# Recent ACT defamation cases

**Noel Greenslade provides a round-up**

In *Packer -v- The Australian Broadcasting Corporation & Ors*, the plaintiff sued in respect of an edition of *"Lateline"* broadcast on 11 October 1990. The program dealt with corporate collapses in the 1980's, the alleged failure of the Labor Government to prevent these events, and depicted now failed entrepreneurs such as Messrs Bond and Skase as having enjoyed access, through financial patronage to government leaders. The program described practices used by unscrupulous corporation controllers to "rip off" shareholders, such as "skimming", "window dressing", and "insider trading", and the reporter then said:

"It's now clear in the heady boom times of the 1980's, many major corporations used these practices and many more were tempted to use them. But what is not clear is why no one in the Labor Government did anything to seriously investigate them or stop them.

The immediate reason can be found in the events of the time".

At this point in the broadcast, a background shot displaying the plaintiff engaged in conversation with the then Prime Minister, Mr Hawke was broadcast lasting approximately 4 seconds, during which time the reporter said:

"Before the crash, entrepreneurs were national heroes, their deals were barely questioned. They might, if you were lucky, even assist you in your re-election".

Later in the program there was an interview with the Hon. Michael Duffy, Federal Attorney General on the role of the NCSC. The interviewer asked Mr Duffy at the beginning of the interview:

"If Malcolm Fraser and John Howard presided over the era of the tax evader, and the avoider, it would be fair to say, would it not, that your Labor Government has presided in the 80's over the era of the corporate crook?".

and in a later question:

"Talking for obvious reasons in general terms, do you believe that there are business people walking around in Australia now who should be behind bars and, secondly, if so, how confident can you be that that is where they will end up?".

At the end of the interview, as the program closed, the image of the plaintiff and Mr Hawke was broadcast again.

The plaintiff's lawyers wrote to the ABC complaining of defamatory inferences that they alleged flowed from the program concerning the plaintiff, and demanded an apology. The ABC responded by denying that any of the specific imputations alleged by the plaintiff's lawyers could have arisen from the broadcast and stated that they did not believe an apology was warranted. Nevertheless, on 18 October 1990, the ABC wrote to the plaintiff's solicitors and suggested a statement in the followng terms:

"Welcome to the program ... before we start tonight, I'd like to refer back to our program last Thursday.

You may be aware that lawyers acting for Mr Kerry Packer have complained to the ABC about the Lateline program.

It was called "The Horse has Bolted" and examined why the Hawke Government had failed to properly regulate the corporate sector.

The Report included three seconds of well-known file footage of Mr Packer at a dinner with Prime Minister Hawke.

Mr Packer's lawyers have complained that some viewers may have concluded that Mr Packer was in some way involved in corporate fraud.

We didn't intend any such meaning and we don't believe viewers would have drawn this conclusion, but if any viewers did so, we apologise to Mr Packer for that".

The plaintiff was not satisfied with this offer and through his solicitors replied suggesting a different form of words. However, on 18 October 1990, the first defendant's version was broadcast with the exception that the words "four seconds" were substituted for the words "three seconds".

In his reasons for decision of 25 Novermber 1993, Justice Higgins found that whilst the program did impute that the plaintiff had aided politicians being re-elected, such an imputation alone was not defamatory unless it was further imputed that such assistance in gaining re-election was for an illegal or improper purpose, and found that an imputation that the plaintiff had bribed politicians to ensure they did not investigate his criminal activities was not made out. However, the following imputations were found to be made out:

(a) that the plaintiff was guilty of corporate fraud;
(b) that the plaintiff had acted deceitfully in manipulating company accounts;
(c) that the plaintiff had acted dishonestly in stripping companies of their assets for his personal benefit; and
(d) that the plaintiff had engaged in disreputable financial dealings in connection with companies controlled by him.

Justice Higgins awarded $40,000 for damage to the plaintiff's reputation, $5,000 for aggravated damages, and $2,750 for interest. Matters aggravating damages were the admitted falsity of the allegations, although His Honour noted that he was not satisfied that the defendants had intended to defame the plaintiff, and the rejection of the plaintiff's request for an appropriate apology and the publication of an inadequate apology which was described as ".... appallingly incompetent and arrogant....".

## Defamation of a "class" or "group" - identification of individuals

Richard Farley, Graham Blight, John MacKenzie, William Bodman, Ross MacIver, and Neil Samuels have all brought separate proceedings in the A.C.T. Supreme Court against John Fairfax Group Pty Ltd & Ors in respect of an article published in the *"Financial Review"* on 22 June 1992 entitled "Meatman sent packing to undertakers". The article criticised activities of unnamed officials, representatives, lawyers and consultants engaged by or acting for the National Farmers Federation and the Victorian Farmers Federation. The Plaintiffs allege that they are, or were at the relevant time, officials of the National Farmers Federation or the Victorian Farmers Federation, and each of them alleges that the matter complained of was defamatory of him.

The defendants (except for William Matthews) brought an application to strike out the statement of claim on the basis that none of the plaintiffs could be identified from the matter complained of. Justice Higgins dismissed the application and in his reasons for decision of 25 November 1993, discussed the factors he considered relevant to whether defamatory statements made about members of a class of persons without expressly identifying individuals within that class, can give rise to cause of action

on behalf of individuals within the class so described. Those factors were:

1. Whether the matter complained of properly interpreted, defames all or some of the class; if the matter complained of conveys a meaning that defames all members of the class, it is more likely that each member of the class will have a cause of action.
2. The size of the class; the smaller the size of the class, the more likely it is that individuals within the class will have a cause of action.
3. The generality of the defamatory allegation; Justice Higgins commented: "The more general the allegation, the less likely it is that the average reasonable reader would interpret the matter complained of as defaming each member of the class or, if appropriate, any of them. On the other hand, the more specific the allegations against a large class, the less likely it is that the average reader could accept that the matter complained of conveys the relevant imputation against each member of the class".
4. The extravagance of the allegation: the more extravagant the allegation, the less likely that the average reasonable reader would accept that imputations were conveyed against any or all members of the class.

His Honour found in this case that because the allegations in the article related to a specific fact situation and were not, per se, extravagant it was not possible for him to conclude that it was impossible for the matter complained of to defame the plaintiffs and accordingly the application was refused. *(Ed - an application by the defendants for leave to appeal has been refused).*

## Thompson -v- Australian Capital Television Pty Limited - Appeal

A Notice of Appeal against the decision of Justice Gallop of 20 December 1993 was filed in the Federal court on 7 January 1994. In substance the two grounds of Appeal are:

1. That the defence of innocent dissemination is not open to a television broadcaster who has deliberately re-broadcast a programme containing libel (whether that broadcaster was aware the program contained libel or not); and
2. That the Learned Judge erred in holding that on its terms the Deed of Release executed on 23 August 1985 released the defendant.

The Court's decision in relation to the first point of Appeal, will obviously be of great importance to television broadcasters, particularly regional stations, that take broadcasts on relay.

## High Court - Statutory Privilege

In *Pervan -v- North Queensland Newspaper Company Limited & Anor*, the High Court was required to consider the application of the statutory defence provided by Section 377(8) of the *Criminal Code Act 1899 (QLD)* which provides:

"It is a lawful excuse for the publication of defamatory matter .....

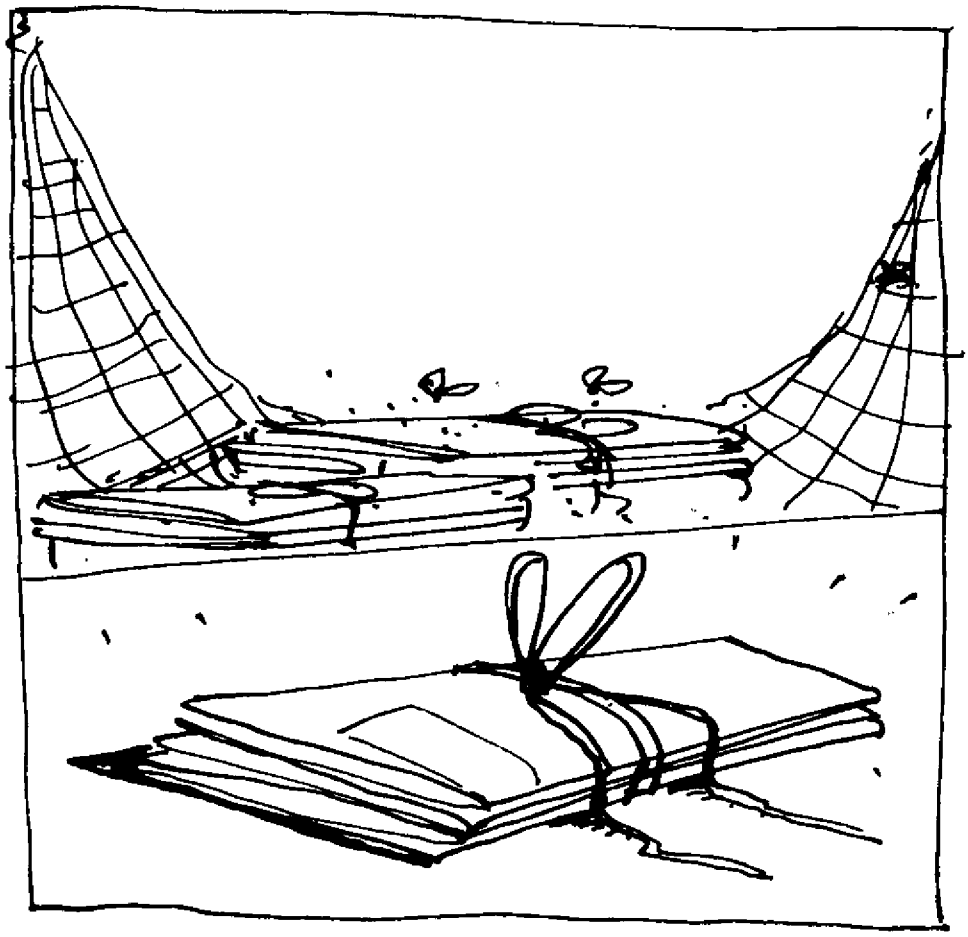
(8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue".

In 1986, a member of the Parliament of Queensland, made allegations in the Parliament that Mr Pervan, a Councillor of the Johnston Shire Council and Chairman of its Works Committee, had misapplied the Council's Cyclone Relief funds, and had been "feathering his own nest". The first respondent, the publisher of the *"Innisfail Advocate"* had twice published a fair report of these allegations. It then published on behalf of the second respondent in its Public Notice section, an advertisement in the following terms:

*"Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable damage to the image of our shire. It is now more important than ever to attend the ratepayers and residents Meeting at the Grand Central Hotel, Tuesday, 12th August at 8pm".*

The plaintiff brought proceedings in the District Court of Queensland. The Trial



Judge excluded the defence under s.377(8) from the jury's consideration, and the plaintiff received $4,000 damages.

The Full Court of the Supreme Court of Queensland allowed an appeal by the North Queensland Newspaper Company; found that the defence under s.377(8) should have been left to the jury, and that on the evidence, Judgment should have been entered for the first respondent.

The plaintiff appealed against the Full Court finding, and on 17 November 1993, the appeal was dismissed by the majority of Mason C J, Brennan, Deane, Dawson, Toohey and Gaudron J J with McHugh J dissenting.

The majority in their joint judgment considered that s.377(8) gave rise to two principal questions:

"(1) Is the protection under that sub-section for comment which is fair only available when the facts on which the comment is based are indeed true and stated, referred to or notorious to those to whom the matter is published?

(2) Is it an essential element of the defence when pleaded in relation to the publication of another's comment that the publisher hold the opinion expressed in the comment".

In answering the first of those two questions, the Court approved the approach of Sugerman J in *Rigby -v- Associated Newspapers Limited* and held that reference in s.377(8) to "fair comment" does not require that the facts upon which that comment is based to be true, provided that, at the time the comment is published the publisher does not hold a belief that such facts are untrue. The Court commented:

"When the paramount policy interest manifest on the face of s.377(8) is the encouragement and protection of freedom of discussion on a matter of public interest for the benefit of the public, it would be inappropriate to construe that sub-section as requiring that a person wishing to participate in the discussion of such a matter by way of comment on the facts stated on a privileged occasion, when that discussion is for the public benefit, should firstly satisfy himself or herself the truth of those facts before commenting upon them".

Further, it was held that it was not necessary that there be a statement of the facts on which the comment is based in the publication, provided that the jury is satisfied that such facts are sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves the fairness or otherwise of the comment.

In relation to the second question, the Court held that it was not an essential element of the defence that the publisher of another's comment hold the opinion expressed in the comment, and held that "it is sufficient if the publication is objectively fair and the plaintiff does not prove that the defendant publisher was actuated by malice". The Court cited with approval the comments of Dickson J in his dissenting judgment in *Cherneskey -v- Armadale Publishers Ltd* a decision of the Supreme Court of Canada:

"It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if it did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press".

In applying s.337(8) to the present case, the Court found that the statements made in Parliament constituted a sufficient substratum of fact upon which to base the publication; that the comment was fair, and that there was no evidence to suggest that anyone connected with the first respondent believed the contents of the advertisement to be untrue.

A submission by the appellant that the manner and extent of the publication exceeded that that was reasonably sufficient for the occasion because the first respondent's Newspaper circulated in an area which extended outside the Johnston Shire was described as "... utterly without merit" and rejected on the basis that the administration of the Johnston Shire was a matter of public interest to persons resident outside the Shire, including ratepayers of the Johnston Shire who reside outside the shire, and that there was nothing to suggest that placing the advertisement in another publication would have succeeded in bringing the matter sufficiently to the attention of the ratepayers and residents of the shire.

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# Interconnection and the dominant market position in New Zealand

**John Mackay and Jane Trethewey report on the recent decision in Clear Communications Limited -v- Telecom Corporation of New Zealand and Ors.**

On 17 December 1993, the New Zealand Court of Appeal handed down its judgment on the application of s.36 of the *Commerce Act* 1986 to negotiations between New Zealand Telecom and Clear Communications for the interconnection of Clear's network to Telecom's network. Section 36 (the New Zealand equivalent of s.46 of the *Trade Practices Act 1974*) proscribes the use of a dominant position in a market for the purpose of restricting the entry of a person into a market, preventing or deterring a person from engaging in competitive conduct in a market or eliminating a person from a market.

Clear (which was formed in 1990 to compete in the newly deregulated telecommunications market in New Zealand) wished to establish local telephone services to business subscribers. Access to Telecom's network was essential to enable Clear's and Telecom's customers to call one another. After protracted negotiations, the parties could not agree on the terms for interconnection. Telecom's conduct and the stance adopted by it in the negotiations were alleged to contravene s. 36.

It was accepted that Telecom was in a dominant position in the relevant market, being the national market for standard switched telephone services, as the majority of the Court held in *Telecom Corporation of New Zealand Ltd -v- Commerce Commission.*