmas Pudding. There was not even a sign saying Happy Christmas. We got a passenger who was a bit of a sign writer to do it." "One cabin, booked by prominent businessman, Mr Charles Eckart and his wife, was said to have a vile smell...Daily News reporters found the smell in the bath and toilet almost unbearable".

The reports did however note that "[O]ther media personalities who were given free promotional trips by the organisers, said they had no complaints".

The action succeeded on both defamation and misleading and deceptive conduct and substantial damages were awarded.

It put consumer protection law on a collision course with the freedom of the press.

## Getting the media off the hook

Media organisations were, of course, horrified. They feared that unscrupulous organisations would be able to paralyse the daily job of journalism. The relationship between journalist and reader, listener and viewer, they said, was different to that between a supplier and a customer. Society needed the media to be able to investigate and report fully, frankly and fearlessly, even if the price of that freedom, occasionally, might be imprecision or inaccuracy.

Although, in the Dalmacija case, the aggrieved party could also recover damages in defamation, a new and powerful form of potential liability

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had been created under the Trade Practices Act. The federal government responded quickly to the concerns of newspapers and broadcasters and amended the Trade Practices Act to exempt most publishing activities of "prescribed information providers" from "misleading and deceptive conduct" and related causes of action under the Trade Practices Act.

The government didn't however, exempt the advertising and promotional activities of information providers. There, the public policy balance has been struck firmly on the side of consumer protection. The point is not to set fundamentally different standards of accuracy for journalists and advertisers. It's to distinguish the type of regulatory system that applies.

## Getting the media on the hook

The media can't have it both ways. They can't claim the "freedom of the press" to get out of misleading and deceptive conduct, but then behave like advertisers.

Down in Lawsdale and Jonestown, the glitziest shopping malls in Australian commercial radio, ABC TV's *Media Watch* and the Australian Broadcasting Authority have found that agreements have been signed which require certain kinds of behaviour by on-air commercial radio announcers. Some of them are about positive promotion of causes, others are about "no-disparagement" of the sponsoring companies. If it were simple advertising, audiences would know what they were dealing with.

But this material is not presented as advertising. It's comment, opinion, something else altogether. Laws has terminated most of his agreements of this kind, while Jones continues to insist they have no impact on his on-air behaviour, as if that should be enough to satisfy his audiences. "Words," even those in contracts with major corporations "can mean whatever you want them to mean," he argues, quoting another character with a taste for mirrors.

It's difficult to see how much of the kind of conduct John Laws and Alan Jones have been engaged in can be anything but advertising or promotion, in which case the Australian Competition and Consumer Commission needs to be looking hard at it, as well as the Australian Broadcasting Authority. If promotion is going on in the midst of the expression of views and opinions, but the existence of the agreements which require that promotion is not being disclosed to audiences, it's starting to smell awfully like conduct which is likely to mislead or deceive.

If it's not advertising or promotion, then it's back to the ABA, which needs much tougher rules about whether these kinds of agreements can exist at all, and, at the very least, about their effective disclosure to audiences.

In its Sponsorship Rules, the US Federal Communications Commission says "Radio listeners have a right to know by whom they are being persuaded". It doesn't seem a bad place to start.

## Flint

In the midst of the ABA's high profile inquiry about the peddling of influence on commercial radio, Australians were treated to the sounds of the broadcasting regulator responsible for running the inquiry spruiking a cause on one of the very programs at the centre of the inquiry.

Even those who spend their days a long way from the lawyerly deliberations of judges and tribunals and authorities wondered if they'd got up on the wrong side of the planet that morning.

But Professor David Flint, like Alan Jones, sees the world differently, insisting that radio audiences can trust his ability to keep Friday's work out of Monday's mind. He stood down from the ABA's hearing, but, he insisted, only because of the unconscionable delays which would otherwise be caused. He'd looked at his behaviour in the mirror and found nothing that the law of apprehended bias by administrative decision-makers could find astray.

## Causes

Alan Jones, John Laws, JP Morgan, and perhaps Professor David Flint have all been warriors to their causes.

It would be a pity if one of the results of the spectacular cash for comment inquiry was too many new laws which force public people to abandon all their causes, since the world would be a dull and stagnant place without them.

But if we have learned anything over the last few weeks, or months, or even the last century, it is surely that we have a right to expect the most visible lights of a society awash with media to keep their causes, and the circumstances in which they promote them, clear.

On that score, the 2UE inquiry shows that too much has been left to Trust and not enough to the Laws. <

**Jock Given**

**Notes**

1. Skidelsky, R. (1999) 'Giant' (Review of Strouse, J (1999) 'Morgan: American Financier'), *New York Review of Books*, 6 May, pp 4-7
2. Re Global Sportsman Pty Ltd and Jeffrey Robert Thomson and Mirror Newspapers Limited and Nationwide News Pty Ltd (1984) 55 ALR 25
3. Re Australian Ocean Line Pty Ltd and West Australian Newspapers Ltd and William Ross Harvey (1985) 58 ALR 549