Ambush Interviews, Off Limits Questions and Fake Personas Under Trade Practices Law

Sally McCausland discusses recent trade practices actions against the media and the free speech implications for journalists, documentary makers and comedians

Plaintiffs unhappy with their treatment by the media are increasingly bringing misleading and deceptive conduct actions under section 52 of the T*rade Practices Act 1974* (Cth)[1] and equivalent state fair trading laws[2] (**trade practices actions**). One reason for this may be the recent amendment of the Australian defamation laws to prevent large corporations from suing.[3] In the case of individuals, misleading and deceptive conduct might be alleged where a defamation action is unavailable, or because the grievance is about the way an interview or footage was obtained.

Recent judicial and legislative developments in other areas suggest an impetus to rein in some of the more invasive contemporary methods of newsgathering.[4] However, this article argues that there is potential for new applications of trade practices laws to chill the publication of material which is in the public interest.

Misleading and deceptive representations made to talent prior to publication

In the recent hit movie *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan* the English comedian Sacha Baron-Cohen pretends to be 'Borat Sagdiyev', a boorish, sexist and anti-Semitic Kazakh reporter making a documentary about America. Cohen is a Jewish comedian whose alter ego personas, including Borat, often lull his real life interview targets into revealing their own prejudices. Several people who appeared in the movie as themselves have attempted, so far unsuccessfully, to sue in US courts on the grounds that they were tricked into appearing and consequently suffered public ridicule or contempt.

In Australia, similar cases have now established that the media can potentially attract liability under trade practices actions in the course of obtaining material for publication where:

- The plaintiff was misled into granting the interview or being recorded for the story under false pretences; or
- the plaintiff can prove that they were misled about the scope or purpose of the interview or appearance and what topics would be 'off limits'.

False pretences: *Craftsman Homes Pty Ltd v TCN Channel Nine* (2006)[5]

This case concerned reporters from the Channel Nine current affairs program *A Current Affair* (ACA) who masqueraded as a husband and wife in order to film a 'surprise' interview with the owner of a building company. The building company and its franchisee was the subject of several complaints from unsatisfied customers. *ACA* had previously attempted to interview the managing director of these companies, Mr Cox, but did not agree to his proposed conditions. One of the reporters rang Mr Cox's business premises pretending to be part of a couple interested in building work, and arranged for an appointment at the business premises. These premises were also the Coxes' residential premises.

On the day of the appointment the reporters, pretending to be the husband and wife, were invited into the premises by Mrs Cox. Once inside Mr Cox's office, the male reporter, Ben Fordham, used his mobile phone to ring a *ACA* film crew waiting outside, invited them in and revealed his identity. He then filmed Mr Cox's angry reactions, which were later played in Nine program promotions and during the program.

In the New South Wales Supreme Court, Smart AJ found for Mr Cox on his trade practices action. In his Honour's view, Mr Cox had been misled into granting entry to the reporters in reliance on their misleading and deceptive representations that they were a couple interested in the services of the building company:

> *…If the misleading and deceptive conduct had not occurred there would have been no admission to the Edmondson Park premises, no discussion with Mr Cox, no filming of Mr Cox and no opportunity for TCN Nine to enhance its program by a personal confrontation in unfair circumstances…*[6]

Nine argued that its reporters' conduct was not 'in trade or commerce' and therefore the trade practices action could not succeed. However, Smart AJ disagreed, finding it sufficient that the conduct was for the purposes of making a commercial television program which used advertising to attract viewers.

His Honour found that Mr Cox had suffered detriment, as the reporters' misleading conduct had allowed *ACA* to expose him to 'public criticism' by showing him in *an* "unflattering light…[7] stunned, distressed and seething".[8] Channel Nine and the reporter Ben Fordham were ordered to pay $50,000 to Mr Cox to compensate him for "the damage of his visual representation being exposed to hundreds of thousand[s] of people in adverse circumstances".[9] He granted a further $30,000 to Mr Cox's company, which had been mentioned by name several times in the program promo.

Implications of Craftsman Homes

This case fits within a larger trend of Australian courts developing new legal remedies against allegedly unethical media conduct.[10] While many people may be sympathetic to plaintiffs such as Mr Cox, the extension of trade practices actions into the area of newsgathering raises concerns. These laws were not designed to address the difficult ethical questions of newsgathering, where sometimes, it may be argued, deception of some kind is justified in the pursuit of a story.

A couple of hypothetical examples show the potential detriment to freedom of expression should *Craftsman Homes* style actions be applied in different circumstances.

The first is undercover investigative journalism. The Australian Journalist's Association Code of ethics requires that journalists use 'fair, responsible and honest' means to obtain material and that they 'identify yourself and your employer' before obtaining an interview. However, this ethical rule has at times been breached in the interests of getting the truth. Internationally, undercover journalism is more widespread and has achieved famous exposés which could not otherwise have been brought to public attention.

Another potential casualty of *Craftsman Homes* style actions is satirical pranking, a tradition well known to Australian audiences. In the US, satirical pranking has received support under the First Amendment. Earlier this year a Californian court struck out a claim by two college boys who were shown in *Borat* expressing 'stereotypical' views about minorities.[11] They claimed that they were 'fraudulently' induced into signing a consent release after being offered alcohol and 'at the encouragement of Defendant, engaged in behaviour that they otherwise would not have engaged in'. But the court struck out the case using the Californian 'anti-SLAPP' law[12] designed to protect free speech and other public interest activities where a case discloses no probable basis for success at trial:

> *…it is beyond reasonable dispute… that the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-semitism, ethnocentricism and other societal ills – are issues of public interest, and that the movie itself has sparked significant public awareness and debate about these topics.*[13]

In doing so he distinguished between legal and ethical concerns:

> *The propriety of filming individuals, often in crude contexts and with a disarming disguise, with the specific intent of later embarrassing them on a national scale – even those individuals who, on occasion, exhibit less than admirable qualities – is not before the Court.*[14]

There is no equivalent anti-SLAPP legislation in Australia. There is therefore little opportunity for undercover journalists or satirical pranksters to argue for the public interest in publication. If Borat's 'frat boy' victims had been able to sue under Australian trade practices law, they may have succeeded.

The difficult 'fit' of trade practices law to this area is demonstrated by comparing the position under Australian defamation laws. In the first instance defamation generally arises in relation to what is published, not the conduct involved in obtaining material for publication. Defamation laws also contain defences which go some way towards protecting free speech. For example in *Craftsman Homes,* Channel Nine was found *not* liable for defamation, as it was able to establish defences of truth and comment in relation to the defamatory material published. As noted above, large corporations can no longer sue, and interlocutory injunctions to prevent publication of defamatory material are only available 'in the clearest of cases.[15]

In comparison to defamation laws, trade practices laws favour the plaintiff. Trade practices laws are generous as to who can sue. There are no defences allowing publication of material obtained through misleading representations even though the publication itself is accurate and in the public interest. And it is less than certain that an Australian court hearing arguments on a trade practices injunction application in either of the hypothetical examples given above would be swayed by arguments on the public interest in publication.[16]

Another area into which *Craftsman Homes* style actions could expand is misleading media conduct which does not occur in the course of a trespass. In *Craftsman Homes* the defendants were found to be additionally liable for trespass. However, the principle established in *Craftsman Homes* is not limited to media trespasses. His Honour found that the initial telephone call, in which the female reporter had pretended to be a wife interested in building work, formed part of the misleading conduct. On this basis, trade practices liability could potentially arise whenever a reporter sitting at her desk rings up a subject pretending to be a 'civilian' in order to elicit an unguarded response, or a comedian in disguise films his target's response to a prank on a public street.

What is 'off limits'? Hearn v O'Rourke (discontinued 2007)

A case which supports this further expansion of trade practices law is *Hearn v O'Rourke*, brought by two girls interviewed for Denis O'Rourke's documentary 'Cunnamulla'.

This case against O'Rourke and his production company was recently discontinued before trial. However, a prior interim judgment in the case[17] has established that a filmmaker can be sued for misleading and deceptive representations made about the subject matter of an interview or areas which will be 'off-limits'.

'Cunnamulla' was a 'fly on the wall' documentary following various real people living in the central Queensland town Cunnamulla. O'Rourke approached the two girls, then aged 13 and 15, to appear in his film. He obtained the consent of their parents and had them sign releases. The dispute arose over segments in the film where the girls discuss their sex lives. The girls claimed that O'Rourke promised that he would not ask them about their sex lives. They sought damages for misleading and deceptive conduct based on reputational harm and distress they allegedly suffered after the film was shown in the town.

In her first instance judgment[18] on O'Rourke's strike out application, Justice Kiefel in the Federal Court found that, while O'Rourke's production company made the film *Cunnamulla* for profit, the seeking of unpaid interviews for the film was not conduct in trade or commerce. She therefore found that section 52 could not apply and struck out the proceedings. However, in a split appeal decision,[19] the majority, Finn and Jacobson JJ, reversed her decision, holding that the alleged misrepresentations, if ultimately made out, could be characterised as being in trade or commerce:

> *…the conduct which [O'Rourke's company] was engaging in was the identification of prospective participants in the projected documentary who would provide the material that was likely to be used…There could be no documentary unless appropriate interviews were secured. Securing such interviews, in our view, could properly be said to be central to the trading or commercial activity in which [O'Rourke's company] was engaged in producing a film for profit.*[20]

However, their Honours commented that the 'Trade Practices Act claim pleaded faces formidable obstacles for reasons we have not had to consider.'[21]

This was a prescient remark. The trial was eventually set down for 2007. Before it went on, however, a separate trial was heard in ACT defamation proceedings brought by O'Rourke in relation to newspaper articles about the case.[22] These proceedings related to imputations in the articles alleging that, among other things O'Rourke had misled the girls into discussing sexual matters and was unscrupulous. At this defamation trial O'Rourke, the girls and their parents gave evidence. Again the central issue was whether O'Rourke had promised not to interview the girls about sexual matters during the weeks of filming his documentary. On this issue the court

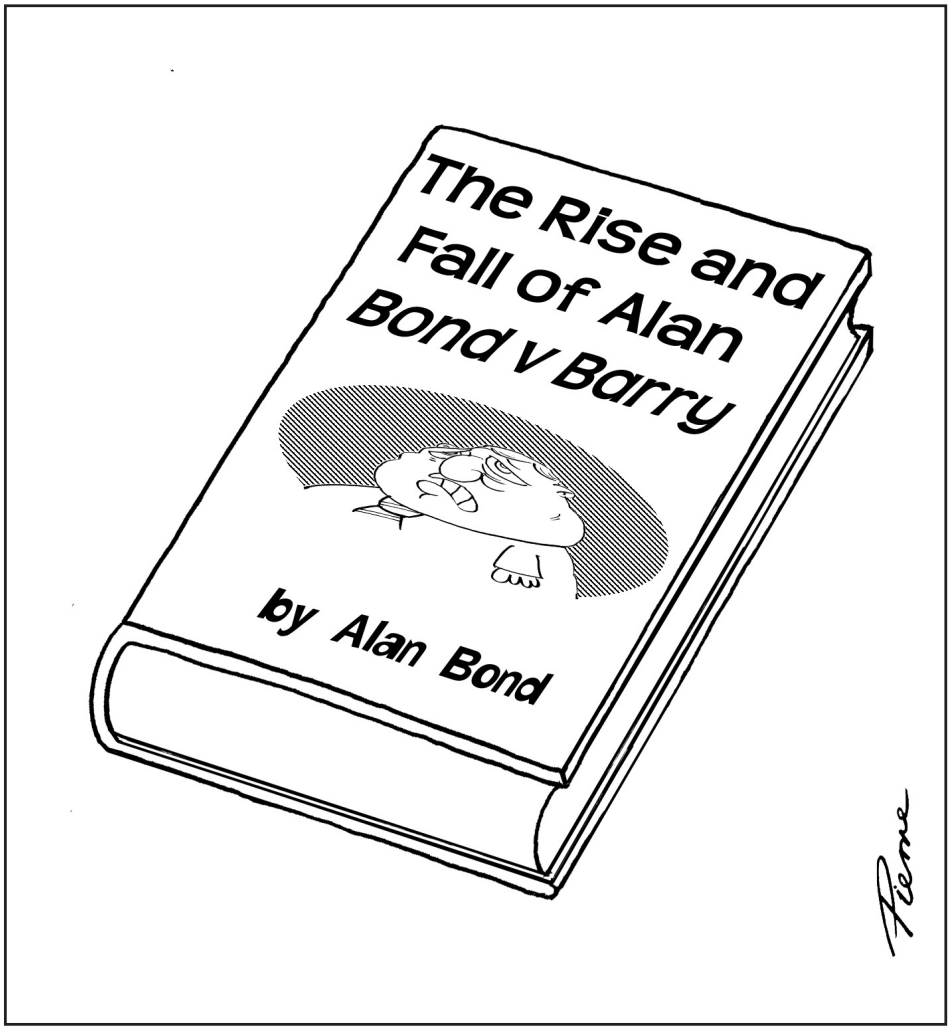
preferred O'Rourke's evidence that he used an open-ended approach to documentary making and did not promise to limit what was discussed. The trade practices action has now been discontinued.

The outcome of this trade practices action demonstrates that an interviewee will often have difficulty in proving express or implied oral representations made by an interviewer about what would or would not be discussed. This suggests that, at least where false pretences are not involved, trade practices actions will not unduly constrain ordinary news reporting and documentary making. The usual journalistic practice of keeping matters as open ended as possible when setting up interviews will usually avoid potential liability for misleading conduct in relation to what was or wasn't 'off limits'.

However, trade practices laws may have a real impact where sophisticated and well advised plaintiffs, such as celebrities and public figures, are concerned. It is not uncommon for those advising such persons to demand that interviews be limited to certain approved topics or to request that questions be submitted in advance. As these tactical manoeuvres are now underpinned by potential legal liability, journalists will need to be cautious when entering into written correspondence with prospective interviewees. In addition to facing a walk out in response to an 'off limits' question, journalists may now also find themselves receiving a letter of demand citing the prior correspondence and threatening legal action should they publish the client's response to an 'ambush' question. Based on the decision in Craftsman Homes, the likelihood of an interlocutory injunction would be higher in the audiovisual medium, where the client may object to being shown responding angrily to such a question.

Such a scenario would once again raise the free speech concerns outlined above. Some of the most famous media interviews in history arose out of questions the interviewee was not expecting or was trying to avoid discussing.

A carefully drafted interview release may assist in defending an interviewee's claim that they were misled about the nature of the program or the subject of their interview. However, whether or not such a release will assist will depend on factors such as the nature of the alleged representations and the damage suffered. In any event such releases are not commonly used in news reporting, and some interviewees refuse to sign them.



Challenges to the 'Publishers Defence'

Broadcasters and other publishers generally enjoy the 'publishers defence' in relation to publication of information.[23] This defence provides that a news provider cannot be sued under trade practices law for inaccurate statements in a publication except in limited circumstances not generally applicable.

However, this defence appears to be shrinking relative to the expanding scope of media liability under trade practices law discussed above. In both *Craftsman Homes* and *Hearn v O'Rourke* the courts accepted that section 65A does not apply to pre-publication conduct. In *Craftsman Homes* Smart AJ also found that section 65A does not apply to a 'program promotion'. And in a recent win for the ACCC, Seven's program *Today Tonight* lost the defence where it was found to have 'adopted' various misleading statements about a financial service for 'Wildly Wealthy Women' by failing to sufficiently distance itself from those statements in its reportage.[24]

Fortunately for freelance journalists, a further attempt to limit the publishers defence was recently dismissed by French J in the Federal Court in the case of *Bond v Barry.*[25] In this case Alan Bond and a company called Lesotho Diamond Corporation attempted to bring a trade practices action against the freelance journalist Paul Barry and the publishers of the Sunday Telegraph and the website News.com over an article the Telegraph's editor had commissioned from Barry. The plaintiffs alleged that misleading and deceptive representations were made in the article. They argued that the publishers defence did not apply to Barry as he was a freelance journalist.

The court dismissed the action, holding that Barry was entitled to the publishers defence as he had been commissioned to write the article as a 'freelance journalist.' He was therefore a 'proscribed information provider' and could use the defence. The publishers were also entitled to the defence.

It is less clear whether the producers of *Borat* could claim the publishers defence, as they may not be determined to be providing 'information.' The publishers defence may

also prove elusive for bloggers and other freelancers now joining traditional media outlets in increasing numbers, if their publications are not primarily about the supply of 'information'.[26]

Conclusion

Trade practices actions are not an appropriate vehicle to address disputes which commonly involve difficult questions of media ethics and the balancing of public and private interests. The publishers defence was introduced in 1984 to ensure

> *a vigorous, free press' and to 'exempt the media…from the operation of [section 52 and related provisions] which could inhibit activities relating to the provision of news and other information.*[27]

The subsequent creep of trade practices actions back into this area suggests that it now may be necessary to extend the publishers defence to pre-publication media conduct and possibly to a broader range of publications. Alternatively there may be a case for inserting new defences where material obtained through deception is nevertheless in the public interest. It would also be useful to have some form of anti-SLAPP laws or an express requirement to consider free speech issues on injunction applications where a public interest may weigh in favour of publication.

These suggestions do not deny the ethical difficulties that can arise when material for publication is obtained by deception. Particular concerns arise where vulnerable groups such as children are concerned, and there may be a case for reviewing codes of conduct or strengthening other laws in some instances. Rather, it is to suggest that trade practices laws are, quite naturally, not equipped to weigh the public interest, where it exists, in publication of such material. Trade practices laws as they now stand are potentially overbroad in application to journalism, filmmaking, comedy and other forms of communication to the public. In the absence of law reform, it must be hoped that courts keep in mind the potential results if plaintiffs shown in an 'unflattering' light are allowed to win too often.

Sally McCausland is a senior lawyer at the Special Broadcasting Service (SBS). The views expressed are those of the author. ***Special thanks to Lesley Power and Sally Begbie for comments on an earlier draft of this article.***

(Endnotes)

1 *Trade Practices Act 1974* (Cth) s 52 provides as follows (1) a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

2 See eg *Fair Trading Act 1987* (NSW) s 42, which is in equivalent terms to section 52 of the Commonwealth Act except that it prohibits conduct by a 'person'.

3 *Defamation Act 2005* (NSW)(enacted by mutual agreement of each state and territory) s9. Corporations with less than 10 employees and not for profit corporations can still sue.

4 See eg *TCN Channel Nine v Anning* [2002] NSWCA 82; Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] 208 CLR 199; New South Wales Law Reform Commission, Consultation Paper 1, Invasion of Privacy (May 2007); Australian Law Reform Commission, Review of Australian Privacy Law (DP 72, September 2007).

5 *Craftsman Homes Pty Ltd v TCN Channel Nine* [2006] NSWSC 519 (2 June 2006).

6 Id at 1069.

7 Id at 1007.

8 Id at 1069.

9 Ibid.

10 See e.g above n 4. Overseas developments, particularly in privacy law, are also becoming influential.

11 *John Doe v One America Productions Inc* (15 February 2007) SC California, LA, Biderman J.

12 "SLAPP" stands for "strategic litigation against public participation. See California Code of Civil Procedure, section 425.16.

13 Above n 11 at 4.

14 Above n 11 at 2.

15 Patrick George, *Defamation Law in Australia* (2006 LexisNexis – Butterworths) at 410 citing *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR at 163, 172.

16 *See Trade Practices Act*, *1974* (Cth) s 80(1). Cf *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 77 ALR 615.

17 *Hearn v O'Rourke* [2003] FCAFC 78 (2 May 2003). For a review of this case and in depth discussion of some of the issues raised in this paper see Craig Burgess, *"Hearn v O'Rourke: What does it mean for journalists?"* (unpublished, faculty presentation 2003, University of Southern Queensland http://www.usq.edu.au/faculty/arts/Research/files/JEA%20Paper%202003.doc)

18 *Hearn v O'Rourke* [2002] FCA 1179 (20 September 2002).

19 Above n 17.

20 Above n 17 per Finn and Jacobson JJ at 10.

21 Above n 17 at 14.

22 *O'Rourke v Hagan* [2007] ACTSC 61 (8 August 2007)

23 *Trade Practices Act 1974* (Cth), s 65A.

24 *ACCC v Seven Network Limited* [2007] FCA 1505 (5 October 2007) (under appeal by Seven).

25 [2007] FCA 1484 (21 September 2007).

26 French J cited the *Shorter Oxford English Dictionary* definition of 'information' as relevantly including 'knowledge or facts communicated about a particular subject, event, etc: intelligence, news': ibid at 33. Cf *Gianni Versace SpA v Monte* [2002] FCA 190. at 126.

27 Attorney General, second reading speech, Law (Miscellaneous Provisions) Bill, *Hansard Reports of Debates* (House of Representatives, 13 September 1984 at 1296); cited in *Advanced Hair Studios*, above n 16.