THAILAND

There is no independent regulator in Thailand but there are plans for a National Telecommunications Committee. Monopoly operators provide local and long-distance ("**TOT**") and IDD services ("**CAT**"). There are two mobile operators. Competition is available for value-added services.

Key reforms are currently under review, including wholesale changes to current concessions, cost based tariffs and foreign investment in TOT and CAT. Draft legislation has been prepared but is yet to be agreed by Cabinet. Again current economic circumstances will impact.

CONCLUSION

It is possibly too early to predict the impact recent economic difficulties will have on regional telecoms liberalisation. In practical terms local financial constraints will mean there will be fewer domestic investors. New investment, if it is to come at all, is likely to come from foreign sources. This may provide an impetus to liberalisation. On the other hand, telecommunications liberalisation may become a secondary priority as governments grapple with economic reform across multiple sectors.

While times are difficult, the underlying need to provide increased levels of services to their peoples and continuing engagement in the WTO process will see Asian governments continue, if haltingly in some cases, on the liberalisation path. To maintain the information rich, information poor, dichotomy is not politically sustainable.

Chris Shine is a partner and Jacqui Brosnan a lawyer at the Sydney office of Blake Dawson Waldron. This article was previously published in the Interdata Handbook, 8th edition.

Oprah and the Texas Cattlemen: Food Disparagement in the US and Australia

The enactment of food disparagement statutes in 13 US states has raised widespread constitutional debate, with critics claiming the laws effectively gag discussion by environmental and consumer groups of possible health risks. Anne Flahvin outlines the recent US developments and considers what, if any, restrictions apply in Australia to disparagement of generic food products

OPRAH AND THE TEXAS CATTLEMEN

The US food disparagement statutes came under the spotlight recently when TV personality Oprah Winfrey was sued by a group of Texas cattlemen who claimed that Winfrey's public vow never to let another hamburger pass her lips for fear of contracting bovine spongiform encephalopathy (BSE), or Mad Cow Disease, had caused a massive drop in the price of beef. As well as actions for common law business disparagement, negligence and defamation, the cattlemen sued for breach of a provision of the *Texas Civil Practice and Remedies Code* which imposes liability for the public dissemination of information relating to a perishable food product in circumstances where the publisher knows the information to be false and the information states or implies that the product is not safe for consumption by the public. The statutory action imposed a less onerous hurdle than common law disparagement, under which a plaintiff must show an intention to injure. The case was widely tipped to become the first test of the constitutionality of the so-called 'veggie libel' laws, but this hope was dashed when US District Judge Mary Lou Robinson - without explaining why - ruled that the plaintiffs would be limited to arguing the case as a common law disparagement suit.

The food disparagement statutes are an attempt to fill what many observers believe to be a gap in the law. They were enacted in response to a failed attempt by Washington state apple growers to sue CBS 60 Minutes for a program on the pesticide Alar which was routinely sprayed on apples to improve their shelf life. The 1989 program discussed a report from the Natural Resources Defence Council entitled *Intolerable Risks: Pesticides in Our Children's Food*, which itself was based on Environmental Protection Agency data which suggested a statistically significant link between ingestion of Alar by lab animals and development of tumours. What this case, *Auvil v CBS 60 Minutes*, highlighted was that while disparagement of a generic product might cause a substantial loss to agricultural producers, the common law could not be relied on for a remedy.

One hurdle was the group libel principle. Although the district court in *Auvil* initially denied the defendant's motion for summary judgment, holding that the telecast was of and concerning all apples, CBS was eventually successful in obtaining summary judgment on the ground that the plaintiffs could not satisfy the requirement of falsity. But in affirming this judgment, the court of appeals declined to consider CBS's argument that the 'of and concerning' requirement applied to common law product disparagement.[1] The question remains unsettled.

Pending a constitutional challenge, the food disparagement statutes - in settling that uncertainty - removed a major

obstacle to seeking a remedy for disparagement of generic products. All but one of the US food disparagement laws - with Idaho being the exception - omit an explicit requirement that a false statement be of and concerning the plaintiff.[2] This omission is sure to be a major focus of any First Amendment challenge. As Stahl notes, the group libel principle has constitutional significance:

> *"Without some effective limit on group disparagement claims, valuable speech on issues such as product safety will be stifled as journalists, scientists and others worry about being sued, not just by the actual subjects of their criticism but by trade associations and entire industries."*[3]

In an interview with CNN, University of Chicago professor Richard Epstein challenges such reasoning:

> *"Suppose somebody says that all beef made in the state of Kansas contains deadly magnesium poison, and nobody buys that beef. It seems to me that it would be ludicrous to say that the producers of Kansas beef would not be able to sue because they are not identified by name. People are frightened to death of their product. Indeed the only interesting question is whether Nebraska beef (producers) could sue in these circumstances, given the negative spillover effects that are likely to take place."*

Another constitutional hurdle for the new crop of food disparagement statutes is likely to be the requisite mental element for liability. While some states, such as Texas, require the plaintiff to show that the defendant knew the information published was false - a standard which would seem unproblematic under the *New York Times v Sullivan* 'actual malice' standard for defamation - others, such as Florida, impose liability for the publication of false information, which is defined as "information which is not based on reliable, scientific facts and reliable, scientific data which the disseminator knows or should have known to be false." Such a standard, which would engage the courts in a determination of whether challenges to prevailing orthodoxies were 'reliable', as well as whether the defendant was negligent in failing to heed the dominant view, would pose a serious challenge to the First Amendment jurisprudence.

THE AUSTRALIAN POSITION

What scope exists under Australian law for a plaintiff who claims to be harmed by disparagement of a generic product to seek a remedy? Do agricultural producers have a remedy for attacks on the safety of their products?

DEFAMATION

Defamation is of limited use in such circumstances. There are two main stumbling blocks. The first is the group defamation problem. A report suggesting that a product such as apples, or beef, was unsafe would not satisfy the 'of and concerning' requirement of an action in defamation. The class of producers would be too large to enable any one producer to claim that he or she had been identified by the publication. The second hurdle would be that in all states other than Tasmania and Queensland,[4] disparagement of a product is not actionable as defamation in the absence of some express or implied disparagement of a legal or natural person. In *Aqua Vital Australia Ltd v Swan Television and Radio Broadcasting Pty Ltd*[5] Malcolm CJ notes that the suggestion that the plaintiff sold bottled water which was a risk to the health of consumers was not, without more, defamatory of the plaintiff. While it is defamatory of a trader to suggest that he or she knowingly sells products likely to cause harm, in the absence of an express or implied suggestion of misconduct or negligence there is no action in defamation. It is clear from the *Aqua Vital* decision that merely to suggest a trader is selling dangerous or harmful goods does not, in itself, imply some form of misconduct. Some commentators suggest that the 'shun and avoid' test of defamatory matter might be employed to provide a cause of action in defamation in such circumstances, however, even if this novel argument were adopted by the courts, the group defamation hurdle would be difficult to overcome.

INJURIOUS FALSEHOOD

An action in injurious falsehood, or product disparagement, is arguably equally impotent to remedy the sort of damage being considered.

The elements of this cause of action are publication, with malice, of false material

about or affecting the plaintiff's business or goods, which is calculated to cause and does actually cause damage to the plaintiff.

The real stumbling block to using the action against environmental or consumer groups is the requirement of malice. The plaintiff must show that the publication was actuated by a deliberate intention to injure with knowledge that the statement was untrue. While some commentators suggest that malicious intention combined with a reckless indifference as to truth or falsity would be enough, it is clear that the plaintiff must be able to point to improper motive. To merely publish with reckless indifference as to truth or falsity will not be enough to ground an action in injurious falsehood.[6] Malicious intention will be much easier to make out when the material complained of is published by a trade competitor. But where publication is by a consumer group motivated by a desire to alert the public to perceived health threats, this element is going to be almost impossible to satisfy.

MISLEADING AND DECEPTIVE CONDUCT

In many situations, an action under section 52 of the *Trade Practices Act* ('**TPA**') or the *Fair Trading Act* equivalents will be much easier to make out than an action in injurious falsehood. There is no need to show falsity; it is enough that a statement is misleading. Intent is irrelevant. Proof of damage, while relevant to the likelihood of obtaining relief, is not an essential element of the action. But despite these advantages, the statements of environmental and consumer groups will generally not attract the application of section 52 or its equivalents for failure to amount to 'conduct in trade or commerce'.

While claims made by non-profit groups might amount to 'conduct in trade or commerce' within the terms of state fair trading laws, the recent Federal Court decision of *Fasold v Roberts*[7] - in which claims that a boat-shaped geological formation in Eastern Turkey was or could be the remains of Noah's Ark were challenged under the TPA and the NSW *Fair Trading Act* - makes clear that an organisation directed principally at bringing public attention to what its founders believe is a matter of public importance will generally not be caught by laws directed at protecting consumers from misleading or deceptive conduct.

So far as media reporting of any such claims is concerned, section 65A of the TPA (and state equivalents) generally exempts it from the application of section 52 of the TPA.

CONCLUSION

Clearly, the suit against Oprah Winfrey has highlighted the difficulties encountered in any attempt to strike a balance between the damage which can flow to producers from attacks on the safety of their products and the need to ensure a freedom to challenge the claims of agribusiness about product safety. Chemical and radiation treatment of food raise concerns that are of utmost public importance, and any attempt to stifle public scrutiny of these practices would be troubling. The Australian and New Zealand Food Authority, which recently considered and rejected a proposal that an offence of publicly disparaging food be included in the Food Acts, noted that there is a real concern that food disparagement statutes such as those being enacted throughout the US would "make it harder for those outside the scientific establishment to question products and practices they consider unsafe." Stahl suggests that the US laws "address economic protectionist concerns that do not outweigh the constitutional interests in barring broad generic disparagement claims."[8] While there is no First Amendment impediment to the introduction of such laws in Australia - with constitutional protection of speech limited to a guarantee of freedom of political discourse - the concerns raised by Stahl, in particular the constitutional significance of the 'of and concerning' limitation as it relates to defamation, are relevant to any consideration of whether such restrictions on speech should be accepted.

Anne Flahvin is an Associate with Baker & McKenzie, and teaches law part-time.

1 Stahl, Eric 'Can Generic Products be Disparaged? The "Of and Concerning" Requirement After Alar and the New Crop of Agricultural Disparagement Statutes' (1996) 71 Washington Law Review 517

2 Ibid, at 531

3 Ibid, at 529

4 In these States the test of defamatory matter includes an imputation concerning the plaintiff by which the plaintiff is likely to be injured in his profession or trade.

5 (1995) AustTortsR 81-364)

6 *McDonald's Hamburgers Ltd v Burger King (UK) Ltd* (1986) FSR 45.

7 145 ALR 548

8 Stahl, op cit, at 541