Key words: defamation risk; risk management; banks and banking

Defamation risk in the banking industry

Based on recent groundbreaking decisions, this paper examines the legal means by which banks and financiers can protect their own reputation and manage defamation risk. It also highlights the defamation risk to financial institutions as credit providers and drawees of cheques and financial instruments, including the risk of providing information about creditworthiness.

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1. Can you defame a bank?

The days of a bank or major finance company threatening to sue in Australia for defamation are over. As a result of the *Uniform Defamation Laws 2005*, many corporations no longer have the ability to bring an action for defamation. The exceptions are companies employing fewer than 10 persons and not-for-profit companies. Prior to 2005, a company could sue in defamation but could not recover for hurt to feelings. Of course, individual directors or officers, if identified, still retain a right to sue for defamation.

On 16 February 2009, Gray J of the Supreme Court of the ACT handed down judgment dismissing a defamation action brought by Macquarie Bank just prior to the new 2005 legislation. *(Macquarie Bank Limited, Morris & Rourke v Nationwide News Pty Limited (2009))*

The action was brought in respect of an article in *The Australian* newspaper on 5 March 2005 regarding Macquarie Bank's involvement in the Beaconsfield goldmine in Tasmania. The banner headline on the front page of the business section was 'The Mine Shaft' by Michael West.

Macquarie Bank pleaded 10 different imputations or defamatory meanings from the article. *The Australian* pleaded truth. A defence of truth multiplies the stakes in defamation litigation. Fortunately for Macquarie Bank, *The Australian* fell short of proving truth. The court also found that none of the 10 imputations were actually conveyed by the article. The judge reached this conclusion with 'considerable hesitation' (para. 88). He described the article in *The Australian* as containing '*cheap shots*' at Macquarie's expense (para. 191). The judge found as follows:

> I do not consider that the ordinary reasonable reader would necessarily conclude that Macquarie had acted unlawfully or improperly … the article falls short of conveying impropriety as opposed to shrewd and perhaps even manipulative conduct on Macquarie's part in advancing Macquarie's own interests. (para. 88)

In due course, the court accepted that the bank did not mislead creditors and did not have the same obligation as did an administrator in terms of providing information as to the prospects of the mine.

Suffice it to say for a bank or any major financial institution to commence court proceedings where the object is reputation protection, the action in defamation has proven quite unpredictable. The Macquarie Bank case is a further and, most likely, final example. Observers were entitled to scratch their heads. Most of the hearing was concerned with the newspaper trying to prove the truth of allegations, which the judge ultimately found were not actually contained in the newspaper article.

Alternatives to the defamation action for corporations

In the absence of a remedy in defamation and with the expansion of the internet, companies have needed to consider alternative remedies. This is especially the case with the increased frequency of 'sucks.com' websites. Most of the major banks have experience of these.

Injurious falsehood

In *Kaplan v Go Daddy Group (2005) NSW SC 636*, the defendant's motor vehicle was stolen from Hunter Holden. The dealer's insurer offered to pay indemnity value only, which the defendant rejected. The unhappy customer contracted with a US company to establish a blog website under the domain name Hunterholdensucks.com. Statements on the website included 'people say that overcharging on customer cars is rife at Hunter Holden'.

The plaintiff sought an interim injunction on the grounds of injurious falsehood. White J found a strong prima facie case that the website was established by the disgruntled customer with malicious intent to damage the Hunter Holden business and that the balance of convenience was in favour of granting an injunction to restrain the establishing and maintaining of the internet website.

The requirements to establish a case for injurious falsehood are quite onerous and include the following:

- the publishing of statements that are false;
- the publication is actuated by malice;
- the publication induces others not to deal with the plaintiff or otherwise causes damage to the plaintiff; and
- actual damage to the plaintiff can be proven and was wilfully and intentionally caused by the publication.

Misleading or deceptive conduct

Publications that are misleading or deceptive or likely to mislead or deceive may constitute a breach of section 52 of *The Trade Practices Act 1974* or a breach of the equivalent provisions in the Fair Trading Acts of the various states.

The advantage of an action for misleading and deceptive conduct is that there is no need to prove intention, nor is it a requirement that the statement be disparaging and nor is there a requirement for proof of actual damage.

A significant restriction, however, is that the misleading and deceptive conduct must be made 'in trade or commerce'.

2. Defamation risk for banks and financiers

It is the traditional roles of banks and financiers as drawees of cheques and financial instruments and also as credit providers that often attract the risk of defamation liability.

In the absence of a remedy in defamation and with the expansion of the internet, companies have needed to consider alternative remedies. This is especially the case with the increased frequency of 'sucks.com' websites. Most of the major banks have experience of these.

There is a common expression, 'refusal of credit offends'. Bank processes include saying 'no' to certain credit requests. The invidious position of a bank as a drawee institution is that from time to time they need to say 'no' to third parties in relation to the bank's own customer. This communication is likely to be defamatory.

Communications as to a lack of creditworthiness and/or concerns as to solvency have long been regarded as defamatory. In *Barnes v Holloway (1799) 8 TR150* it was held to be actionable when the defendant made the remark about a farmer named Barnes 'have you heard Barnes could not pay his labourers?'

Defences to defamation

Defences include truth and fair comment and the defence of qualified privilege. It is the defence of qualified privilege that is particularly valuable to banks and financiers as drawee institutions and as credit providers. The examples in this paper demonstrate the importance to officers of banks and finance companies of ensuring that their communications accord as closely as possible with their obligations, are addressed to the appropriate recipients and communicate the relevant message for the proper purpose.

Qualified privilege

Assume a publication is defamatory and a truth defence is not available because the publication was made in error. Assume a fair comment defence is unavailable because the statement made is clearly not opinion. The law provides occasions of privilege that may protect the making of the publication even though it is defamatory and false.

A privilege at common law exists where a publication is made:

- pursuant to a legal social or moral duty to a person with a corresponding duty or interest and/or;
- for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest; or
- to a person who shares a common interest in the subject.

It is a 'qualified' privilege only, because the protection will be lost if there is actual malice, that is, if publication has been made for an improper purpose or with reckless disregard to its truth or falsity.

It is a further requirement that the defamatory matter must be relevant, or sufficiently connected to the privileged occasion.

The circumstances in which a court will recognise an occasion of qualified privilege may seem quite fluid. The original underlying principle was that certain communications should be protected, even if erroneous, for the 'common convenience and welfare of society' *(Toogood v Spyring)*.

In addition to qualified privilege at common law, the Uniform Defamation Laws contain a statutory defence of qualified privilege. Under the statutory defence, the recipient must have an interest in receiving the information and the conduct of the publisher must be reasonable in the circumstances.

There are also a number of specific circumstances where the law gives the protection of qualified privilege by statute. In particular, under the Corporations Law, liquidators and administrators are protected but only in respect of statements made in the course of carrying out their official roles. How else could they provide meaningful reports on directors and officers of insolvent companies? Qualified privilege is also given by statute to 'whistleblowers'. In this way, the law facilitates appropriate communications even if defamatory.

Let's look at some examples relevant within the financial services industry.

Qualified privilege defence – drawee institutions

Aktas and Homewise Realty Pty Limited v Westpac (2009) NSW CA 9 is an important case for banks. In November 1997, Westpac was served with a garnishee order on its customer Homewise Realty Pty Limited.

Homewise had a rent trust account, a sales trust account and a general account with Westpac. On 1 December 1997 at 5.18 pm, all three Homewise accounts had a status change to PCO (Post Credits Only i.e. Customer initiated debits not allowed). Also on 1 December 1997, Mr Aktas signed 30 trust account cheques on the rent trust account, which were directly deposited into the clients' account or forwarded by mail to the clients.

At 10.19 am the next day, 2 December 1997, an error was realised and PCO status for the two trust accounts was reversed. However, cheques were processed prior to this and a decision was made to refuse payment.

The Cheques Act 1986 imposes a statutory obligation on banks to communicate any such decision to payees. The Homewise cheques were returned to the payees if they banked with Westpac or otherwise were sent to the collecting bank endorsed with the words 'refer to drawer' with a covering letter.

On 14 January 1998 Westpac wrote to Homewise to acknowledge its error and apologise, and offered to write to all cheque payees to explain the mistake. Westpac wrote several letters. It sought information that would enable it to meet a request from Homewise that the bank write to each of its clients. These address details were never provided by Homewise. After that the bank heard nothing for almost five years until Aktas issued proceedings in November 2002.

It is the traditional roles of banks and financiers as drawees of cheques and financial instruments and also as credit providers that often attract the risk of defamation liability.

Three words 'refer to drawer' were found by a jury to convey defamatory imputations including that Homewise was unable to pay its debts as they fell due.

The controversial issue in the Aktas case was whether qualified privilege should be available when the occasion for the defamatory communication was created by the error of the person making the communication.

The New South Wales Court of Appeal found in favour of Westpac:

> Although the drawer's reputation may suffer, in most cases of error, this will be transitory. Greater damage may be done, including damage to the payee, by a delay in the payee being made aware that the cheque has not been honoured (McClelland J).

Westpac had a statutory duty to communicate its decision to refuse payment and the payees had a corresponding interest to know that payment had been refused. The defence of qualified privilege succeeded. (The plaintiff did, however, succeed against Westpac in a claim for damages for breach of contract).

Defamation actions against drawee institutions on wrongly dishonoured cheques or instruments are almost as old as the banking system. In contrast to Aktas, *McNickle v Bank of New South Wales (1881) 2LR (NSW) 7* is an example where a bank failed in its defence of qualified privilege. A promissory note was payable at the Union Bank in Wagga Wagga four months after 16 December 1879. The payee gave the note for collection to the Bank of NSW in Gundagai, which sent the note to the Wagga branch of the Bank of NSW but which did not present the note for payment until a few days after it had fallen due. The Union Bank refused to pay the overdue note.

The manager of the Wagga Branch of the Bank of NSW wrote to the payee saying that the cheque 'has been duly presented for payment and dishonoured, and now lies overdue at the bank'.

The then Court of Appeal found the communication had not been made on an occasion of qualified privilege because the collecting bank had a duty to inform the client of 'what had actually occurred'. Since the collecting bank knew it had caused the non-payment by not presenting the note on time, the Court found it did not act in accordance with the duty that may have given rise to a privileged occasion.

One way to reconcile the different outcome in the McNickle case is to consider it as an example of the requirement of the qualified privilege defence that the defamatory matter must be *relevant* to the privileged occasion. In McNickle, the statement by the bank was a misrepresentation of what the bank knew had occurred.

The Aktas decision recognised the substantial volume of process-driven activities undertaken by the major banks. In effect, the court found that a drawee institution in these circumstances should not be liable in defamation for an innocent error.

Qualified privilege in communications as to creditworthiness

Credit reporting

On 1 April 2009 the Federal Court of Australia handed down its decision in *Dale v Veda Advantage Information Services and Solutions Ltd* ***(Veda)***, removing a perceived restriction on the availability of the defence of qualified privilege for credit reporting services.

Veda was originally incorporated in 1967 under the name Credit Reference Association of NSW Limited. By 1995, it ceased being a non-profit company and its members were all themselves credit providers.

In a two-page summary of his own 155-page judgment Justice Lindgren explained:

> The nine applicants complain about credit reports concerning them that were issued to credit providers to whom they had applied for credit. The credit reports were issued by the respondent, Veda, which is a credit reporting agency. The reports were to the effect that the applicants had committed a default of one kind or another in respect of earlier loans that they had had from other credit providers …
>
> The heart of Veda's business is its computerised database. Subscribing credit providers enter particulars of defaults directly into the database and extract data directly from the database. The credit reports are therefore in the nature of a computer-generated composition of the data that credit providers have entered into the database.
>
> Veda is not in a position to know whether information being fed into the database is accurate or not. The applicants sue Veda, however, not the credit providers who listed the defaults.
>
> Part IIIA of the *Privacy Act 1998* regulates credit reporting. Item 4 imposes responsibility for the correctness of the data on the listing credit provider, while imposing a duty on Veda to ensure that only information of certain kinds is entered into the credit information file relating to an individual.

Standing directly in the way of Veda was a 100-year-old decision of the English Privy Council which had at the time overruled the Australian High Court in the 1908 decision *Macintosh v Dun* [1908] AC390.

Dun later became Dun & Bradstreet but, at the time, traded under the name The Mercantile Agency. The agency obtained information and communicated that information confidentially to subscribers in response to confidential enquiries.

The Australian High Court had allowed a defence of qualified privilege. The Lords on the Privy Council, however, reversed the High Court decision. They appeared offended that the Mercantile Agency had 'motives of self interest by persons who trade for profit in the characters of other people'.

The Privy Council stated:

> There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation.

Macintosh v Dun has been seen as a restriction on the availability of qualified privilege where the communication is made pursuant to a contractual duty for a profit. A number of cases have since cast doubt on the Privy Council decision. In *Dale v Veda* Lindgren J found:

- Enquiring credit providers had a legitimate business interest in receiving particulars of listed defaults because this was relevant to their assessment of credit worthiness.
- Veda as an intermediary custodian of the information had a social or moral duty to pass it on.
- Veda also had a legal (contractual) duty to pass on information (which contractual duty by itself would not have been a sufficient interest).
- It is in the interest of credit providers and society at large that credit providers make decisions on applications for credit in an informed, speedy and efficient manner.

Lindgren J considered *Macintosh v Dun* was distinguishable from *Dale v Veda*:

> In *Macintosh v Dun*… the creditworthiness reports were wide ranging and did not identify the sources relied on…
>
> The circumstances of the present cases are vastly different. The subscribers are a closed group of credit providers who have legitimate business interests to be served by their receipt of the personal information touching the seekers of credit that is contained in their credit information files. The credit providers are both the providers and the recipients of the information. The sources of the information are in all cases clearly identified. The Privacy Act protects the individual in the ways described earlier. (para. 321)

In allowing a qualified privileged defence Lindgren J said (p. 91) 'What I have said is not, of course, intended to mean that the credit information industry should be unregulated. It is, however, to make the point that the convenience of a community and welfare of society at the present time makes demands and allowances that are quite different from those applied to Sydney in 1903'.

Dale v Veda represents a major victory for credit reporting agencies which are properly run and conform with the privacy legislation.

Other occasions of privilege

Qualified privilege provides a defence to the threat of defamation proceedings for many internal and external communications as to the creditworthiness of customers and potential customers, providing the communication is relevant to and made on an occasion of privilege. Communications of this type are usually intended to be kept confidential but are often exposed inadvertently or upon court discovery and subpoena processes.

Many of these occasions will be communications between responsible employees or members of responsible organisations acting in the course of their respective duties and will be protected. An example is *Howe v Lees (1910) 11 CLR 361*. The Association of Stock and Station Agents of Bendigo included in its rules that payment for stock be settled within seven days and notice of any default shall be immediately given to the secretary. It was the duty of the secretary if any defaulter's name was mentioned to communicate it to the other members.

At the weekly sales, the defendant said the word 'Lees' to the secretary. The secretary told other members. In fact, Lees was not in default. Due to the Christmas holiday period a receipt for his payment had not been entered in the defendant's ledger kept at the sale yards.

Lees issued proceedings but was unsuccessful. The court held that the solvency of a 'probable customer' was of mutual or community interest to the members of the association.

The following two cases are brief illustrations of the limits to the occasion of privilege. In *Middendorp Electric Co Pty Limited v Sonneveld (2001) VSC 312*, the defendant's employee said of Mr Sonneveld, to an electrical contractor working at the defendant's premises, 'make sure you get your money in each week because (he) is a slow payer'.

The remarks were held to be defamatory. The defendant sought to rely on qualified privilege that its employee made the remarks pursuant to a social or moral duty.

The court found that the employee had no role within the defendant organisation in relation to account customers paying on time. The court found that the remarks were volunteered and had the attributes of gossip or rumour.

SMEC Holdings Limited v Boniface (2007) NSW SC 1402 concerned anonymous and deliberately mischievous emails circulated within SMEC (formerly the Snowy Mountains Hydroelectricity Authority) including that the company's bank may cancel credit facilities and the company will probably be liquidated. The recipient staff were very 'interested'. However, a defence of qualified privilege failed because the employees did not have a 'relevant interest'. They were not in a position to act in any meaningful way upon the information.

Reducing defamation risk

It may be helpful to consider the following points when troubled about a proposed communication, bearing in mind that they are not a substitute for legal advice:

1 Is it defamatory – could it make a reasonable reader think less of a person?

2 Be alert for the unintended meaning or innuendo.

3 Have you unnecessarily identified persons expressly or by implication?

4 Have you said more than you need?

5 Does it need to be in writing?

6 Is it accurate – check and verify your sources, including with persons affected?

7 Consider the purpose of the communication. Is there a duty or obligation?

8 If there is a duty or proper reason to publish, make this clear in the document.

9 Who should make the publication – you, your manager, your customer, your principal?

10 Make it clear if you are being authorised or instructed to send the communication.

11 To whom should publication be made – do they have a relevant interest?

12 Separate out facts and opinions – the word 'alleged' is not a complete safeguard.

13 If it is opinion, ensure you hold the opinion and have reasonable grounds.

14 Include any appropriate qualifications or disclaimers.

15 Mark 'personal/confidential' to limit the audience and deliver personally – don't fax.

16 If it does not relate to work – don't use your work computer.

17 Have the draft communication 'legalled'.

18 If you receive a complaint – seek legal advice and consider making an apology and offer of amends within the 28-day time limit.