How deep is the "media safe harbour"?

Section 65A of the *Trade Practices Act* was intended to exempt the media (and other persons who engage in the business of providing information) from the operation of certain provisions of the TPA which could inhibit activities relating to the provision of news and other information. It was described in *Bond v Barry* [2007] FCA 1404 as a "media safe harbour". Twenty four years after s 65A was enacted, the depth of the "media safe harbour" is being fathomed by appellate courts.

In February, the NSW Court of Appeal in *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd* [2008] NSWCA 9 ruled that Nine was not entitled to the protection of s 65A for misleading and deceptive conduct by staff of *A Current Affair* in gaining access to premises upon which film footage was obtained. An appeal to the Full Federal Court in *Bond v Barry* is pending from the decision of French J which extended the protection of s.65A to the transmission by a freelance journalist of a news article to a media outlet. The appeal is expected to be heard in May. The Seven Network also is appealing from the decision of Bennett J in *ACCC v Seven Network Limited* [2007] FCA 1505.

The shape of the "safe harbour"

In *ACCC v Seven Network*, Bennett J stated that the drafting of s 65A "is not a model of clarity". Generally speaking, it exempts a "prescribed publication" of matter by a "prescribed information provider" from ss 52, 53, 53A, 55, 55A or 59 of the TPA if the publication was made by the prescribed information provider "in the course of carrying on a business of providing information". The exemption also applies in the case of certain commercial broadcasting licensees, the ABC and the SBS for the publication by way of a radio or television broadcast by the prescribed information provider.

A "prescribed information provider" means a person who carries on a business of providing information and expressly includes the holders of broadcasting licences under the *Broadcasting Services Act*, the ABC and the SBS. A person who carries on business as a freelance journalist is a "prescribed information provider": *Carlovers Carwash Ltd v Sahathevan* [2000] NSWSC 947 at [36]; *Bond v Barry* at [35]. Many other persons and companies who carry on professions or trades that involve the provision of information would qualify as a "prescribed information provider". But the s.65A exemption is not available to them because of exceptions in s 65A(1)(a) and (b).

Shoals in the harbour

These exceptions were intended by the Parliament to disallow the exemption where the prescribed information provider had what might be regarded as a commercial interest in the content of the information. The exceptions are complex in their wording. But, in essence, the exemption in s 65A does not apply to:

- a publication of an advertisement;
- a publication of matter in connection with the supply or possible supply of goods or services supplied by the prescribed information provider;

- a publication pursuant to a contract, arrangement or understanding with a person who supplies goods or services or who promotes those goods or services.

As a result, the s 65A exemption does not apply to a "self-promotional exercise" such as a promotion for a forthcoming episode of a television show.

In *ACCC v Seven Network* Bennett J concluded that s.65A did not provide a defence to the ACCC's claim against Channel Seven's licensees because the publication in question was made pursuant to an arrangement with two women who appeared on *Today Tonight*, and who supplied or promoted goods or services of the kind that appeared in the program.

Bond v Barry

The case involved the transmission by a freelance journalist to a media outlet of an article for publication. The transmission was held not to be a publication of matter "in connection with" the supply of the journalist's services, since that phrase refers to a publication the content of which has some relationship to the supply of the goods and services in question. The transmission was found to be protected by s.65A. French J concluded that, absent such coverage, media organisations could be exposed to liability as accessories for publishing articles prepared for publication by freelance journalists in contravention of s 52. This would be "a major and unintended gap in the coverage of the exemption and completely at odds with its purpose".

TCN Channel Nine v Ilvariy Pty Ltd

As reported in GLJ 28 February 2008, the NSW Court of Appeal reduced damages awards against Nine for trespass and contravention of the TPA. Nine also appealed its liability for contravention of s52 arsing from deception by the staff of *A Current Affair* in gaining access to the plaintiff's premises, when they purported to be interested in building a home.

The Court of Appeal concluded that the conduct was "in trade and commerce" because the communications by Nine's employees purported to be for the sole purpose of acquiring the services of the respondents as builders. Nine claimed the s 65A exemption applied, and relied on the reasoning of French J in *Bond v Barry*. Spigelman CJ (with whom Beazley and Hodgson JJA agreed) distinguished *Bond v Barry* on its facts. The communication of a draft article as in *Bond v Barry* was said to be "one step removed from the act of publication itself". The protection of s 65A would be "virtually non-existent if a journalist, who in the usual case would be an employee of and indemnified by the publisher, could be successfully sued for supplying an article, the publication of which was protected". Spigelman CJ posed the question for decision as follows:

> "whether a false or misleading statement made for the purposes of obtaining information or material for an ultimate purpose of publication is a 'prescribed publication of matter' as defined in s.65A(2), namely a 'publication … made … in the course of carrying on a business of providing information'."

His Honour concluded:

> "No doubt the collection of information, including audio-visual images, can be said to occur for some purposes "in the course of carrying on a business of providing information". However, the formulation "in the course of" is not

> equivalent to "in connection with" or "for purposes of". The relevant publication is the ultimate output of the business of providing information.
>
> The focus of the section upon "publication of matter" … "in the course of carrying on a business of providing information" indicates that there should exist, as there was in *Bond v Barry*, a close correspondence, perhaps even identity, between the "matter" published and the information "provided" by the business. Statements made in the course of an investigation, even where there is an ultimate intent to publish something, have no such correspondence. They may be "in connection with" or "for purposes of" the business of providing information, but they do not occur "in the course of carrying on" that business."

As a result, Nine was unable to rely upon the s.65A exemption.

Conclusion

Pending appeals in *Bond v Barry* and *ACCC v Seven Network* may serve to define some of the hazards that a "prescribed information provider" encounters in trying to enter the "media safe harbour" created by s 65A.

The recent decision of the NSW Court of Appeal in *TCN v Ilvariy* shows that the "media safe harbour" is not as deep as some media organisations may have imagined. The exemption created by s.65A applies to a "prescribed publication", and s.65A(2)(a) limits this to a publication that "was made by the prescribed information provider in the course of carrying on a business of providing information". *Bond v Barry* ruled that the provision by a freelance journalist of a draft article to a media outlet is such a protected publication. It would be surprising if that conclusion was overturned on appeal, given the purpose for which s.65A was enacted and the endorsement given to that view by the NSW Court of Appeal in *TCN v Ilvariy*.

TCN v Ilvariy shows that the protection of s 65A does not extend to statements made in the course of a media investigation. The language of s 65A is said to require "a close correspondence…between the matter published and the information provided by the business". Statements made in the course of an investigation are said to lack such correspondence because they do not occur "in the course of carrying on" a business of providing information.

Once intermediate appellate courts have ruled on the meaning of s 65A it may be time for the Commonwealth Parliament to review the extent of protection provided by the "media safe harbour" defence, and to decide whether the section should be re-drafted in clearer language. The purpose of the section is to provide sufficient protection to the media so as to not inhibit activities relating to the provision of news and other information. The imposition of TPA liability on the information gathering activities of journalists may create such an inhibition.

Peter Applegarth SC