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Australian high court limits the scope of the publisher's defence in the Trade Practices Act

Introduction

Section 52(1) of the Trade Practices Act 1974 provides that:

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Arguably, this section is the most important single sentence in any Australian statute and it has been used in respect of a wide range of misleading and deceptive practices, including advertising and marketing activities that are misleading and deceptive, and misleading and deceptive behaviour in commercial transactions, such as misrepresentation.

In the early 1980s actions were brought against newspaper publishers and television broadcasters under Section 52 alleging misleading or deceptive news stories. These actions were considered to be an alternative to proceedings for defamation and were of great concern to the news media. This resulted in the amendment of the Trade Practices Act in 1984 to insert, in new Section 65A, a statutory exemption to Section 52 and some other consumer protection provisions of the Trade Practices Act for "prescribed information providers".

However, the exemption for prescribed information providers does not apply to, in particular, the publication of matter by the prescribed information provider if the publication is in connection with the supply or possible supply of goods or services or the promotion by any means of the supply or use of goods or services, and the publication was made on behalf of, or pursuant to, a contract, arrangement or understanding with a person that supplies goods or services of that kind. The exemption also does not apply to the publication of advertisements.

Facts

In 2003 Dymphna Boholt and Sandra Forster established a business which they operated and promoted under the name Wildly Wealthy Women. The business offered, for a fee of A\$3,000, a nine-month mentoring programme teaching women how to become wealthy through investment in real estate.

In an attempt to generate publicity, Boholt and Forster approached a media consultant to arrange media exposure for the mentoring programme. Subsequently, the media consultant arranged for *Today Tonight*, a nightly current affairs programme broadcast on Channel Seven, to broadcast six stories on the mentoring programme. The producer of *Today Tonight* signed a letter confirming this arrangement.

A short time after the letter was signed, the media consultant informed the producer of *Today Tonight* that Boholt and Forster had also had meetings with the producers of other current affairs television programmes broadcast on other networks. The producer of *Today Tonight* informed the media consultant that in order to produce and broadcast the stories, *Today Tonight* would require exclusivity to the story of Wildly Wealthy Women and its activities. The media consultant agreed to this arrangement of exclusivity. There was, at no stage, any discussion or agreement between the parties concerning any payment from or to the Seven Network and no payment was made.

Misleading or Deceptive Representations

Today Tonight broadcast two stories on the mentoring programme. During the broadcasts, the *Today Tonight* reporter made the following four statements:

- Boholt owned in excess of 60 properties;
- Forster had purchased over A\$1 million-worth of property using none of her own money;
- Forster was a millionaire; and
- the women had made millions of dollars through investing in property.

Federal Court at First Instance

At first instance, Judge Bennett of the Federal Court of Australia found that each of these four representations constituted misleading or deceptive conduct pursuant to Section 52 of the Trade Practices Act.

The Federal Court held that Section 65A of the Trade Practices Act did not provide a defence against the allegations in respect of Channel Seven. This is because Channel Seven's conduct fell within an exception to the exemption from liability provided by the section on the basis that the broadcasts had been made pursuant to an arrangement between Channel Seven and the two women and related to services provided by the two women.

The Federal Court found that:

- as the *Today Tonight* reporter did not investigate the status and success of Forster and Boholt, *Today Tonight* had endorsed or adopted the representations made in the broadcast;

- a contract, arrangement or understanding between the parties existed; and
- "goods and services of that kind" was a reference to the goods or services of the kind which were offered or sold by the third party that enters a contract, arrangement or understanding with the information provider.

Appeal to Full Federal Court

On appeal, the Full Federal Court agreed that it was open to Bennett to make the finding that the four representations were misleading and deceptive. However, the Full Federal Court found that the exception to the exemption did not apply to Channel Seven and therefore Channel Seven could rely on the exemption in Section 65A of the Trade Practices Act to absolve itself from liability.

High Court Decision

A majority of the High Court (Australia's highest appeal court) found that Bennett was correct in her construction of Section 65A of the Trade Practices Act, and that the section did not provide a defence to liability for the misleading and deceptive conduct on the part of Channel Seven.

In particular, the High Court confirmed that the arrangement of exclusivity agreed between Channel Seven and the representative of Wildly Wealthy Women amounted to a contract, arrangement or understanding between the parties. The High Court also held that the reference to "goods and services of that kind" was a reference to goods and services of the kind which were offered or sold by the third party that enters into a contract, arrangement or understanding with the information provider.

Comment

In light of the decision, Australian Competition and Consumer Commission Chairman Graeme Samuel has stated that the commission will closely scrutinize infomercials, advertorials and current affairs programmes. The more akin a story is to an infomercial or advertorial, the more a broadcaster will begin to take part ownership of the representations being made.

Accordingly, broadcasters and publishers that publish information concerning goods and services of a third party at the request of the third party should consider carefully the statements that are made concerning the goods and services, taking particular care not to adopt or endorse those statements, or to adopt only statements which are independently verified.

The decision of the High Court appears to narrow significantly the scope of the publisher's defence in Section 65A of the Trade Practices Act. In particular, it appears to limit substantially the availability of that defence for publishers in circumstances where the publisher has reached an agreement with a person that provides the publisher with information for a story that the information is provided on an exclusive basis. Such arrangements are a daily occurrence in the activities of the news media and it will be interesting to see whether subsequent decisions continue this quite stringent limitation on the availability of the publisher's defence.