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# Newspapers get into Trade Practices Act



**A Federal Court ruling that a newspaper report was capable of breaching the Trade Practices Act, as well as being defamatory, has alarmed major publishers.**

Mr Justice Toohey held in the Federal Court in Perth on 19 April, 1983, that reports in the Daily News and West Australian newspapers (both published and owned by the first respondent, West Australian Newspapers Limited) could be actionable under section 52 of the Trade Practices Act - by being misleading and deceptive or likely to mislead and deceive.

(The second respondent, William Ross Harvey, was the printer of the two newspapers).

The reports dealt with a Christmas holiday cruise aboard the Dalmacija (Dalmacija) which had been on charter to the Plaintiff company, Australian Ocean Line Pty. Ltd.

The judge said the reports contained criticism of the cruise comments (in direct and indirect speech) from passengers, and some small comment by the authors of the articles.

The proceedings before Toohey J. were in the form of a case stated (for the purpose of raising certain questions of law, the Court assumed certain alleged facts to be true).

The first respondent argued, inter alia:

"... that even if the contents of the newspaper articles complained of can be described as misleading or deceptive, on no view of the facts pleaded in the Statement of Claim can it be said that in any relevant respect the first respondent engaged in conduct in trade or commerce.

His Honour noted in his judgement that the respondents did not deny that in publishing and selling the

newspapers in which the articles appeared the first respondent engaged in trade. But, they said, the trade was that of publishing and selling newspapers.

The respondents accepted that it was possible to engage in misleading or deceptive conduct in that trade e.g. by publishing false circulation figures or by claiming a greater number of classified advertising pages than was true. But, their argument ran, if the complaint was of a report, the contents of which were said to be accurate, the conduct complained of was not conduct in the trade of publishing and selling newspapers.

The argument was that in s.52 the conduct complained of had to be an unfair trade practice, something incidental to the trade which, in the present case, was publishing and selling newspapers. And, it was submitted that there was no unfair practice in the trade of publishing and selling newspapers just because a report of general interest might prove to be false.

Toohey J. found that submission placed too narrow a construction on the language of s.52(1):

"The first respondent published the articles in the course of carrying on an activity which was undoubtedly commercial and which may be fairly described as conduct in trade or commerce", His Honour said. "While it may be true to say that the first respondent's activity is the publishing and selling of newspapers, it would be unreal to divorce the paper which is sold from its contents.

**"The sale of a newspaper is a sale**

**of goods to a consumer. And the buyer is a consumer not only of the object he buys but, actually or potentially, of products or services it describes. If the product or service is described in terms that are false, the buyer is thereby misled or deceived or is likely to be misled or deceived by what he has read.**

"And what he has read is part of the conduct of the publisher in publishing and selling the newspaper in question," Toohey J. said in his judgement.

Whether the applicant could make good its allegations, whether in terms of s.86 of the Act it could show that it was a "person who has suffered loss or damage by conduct of the first respondent done in contravention of s.52" remained to be seen. His Honour held that the statement of claim disclosed a cause of action against the first respondent under s.52 of the Trade Practices Act.

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# Uniform Defamation Law —

Contrary to some Press reports, the Federal Attorney-General, Senator Evans, has NOT announced a "new defamation law by July".

The situation, of course, is that the draft Bill for a uniform law on defamation is expected to be ready for approval at the July meeting of the Standing Committee of Attorneys-General.

In the interests of those who may have been taken aback at reports of such legislative alacrity, the Communications Law Bulletin has obtained the official **Press Release by the Attorney-General of 27 March, 1983**. Here is the full text on the topic of defamation:

A uniform law on defamation for the whole of Australia should be finally agreed to by July this year, the Attorney-General, Senator Gareth Evans, said today.

Senator Evans said the July target

date had been set at the meeting of the Standing Committee of Attorneys-General in Adelaide over the weekend.

The model Bill for a uniform law was now at an advanced stage. With decisions taken by the Ministers at the meeting and with further work to be done before the next meeting in July, it was hoped that the Bill could be in a form in which Attorneys-General could present it to their Governments after the next meeting.

The Attorney-General said that

uniform defamation legislation would be a major step forward in law reform in Australia.

"It now seems that one defamation law for Australia is close to reality. The benefits to potential litigants and to the electronic and print media should be immediately apparent.

"The impetus for the new law come from the recommendations of the Australian Law Reform Commission. This new law will provide workable, and above all, uniform legislation in an area which has been historically fragmented. It will mean the end of the spectacle of the publisher being liable in some States but not in others for the publications of the same material," Senator Evans said.

## Newspapers and Trade Practices (from Page 1)

Toohy J. also found that the statement of claim disclosed a cause of action or triable issue under the **Trade Practices Act** against either respondent. The Federal Court had jurisdiction to hear and determine the claims of the applicant against the respondents under the defamation laws of Western Australia.

His Honour said: "In arguing that this question should be answered in the negative, counsel for the respondents drew attention to the fact that the range of defences in a defamation action may be considerably wider than in an action brought under s.52 of the **Trade Practices Act**. That may well be the case; I express no opinion on the matter.

"But it was not suggested by the applicant that if this court has jurisdiction to entertain the defamation claim, defences available to the respondents at common law or by statute would not be available to them before this court. In my opinion they undoubtedly are available.

"If it be the case that there are fewer defences available to the respondents in answer to a claim under s.52 than in answer to a claim in defamation, the answer must in colloquial terms be "so what". They are different causes of action. What has to be established in each case is different and the defences available are different.

"The answer to this question must be approached with reference to the judgement of the High Court in

**Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd.** (1980-81) 33 ALR 465, a decision which I discussed in **Muller v. Fencott** (1982) ATPR 40-266. See too the recent analysis by Fitzgerald J. in **L.E. Stack v. Coast Securities No. 9 Pty. Ltd.** (unreported decision delivered 23 March 1983).

"The criterion for associated jurisdiction may be said to be whether there is a common substratum of facts relating to the cause of action in respect of which jurisdiction exists under the **Trade Practices Act** and to the cause of action sought to be attached thereto."

In the case before him, Toohy J. said: "The facts alleged in support of the claim under s.52 and the facts alleged in support of the claim in defamation are not only similar but are for all practical purposes identical"

**The questions of law reserved for the consideration of the court were:**

(i) Does the statement of claim disclose any cause of action or triable issue under s.52 of the **Trade Practices Act** against the first respondent?

**Answer: Yes**

(ii) Was the conduct of the first respondent complained of in the statement of claim engaged in by the first respondent in trade or commerce within the meaning of s.52 of the **Trade Practices Act**?

**Answer: Yes**

(iii) Was the conduct of the first

respondent complained of in the statement of claim capable in law of being misleading or deceptive or likely to mislead or deceive within the meaning of s.52 of the **Trade Practices Act**?

**Answer: Yes**

(iv) Does the statement of claim disclose any cause of action or triable issue under the **Trade Practices Act** against the second respondent?

**Answer: Yes**

(v) If the statement of claim does not disclose any cause of action or triable issue under s.52 of the **Trade Practices Act** or otherwise under that Act against the first and second respondent or either of them, does this Court have jurisdiction to hear and determine the claims of the applicant against the respondents under the defamation laws of Western Australia?

**Answer: No**

(vi) If the statement of claim does disclose a cause of action or triable issue under s.52 of the **Trade Practices Act** or otherwise under that Act against the first and second respondents, or either of them, does this court have jurisdiction to hear and determine the claims of the applicant against the respondents under the defamation laws of Western Australia?

**Answer: Yes**

— John Mancy