

HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION

APPELLANT

AND

CHANNEL SEVEN BRISBANE PTY LIMITED & ORS

RESPONDENTS

*Australian Competition and Consumer Commission v Channel Seven Brisbane
Pty Limited*

[2009] HCA 19

30 April 2009

S506/2008

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Full Court of the Federal Court on 23 June 2008 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth of Australia with
S T White SC and J S Gleeson for the appellant (instructed by Australian
Government Solicitor)

T E F Hughes QC with A S Bell SC and P Zappia for the respondents (instructed
by Freehills)

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Limited

Trade Practices – Consumer protection – Misleading or deceptive conduct – Where *Trade Practices Act* 1974 (Cth), s 65A provides exemption from liability in respect of prescribed publication of matter by prescribed information provider – Exception to exemption in respect of publication in connection with supply, possible supply or promotion of supply or use of goods or services – Application of exception where publication made pursuant to contract, arrangement or understanding with person who supplies goods or services "of that kind" – Meaning of phrase "of that kind" in context of provision – Whether exception applies only where contract, arrangement or understanding relates to specific representations made in publication of matter.

Statutory Interpretation – Use of demonstrative adjective "that" – Determining referent of phrase "of that kind" – Relevance of textual proximity or sequential order – Whether alternative paragraphs in sub-section to be read distributively or as single sentence – Relevance of statutory intention – Extent of assistance from extrinsic materials.

Words and phrases – "advertisement", "contract, arrangement or understanding", "goods or services of that kind".

Trade Practices Act 1974 (Cth), ss 52, 65A.

Introduction

1 Section 52(1) of the *Trade Practices Act* 1974 (Cth) ("the TPA") provides:

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

Actions brought under the section alleging misleading or deceptive news media stories in the late 1970s and early 1980s¹ led to the creation, in 1984, of a statutory exemption for "prescribed information providers". The exemption was created by the enactment of s 65A. An identical provision limiting the scope of the prohibition on misleading or deceptive conduct in relation to financial services is to be found in the *Australian Securities and Investments Commission Act* 2001 (Cth)². Similar provisions appear in the *Fair Trading Acts* of the various States and Territories³.

2 The present appeal concerns an exception to the exemption. The exception relates to the publication of matter pursuant to a contract, arrangement or understanding between the party publishing the matter and a supplier of goods or services. The proceedings which have led to this appeal arise out of two episodes of the *Today Tonight* program broadcast by the respondents in October 2003 and January 2004. Each respondent is a licensed broadcaster, a member of the Channel Seven network, and a subsidiary of Seven Network Ltd.

3 The broadcasts were about a business offering training for women in the arts of property investment. It was promoted and conducted by Dymphna Boholt and Sandra Forster under the title "Wildly Wealthy Women Millionaire

1 *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531; *Universal Telecasters (Qld) Ltd v Ainsworth Consolidated Industries Ltd* (1983) 78 FLR 16; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1983) 47 ALR 497.

2 Section 12DA of the *Australian Securities and Investment Commission Act* 2001 (Cth) renders unlawful, in the language of s 52, conduct in relation to financial services which is misleading or deceptive or is likely to mislead or deceive. Section 12DN is in similar terms to s 65A.

3 *Fair Trading Act* 1987 (NSW), s 60; *Fair Trading Act* 1987 (SA), s 74; *Fair Trading Act* 1987 (WA), s 63; *Fair Trading Act* 1989 (Qld), s 51; *Fair Trading Act* 1990 (Tas), s 28; *Consumer Affairs and Fair Trading Act* (NT), s 60; *Fair Trading Act* 1992 (ACT), s 31. Section 32 of the *Fair Trading Act* 1999 (Vic) differs materially from s 65A of the TPA.

Mentoring Program". According to the broadcasts, Ms Boholt and Ms Forster were offering, for a fee of almost \$3,000 per person for a nine month program, to teach women how to become wealthy through investments in real estate.

4 On 26 September 2005, the appellant, the Australian Competition and Consumer Commission, commenced proceedings against the four respondents, their holding company Seven Network Ltd, the two women and a company called Universal Prosperity Pty Ltd ("Universal") controlled by Ms Forster. The appellant alleged contraventions of s 52 of the TPA by all of them except Seven Network Ltd⁴. It claimed, inter alia, that, by their broadcasts about the Wildly Wealthy Women mentoring program on *Today Tonight*, the respondents had made representations about the benefits of the services offered by Ms Boholt and Ms Forster and that those representations were misleading or deceptive. Declaratory and injunctive relief and non-punitive orders under s 86C(1) of the TPA were sought.

5 The application came on for trial before Bennett J in the Federal Court. On 5 October 2007, her Honour gave judgment in favour of the appellant⁵. There had been no allegation and no evidence presented that the holding company, Seven Network Ltd, had published any matter or engaged in misleading or deceptive conduct. Her Honour granted injunctive and declaratory relief against the respondent broadcasters and ordered that they pay three quarters of the appellant's costs of the proceedings. Ms Boholt, Ms Forster and Universal had previously agreed with the appellant on forms of order to dispose of the proceedings as against them. Ms Boholt and Ms Forster provided affidavit evidence for use by the appellant in its case against the respondents.

6 Bennett J held that s 65A of the TPA did not provide a defence. The respondents' conduct fell within an exception to the exemption from liability provided by the section. This was on the basis that the broadcasts had been made pursuant to an arrangement between the respondents and the two women and related to services provided by the women.

7 The respondents appealed to the Full Court of the Federal Court. On 23 June 2008, the Full Court (Sundberg, Jacobson and Lander JJ) allowed the

4 Seven Network Ltd was joined on the basis that it had entered into the relevant contract, arrangement or understanding: *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 345 [5].

5 (2007) 244 ALR 343.

appeal and set aside the declaratory and injunctive relief awarded by Bennett J⁶ on the basis that the exception to the exemption provided by s 65A did not apply to the conduct of the respondents. The respondents' conduct therefore fell within the exemption and their defence was made out.

8 On 14 November 2008, the appellant was granted special leave to appeal to this Court from that part of the judgment of the Full Court which held that the exemption from liability for contravention of s 52 of the TPA, contained in s 65A(1) of that Act, applied to the conduct of the respondents.

9 For the reasons that follow, the appeal should be allowed. The exemption conferred by s 65A does not apply to situations in which a media outlet, pursuant to an arrangement with a supplier of goods or services, publishes and, by adoption or otherwise, makes representations of a misleading or deceptive character in relation to goods or services of that kind. That is the present case.

Statutory framework

10 Section 52 of the TPA is followed by a number of other provisions of Pt V of that Act relating to false or misleading representations and conduct. The exemption provided by s 65A applies to s 52 and those associated provisions. Section 65A is in the following terms:

"(1) Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

(a) a publication of matter in connection with:

- (i) the supply or possible supply of goods or services;
- (ii) the sale or grant, or possible sale or grant, of interests in land;
- (iii) the promotion by any means of the supply or use of goods or services; or
- (iv) the promotion by any means of the sale or grant of interests in land;

where:

6 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97.

4.

- (v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
 - (vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:
 - (A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or
 - (B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or
 - (b) a publication of an advertisement.
- (2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:
- (a) in any case – the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or
 - (b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of ***prescribed information provider*** in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition) – the publication was by way of a radio or television broadcast by the prescribed information provider.
- (3) In this section:
- prescribed information provider*** means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:
- (a) the holder of a licence granted under the *Broadcasting Services Act 1992*; and
 - (aa) a person who is the provider of a broadcasting service under a class licence under that Act; and

- (ab) the holder of a licence continued in force by subsection 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*; and
- (b) the Australian Broadcasting Corporation; and
- (c) the Special Broadcasting Service Corporation.

relevant goods or services, in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

relevant interests in land, in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider."

The exception to the exemption with which this appeal is concerned is that defined by s 65A(1)(a)(i) and (iii) read with s 65A(1)(a)(vi)(A).

Factual background

11 Between September 2003 and March 2004, Rachael Bermingham carried on business offering marketing services to other businesses, advising them on how they could identify prospective clients and get their products to those clients.

12 In October 2003, Ms Boholt and Ms Forster had set up a business which they were operating or proposed to operate under the name "Wildly Wealthy Women". Ms Forster was, at the time, the sole director and shareholder of Universal. Universal had a registered website associated with the domain name www.wildlywealthywomen.com.

13 Ms Bermingham was approached by Ms Forster in October 2003 asking her to arrange for media exposure for the Wildly Wealthy Women mentoring program. Ms Bermingham would receive a commission for every woman that signed up to the program. Ms Forster told her that her main aim was to get a program like *A Current Affair*, *Today Tonight* or *Sunrise* to cover the story and ideally to run a series of stories following the women they mentored and their journey over a nine month period. Ms Bermingham agreed to represent the business on that basis.

14 Shortly after 9 October 2003, Ms Bermingham contacted Mr Howard Gipps who was then the producer of *Today Tonight*. At that time and at all material times, each of the television companies broadcast a television program

entitled "*Today Tonight*" on each week night. They had a number of telephone conversations between 9 October and 20 October 2003. During the conversations Ms Bermingham set out a proposal for stories about the Wildly Wealthy Women mentoring program to be broadcast on *Today Tonight*. The substance of her proposal was contained in an email she sent to Mr Gipps on 20 October 2003. In that email she said:

"Based on our few talks, here is an outline of what we would like to be included in the agreement;

- . October – Initial story on the founders Sandy & Dypmhna [sic] regarding their own stories ...
- . November – A story on some women who have signed up for the program ...
- . February/March 2004 – A story on the women at their first Wildly Wealthy Women Wicked Weekend ...
- . April/May 2004 – Another story of the women buying property, at auctions, renovating, walking the pavements searching for property etc ...
- . August 2004 – Who's leading the way – how many properties have been acquired ...
- . November 2004 – Graduation – who is our star Millionaire – how their life has changed etc etc.

We love your suggestions Howard & would be happy if you were to confirm this proposal. We will be finalising our agreements with the TV Media tomorrow to enable us to move onto our other press engagements ..."

15 Mr Gipps replied to the email on the same day saying, inter alia:

"all of that is fine and agreed ... looks like a total of 6 stories".

16 Ms Bermingham prepared a draft letter for Mr Gipps to sign as confirmation that they would be doing six stories on Wildly Wealthy Women along the lines set out in the email. The letter concluded:

"Today Tonight confirm these stories will be done at the suggested periods you have advised as above. The story content may change to evolve with the success & stories of the women participating."

A signed version of the letter was returned to Ms Bermingham, who sent a copy of it to Ms Forster. Ms Bermingham then called Mr Gipps and thanked him for sending through the confirmation. She said they had been in talks with *A Current Affair* but as he had confirmed that *Today Tonight* would run a series of stories, the women wanted to go with him. Mr Gipps said that *Today Tonight* would require exclusive rights to the story if that were the case. Ms Bermingham replied:

"Yes, Today Tonight can have the exclusive to the story based on your proposal until November 2004."

- 17 After receiving the signed copy Ms Bermingham did not offer rights to the story to any other Australian television outlet. There was no discussion between the parties about any payment either from or to the Seven Network for the publicity given to the Wildly Wealthy Women program.

The misleading or deceptive representations

- 18 The transcripts of the two segments of the *Today Tonight* program broadcast in October 2003 and January 2004 were set out in the judgment of the primary judge. It is not necessary to refer to them in detail here. The nature and content of the broadcasts and the statements made by the compere and reporter in each of them were sufficient, as the Full Court held, to support her Honour's finding that a number of representations, which were misleading or deceptive, were made by the respondents. Three such representations, each based on a statement made by the reporter, were found to have arisen out of the first broadcast⁷. They were⁸:

- (i) Ms Boholt owned in excess of 60 properties.
- (ii) Ms Forster had purchased over \$1 million worth of property using none of her own money.
- (iii) Ms Forster was a millionaire.

- 19 A fourth representation, arising out of a statement made by the program's compere, was found to have been made by the respondents in the second broadcast⁹. It was¹⁰:

7 (2007) 244 ALR 343 at 351 [32].

8 (2007) 244 ALR 343 at 346 [8].

9 (2007) 244 ALR 343 at 354 [45].

"the women had made millions of dollars through investing in property".

20 The respondents argued that, in the first broadcast, the compere had made a disclaimer about the truth of the claims made by the two women by saying¹¹:

"we'll see if the two ladies behind the program can live up to their promises over the next 12 months".

And¹²:

"Too good to be true? Well we'll be following the scheme's progress to let you know."

21 The trial judge said¹³:

"Viewing the first episode as a whole, the Seven licensees embraced and advanced the proposition that Ms Boholt and Ms Forster were millionaires and had achieved that status through investing in property. Those propositions were adopted and stated as fact by the reporter. In context, what was 'put up for examination' by the compere was whether others could achieve millionaire status by participation in the mentoring program. There was no suggestion by the compere, express or implicit, that the women's status as millionaires or as owners of property was questioned or would be examined or investigated in subsequent programs. There was no suggestion that the truth of those matters, as asserted by the reporter, would be the subject of further inquiry or should be the subject of such inquiry.

As a matter of overall impression, the scepticism injected by the compere does not overcome the strength of the representations made by the reporter. The disclaimer did not detract from the Wildly Wealthy Women representations. When the first episode is viewed as a whole, the ordinary and reasonable viewer would consider those representations to have been made by the Seven licensees."

10 (2007) 244 ALR 343 at 354 [45], 352 at [38].

11 (2007) 244 ALR 343 at 346 [8].

12 (2007) 244 ALR 343 at 346 [8].

13 (2007) 244 ALR 343 at 351 [30]-[31].

Her Honour also rejected an argument by the respondents that the compere had effectively entered a disclaimer in the second episode¹⁴.

22 Ms Forster swore an affidavit in the proceedings setting out her assets. Her evidence was not challenged. As at 31 October 2003 her assets did not exceed \$65,000 before taking into account liabilities of at least \$8,000. As at 30 January 2004, they did not exceed \$115,000 before taking into account liabilities of at least \$8,000. Ms Boholt swore an affidavit, also unchallenged, in which she said, inter alia, that as at 31 October 2003 she "did not own over 60 properties". The primary judge found that each of the four representations made by the respondents was misleading and deceptive¹⁵.

23 The Full Court, in findings not under challenge in this appeal, said¹⁶:

"We are not persuaded that there was not sufficient evidence for her Honour to make the findings which she did in relation to the *Wildly Wealthy Women* representations. In our opinion, having regard to the words used by the reporter in the first program and the words used by the compere in the second program, her Honour was entitled to find, notwithstanding the words which were said to amount to disclaimer in both programs, that the representations were made by the appellants.

Having found that the representations were made, it is clear beyond doubt that her Honour was entitled to find that the representations were false and that, subject to one other matter which we will now address, the conduct in making those representations was misleading or deceptive pursuant to s 52 of the Act."

That "other matter" was the s 65A defence. The primary judge found that it did not apply because the respondents' conduct fell within the exception defined by sub-pars (i), (iii) and (vi) of s 65A(1)(a). The Full Court found that the exception to the exemption did not apply. It did so on the basis that the only goods or services covered by the exception were "relevant goods or services", ie goods or services of a kind supplied by the prescribed information provider itself.

Grounds of appeal

24 The grounds of appeal against the decision of the Full Court are:

14 (2007) 244 ALR 343 at 354 [42]-[45].

15 (2007) 244 ALR 343 at 355 [52] and [54], 356 [58]-[59].

16 (2008) 249 ALR 97 at 102 [20]-[21].

- "2. The Full Court erred in holding that, by reason of the operation of section 65A(1) of the *Trade Practices Act 1974*, section 52 of that Act did not apply to the conduct of the Respondents.
3. The Full Court erred in holding that the reference to '*goods or services of that kind*' in section 65A(1)(a)(vi)(A) was a reference to goods or services of a kind supplied by the prescribed information provider as used in the expression '*relevant goods or services*' in section 65A(1)(a)(v) which, in turn, is defined in section 65A(3).
4. The Full Court erred in failing to hold that, on the proper construction of section 65A(1)(a)(vi)(A) of the *Trade Practices Act 1974*, the reference to '*goods or services of that kind*' was a reference to the goods or services referred to in section 65A(1)(a)(i), being the goods or services the subject matter of the publication referred to in s 65A(1)(a)."

Notice of Contention

- 25 The respondents filed a notice of contention seeking to uphold the judgment of the Full Court on the following ground:

"For the exception to the exemption contained in s 65A(1)(vi) of the *Trade Practices Act* (1974) (Cth) to apply, the '*contract, arrangement or understanding*' '*pursuant to*' which the subject publication was made must be a '*contract, arrangement or understanding*' to publish the misleading or deceptive matter that resulted in the contravention of s 52; and, as the Appellant concedes, there was no such '*contract, arrangement or understanding*'."

The questions for decision on the s 65A defence

- 26 It was not in dispute before the primary judge nor in this Court that:
- Each of the respondents was a "prescribed information provider" as defined in s 65A(3).
 - The broadcasts were "prescribed publications" of matter as defined in s 65A(2).
 - The publications were of matter in connection with the supply or possible supply of goods or services or promotion of that supply within s 65A(1)(a)(i) and (iii).

- The goods or services the subject of the publication were not "relevant goods or services". On that basis the exception defined by sub-pars (i) and (iii), read with sub-par (v) of s 65A(1)(a), had no application.
- The condition in s 65A(1)(a)(vi)(B) had no application.
- It was not argued that the broadcasts constituted an advertisement. There was therefore no contention that the exception defined by s 65A(1)(b) applied.

27 The following questions arise for decision in determining whether the contested exception to the s 65A exemption applied to the broadcasts in issue:

- (i) Did the conduct of the respondents, found to be misleading or deceptive, constitute a publication of matter 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 services¹⁷? – The answer to that question is in the affirmative and was not in dispute.
- (ii) Was the publication made pursuant to a contract, arrangement or understanding within the meaning of sub-par (vi)¹⁸? – This question is raised by the respondents' notice of contention.
- (iii) If "yes", was the contract, arrangement or understanding made with a person who supplies goods or services¹⁹? – The answer to this question was in the affirmative and was not in dispute. Ms Boholt and Ms Forster were supplying training services.

28 The next two questions are the primary constructional questions upon which this appeal turns:

- (iv) Do the goods or services referred to in s 65A(1)(a)(vi) as "goods or services of that kind" mean goods or services of the kind the subject of the publication referred to in s 65A(1)(a)(i) and (iii)? or
- (v) Do they mean only goods or services of the same kind as the "relevant goods or services" mentioned in s 65A(1)(a)(v)?

17 TPA s 65A(1)(a)(i) and (iii).

18 TPA s 65A(1)(a)(vi).

19 TPA s 65A(1)(a)(vi)(A).

The first construction, proposed in question (iv), yields a wider exception to the exemption than the second, proposed in question (v). The first was that adopted by the primary judge²⁰. The second was that adopted by the Full Court²¹.

29 If the first construction be correct, then a prescribed information provider is not protected by s 65A when publishing matter in connection with the supply of goods or services of any kind where the publication is made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who supplies goods or services of that kind.

30 If the second construction be correct, the prescribed information provider will be protected in such a case unless the goods or services are "relevant goods or services", that is to say goods or services of a kind supplied by that prescribed information provider or a related body corporate²².

The construction of s 65A

31 It is not necessary to set out in detail the background to the enactment of s 65A²³. In order to understand the purpose of the provision it is useful to refer to a passage from the Second Reading Speech for the Bill which became the *Statute Law (Miscellaneous Provisions) Act (No 2) 1984* (Cth) by which s 65A was introduced into the TPA. In the Second Reading Speech it was said, inter alia²⁴:

"The Government recognises the need to maintain a vigorous free press, as well as an effective and enforceable Trade Practices Act. In doing so, the Government recognises that, whilst the problem may have been highlighted by a defamation action, similar considerations apply in respect of action for negligent mis-statement and actions for injurious falsehood. The Government also recognises that the difficulties in this area are experienced not only by the main newspaper, magazine and television publishers, but also by a wide range of other people who provide information.

20 (2007) 244 ALR 343 at 365 [92] and [94].

21 (2008) 249 ALR 97 at 108 [53].

22 TPA s 65A(3).

23 For a description of that background see *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 18 FCR 1 at 6-11.

24 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

New section 65A will operate to exempt the media (and other persons who engage in businesses of providing information) from the operation of those provisions of Division 1 of Part V of the Trade Practices Act which could inhibit activities relating to the provision of news and other information."

The exemption was limited and the relevant limit was²⁵:

"The exemption is not available, however, in respect of a publication of information relating to goods, services or land of a kind supplied by the information provider, or relating to goods, services or land where the publication is made pursuant to a contract, arrangement or understanding with a body corporate related to a body corporate that supplies such goods, services or land. These provisions ensure that information providers are not exempt from the consumer protection provisions of the Trade Practices Act in respect of the provision of information where they have what might be regarded as a commercial interest in the content of the information. In such cases, information providers must take the same responsibility for the accuracy of information as any other person who publishes information in trade or commerce. This can occur, for example, where a newspaper has agreed to publish a 'news' item about a product in exchange for the product supplier taking out paid advertising in that publication."

32 The Explanatory Memorandum in relation to s 65A(1)(a) stated:

"Proposed paragraph 65A(1)(a) provides that the exemption does not operate in relation to publication in connection with the supply or promotion of relevant interests in land, relevant goods or services or where publication is pursuant to a contract, arrangement or understanding with the supplier, or a related body corporate, of lands, goods or services."

33 The extract from the Second Reading Speech defines the purpose of the exemption and of the relevant exception to it. It is based in part upon a misreading of s 65A which would have the exception apply only in respect of goods or services supplied by a body corporate or related body corporate. The Minister used the term "such goods or services" in a way that might be taken to have referred to goods or services of a kind supplied by the information provider or to goods or services the subject of publication pursuant to a contract, arrangement or understanding. The extract from the Explanatory Memorandum moves without explanation between a general reference to "relevant goods or services" and "goods or services" generally. These features of the Second Reading Speech and the Explanatory Memorandum mean that they are of little

25 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

assistance in the construction of s 65A save to the extent that they identify its purpose.

34 The respondents supported the Full Court's construction of s 65A by reference to textual and contextual considerations and the purpose of the section. In substance the respondents' propositions were:

- (i) The only goods or services referred to as a class in s 65A are the "relevant goods or services" in relation to a particular information provider. The "goods or services of that kind" referred to in s 65A(1)(a)(vi) can therefore only refer to relevant goods or services in relation to a prescribed information provider.
- (ii) The proximity of the term "goods or services of that kind" in s 65A(1)(a)(vi) to the term "relevant goods or services" in the immediately preceding sub-paragraph suggests that the term in sub-par (vi) refers to the "relevant goods or services" in sub-par (v).
- (iii) Sub-paragraphs (v) and (vi) are alternatives which should be read in their context as referring to the same kind of goods or services.
- (iv) If the expression "goods or services of that kind" in sub-par (vi) refers to any third person's goods or services the subject of the publication, the reference in s 65A(1)(b) to an "advertisement" would be otiose. Any advertisement would meet the description in sub-par (vi) because it would entail the publication of matter in connection with any goods or services pursuant to a contract, arrangement or understanding with a person who supplies those goods or services.
- (v) The Minister's Second Reading Speech referred to publication being made "pursuant to a contract, arrangement or understanding". The Minister made it plain through his use of the words "such goods, services or land" that the type of goods covered by the sub-section were goods of the kind supplied by the prescribed information provider.
- (vi) The Second Reading Speech indicates that the exemption was intended to have a broad operation in relation to the media and other information providers. There is no basis for suggesting that the policy of promoting a "vigorous free press" was to be subordinated to consumer protection concerns.
- (vii) The construction adopted by the primary judge would inhibit activities relating to the provision of news and other information by the media and other information providers. It could inhibit media from entering into arrangements or understandings including non-commercial arrangements

or understandings for the purpose of publishing information about the supply of goods or services.

35 Notwithstanding the above arguments the construction adopted by the primary judge and propounded by the appellant is to be preferred to that adopted by the Full Court and propounded by the respondents.

36 The first constructional argument, that the reference to "goods or services of that kind" in sub-par (vi) can only refer back to "relevant goods or services" in sub-par (v), depends upon "relevant goods or services" being the only goods or services capable of designation as a class and therefore as goods of a particular kind. That premise is wrong. The designation "goods or services of that kind" used in sub-par (vi) can logically be applied to the goods or services the subject of the published matter referred to in sub-pars (i) and (iii). Those sub-paragraphs define a class of goods or services by reference to the fact that they were the subject of the published matter.

37 The second and third construction arguments rely upon the proximity of sub-pars (v) and (vi) and the fact that they are disjunctive. These considerations do not support the respondents' construction. At best they are neutral. Sub-paragraphs (i) to (iv) define classes of publication not covered by the exemption if the conditions either of sub-pars (v) or (vi) are met. These are two different kinds of condition, the first being that the publication concerns relevant goods or services, the second depending upon the existence of a relationship between the information provider and a supplier of the goods or services the subject of the publications and action pursuant to that relationship.

38 The fourth argument was that the appellant's construction rendered the exception in respect of advertisements in s 65A(1)(b) otiose. The argument is answered by considering the way in which the exceptions are arranged in the section. The exceptions to the s 65A exemption cover a hierarchy of related and overlapping categories of publication which are entirely consistent with the purpose of the provision. Those categories were described, in broad terms, in the submissions for the appellant as:

- Self promotion – s 65A(1)(a)(v).
- Third party promotion – s 65A(1)(a)(vi).
- Advertisement – s 65A(1)(b).

39 There are some categories of promotion of third party goods or services by a broadcaster which would fall squarely within the concept of an advertisement within the meaning of par (b). But it is not to be supposed that that exception, which was not relied upon at any stage in these proceedings, would cover the field of the promotion of third party goods and services. Nor is it to be supposed

that the class of publication defined by the word "advertisement" and the kind of third party promotion covered by sub-par (vi) are mutually exclusive. The ordinary English meaning of "advertisement" according to the *Australian Oxford Dictionary* is²⁶:

"A public notice or announcement, especially one advertising goods or services in newspapers, on posters, or in broadcasts."

The *Macquarie Dictionary* includes, in its similar definition, "a commercial film on television"²⁷. The word "advertorial" which appears to have entered ordinary usage is defined in the *Australian Oxford Dictionary* as "an advertisement in the style of editorial comment"²⁸ and in the *Macquarie Dictionary* as²⁹:

"a media piece that looks like a news or feature article but which is written and paid for by an advertiser".

40 The interpretation of "advertisement" may conceivably cover some kinds of broadcast which also fall within the description of advertorial. Its relevant ordinary meaning is nevertheless relatively narrow. It does not extend to every publication of matter, pursuant to some contract, arrangement or understanding, in connection with the supply of goods or services.

41 The fifth argument relies upon the Minister's Second Reading Speech and his use of the term "such goods [or] services" in it. Given the infelicities referred to earlier, neither the Second Reading Speech nor the Explanatory Memorandum are of particular assistance in choosing between competing constructions on textual grounds. The assistance they do accord is largely related to an understanding of the purpose of s 65A and its exceptions.

42 The purpose of the exemption in s 65A, which was the subject of the sixth and seventh arguments made by the respondents, was to maintain a vigorous free press as well as to maintain an effective and enforceable TPA. That purpose is served by releasing newspapers and electronic media proprietors, inter alia, from undesirable inhibitions on the provision, by them, of news, information, opinion

26 The *Australian Oxford Dictionary*, 2nd ed (2004) at 18.

27 The *Macquarie Dictionary*, accessed online at <http://www.macquariedictionary.com.au> on 24 March 2009.

28 The *Australian Oxford Dictionary*, 2nd ed (2004) at 18.

29 The *Macquarie Dictionary*, accessed online at <http://www.macquariedictionary.com.au> on 24 March 2009.

and comment. Consistently with that purpose information providers are free as part of the function of an independent free press to praise or criticise the providers of goods or services and the quality of what they provide. Where, however, the information provider publishes matter in connection with goods or services which it itself provides, or publishes an advertisement for its own or someone else's goods or services, the rationale of maintaining a free and vigorous press does not require its exemption from the prohibition of misleading or deceptive conduct. The same is true where the information provider promotes the goods or services of a third party pursuant to a contract, arrangement or understanding with that party. It would be true also of publications critical of goods or services provided by competitors of the information provider or of a third party with whom the information provider has a contract, arrangement or understanding.

43 The rationale for limits upon the exemption should be understood in the light of conditions that must be satisfied before an information provider is liable in respect of misleading or deceptive representations made by a third party and published by the information provider. The publication, by an information provider, of third party statements about goods or services, does not, without more, amount to the adoption or making of those statements by the information provider³⁰.

44 Consistently with the legislative purpose enunciated in the Second Reading Speech, there is a clear rationale, derived from the purpose of the TPA itself, for not confining the exceptions to the exemption under s 65A to advertisements and to publications about goods or services of a kind provided by the information provider.

45 There will no doubt be factual circumstances in which the application of s 65A will not be without difficulty. Nevertheless, text, context and purpose favour the construction adopted by the primary judge, rather than that adopted by the Full Court.

46 This leaves for consideration the point raised by the notice of contention. It was not argued by the respondents that there was not a contract, arrangement or understanding between them and the two women operating the Wildly Wealthy Women Millionaire Mentoring Program. The point in contention is whether the contract, arrangement or understanding must relate to the specific representations made in the publication or whether it suffices that the publication is made pursuant to the terms of the contract, arrangement or understanding. The primary judge found that it was sufficient that the arrangement extend only to the

30 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 605 [38]-[40]; [2004] HCA 60.

content of the publication in a general sense³¹. The respondents contended that this formulation was too nebulous. It would drive a "coach and horse" through the exemption. They argued that the contract, arrangement or understanding must relate to the actual content of the relevant publication or broadcast. The exception to the exemption would apply where the contract, arrangement or understanding covered the script or text of the publication or broadcast and the script or text was found to have been misleading or deceptive.

47 The primary judge found against the construction advanced by the respondents and made the following points:

- Section 65A(1)(a) is directed to the "publication of matter" and not the publication of particular statements or representations.
- The publication may be made "pursuant to" a contract, arrangement or understanding. This does not require that the contract, arrangement or understanding descend to the detail of the content of the publication.
- The coverage by sub-par (vi) of publications made "on behalf of" third party suppliers of goods or services also contra-indicates a limitation on the nature of the relevant contract, arrangement or understanding to the particular content of the publication.
- While s 65A(1)(a) is concerned with the "matter" the subject of the publication, sub-par (vi) concerns its source and not its subject.

48 An arrangement or understanding ordinarily involves an element of reciprocal commitment even though it may not be legally enforceable. It involves more than a mere hope or expectation that each party will act in accordance with its terms³². It is not necessary to consider the limits of the term

31 (2007) 244 ALR 343 at 362 [80].

32 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 334-335 [35]-[37]; *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at 464 [46]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 257-258 [79]; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231; *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 at 56; *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 26 ALR 609 at 629; *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 5 ALR 465 at 469-470.

here because there is no dispute that the respondents did have an arrangement or understanding with the two women. The question is whether it was the kind of arrangement or understanding with which sub-par (vi) is concerned.

49 The collocation "on behalf of, or pursuant to a contract, arrangement or understanding with ..." is directed to the relationship between the publisher of matter and the supplier of goods or services to which the published matter relates. The respondents' construction places a gloss and a limitation upon the language of sub-par (vi) which Parliament did not see fit to place upon it. The content of the so-called "arrangement or understanding" is not defined save that it must necessarily relate to the publication of matter in connection with goods or services. The relevant publication must be made "pursuant to" it. This does not convey any requirement that the particular text published must be specified in the contract, arrangement or understanding. The respondents contended that the exception to the exemption as construed by the primary judge would destroy the exemption. This was on the basis that anybody who was interviewed by television, radio or other media does so because they agree to do so. So all voluntary interviewees are party to a contract, arrangement or understanding.

50 This was something of a "straw man" argument. Sub-paragraph (vi) is concerned with contracts, arrangements or understandings between information providers and the suppliers of goods or services. The information provider that publishes matter in connection with the supply of goods or services, and engages in misleading or deceptive conduct in so doing by the adoption or making of misrepresentations, is the party affected by this exception. This case was well within the purposes of the exception. Other cases may require consideration of the range of arrangements or understandings that fall within it.

51 The primary judge was correct in her construction.

Conclusion

52 For the preceding reasons the appeal should be allowed, the orders made by the Full Court of the Federal Court set aside and the orders made by the primary judge restored. The respondents in this appeal should pay the appellant's costs of the appeal in the Full Court and in this Court.

53 GUMMOW J. The facts and the course of the litigation are explained in the reasons of the Chief Justice and Kiefel J, which should be read with what follows.

54 Section 65A of the *Trade Practices Act* 1974 (Cth) is so drawn as to compress within a fairly short text numerous interactions between various integers or elements specified in the section. That interaction produces various combinations in which those integers operate conjunctively and disjunctively. When any particular set of facts is said to engage the section it becomes necessary first to identify which one or more of those combinations is relied upon to attract the section. If this step is taken with the present appeal, much of the uncertainty said to attend the application of s 65A in this case does not appear.

55 The consequence is that the appellant ("the ACCC") should succeed, the appeal should be allowed and consequential orders made as proposed by the Chief Justice and Kiefel J.

56 Section 65A excludes what otherwise could be contravention of the norms of conduct proscribed by various provisions in Pt V, Div I of the Act. These are ss 52, 53, 53A, 55, 55A and 59. The contraventions alleged by the ACCC against the respondents ("Channel Seven") were of s 52. This states:

"52 Misleading or deceptive conduct

- (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)."

The contraventions by Channel Seven were said to have occurred by the making of two television broadcasts, being episodes of the *Today Tonight* program which went to air in October 2003 and January 2004. The central issue in this Court is whether the exclusion of s 52 otherwise effected by s 65A did not apply by reason of either of two operations of s 65A. Each of these, by the use in them of the words "other than", is said by the ACCC to deny what otherwise would be the exclusion by s 65A of the application of s 52, to the broadcasts by Channel Seven.

57 Channel Seven submitted that the construction of s 65A for which the ACCC contends should be examined with particular caution because acceptance of it would inhibit and not advance the position of a free and vigorous press. However, following the decision of Toohey J in *Australian Ocean Line Pty Ltd v*

*West Australian Newspapers Ltd*³³, it has become well established that, for the broadcasts in question here to give rise to contraventions of s 52 by Channel Seven, it was necessary at least for some "endorsement" or "adoption" of what was represented on the programs by the relevant third parties, Ms Forster and Ms Boholt. The point, with particular reference to s 53 of the Act (which deals with certain false or misleading representations), was made as follows by French J in *Gardam v George Wills & Co Ltd*³⁴:

"The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation. ... When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation. It will be a question of fact in each case".

58 The evidence demonstrated that with respect to the alleged contraventions of s 52 by Channel Seven, in relation to the status and achievements of Ms Forster and Ms Boholt, there was at least the necessary endorsement or adoption. The transcript of the broadcast of 31 October 2003 contains the following:

"REPORTER: Through shrewd investment in real estate *the pair* [Ms Forster and Ms Boholt] *have become millionaires*, their secrets to be revealed in a mentoring program called 'Wildly Wealthy Women'.

...

REPORTER: Sandy [Forster], a former surf wear designer is now a prosperity coach teaching women how to think like millionaires. *In eight months she's bought more than \$1 million worth of property with no money whatsoever.*

...

REPORTER: She [Ms Boholt] now owns more than 60 properties all around Australia." (emphasis added)

The fact was, as affirmed in a declaration made by the primary judge, Ms Boholt did not own in excess of 60 properties at the time the representation was made, Ms Forster was not a millionaire, and Ms Forster had not purchased over

33 (1985) 58 ALR 549 at 586-587.

34 (1988) 82 ALR 415 at 427.

\$1 million worth of property using none of her own money. The primary judge also made a declaration with respect to the broadcast on 30 January 2004 to the effect that the statement in the transcript:

"COMPERE: The women you're about to meet have made millions of dollars ..."

represented that Ms Forster had made millions of dollars through investing in property whereas in fact at this time she had not made millions of dollars through investing in property.

59 Hence the importance for Channel Seven to make out what it pleaded was the complete answer to the allegations by the ACCC of contravention of s 52, namely that s 65A of the Act operated in favour of Channel Seven.

60 It is convenient now to set out the text of s 65A(1). The chapeau to s 65A reads:

"Application of provisions of Division to prescribed information providers."

The text of s 65A(1) states:

"(1) *Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:*

(a) *a publication of matter in connection with:*

- (i) *the supply or possible supply of goods or services;*
- (ii) *the sale or grant, or possible sale or grant, of interests in land;*
- (iii) *the promotion by any means of the supply or use of goods or services; or*
- (iv) *the promotion by any means of the sale or grant of interests in land;*

where:

- (v) *the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or*

23.

- (vi) *the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:*
 - (A) *a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or*
 - (B) *a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or*
- (b) *a publication of an advertisement."* (emphasis added)

61

It is apparent that par (a) of s 65A(1) has many different operations, each of which triggers an exception to what otherwise is the relief given by the opening words of the sub-section from, in this case, s 52. This comes about because par (a) operates such that either sub-pars (i), (ii), (iii) or (iv) must be satisfied along with either (v), (vi)(A) or (vi)(B). Once the sub-section is disentangled and its numerous operations are separated the operation of the exceptions becomes clear. There are twelve exceptions produced from the different combinations in par (a) of s 65A(1). For convenience, these may be set out as follows:

- (1) a publication of a matter in connection with the supply or possible supply of goods or services where the goods or services were relevant goods or services in relation to the prescribed information provider; [(a)(i) + (v)]
- (2) *a publication of a matter in connection with the supply or possible supply of goods or services where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a person who supplies goods or service of that kind; [(a)(i) + (vi)(A)]*
- (3) a publication of a matter in connection with the supply or possible supply of goods or services where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a body corporate that is a related body corporate that supplies goods or services of that kind; [(a)(i) + (vi)(B)]
- (4) a publication of a matter in connection with the sale or grant, or possible sale or grant, of interests in land where the interests in land were relevant interests in land in relation to the prescribed information provider; [(a)(ii) + (v)]

- (5) a publication of a matter in connection with the sale or grant, or possible sale or grant, of interests in land where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a person who sells or grants interests in land, being interests of that kind; [(a)(ii) + (vi)(A)]
- (6) a publication of a matter in connection with the sale or grant, or possible sale or grant, of interests in land where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a body corporate that is related to a body corporate that sells or grants interests in land, being interests of that kind; [(a)(ii) + (vi)(B)]
- (7) a publication of a matter in connection with the promotion by any means of the supply or use of goods or services where the goods or services were relevant goods or services in relation to the prescribed information provider; [(a)(iii) + (v)]
- (8) *a publication of a matter in connection with the promotion by any means of the supply or use of goods or services where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a person who supplies goods or service of that kind; [(a)(iii) + (vi)(A)]*
- (9) a publication of a matter in connection with the promotion by any means of the supply or use of goods or services where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a body corporate that is a related body corporate that supplies goods or services of that kind; [(a)(iii) + (vi)(B)]
- (10) a publication of a matter in connection with the promotion by any means of the sale or grant of interests in land where the interests in land were relevant interests in land in relation to the prescribed information provider; [(a)(iv) + (v)]
- (11) a publication of a matter in connection with the promotion by any means of the sale or grant of interests in land where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a person who sells or grants interests in land, being interests of that kind; [(a)(iv) + (vi)(A)]
- (12) a publication of a matter in connection with the promotion by any means of the sale or grant of interests in land where the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with a body corporate that is related to a body

25.

corporate that sells or grants interests in land, being interests of that kind; [(a)(iv) + (vi)(B)]

This case is concerned with the exceptions numbered (2) and (8) which are emphasised in the above list. Once the exceptions are read in this way it becomes apparent that, contrary to the construction of the Full Court, the phrase "of that kind" refers to the goods or services which are the subject of the publication. This is consistent with the conclusion of the primary judge and with the case presented in this Court by the ACCC.

Textual considerations

62 The arguments put against this construction by Channel Seven are that it is inconsistent with "textual considerations" and with the purpose of the legislation.

63 In their reasons, the Chief Justice and Kiefel J list the propositions advanced by Channel Seven³⁵. They are numbered (i) to (vii). They may be briefly restated as follows:

- (i) The only other kind of goods or services identified in s 65A(1) is the "relevant goods or services" identified in sub-par (a)(v) and defined in s 65A(3). Thus, the reference to "goods or services of that kind" in sub-par (a)(vi)(A) must be a reference to those "relevant goods or services", not those of Ms Forster and Ms Boholt.
- (ii) The textual proximity of the two phrases, "goods or services of that kind" in sub-par (a)(vi) and "relevant goods or services" in sub-par (a)(v), indicates that the first of these two phrases identifies the second.
- (iii) Sub-paragraphs (v) and (vi) are expressed disjunctively, but each refers to the same kind of goods or services.
- (iv) Full effect should be given to par (b) of s 65A(1), dealing with the publication of an advertisement; par (b) would be otiose if the phrase "goods or services of that kind" in sub-par (a)(vi) identifies those of any third person being the subject of the publication.
- (v) The Second Reading Speech supports the construction advanced by Channel Seven.

35 See [34].

- (vi) The promotion of a "vigorous free press" is not to be subordinated to the concerns of consumer protection.
- (vii) The ACCC construction, accepted by the primary judge, would inhibit arrangements between information providers and third parties for the publication of information about the supply of goods or services.

64 Propositions (i) to (iv) deal with what may be called "textual considerations". Propositions (v) and (vi), which deal with the Second Reading Speech, are addressed below. Proposition (vii), the alleged impact upon the interests of a free press has been addressed earlier in these reasons.

65 Proposition (i) is incorrect. The goods and services in ss 65A(1)(a)(i) and (iii) will naturally be of a kind. Furthermore, once the exceptions are disentangled it becomes clear that the reference, in s 65A(1)(a)(vi)(A), to "of that kind" is a reference to the kind of goods or services in ss 65A(1)(a)(i) or (iii).

66 Channel Seven submit, in proposition (ii), that the textual proximity of the phrases "goods or services of that kind" and "relevant goods or services" indicates that they refer to the same goods or services. Further, they argue, in proposition (iii), that as sub-pars (a)(v) and (a)(vi) are disjunctives they should be read as referring to the same kind of goods or services. If these propositions were to be accepted the Parliament could not, as it has done with s 65A, effectively abbreviate a large number of exceptions by listing the relevant integers as sets of disjunctives without risking the qualification of the terms of one integer by the terms of the other integers.

67 Reference should be made to the definition of "relevant goods or services" in s 65A(3). This reads:

"relevant goods or services, in relation to a prescribed information provider, means *goods or services of a kind* supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider." (emphasis added)

68 During the hearing before this Court the suggestion was made that the similarity between the words "goods or services of that kind", used in s 65A(1)(a)(vi), and the words "goods or services of a kind", used in the definition of "relevant goods or services" in s 65A(3), suggests that the goods in s 65A(1)(a)(vi) are to be read as "relevant goods or services". The defined expression appears in sub-par (v) not sub-par (vi), and (v) and (vi) are expressed disjunctively. The presence of the definition in s 65A(3) supplies no textual support to break the link which, for this appeal, appears between sub-par (vi) and sub-pars (i) and (iii).

69 The fourth submission by Channel Seven should not be accepted. It is true that the exceptions provided by ss 65A(1)(a)(vi)(A) and 65A(1)(b) overlap, upon the construction accepted by the primary judge, but they also apply to discrete publications. Further, as was noted by French J in *Bond v Barry*³⁶, the limits of the wide application of s 65A are formed by the exceptions provided by ss 65A(1)(a) and (b). The exceptions operate to confine the application of the general exemption introduced by s 65A rather than to exclude discrete publications from its application. Thus, the exceptions do not necessarily operate discretely.

Purpose of the section

70 Channel Seven submits that the construction of Bennett J is inconsistent with the intention of the legislature. This intention, they submit, is "unusually clear" from the Minister's Second Reading Speech³⁷:

"The exemption is not available, however, in respect of a publication of information relating to goods, services or land of a kind supplied by the information provider, or relating to goods, services or land where the publication is made pursuant to a contract, arrangement or understanding with a body corporate related to a body corporate that supplies *such goods, services or land*. These provisions ensure that information providers are not exempt from the consumer protection provisions of [the Act] in respect of the provision of information where they have what might be regarded as a commercial interest in the content of the information." (emphasis given by counsel for Channel Seven)

71 Channel Seven submitted that it is clear from the use of the term "such goods", that the type of goods covered by sub-par (a)(vi) are goods of the kind supplied by the prescribed information provider. Yet the Second Reading Speech is no more than a summary of the section and fails to deal directly with sub-par (a)(vi)(A). Further, the replacement of the words "of that kind", used in the sub-paragraph, with the words "such goods" only repeats the controversy at hand, namely, the identity of the goods in question. There is no indication that the Minister's reference to "such goods" is to goods of the kind supplied by the prescribed information provider rather than to those goods which are the subject of the publication.

36 [2007] ATPR §42-187 at 48,069 [34]. This judgment was affirmed on appeal to the Full Court of the Federal Court of Australia: *Bond v Barry* (2008) 249 ALR 110.

37 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

72 The Minister also states that the exceptions operate where the information provider has "what might be regarded as a commercial interest" in the content of the information. This statement appears to be an attempt to summarise the effect of the complex legal relationship that exists between provisions s 65A(1)(a)(i) to (vi), and s 65A(1)(b). The summary risks over-simplification. Given this legal complexity, care should be taken in looking to the Second Reading Speech to answer intricate questions of construction which arise in this case.

Notice of contention

73 I would agree with the reasons of the Chief Justice and Kiefel J with respect to the Notice of Contention.

Orders

74 I agree with the orders proposed by the Chief Justice and Kiefel J.

75 HAYNE J. I agree with French CJ and Kiefel J that the appeal should be allowed and consequential orders made in the form proposed.

76 The disposition of the appeal turns principally upon the proper construction of s 65A(1) of the *Trade Practices Act 1974* (Cth). The text of s 65A is set out in the joint reasons.

77 Section 65A(1) begins by providing that nothing in certain specified sections of the Act "applies to a prescribed publication of matter by a prescribed information provider, other than" the several kinds of publication identified in pars (a) and (b) of the sub-section. The immediate question in the case was whether the publication in issue was one of those excepted kinds of publication. In particular, was there "a publication of matter in connection with ... the supply or possible supply ... [or] the promotion ... of the supply ... of ... services" where "the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with ... a person who supplies ... services of that kind"?

78 When the question for consideration is identified in that way, there is no ambiguity in the applicable provisions of s 65A(1). The contract arrangement or understanding must be with a person who supplies services of the kind that are the subject of the publication. The expression "services of that kind" points back to the services which are the subject of the publication.

79 Section 65A(1) is drafted as a single sentence of nearly 200 words. But that sentence is divided and subdivided into paragraphs and sub-paragraphs which, for the most part, are to operate disjunctively. When account is taken of those disjunctions, s 65A(1) can have more than a dozen distinct operations, even if no distinction is drawn between the supply or possible supply of goods and the supply or possible supply of services.

80 When construing s 65A(1) account must be taken of these disjunctive operations of the provision. Ordinarily, the attribution intended by the demonstrative adjective "that" is determined by proximity. But where, as here, there are distinct operations of the provision, the relevant proximity is identified by consideration of so much of the sub-section as is relevant to the case at hand. It is not identified by treating the sub-section as a single sentence in which "goods or services of that kind" always refers back to the goods or services which were identified in the immediately preceding paragraph of the sub-section.

81 In this case, the words "of that kind", where they appear in s 65A(1)(a)(vi)(A) (a person who supplies goods or services *of that kind*) fell to be applied in a case in which it was alleged that there was a publication of matter in connection with "the supply or possible supply [or the promotion of the supply] of goods or services". Read in that way there is no ambiguity or difficulty in understanding the "goods or services of that kind" as referring back

to the goods or services in connection with the supply, possible supply, or promotion of which there was a publication of matter.

82 HEYDON J. The Commission complained that s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act") had been contravened by certain conduct of the respondents (Channel Seven Brisbane Pty Ltd, Channel Seven Sydney Pty Ltd, Channel Seven Melbourne Pty Ltd and Channel Seven Perth Pty Ltd). The conduct in question was broadcasting two episodes of a current affairs television programme known as *Today Tonight*. Those episodes reported on what was called the "Wildly Wealthy Women Millionaire Mentoring Program" ("the Mentoring Programme"). The Mentoring Programme envisaged the provision of instruction to women over a nine month period on how to formulate and implement successful property investment strategies. In return for the provision of this service, the participants would each pay \$2,995.

83 Dymphna Boholt and Sandra Forster, who had conceived the idea of the Mentoring Programme, asked Rachael Bermingham to organise publicity for the Mentoring Programme. In particular, on about 9 October 2003 Sandra Forster asked Rachael Bermingham "to get a program like ... [*Today Tonight*] ... to cover the story for us and ideally run a series of stories following the women we mentor and their journey within the 9 months". In due course, on 20 October 2003 the Executive Producer of *Today Tonight* in Brisbane consented to broadcast six "stories" on the Mentoring Programme. The first two of these "stories" were the episodes about which the Commission complains. They were broadcast on 31 October 2003 and 30 January 2004 respectively.

84 The Commission's contention that these episodes contravened s 52 was upheld by the Federal Court of Australia (Bennett J). On the strength of an unchallenged affidavit by Dymphna Boholt, the trial judge held that in the first episode the respondents made a misleading and deceptive representation that Dymphna Boholt owned in excess of 60 properties³⁸. The trial judge also found, on the strength of an unchallenged affidavit by Sandra Forster, that in the first episode the respondents made misleading and deceptive representations that she had purchased over \$1 million worth of property and was a millionaire. And the trial judge found that in the second episode the respondents made a misleading and deceptive representation that Sandra Forster had made millions investing in property. These conclusions are not now in controversy, and no fresh demonstration of their validity is now called for. However, the learned Solicitor-General of the Commonwealth, who appeared for the Commission, did take the Court through parts of the broadcasts. That process certainly revealed the broadcasts as tasteless, as vulgar, as pandering to the basest of human desires, and as highly likely to achieve both popular and critical acclaim.

38 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343.

85 What is controversial is the trial judge's conclusion that the respondents' conduct did not fall within an immunity from s 52 conferred by s 65A. That conclusion led her to grant declaratory and injunctive relief. The Full Federal Court (Sundberg, Jacobson and Lander JJ), however, allowed an appeal. They held that the trial judge's construction of s 65A was erroneous and that it did afford the respondents immunity from s 52³⁹.

86 The Commission's appeal against the Full Court's orders should be dismissed with costs for the following reasons.

The terms of s 65A

87 *Background.* Soon after s 52 was enacted in 1974, applicants began to contend not only that untrue defamatory statements were actionable at common law by reason of the tort of defamation, but also that they attracted relief by way of damages under s 82 of the Act for contravention of s 52⁴⁰. Some applicants viewed reliance on s 52 and s 82 as offering attractions over actions in defamation. One class comprised applicants who preferred non-jury trial but who could only sue in defamation in a jurisdiction which offered jury trial. Another class comprised applicants who wished to bypass the numerous common law and statutory defences available in defamation proceedings. Numerous actions for damages under s 82 in relation to s 52 allegations have succeeded even though the conduct in question was defamatory. Various arguments that s 52 on its true construction did not permit this have been rejected, both in the relatively distant past and quite recently. One is that s 52 is to be read down in the light of "the doctrine of freedom of speech, which incorporates the freedom of the press"⁴¹. Another is that s 52 is not to be construed so as to disrupt so well-established and finely balanced a body of law as defamation⁴². Yet another

39 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97.

40 Section 82(1) of the Act now provides:

"Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

Section 52 is a provision of Pt V.

41 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 86.

42 *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd* (2008) 71 NSWLR 323 at 339 [77].

is that s 52 is not to be construed as applying where the publication complained of, though defamatory, was true and in the public interest⁴³.

88 By at least 1984 the availability of s 52/s 82 proceedings as a means of bypassing the law of defamation had become clear⁴⁴. The breadth of s 52 from this point of view caused "major newspaper proprietors" to seek exemption from its operation, and from the operation of similar sections in Pt V Div 1 of the Act⁴⁵. In late 1984, s 65A was enacted as a result.

89 In the spring of 1984 the government introduced a provision which became s 65A. The Minister's Second Reading Speech stated⁴⁶:

"New section 65A will operate to exempt the media (and other persons who engage in businesses of providing information) from the operation of those provisions of Division 1 of Part V of the [Act] which could inhibit activities relating to the provision of news and other information."

90 *The terms of s 65A.* The structure of s 65A is as follows⁴⁷. The opening words of s 65A(1) grant an immunity by providing: "Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider other than ...". Section 65A then creates two groups of exceptions to that immunity, one in s 65A(1)(a) and one in s 65A(1)(b).

43 *TCN Channel Nine Pty Ltd v Ilvari Pty Ltd* (2008) 71 NSWLR 323 at 339-341 [78]-[93].

44 *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1983) 47 ALR 497; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82.

45 Australia, *The Trade Practices Act – Proposals for Change*, Green Paper, February 1984 at [70]. The other sections were s 53 (which deals with certain false or misleading representations about goods or services), s 53A (which deals with certain false representations and misleading or offensive conduct in relation to land), s 55 (which deals with certain conduct liable to mislead the public in relation to goods), s 55A (which deals with certain conduct liable to mislead the public in relation to services) and s 59 (which deals with certain other false or misleading representations about business activities). These are the sections from which s 65A now provides immunity.

46 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

47 Section 65A is set out above at [10] and [60].

91 It is not in controversy that the respondents are "prescribed information providers". That is because they hold licences under the *Broadcasting Services Act* 1992 (Cth)⁴⁸. Nor is it in controversy that the two episodes complained of were "prescribed publications of matter". That is because they fell within the meaning of "prescribed publication" in s 65A(2)(b): the publication was "by way of a ... television broadcast" by the respondents, who were prescribed information providers by virtue of par (a) of the definition of "prescribed information provider", namely as holders of licences under the *Broadcasting Services Act*⁴⁹.

92 The first group of exceptions to the immunity granted by the opening words of s 65A(1) is found in s 65A(1)(a). The second group of exceptions to the immunity granted by the opening words of s 65A(1) comprises the publication of advertisements: s 65A(1)(b). The Commission did not allege that this had application in the present case.

The narrow range of controversy

93 It is clear that if the Commission is to establish that the respondents are outside the immunity granted by the opening words of s 65A(1), it must satisfy two conditions. The first necessary condition is that one of sub-pars (i)-(iv) applies to the respondents. The second necessary condition is that one of sub-pars (v) or (vi) also applies to the respondents.

94 It was common ground that the Commission established the first of these two necessary conditions. The broadcast episodes were within s 65A(1)(a)(i). That is because they constituted a publication of matter in connection with the supply or possible supply of services (namely the services to be supplied by Dymphna Boholt and Sandra Forster under the Mentoring Programme). The broadcast episodes were also within s 65A(1)(a)(iii). That is because they constituted a publication of matter in connection with the promotion of the supply of services (namely the services to be supplied by Dymphna Boholt and Sandra Forster under the Mentoring Programme).

95 What of the second of the two necessary conditions? It was common ground that the Commission could not establish it by invoking s 65A(1)(a)(v). That is because the services were not supplied by the respondents⁵⁰. It is also

48 See the definition of "prescribed information provider" in s 65A(3) set out above at [10].

49 See s 65A(2), set out above at [10].

50 See the definitions of "relevant goods or services" and "relevant interests in land" in s 65A(3), set out above at [10]; see also at [67].

common ground that the Commission could not establish it by invoking s 65A(1)(a)(vi)(B). That is because no related body corporate was involved.

96 That left s 65A(1)(a)(vi)(A) as the sole avenue by which the Commission could establish the second necessary condition.

The reasoning of the trial judge

97 The respondents' submission was that s 65A(1)(a)(v) deprives a prescribed information provider of immunity in relation to a publication of matter promoting its own goods or services or interests in land or (by reason of the definition of "relevant goods or services" and "relevant interests in land") those of a related body corporate; that s 65A(1)(a)(vi) deprives it of immunity in relation to a publication of matter on behalf of, or pursuant to a contract, arrangement or understanding with, a third party or a related body corporate who supplies the prescribed information provider's goods or services or interests in land or those of a related body corporate; and that s 65A(1)(b) deprives a prescribed information provider of immunity from publishing an advertisement for the products of others. Inherent in this submission was a submission that the words in s 65A(1)(a)(vi) "of that kind" in relation to services referred not to the services mentioned in s 65A(1)(a)(i) and (iii), but to those mentioned in s 65A(1)(a)(v) – the "relevant ... services", ie those supplied by the prescribed information provider. The trial judge disagreed with that submission⁵¹. The trial judge held that s 65A(1)(a)(vi)(A) was satisfied on the basis that the respondents broadcast the episodes pursuant to their contract, arrangement or understanding with Dymphna Boholt and Sandra Forster made on 20 October 2003⁵². On this basis Dymphna Boholt and Sandra Forster supplied services "of that kind" because the trial judge considered that those words referred to the services mentioned in s 65A(1)(a)(i) or (iii).

The reasoning of the Full Court

98 The Full Court, on the other hand, preferred the construction advocated by the respondents. The Full Court considered that s 65A(1)(a)(vi)(A) could only have been satisfied if the respondents had broadcast the episodes pursuant to a

51 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 365 [92]-[94].

52 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 367 [106].

contract, arrangement or understanding with a person who supplied "relevant ... services" of the type referred to in s 65A(1)(a)(v)⁵³.

The submissions of the parties

99 The submissions of the parties each adopted the broad approach of defending those aspects of the reasoning in the courts below which favoured their interests, with some elaboration. In general it is convenient to proceed by examining the Commission's attacks on the reasoning of the Full Court in the light of the respondents' defence of it.

Unhelpful matters

100 Before that procedure is commenced, however, at the outset it must be said that there were some materials referred to by the parties which do not assist in construing s 65A.

101 *Section 2.* Section 2 of the Act provides:

"The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

The Commission submitted that this supported its construction. The submission relied on s 15AA(1) of the *Acts Interpretation Act* 1901 (Cth) which provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

But the submission did not answer the question: how does one assess the purpose or object underlying s 52 in relation to the purpose or object underlying s 65A? Further, s 2 is a curious provision. If "Australians" in s 2 is meant to denote "Australian citizens", so that the Act, unlike s 75(v) of the Constitution, has as its object the benefiting of a narrower class than all the persons present in Australia within the Queen's peace, s 2 has an application which is narrow, discriminatory and unworkable. If, on the other hand, "Australians" in s 2 is meant to refer to all persons present in Australia, s 2 ignores the extraterritorial reach of the Act, pursuant to s 5, on the many persons who are Australian citizens or permanent or other residents of Australia who are not at any particular

53 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97 at 107-108 [47]-[57].

moment present in Australia. But, in any event, the language of s 2 is far too broad and vague to assist in arriving at the correct construction of a provision having the detailed and precise wording of s 65A.

102 *Construction to give the fullest relief.* A similar appeal was made by the Commission to a principle that Pt V of the Act should be construed "so as to give the fullest relief which the fair meaning of its language will allow"⁵⁴. That principle may be accepted, but it casts no specific light on the question of what the fair meaning of s 65A actually is.

103 *Explanatory Memorandum.* Contrary to a submission of the Commission, what is said in the Explanatory Memorandum is far too compressed and brief to assist; indeed, its terms do not suggest that its author had in mind the present problem⁵⁵.

104 *The Minister's Second Reading Speech.* Both the Commission and the respondents relied on the following statement by the Minister in the Second Reading Speech⁵⁶:

"The Government recognises the need to maintain a [vigorous] free press, as well as an effective and enforceable [Act]."

These words are too vague to indicate what the precise construction of the words "of that kind" in s 65A(1)(a)(vi) is. Although the trial judge said that the point at issue in these proceedings "is not directly addressed" in that Speech⁵⁷, when the Minister turned to discussion of the circumstances in which the exemption conferred by the opening words of s 65A(1) did not exist, he said this⁵⁸:

"The exemption is not available, however, in respect of a publication of information relating to goods, services or land of a kind supplied by the

54 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 621 [97] per McHugh J (dissenting); [2004] HCA 60, approving *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503 per Lockhart and Gummow JJ.

55 Australia, Senate, Statute Law (Miscellaneous Provisions) Bill (No 2) 1984, Explanatory Memorandum at 64.

56 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

57 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 363 [88].

58 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

information provider, or relating to goods, services or land where the publication is made pursuant to a contract, arrangement or understanding with a body corporate related to a body corporate that supplies *such* goods, services or land." (emphasis added)

The first part of that sentence summarises s 65A(1)(a)(v). The second part of that sentence refers to s 65A(1)(a)(vi)(A) and (B), and though it telescopes those provisions, it affords room for the respondents to submit that it made plain the meaning of "goods or services of that kind" in s 65A(1)(a)(vi)(A) for the purposes permitted by s 15AB(1) of the *Acts Interpretation Act*. They submitted that the Minister's use of the words "such goods, services or land" in referring to what he called "goods, services or land of a kind supplied by the information provider" reveals that the legislative words "of that kind" refer to the kind comprised by "relevant goods or services" and "relevant interests in land". The Commission accepted that, if the quoted sentence were to be construed in isolation, on one available construction it supported the respondents. But the Commission submitted that it should not be construed in isolation. It relied on another part of the Second Reading Speech⁵⁹. The Minister said⁶⁰:

"These provisions ensure that information providers are not exempt from the consumer protection provisions of the [Act] in respect of the provision of information where they have what might be regarded as a commercial interest in the content of the information. In such cases, information providers must take the same responsibility for the accuracy of information as any other person who publishes information in trade or commerce. This can occur, for example, where a newspaper has agreed to publish a 'news' item about a product in exchange for the product supplier taking out paid advertising in that publication."

Although the Commission denied that the information provider was required to have a "commercial interest in the content of the information" – an issue which can be put on one side – it did contend that the example given by the Minister supported its construction. However, publication of a "news" item about a product in return for consideration is publication of an advertisement about the product: s 65A(1)(b) provides that the publication of an advertisement is outside the immunity given by the opening words of s 65A(1). If the Minister was speaking of s 65A(1)(b), what he said is thus both correct and not contradictory of the respondents' construction. The Commission submitted that there was no

59 At least on the appeal: on the special leave application counsel then appearing for the Commission twice said, correctly, that nothing could be derived from the Second Reading Speech.

60 Australia, Senate, *Parliamentary Debates* (Hansard), 16 October 1984 at 1710.

reason to suppose that the Minister was speaking of s 65A(1)(b), and that he was actually speaking of s 65A(1)(a).

105 In truth, these debates between the parties lead nowhere valuable. The Second Reading Speech is quite inconclusive. The Speech was directed to the Statute Law (Miscellaneous Provisions) Bill (No 2) 1984. That Bill, when enacted, amended, as its title hinted, many disparate pieces of legislation apart from the Act – 68 in all. It amended two parts of the Act. So far as s 65A is concerned, the Speech offers a very brief account of a complex provision. The version of the Second Reading Speech delivered to the House of Representatives contained a garbled and jumbled passage in relation to s 65A(1)(a)(vi)⁶¹. The Solicitor-General submitted that the standard of Second Reading Speeches in 1984 fell below that attained now. However that may be, the perfunctory, rushed and highly compressed treatment of s 65A gives no confidence that it can usefully be relied on for the present purpose.

106 *Prior authorities.* The respondents relied on statements in various decisions of the Federal Court of Australia which were consistent with their preferred construction. The Commission was correct to submit that none of these decisions concern the construction of s 65A(1)(a)(vi) – a submission which is equally correct in relation to a case relied on by the trial judge⁶².

107 *Policy and purposes.* Both sides appealed to "policy" criteria and legislative purposes, some of them supposedly "clear", but these were actually too uncertain to be of assistance.

108 *Criminal character of the conduct exempted by s 65A.* The Commission briefly allied itself with the proposition that issues to do with the construction of

61 The sentence appearing in the Senate Speech quoted above beginning "The exemption is not available" appears in the following terms in the House of Representatives Speech:

"The exemption is not available, however, in respect of publication of information relating to goods, services or land of a kind supplied by the information relating to goods, services or land where the publication is made pursuant to a contract, arrangement or understanding with a person who supplies goods, services or land of that kind or with a body corporate related to a body corporate that supplies such goods, services or land."

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 September 1984 at 1296.

62 *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1993) 45 FCR 265. The trial judge referred to this case at *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 363 [86].

s 65A had considerable significance, since there were many equivalents of it in other Commonwealth legislation and in State and Territory legislation modelled on Pt V Div 1 of the Act. The significance is even wider than that. Although the parties, correctly, did not develop any submissions around the following point, any conduct falling within s 65A, unless it is no more than a breach of s 52, is likely to be a criminal offence. One of the provisions from which s 65A gives immunity is s 52. The prohibition in s 52 is not backed by a criminal sanction. But the other provisions from which s 65A gives immunity – ss 53, 53A, 55, 55A and 59 – all have counterparts creating prohibitions backed by criminal sanctions. They are found in Pt VC Div 2, and are ss 75AZC, 75AZD, 75AZH, 75AZI and 75AZM respectively. Contraventions of ss 75AZC, 75AZD, 75AZI and 75AZM are liable to a fine of 10,000 penalty units. Contraventions of s 75AZH are liable to a fine of 2,000 penalty units. An immunity from these provisions in the same terms as s 65A is provided by s 75AZR. Defendants to charges that the criminal provisions have been contravened who wish to rely on s 75AZR bear an evidential burden of establishing the necessary facts, pursuant to s 13.3(3) of the *Criminal Code* (Cth). Since the language of s 65A and s 75AZR is identical, whatever meaning is given to s 65A must be given to s 75AZR. If the immunity given by s 65A in relation to attempts to obtain civil remedies for breaches of ss 53, 53A, 55, 55A or 59 is narrow, it will be equally narrow in relation to attempts to get criminal punishments for breaches of ss 75AZC, 75AZD, 75AZH, 75AZI and 75AZM. However, the rule – perhaps a rule of last resort – that if the language of a penal statute is ambiguous or doubtful, the ambiguity or doubt may be resolved in favour of the subject⁶³, has no application here. There is a controversy between the parties as to the construction of s 65A, but the section is not so ambiguous or doubtful as to preclude, after analysis of the statutory language, selection between the competing meanings.

109 Thus, however much it may be an unusually desperate tactic of last resort, there is no alternative but to seek to ascertain the meaning of s 65A by examining its actual words, technical and unpalatable though they may be.

Textual considerations

110 This being an appeal against orders of the Full Court, it is desirable to begin by considering what the reasoning was which the Full Court saw as justifying the orders, and by examining the Commission's complaints about that reasoning. The key part of the Full Court's reasoning begins with two interlinked points⁶⁴:

63 *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55.

64 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97 at 107 [49]-[50].

"[T]he expression [in s 65A(1)(a)(vi)(A)] is 'goods or services of that kind'. That means there must be a reference earlier in the section to goods or services of a kind. That follows from the use of the word 'that', which qualifies the kind of goods or services. It must be referring to some earlier mentioned goods or services.

... in the whole of s 65A there is only one reference to goods or services of a kind, and that is in relation to the kind of goods or services referred to in the 'relevant goods or services'. There is no 'kind' of goods or services in s 65A(1)(a)(i)-(iv)."

111 The Full Court also said⁶⁵:

"[P]lacita (v) and (vi) of s 65A(1)(a) are alternatives, only one of which needs to be established to cause the exception to operate upon the exemption. In those circumstances, alternatives must be read contextually and, in particular, in their context with each other. In those circumstances, where both of the placita refer to goods or services and when the alternative to the first proposition talks of goods or services of that kind, the alternative must be addressing the kind of goods or services mentioned in the first proposition."

112 The Commission criticised the reasoning set out in the first of these quotations from the Full Court's reasons for judgment. It submitted that the reasoning "ignores the opening words of s 65A(1)(a)(vi) which make clear that the kind of goods or services referred to are those which constitute the subject matter of the publication". This is not convincing. Although the goods or services referred to in s 65A(1)(a)(i) which are involved in a particular case, for example, can no doubt be classified into part of a "kind", there is no reference in terms to any particular "kind". And the opening words of s 65A(1)(a)(vi) do not refer in terms to any particular "kind" of goods or services. The opening words refer only to the "publication" of matter which has a connection with "goods or services" or "interests in land". It is true that this reference, like the opening words of s 65A(1)(a)(v), which speak of "goods or services" and "interests in land", refers back to the "goods or services" mentioned in s 65A(1)(a)(i) and (iii), and the "interests in land" mentioned in s 65A(1)(a)(ii) and (iv). But the words in both phrases as used in s 65A(1)(a)(i)-(iv) are entirely general and unqualified: they refer to any goods or services, and any interests in land. The process of cutting down their generality, and imposing some qualification on it, is a function served by the language of s 65A(1)(a)(v)-(vi). That follows from the structure of

⁶⁵ *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97 at 108 [51].

the sub-paragraphs, and the use of the word "where" on its own line immediately before those sub-paragraphs.

113 That linguistic structure also negates an attack which the Commission made on the reasoning in the second quotation from the Full Court's reasons for judgment⁶⁶. The Commission's attack was that the reasoning:

"ignores the context in which the second alternative [sub-par (vi)] is to be read. The second alternative is prefaced by the use of the words 'the publication' and therefore directs the reader to s 65A(1)(a) and the goods or services referred to in sub-paragraphs (i) and (iii)."

While it is true that the words "the publication" refer back to sub-pars (i)-(iv) of s 65A(1)(a), they appear in a portion of par (a) commencing with the word "where", the plain effect of which is to limit the breadth of the expression "a publication of matter" in the first line of s 65A(1)(a).

114 There is no doubt that s 65A(1)(a)(v) identifies a specific "kind" of "goods or services", and a specific "kind" of "interests in land". Each specific "kind" respectively comprises those which are "relevant goods or services" and "relevant interests in land" within the definitions of those phrases in s 65A(3)⁶⁷. Those definitions themselves turn on the notion of "kinds". There is thus a linkage between the two "kinds" referred to in s 65A(1)(a)(vi) and the two "kinds" referred to in the definitions of "relevant goods or services" and "relevant interests in land": indeed those definitions are the only parts of s 65A that refer in terms to a "kind". The class of narrower items cut out from the broad categories in s 65A(1)(a)(i)-(iv) falls into two groups numbered "(v)" and "(vi)" in s 65A(1)(a). The two groups are alternatives. It is the natural reading of the phrase "of that kind" in the second group to treat it as referring to the first group: the two groups are not only contextually linked as establishing qualifications on the breadth of the "goods or services" referred to in s 65A(1)(a)(i) and (iii), and hence on the breadth of the words "a publication of matter", but the second is immediately consecutive to the first. The usage of "that" in sub-par (vi) is usage of the word as a demonstrative adjective. The *Oxford English Dictionary* gives as the first meaning of the word "that" when used as a demonstrative adjective:

66 See [111] above.

67 The definitions are set out above at [10]; see also at [67].

"The simple demonstrative used (as adjective in concord with a sb.), to indicate a thing or person either as being actually pointed out or present, or as having just been mentioned and being thus mentally pointed out."⁶⁸

Before the "kinds" mentioned in sub-par (vi), the only "kinds" in s 65A(1) that have been actually pointed out or have just been mentioned are the kinds referred to in sub-par (v) and defined in s 65A(3).

115 In this respect the trial judge's reasoning, which the Commission adopted, is open, with respect, to criticism. She said⁶⁹:

"(v) and (vi) are alternatives: if (vi) is read in the absence of (v), 'goods or services of that kind' would refer to the goods or services of the kind to be supplied, described in para (a)."

Even if that were true, it does not follow that sub-par (vi) has the same meaning once a court takes into account, as it must, the existence of sub-par (v) and reads it alongside sub-par (vi).

116 There is a further relevant textual argument advanced by the Full Court⁷⁰:

"If a construction is given to s 65A(1)(a)(vi)(A) and (B) so that it applies to any goods or services of any kind, then placita (v) and (vi) cease to be alternatives that govern the placita in (i)-(iv). Indeed, they would speak to quite different circumstances. [Placitum] (v) would be concerned with goods and services only of the kind provided by the broadcaster in the case of a licensee of a radio or television station, while (vi) would be concerned with any goods or services of any kind. If [placitum] (vi) were to be given that construction, there would be no need for [placitum] (v).

Viewed in that way, s 65A(1)(a)(vi) complements s 65A(1)(a)(v) so that if a prescribed information provider has made a publication in connection with the supply or possible supply of goods or services, the exemption will be lost if the goods or services were of a kind supplied by the prescribed information provider or the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a person

68 Simpson and Weiner (eds), *The Oxford English Dictionary*, 2nd ed (1989), vol 17 at 870.

69 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 364 [89].

70 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97 at 108 [54]-[56].

who supplies goods or services of a kind supplied by the prescribed information provider.

In other words, the purpose of s 65A(1)(a)(vi) is to extend the exception to not only include the publication of matter in connection with the supply or possible supply of goods or services by the prescribed information provider itself, but also goods or services of the kind supplied by the prescribed information provider but, in fact, supplied by some other person on its behalf or pursuant to a contract, arrangement or understanding with that other person."

These points are forceful. The Commission contended that on this approach sub-par (vi) was "little more than a gloss on [sub-par] (v)". Sub-paragraph (vi) does not gloss sub-par (v); it widens it. The fact that sub-par (vi) may not widen sub-par (v) much does not establish that the construction is wrong.

117 *An argument from clarity.* One of the trial judge's reasons for preferring the Commission's construction was that if⁷¹:

"para (a) were intended to refer to goods or services and interests in land that were of the 'relevant' kind only, the [drafting] could have made that clear within subparas (a)(i)-(iv) or in (vi)."

The Full Court met that contention in the following words⁷²:

"[T]he drafter could not use the defined term 'relevant goods and services' in s 65A(3), 65A(1)(a)(vi)(A) or (B) because, as defined, 'relevant goods or services' only applies to a prescribed information provider and s 65A(1)(a)(vi)(A) and (B) are directed to persons and corporations who may not be prescribed information providers. So the drafter has used the expression 'goods and services of that kind' referring to the goods or services in the definition which is incorporated in s 65A(1)(a)(v)."

That is a compelling specific answer to the trial judge's point. The elaboration and convolution of the drafting in s 65A, which flow, paradoxically, from its compression, are perhaps to be deplored. But analysts who take advantage of the hindsight conferred by the opportunity to reflect in detail on legislative language in the context of a particular problem can often see that a different form of words

71 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 364 [89].

72 *Channel Seven Brisbane Pty Ltd v Australian Competition and Consumer Commission* (2008) 249 ALR 97 at 108 [52].

might have been clearer. That circumstance is often inconclusive. That is so here.

A gap?

118 The Commission submitted that a factor pointing against the correctness of the respondents' construction was that, if it were correct, there would be "subtle forms of conduct (and myriad others like them)" which would be immune from s 52 and the other relevant provisions of the Act. This would arise, according to the Commission, because these subtle forms of conduct would not be "advertisements" within the meaning of s 65A(1)(b), and the respondents' construction would leave the promotion of goods and services of a person other than the prescribed information provider within the immunity, and not removed from the immunity by s 65A(1)(b). That would create what the trial judge described as a "gap" in cases⁷³:

"where the publication concerned the sale or supply of commercial subject-matter but was made on behalf of the third person or pursuant to an agreement that could not be described as 'an advertisement'."

The Commission gave three examples. One was the example employed by the Minister in his Second Reading Speech. Another was the adoption by a radio broadcaster as programme content of a press release issued by a supplier of goods or services, in circumstances where the supplier sponsored the programme (rather than contracting for placement of specific advertisements) and where there was an understanding that the supplier's press releases would receive air time. Another example was a publication concerning a complaint about or criticism of goods or services made pursuant to an arrangement or understanding with a competitor of the supplier of the goods or services criticised, in exchange for the competitor taking out paid advertising; the publication would occur not merely in order to provide news or information, but to fulfil the terms of the arrangement or understanding.

119 Problems of this kind would have to be decided from case to case as they arise. As indicated above, the first example – that given by the Minister – probably is an advertisement. Even if to some minds the other examples are less clear, they do not so plainly fall outside the category of advertisements as to suggest absurdity or extreme practical inconvenience in the respondents' construction. Nor is the statutory language so ambiguous or obscure that the possibility that the examples may not be advertisements compels a different construction.

73 *Australian Competition and Consumer Commission v Seven Network Ltd* (2007) 244 ALR 343 at 365 [91].

A new textual point

120 That disposes of the principal attacks made by the Commission on the Full Court's reasoning. But the course of oral argument in this Court suggested a new approach – new in the sense that it had not been examined by either the parties at any stage or by the courts below. It was an approach which the Commission speedily adopted. The new approach rests on treating s 65A not as creating an immunity from liability subject to two exceptions, but as creating an immunity from liability subject to quite a large number of exceptions. Thus s 65A(1)(a) creates an exception when sub-paras (i) and (v) are read together. Section 65A(1)(a) creates a second exception when sub-par (i) and sub-par (vi)(A) are read together. Section 65A(1)(a) creates a third exception when sub-par (i) and sub-par (vi)(B) are read together – and so on. The force of this analysis is that it tends to weaken one of the respondents' key points – the demonstrative adjective analysis resting on the proximity of the words "of *that* kind" in sub-par (vi) to the words "relevant goods or services" and "relevant interests in land" in sub-par (v). On that analysis, which breaks s 65A up into quite a number of provisions of differential operation, the proximity of sub-paras (v) and (vi) becomes much less significant.

121 With all respect to those minds which are attracted to this new point, the construction of the Full Court remains preferable. Section 65A(1) is a single sentence. Although it is a complex sentence, although it has to be read several times, and although it may have taken a very long time to write, it does not take long to read. And it does not take long to read the balance of s 65A. Section 65A is not like an entire statute, in which different provisions may have to be read distributively. Nor is there any explicit indication (as there is in s 6 of the Act) that it is to be construed in the light of a distributive reading, as distinct from being applied in that way when the particular circumstances call for it. It is true that when s 65A is applied to particular sets of circumstances, only some parts of the language may need to be examined in order to assess whether conduct claimed to fall within it does fall within it. But in other cases the application of those parts of the language may not be clear because their meaning is unclear. Assessment of their meaning may depend on construing the sentence as a whole. Construing this particular sentence as a whole would, in my opinion, entail reading it as a unified piece of prose rather than reading it in its potential individual applications. When s 65A is read through, the lack of any explicit reference to "kind" before that conception appears in sub-par (v), read with the definitions in s 65A(3), suggests that the words "of that kind" in sub-par (vi) refer back to sub-par (v).

Orders

122 For those reasons the construction adopted by the Full Court was correct. So was its decision to allow the appeal from the trial judge. It is therefore

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unnecessary to consider the respondents' notice of contention. The appeal to this Court should be dismissed with costs.