

# Editorial or advertisement

**Bill Childs examines the Sun Earth Homes case and warns that greater caution may need to be exercised by publishers and broadcasters of news and current affairs**

**T**he *Sun Earth Homes v ABC* (1990) case resulted from the editing of an ABC radio program last year. The program included an interview with the presenter of the ABC television program *The Investigators*, promoting *The Investigators* program later that evening which was to deal with complaints about designers of solar or mud brick homes 'where the company' charged clients up to \$10,000 for unrealistic plans which could not be built within the budget set by the client. Such practices, the presenter said, were 'traps'. The promotion also contained an interview with a representative of Sun Earth Homes Pty Limited, which company it identified as being involved in the design and construction of solar and mud brick homes.

Sun Earth Homes claimed damages in the Federal Court for, amongst other things, breaches of sections 52, 52A, 55 and 55A of the Trade Practices Act.

Justice Burchett dismissed a motion by the ABC in an interlocutory hearing to strike out the Trade Practices Act claims, for disclosing no reasonable cause of action. In doing so he considered the extent of the exemption for the 'editorial content' (the news, current affairs, information and comment content of programs or publication) under section 65A of the Trade Practices Act.

## Editorial v promotional

**S**ince the enactment of section 65A in 1984 'information providers' (commercial and public broadcasters, newspaper and magazine publishers, the ABC and SBS) have, assumed section 65A offered a blanket exemption for all editorial content where providers have no commercial interest in that editorial content.

Justice Burchett pointed out that the blanket nature of the exemption was first questioned in the *Advanced Hair Studios* (1987) case where the view was expressed that the exemption did not apply to editorial content which knowingly or recklessly made misleading or deceptive statements.

*Horwitz Grahame Books* (1987) and *Lovatt v Consolidated Magazines* (1988) also raised serious questions as to whether the section 65A exemption extends to the

editorial content of promotional material and advertisements. In those cases the Court found that section 65A was intended to exclude 'ordinary items of news and comment', but that it was not intended to exclude 'any items directly promoting the supply of' an information provider's own goods or services.

On this reasoning, broadcasting or publishing promotional material could be construed as the publication of an advertisement excluded from the exemption by paragraph (1)(b) of section 65A.

In *Sun Earth Homes* Justice Burchett found that it was 'plain' that the discussion on the radio program was 'intended to advertise' the television program.

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## Editorial comment under threat

**O**ther elements of *Sun Earth Homes* could have serious implications for information providers. The first of these is identified in the applicants pleading that the radio discussion, as distinct from the segment of *The Investigators*, contained misrepresentations and the radio discussion and the television program together, constituted conduct of a misleading character. Justice Burchett conceded two such publications may be treated as a composite and that such composite conduct could be sufficient to forfeit the section 65A exemption for the editorial content of the program as a whole.

Secondly, it is argued that because the ABC publishes and promotes a book connected with *The Investigators*, *The*

*Investigators* was a publication of matter in connection with the supply of goods (the book) by the information provider. Justice Burchett accepted that the program was therefore excluded from the exemption by section 65A(1)(a) of the Act.

It is further alleged that the ABC represented that if Sun Earth Homes made available a representative for an interview, the program would be fair, balance, unbiased, truthful and correct. The applicants' claim that the ABC forfeited the section 65A exemption because the appearance in the program of its representative was secured by a misrepresentation.

The issue to be decided at trial is whether because of the appearance of the representative of Sun Earth Homes, *The Investigators* became a publication connected with, or a promotion of the supply or use, of (Sun Earth's) goods or services published pursuant to an arrangement or understanding with a person (Sun Earth) who supplies goods or services of the kind in question. If the Court holds that it was, the program may be excluded from the section 65A exemption by paragraph (a) of the section.

For the reason that Justice Burchett was only required to consider whether the Trade Practices Act claims were so clearly untenable that they could not possibly succeed the interlocutory decision in *Sun Earth Homes* must be treated with some circumspection. Until the issues discussed in his judgment are clarified however, it might be prudent for information providers to exercise caution to ensure that no breach of Part V of the Trade Practices Act occurs when:

- editorial content is included in promotional material and advertisements;
- marketing goods or services by linking them to programs or publications containing editorial content; and
- making representations to induce prospective participants to become involved in a program or publication.

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