

Sun brought to earth on s.52 claim

The media can breathe a sigh of relief after a recent Federal Court decision confirming that the editorial content of their publications is protected from actions for misleading and deceptive conduct under the Trade Practices Act.

With the advent of the Trade Practices Act (1974), lawyers were quick to realise the potential of section 52 which prohibits conduct in trade or commerce which is "misleading or deceptive". For disgruntled subjects of news, current affairs and other information publications the section offered an attractive additional (or alternative) remedy to an action in defamation.

Legislation

To succeed in an action under s.52 or related provisions of the Act, an applicant would only need to show by reference to the publication that the conduct of the publisher was misleading or deceptive. It would not be necessary to establish that the publication was also defamatory. Such an action would also be heard in the Federal Court, where it could be coupled with a defamation claim but could thereby avoid a jury trial which, in some defamation jurisdictions, is a defendant's right.

Following the 1984 decision in *Australian Ocean Lines Pty Ltd -v- West Australian Newspapers Ltd* that newspaper reports were capable of breaching s.52 if they were misleading or deceptive, the Federal Parliament recognised that the section was not intended to be used in this way and introduced a new section 65A. In effect, s.65A provides that s.52 and its related provisions do not apply to a publication by a person who carries on business of providing information except where:

- (a) the publication is an advertisement; or
- (b) the material published relates to the supply or possible supply of goods or services put out by the information provider itself.

While the drafting of the actual section admittedly leaves something to be desired, its purpose is clear: Editorial content of newspapers, magazines, radio and television programs is exempt from action under s.52; advertisements and other promotional material in which the publisher has a commercial interest are not. The Attorney-General's Second Reading Speech indicates that section 65A was intended to operate to exempt the media from s.52 type actions "which could inhibit activities relating to the provision of news and other information..."

Sun Earth Homes

Despite this, however, there have been a number of attempts to circumvent s.65A, the most recent and most novel occurring in *Sun Earth Homes Pty Limited & Ors -v- Australian Broadcasting Corporation*. The ABC was sued for breaches of sections 52 and 55 of the Trade Practices Act in addition to defamation, injurious falsehood and breach of contract in relation to a story on "The Investigators". The program dealt with complaints about the quality of services provided by a kit home company Sun Earth Homes Pty Ltd and the quality of bricks manufactured and supplied by its associated company Terra Firma Bricks Pty Ltd.

The Applicants claimed that the ABC was not protected by s.65A because:

- (a) a radio promotion for the program was an advertisement;
- (b) the television program was incorporated into the radio item by the references made to it in the radio program and was therefore part of the same advertisement; and
- (c) the television program constituted an advertisement for a book published by the ABC entitled "The Complete Consumer".

As reported by Bill Childs (Communications Law Bulletin Vol 11 No 1 Autumn 1991), Justice Burchett considered that each of these claims was arguable and refused the ABC's application soon after proceedings commenced to have the Trade Practices claims struck out.

Decision

After a two week trial in late 1993 involving more than 25 witnesses and a total damages claim in excess of \$5 million, Justice Wilcox found that the ABC was fully protected by s.65A. Sun Earth, and two other Applicants, directors of Sun Earth, also failed in their actions for defamation, injurious falsehood and breach of contract. Allegations in the program that Sun Earth and one its directors, James Firbank had acted incompetently, deceptively and unethically in business matters were proved to be true. Terra Firma succeeded only on the defamation claim and was awarded \$30,000 damages.

In relation to the Trade Practices claims, Justice Wilcox considered that while the

radio program constituted an advertisement none of the Applicants was identified in it and it was therefore not necessary to determine whether its contents were misleading. The Applicants did not press the argument that the television program, being incorporated into the radio program, became in itself an advertisement. However, Justice Wilcox commented that this was an untenable proposition which, if it were correct, would defeat the purpose of s.65A.

While accepting that if the program about the Applicants was published in connection with the supply of goods or services or the promotion of such supply the case would fall into one of the exceptions in s.65A, the judge found that "it would be a departure from reality" to treat the television program as a publication in connection with the supply or promotion of the "Complete Consumer" book or as an advertisement for it. He said:

"The purpose of the segment was to provide information to viewers. The reference to the book was merely a footnote. This seems to be a case of a book seeking to exploit a television program's popularity and reputation, not a case of a television program being treated to promote a book. The televised material contained no promotion for other programs."

Comment

This decision, which was not appealed, is in accord with the intentions of s.65A and represents a significant victory for the media in its ongoing battle to stave off attempts to bring defamation cases under the guise of s.52 actions. However, publishers should continue to be wary. Much of the terminology in s.65A is vague - Justice Burchett referred to its "jumbled accumulation of artificially defined expressions" - and therefore open to exploitation by creative legal minds including any members of the judiciary unsympathetic to the media. And in the Sun Earth case, Justice Wilcox accepted that a promotional item for "The Investigators" program did constitute an advertisement and that s.65A would not have excluded the operation of s.52 in relation to any misleading conduct constituted by that publication.

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