Recent Cases

A roundup of recent cases from Australia and New Zealand

Comparative Advertising: the need for truth and honesty

Hoover (Australia) Pty Ltd v *Email Ltd* represents a cautionary tale for advertisers who engage in comparative advertising.

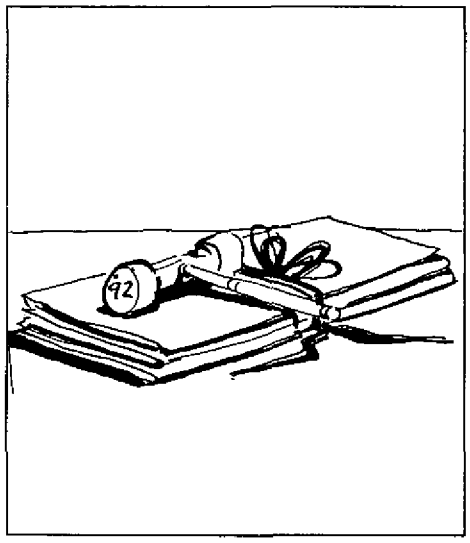
Email produced a promotional video in which a comparison was made between an Email washing machine, a Hoover machine and an American machine by placing a two kilogram weight in the form of a small sack of lead shot in each washing machine. A voice-over stated that the two kilogram weight equated to "a couple of towels, a few shirts and pillow cases". The machines were shown in operation accompanied by appropriate music, with the Email machine remaining stable and the Hoover and American machines becoming unstable and "walking". Hoover argued that the video contravened section 52 of the *Trade Practices Act* in that the representation made in the video was that the Hoover machine would "walk" as depicted it if contained an unbalanced load. The Federal Court upheld this claim, finding that as the specific gravity of lead markedly differs from that of wet cloth, the placement of the lead shot on one side of the wash bowl contributed to excessive vibration and walking of the Hoover machine as depicted in the video. The judge ordered injunctive relief against Email.

Defamation in Victoria

Victoria has for many years been fertile ground for defamation lawyers but very few actions have proceeded to judgment. There are signs that that situation may be changing.

On 17 February Judge Hanlon in *Ristevski* v *Mitchelson,* awarded a solicitor $20,000 plus costs. The defendant, an Estate Agent, had written to the plaintiff's office, the plaintiff's clients in a particular matter and the Law Institute of Victoria alleging that the solicitor had not acted in the best interests of his client.

In *John Hall* v *The Victorian Secondary Teachers Association & Anor,* a Jury awarded the plaintiff $150,000 plus costs on 10 March 1992. This was almost double the previous highest award in Victoria. The action followed the



publication of an article in "The Victorian Teacher" about an allegedly fictitious man, Jack Hall. The publication had a circulation of only 25,000.

A month later, on April 10 1992, a Supreme Court jury ordered the *Herald-Sun* in Melbourne to pay $165,000 plus interest and costs to Police Chief Commissioner Kel Glare for defaming him in an editorial. The editorial related to the "Tennis Australia" affair, which involved the decision by Mr Glare not to prosecute ACTU President Martin Ferguson, the Trades Hall Council Secretary John Halfpenny and two others over a letter requesting a $10,000 payment in return for an agreement not to stage anti-apartheid protests at the Australian Open.

The *Herald-Sun* had claimed that the editorial was fair comment and in the public interest, but was unsuccessful. The editorial implied that Mr Glare had not approached the DPP for advice in prosecuting, but instead had sought advice from a Victorian Government solicitor. The implication was that Mr Glare was avoiding being given advice that those involved should be prosecuted.

ASH appeal

On 20 May 1992 Mr Justice Davies of the Federal Court rejected an application for review made by the Action of Smoking and Health (ASH). ASH sought to have the Australian Broadcasting Tribunal's decision in respect of the broadcast of the 1990 Adelaide Grand Prix set aside. The Tribunal decided that tobacco-related material broadcast by the Nine Network was incidental to the race coverage and therefore did not contravene the ban on tobacco advertising in the *Broadcasting Act.*

Constitutional challenge to political advertising ban

On 16 March 1992 the High Court of Australia heard a constitutional challenge to the *Political Broadcasts and Political Disclosure Act.* The Act bans election advertising on television and radio and forces television stations to provide free advertising for political parties during elections. If the broadcasters' arguments are accepted, the case could have far reaching implications for the interpretation of the Australian *Constitution,* by implying fundamental rights such as freedom of speech. For a full review of the case see page 23.

Challenge to N.Z. Ombudsman fails

Television New Zealand Ltd has failed in a bid to overthrow a decision of the Ombudsman recommending that information be made available to the Tobacco Institute of New Zealand Ltd in accordance with the *Official Information Act* 1982.

Television New Zealand had broadcast in 1989 a current affairs program on tobacco entitled "Fatal Attraction". The Tobacco Institute alleged that the program was biased and requested all unused film and videotapes, all written materials received by TVNZ used in the program and all internal written materials. Its request was refused. The refusal of the request for information was referred to the Ombudsman. The Institute alleged that any delay in providing the material would prejudice a complaint made by the Institute under the Broadcasting Act.

TVNZ sought to justify its refusal on five grounds: commercial prejudice,

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invasion of personal privacy, obligation to protect information obtained from confidential journalistic sources, an improper advantage to the complainant under the *Broadcasting Act* complaint and that it would not promote the public interest.

On the issue of commercial prejudice, the Ombudsman said that she had to determine the matter in each case with reference to the actual information and the likely consequences of release. She said that TVNZ had no grounds for withholding the interview and refused the claim of commercial advantage but said that reporters' notes would be protected from disclosure on the grounds that a reporter must be able to put the notes together without the requirement for form and balance and the withholding of those notes was necessary for TVNZ to carry out its commercial activities.

TVNZ sought judicial review of the Ombudsman's decision in the Hight Court. Mr Justice Heron, declining to upset the Ombudsman's decision, said the interview and other material containing comments about the Tobacco Institute were personal information. He ruled that the decision of the Ombudsman for disclosure was not so unreasonable that no reasonable Ombudsman could make it; that, in considering a complaint about a program under the *Broadcasting Act*, unpublished material can be considered; sufficient material had been placed before the Ombudsman concerning commercial prejudice and she had correctly approached the matter on a case by case basis.

Availability of Defamation Defences

In a decision handed down on 7 February 1992 Mr Justice Hunt of the NSW Supreme Court considered the availability of defamation defences in a defamation action transferred from another jurisdiction to New South Wales. The decision was handed down in the long running case of *Waterhouse* v *Australian Broadcasting Corporation*, in which the plaintiffs claimed damages against the ABC in relation to a "Four Corners" current affairs program. Following changes to Australia's choice of law rules as a result of the High Court's decision in *McKain* v *R W Miller and Co* (19 December 1991), Hunt J held in relation to defamation proceedings transferred to NSW under cross-vesting legislation that:

(a) if the proceedings were commenced in a jurisdiction where defamation is governed by statute, the plaintiff may only plead the defences available under that statute; and

(b) if the proceedings were commenced in a jurisdiction where defamation is governed by common law, the defendant could plead any defence available in that jurisdiction or in NSW.

Penalties under the Trade Practices Act

In *Trade Practices Commission* v *ICI Australia Operation Pty Ltd* the defendant was fined a total of $250,000 for contraventions of the *Trade Practices Act*. The defendant admitted that the contraventions had occurred, cooperated with the Commission and the only question was the penalty to be imposed. The case demonstrates a continuing trend by the Federal Court to impose substantial penalties on corporations as a result of a failure to comply with the Act. The case is significant in light of proposals to increase penalties under the *Trade Practices Act* from the current maximum of $250,000 to $10 million. It also suggests that the Federal Court is likely to impose heavy fines for breaches of broadcasting legislation, if proposals to introduce penalties of $2 million per day for contraventions of the Broadcasting Services Bill become law.

New television advertising standard

In a much publicised decision handed down on 24 February 1992, the Australian Broadcasting Tribunal decided to re-regulate the amount of advertising which could be shown on commercial television. A standard which previously imposed advertising limits had been repealed in September 1987 to allow a trial period of deregulation. The Tribunal found that over this period the amount of non-program content shown on commercial television had risen. In deciding to set a new advertising limit, the Tribunal rejected submissions from the commercial television networks that the re-introduction of a standard would have a substantial adverse effect on their revenue. Both the Seven and Nine Networks have commenced proceedings for judicial review of the Tribunal's decision.

The Editor thanks the ABC's Legal and Copyright Branch, Allen, Allen and Hemsley, Blake Dawson Waldron, Cairns Slane and Minter Ellison for their contributions to this edition of Recent Cases. Contributions to Recent Cases may be forwarded to the Editor.