



**Submission by  
Free TV Australia Limited**

Australian Securities and Investment  
Commission

*Consultation Paper 167*

*Advertising financial products and advice  
services: Good Practice Guidance*

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## 1 Executive summary

- Free TV has strong concerns regarding the content and application of the proposed guidelines.
- The Consultation Paper does not adequately reflect the effect of the publisher's defence. This defence is extremely broad and has the result that in the overwhelming majority of advertisements, the media does not have legal liability under the relevant legislation.
- For this reason Free TV considers that the Guidelines should not apply to media. In their present form, the Paper and the Guidelines would mislead an uninformed reader into a view that media bore much more responsibility for advertising than is the case. In that regard see the discussion at section 4 below.
- The Paper and the Guidelines were drafted prior to the Federal Court's judgement in *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* [2011] FCA 1086 (22 September 2011). Various sections of the Paper and the Guidelines require revision, having regard to that judgement. In particular, it is likely that advertising content in which media has had an involvement (such as "sponsored content") will attract the publisher's defence, contrary to the analysis undertaken in the Paper
- The Paper has tended not to differentiate between various forms of advertising, such as "brand awareness" advertising which is commonly broadcast on television. This advertising will usually not include (and legally need not include) the analysis of risks and other matter, such as requirements for a "complete advertisement", suggested in the Paper. There would be serious economic and competition impacts if ASIC insisted in these requirements. In that regard see the discussion at section 4 and 5.
- Further, a much more layered and nuanced analysis of advertising is required, which reflects the fact that there are many different forms of advertising, advertising platforms and advertising purposes.
- In some cases, the practices required by the Paper do not accord with the legal obligations cast on advertisers and tend to exceed those obligations or do not reflect important qualifications to them.
- Equally, some analysis misses the key legal point (such as the evidentiary requirements relating to advertising of future matters). In that regard see the example discussed in section 10. All examples provided by ASIC require further review, to determine if they attract the evidentiary requirements of section 769C of the *Corporations Act* and section 12BB of the ASIC Act.
- Greater clarity is required in relation to some points discussed in the Paper. Examples are given in section 10.

## 2 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of entertainment and information for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV appreciates the opportunity to provide comment on ASIC Consultation Paper 167 (Paper), which provides good practice guidance in relation to the advertising of financial products and advice services.

Free TV regards the principle of "truth in advertising", as reflected in the statutory provisions which regulate the advertising of financial products and services, as critically important. These provisions serve a number of key purposes. Most importantly, they protect consumers and ensure that the public is properly informed about financial products and services. They create general disclosure obligations on advertisers and promoters, as well as addressing specific practices. They also underpin consumer confidence in the framework in which advertising takes place, which is a key feature of an advanced capitalist economy.

Free TV welcomes any opportunity to work cooperatively with ASIC to minimise the prospect of unlawful advertising of financial products and services. For example, we would be interested in considering a notification procedure in relation to advertisements which are the subject of regulatory action by ASIC.

At the same time, the regulatory regime properly recognises that it is the advertiser or promoter, and not the media, which is primarily responsible for the content of advertising. It would not be feasible for the media to investigate the claims made in every advertisement (nor does the media necessarily have those skills, especially in relation to financial products or services that often involve claims about their security, capital backing, prudential compliance or other matters that would require a level of investigation, and supporting investigative powers, for which only ASIC is equipped). Both the relevant legislation and the Paper recognise this fact, through the "publisher's defence".

We turn now to address specific issues raised in the Paper. As requested by ASIC, Free TV has particularly focussed on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

### 3 Widely varying media and advertising platforms

As a general observation, the Paper has tended to group together a wide range of media and advertising platforms with very different characteristics. For example, paragraph 8 refers to the internet, financial magazines, daily newspapers, television investment programs and radio investment programs as sources for investment information (reflecting the findings in ASIC Report 121).

Each of these media provide different levels of detail, analysis and advertising. The purpose of advertising on each platform is usually quite different. This observation does not negate the common set of legal obligations that apply to each form of advertising, but it does underline a key weakness of the Paper, which is the failure to differentiate between various types of advertising.

Interestingly, ASIC Research Paper 121 (which is used to support much of the analysis) **does not** identify general television advertising (as distinct from investment programs) as a source for investment decisions by consumers. This observation underlines a key point by Free TV, being that television advertising is of very short duration and is often not used to convey information, but to create or increase brand awareness, and thereby to expand a consumer's knowledge of the relevant choices (rather than conveying the information on which to base that choice).

Such advertising is very important in promoting competition, especially when used by new entrants. The Paper demonstrates no understanding or evaluation of this important point. As a result the Paper implies that all advertising should be subject to a uniform set of requirements, when legally that is not the case. The effect of that approach would be to cause advertising and market distortions and to create barriers to market entry.

### 4 The Role of Media

Paragraph 15 of the Paper states that:

“The objective of our guidance is to help promoters and publishers present advertisements that are accurate, balanced and that help consumers make decisions that are appropriate for them.”

This objective reflects a degree of focus on the role of publishers that does not accord with the law. In that regard, after publication of the Paper, Mr Justice Nicholas reviewed the relevant law regarding the role of a publisher in *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* [2011] FCA 1086 (22 September 2011). His Honour's observations appear from paragraph 204 forward, in relation to the wide-ranging effect of the publisher's defence:

204. Section 85(3), as interpreted by Franki J, is not concerned, at least not directly, with the steps which a defendant might have taken to avoid the contravention. Rather, it calls for a consideration of whether the defendant knew or had reason to suspect that publication of the advertisement might give rise to the contravention. The ACCC referred me to para [18.2180] of Heydon in which the learned author provides the following comments on Franki J's interpretation of s 85(3):

[It] suggests that the defence is wide; by acting merely as a conduit and deliberately refusing to read or consider advertisements and refraining from instituting any system to detect errors in an advertisement, the defendant could never know or have any reason to suspect a problem.

Probably, however, the section requires the defendant to establish that it had no reason to suspect a contravention in the sense that a defendant could not discharge the burden if it had closed its mind to the possibility of an advertisement contravening the Act. Instead, the defendant is probably required to show that, recognising its business to involve a frequent risk of contravention, the control system it set up was appropriate.

205. The ACCC relied upon these comments in support of a submission that Google could not succeed in its defence under s 85(3) unless Google showed that it had a control system in place that was appropriate. What an appropriate system might be for this purpose was not the subject of any direct evidence. In any event, I consider I must apply s 85(3) on the basis that Franki J's interpretation was agreed to by Bowen CJ and that it reflects the correct approach.

206. Section 85 of the Act has been the subject of various amendments since *Guthrie* was decided. However, none of the amendments made to s 85(3) modified the scope of the defence created by it with respect to contraventions of the provisions of Part V of the Act. Moreover, Part V of the Act has been the subject of other amendments including, in 1984, the introduction of s 65A. There is nothing in any of these amendments to suggest that Parliament intended that s 85(3) of the Act should be given a different interpretation to that adopted by the Full Court. On the contrary, the terms of s 65A (which is expressly stated not to apply to the publication of an advertisement) suggests that Parliament intended that s 85(3) would continue to operate in accordance with the Full Court's interpretation. See *Re Alcan Australia Limited; Ex Parte Federation of Industrial, Manufacturing and Engineering Employees* [1994] HCA 34; (1994) 181 CLR 96 at 106; *Platz v Osborne* [1943] HCA 39; (1943) 68 CLR 133 at 141, 146 and 146-147 per Rich, McTiernan and Williams JJ respectively.

The publisher's defence was re-enacted at section 12GI(4) of the ASIC Act and section 1044A of the *Corporations Act* after the Full Court's judgement in *Guthrie*, which was decided in 1978. It is an inference of statutory construction that the Parliament intended the same provision to have the same meaning, as had been ascribed to it by the Full Federal Court. Indeed, section 1044A appears to adopt an even lower test than (the now repealed) subsection 85(3) of the *Trade Practices Act* or section 12GI(4) of the ASIC Act. This is because the latter provisions refer to a test of a publisher having no reason "to suspect" that the publication would amount to a contravention of the Act, whereas section 1044A refers to a publisher having no reason "to believe" that the publication would amount to a contravention of the Act. This formulation appears to involve a lower test than that considered by the Court in *Guthrie*.

The broader point is that the Paper implies an active role by publishers which the relevant statutory construct does not ascribe to them. In Free TV's submission, the role of the publisher should be further considered to ensure that it properly reflects the law. For example, paragraph 15 further states that:

While our guidance covers issues of good practice in advertising, it may also help promoters and publishers comply with their legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct.

As is apparent from the judgement of Mr Justice Nicholas, publishers do not have general obligations not to make false or misleading statements in advertisements published on behalf of third parties.

At B1Q1 ASIC has specifically asked whether its guidance should apply to publishers, as well as promoters. The answer must be “No”, firstly because the law is different in relation to each of them. Secondly, as presently drafted, readers could be misled into believing that publishers have the same, or similar, obligations to promoters, when that is not the case. While the publisher’s defence is discussed later in the Paper, an uninformed reader would have no concept of its importance or wide-ranging scope. Thirdly, if the Paper is to be used to inform ASIC investigative decisions, it will lead to a misallocation of resources, by proceeding on the basis that advertisers are subject to similar obligations to promoters, when that is not the case and was found not to be the case, as recently as in the past month.

In the same vein, paragraph 26 of the Paper advises that ASIC expects media to be aware that advertisements need to be accurate, balanced and help consumers make appropriate decisions and to refuse to publish, or cease publishing, advertisements that do not meet these criteria. As Free TV has noted in the introduction to these submissions, it wishes to support ASIC in its regulatory role and is interested in a notification system, where ASIC has taken regulatory or legal action in relation to an advertisement.

However, to the extent that paragraph 26 appears to suggest that media should actively monitor advertisements, that is not the law. No such obligation exists and there are very good policy reasons for this position, as reflected in the “publisher’s defence”. Firstly, responsibility and liability for advertising primarily rests with the advertiser. Secondly, an active monitoring role by media in relation to the tens of thousands of advertisements received annually would be impossible, except at prohibitive cost. That cost would add greatly to the cost of advertising, for a benefit that will usually be of the most minimal nature, because most major advertisers already have review processes for advertisements.

Thirdly, media do not have the tools (or the coercive powers required) to verify advertisements which make financially based claims. For example, if a financial organisation claims that it is “fully capital backed”, an external organisation such as a publisher has no power akin to an auditor to examine whether that is the case.

This is not to suggest that media do not comply with and are not supportive of the legislative regime now in place. Media as an advertising medium is based on consumer confidence and media therefore have a strong interest in appropriate advertising. It is for this reason that the commercial television sector established Commercials Advice to review advertisements. However, the media do not nor should have the same obligations as advertisers, who create the advertisements and know their product or service, so are in the best position to know what can acceptably be said about that product or service in an advertisement. In Free TV’s submission, the Paper needs to reflect that legal and commercial reality.

Contrary to paragraph 28, the paper in its present form does not help publishers minimise the legal and reputational risks that flow from non-compliant advertisements. Instead, the Paper does not adequately reflect the relevant law.

**5 Nature of the Product**

ASIC proposes that “advertisements should be complete so that consumers can assess the merits of the financial product or actual service being advertised”. With respect, this misrepresents the relevant legal test and usually would be an impossible task.

A simple example demonstrates the point. It has been longstanding practice that an advertisement for an offer which has conditions attached to it will contain the words “Conditions apply”. The conditions very rarely appear in the advertisement, because they are usually too long to be presented. For example, a television advertisement runs for 15, 30 or 60 seconds (with a 60 second advertisement being the longest). The conditions of an offer can rarely be conveyed in that time frame. Thus the advertisement is not “complete”, but nor is it misleading, because the viewer has been put on notice that the offer will not necessarily be available to him or her unless the relevant conditions have been satisfied. In this example the ASIC requirement for a “complete advertisement” is contrary to longstanding practice and the relevant law.

The requirement for an advertisement to be “complete” is especially problematic with the advertising of financial products, which invariably involve a number of risks and competing considerations that can be complex and differ as between investors. For example, at present one of the key issues for most investors will be the impact of the Euro debt crisis on an investment. But in order for an investor to assess the “merits” of a financial product or service, is it necessary to say whether the investment could be impacted, and if so, how? The fact is that most providers of financial products and services will not know the answer to this question, except within a range of probabilities. Do these probabilities need to be presented? Alternatively, is it sufficient for the promoter to advise that the product could be affected by whether or not the Euro debt crisis is satisfactorily resolved. If so, this qualification probably applies to all products- even home mortgages could have some interest rate sensitivity if the debt crisis produces a shortage of international capital (as is one probable, although not necessarily inevitable) outcome. This would have the result that every single advertisement would probably need to carry a qualification about the impact of the debt crisis.

On the other hand, if a test of potential impacts is adopted, then several other factors could affect the “merits” of a financial product. In the case of insurance, this could include a major disaster which produces a rise in premiums. In relation to CFDs, events such as a slowdown in Chinese manufacturing, the continuation of a poor outlook for the US economy and poor consumer data would fall into the same category.

It might legitimately be said that all of these factors are external to the investment itself and that the intention of Proposal C2 is to focus on the features of the product or service and not external factors. However, that does not appear from the proposal. For example, most of the major risks associated with any product are

external factors such as those outlined above. Yet no advertisement could reasonably address those risks. These are properly areas for investor education and professional advice, not 60 second advertisements.

To insist on detailed requirements of this nature will have two very important and negative economic distortions. Firstly, because onerous requirements of this nature are difficult to address in media with short advertising windows (such as radio, television and outdoor) there would be a flight of advertising away from these media to other media, usually print or internet. This is because print and internet media are designed to present more detailed information than television and radio. Secondly, television, radio and outdoor tend to be used to raise awareness, rather than provide detailed information. “Awareness raising” advertising is very important for new products and services, as well as new promoters and market entrants. The proposal will create a barrier to entry because a new product, service or market entrant will have difficulty using the media which are best designed for this very purpose.

Expressed another way, the crucial point which is not discussed in the Paper is the many purposes served by advertising. Some (indeed a good deal of) advertising is never intended to inform or educate consumers in the manner posited by the requirement for a “complete advertisement”. The point of the advertisement is to make consumers aware of the relevant product or service, which is a critical phase of market entry. This requires a simple clear message, because the new entrant is struggling to create brand awareness against well known incumbents.

A simple and very effective example of this point was Aussie Home Loan. It would have materially impacted Aussie Home Loan, if from the very first advertisement it was required to advise of all the risks associated with home mortgages (interest rates can rise, overextending can lead to home foreclosure etc). Only established incumbent lenders would have benefited from this requirement. In all likelihood, Australians would have been deprived of a new choice to the traditional mortgage market and of greatly increased competition in that market.

The fact is that consumers are very used to advertisements which contain “tags” for other information. The qualification “Conditions apply” is just one example, which will be encountered by a consumer many times on any given day. Equally, an advertisement may contain a recommendation to “consult your professional adviser”. Health advertisements have long carried advice to “Consult your doctor if symptoms continue”. A “complete advertisement” requirement for health advertisements would be just as impossible in that sector, as in the financial sector- which is the very reason that health products contain product information disclosures. The Paper needs to recognise both modern advertising practice and the level of familiarity of the consumer to that practice.

A further point is that advertising usually takes place within the context of a campaign, where multiple advertising platforms are used. However, the “complete advertisement” test tends to view related advertisements in isolation from each other. While it is true that a consumer may not view each advertisement, there is no reason that a television advertisement cannot refer the consumer to a website which

contains more detailed information. Consumers are very familiar with this practice. For example, it was the Virgin Airline television campaign, referring viewers to its website, which led to the success of its internet check-in model, a model which is now followed by all airlines. Prospectuses are now commonly marketed in the same way.

In summary, it is Free TV's submission that:

- ASIC should abandon the simplistic "complete advertisement" approach and adopt a much more layered analysis to advertising practices;
- "Awareness" advertising needs to be recognised and accepted as having an important place in a vibrant financial services sector;
- Advertising practices which cross-refer consumers to other sources of information also need to be recognised; and
- There needs to be some recognition that advertising is not a substitute for investor education or professional advice.

## **6 Disclaimers and Qualifications**

Free TV agrees that disclaimers and qualifications should be consistent with other content and given appropriate prominence. There are reasonably common "rules of thumb" for qualifications and disclaimers in television advertising. While these conventions are no more than "rules of thumb", and the qualification or disclaimer needs to be considered in its context, they are used by advertisers and agencies as a guide. Free TV would be very happy to consult further with ASIC about common practices in this area.

## **7 The advertisement's target audience**

The Paper suggests that "advertisements for complex products that are only appropriate for a limited group of consumers should not be targeted at a wider audience". Free TV is concerned that this suggestion will be difficult to apply in practice.

For example, on one view a CFD might be regarded as a complex product suitable only for experienced or expert investors. However, on another view the general level of investment sophistication across the Australian community has increased greatly in recent years and it should be a matter for an individual investor to decide whether this type of financial product is appropriate to their needs. This consideration underlines that general investor knowledge of and confidence in a financial product can be fluid, with investor sophistication tending to increase over time (for example, due to the large number of self-funded retirees and self-managed superannuation funds). Furthermore, even if the view is adopted that a CFD is a product for expert investors (for the purposes of the example), is it appropriate for the CFD to be advertised in a financial or investment magazine which is generally available? If so,

what of an investment television or radio program? Alternatively, what if the program is not an investment program but nevertheless is shown to attract reasonably sophisticated and older demographic (such as the current affairs programs now broadcast by many television networks on Sunday mornings)? This relatively simple example demonstrates that practical difficulties could easily arise when an advertiser seeks to apply ASIC's guidance.

In any event, this guidance is wider than the relevant test, which is whether or not the advertisement is misleading or deceptive to likely to mislead or deceive. The mere fact that a product is complex does not necessarily mean that an advertisement for it, even when pitched at the general public, would a priori be misleading or deceptive or likely to mislead or deceive.

## **8 Media-Specific Issues**

Free TV is concerned that the discussion of media-specific issues does not appropriately reflect the position of media, arising from the publisher's defence. We refer to the discussion above. Furthermore, paragraph 66 when referring to the distinction between advertising and other program or editorial content, should cross-refer to the provisions of various media codes which already have this effect (such as paragraph 1.18 of the Commercial Television Code of Practice).

## **9 Regulatory and financial impacts**

As Free TV has noted above, the requirement for "complete advertisements" is a broader test than the relevant legislation and could have far-reaching effects both for television advertising and the financial industry generally. In Free TV's submission this issue needs to be reconsidered and completely recast. Furthermore, these impacts are neither minor nor machinery impacts.

## **10 Regulatory Guide**

Free TV does not propose to repeat the points already made above. We make the following short points.

The final key point in the Overview is incorrect, in that the media have some responsibility only if the publisher's defence does not apply. As presently cast, this point is misleading by omission.

The same point applies very starkly to paragraph RG 000.5, which implies that publishers have legal obligations "to not make false or misleading statements or engage in misleading or deceptive conduct", when the publisher's defence will usually apply and has been found by the court to be of very wide scope.

RG 000.27 states that:

“Publishers have a role in promoting financial products and financial advice services. Some of these products and services may be directly promoted in the media, through advertising and by media commentators.”

In Free TV’s submission this paragraph is confusing. The reference to products and services which are “directly promoted” suggests a distinction with indirect promotion, which is not obvious. If by “direct promotion” the author intends to refer to advertising, then that should be the term used. If more than advertising is to be covered, then those additional activities need to be expressly referred to. Free TV would also request a further opportunity to comment on those additional activities. Furthermore, the reference to “promoting” could be read as implying a wider involvement than advertising, when media will usually have no other role. This confusion in terminology is compounded because the Paper also refers to “promoters” (see for example at RG 000.29). It is not clear whether those references are intended to include publishers, given that the Paper refers to them as having a role in promotion. Greater clarity would be desirable.

RG 000.28 should make clear that in the normal course media may have some responsibility for advertising content only if the publisher’s defence and any other applicable defences do not apply.

As to RG 000.31, see the comments made above regarding “complete advertisements”.

RG 000.34 at Example 1 provides that “the advertisement should also state that the expected returns may not arise and that the client’s balance may even fall.” The difficulty with this example is that it goes well beyond the scope of ASIC’s responsibility, which is in relation to advertisements which are misleading or deceptive or likely to mislead or deceive. There is no general rule that an advertisement which does not state that a client’s balance may fall would be (or be likely to be) misleading, any more than an advertisement for a mortgage loan would be misleading because it does not state that interest rates can vary over time. In this respect the example confuses an educative role with an obligation not to mislead or deceive. Advertisers have no positive obligation to educate consumers and it is not appropriate for ASIC to attempt to construct one. The implication of general obligations to include standard wording, when not supported by law, will inhibit the use of media such as television, where 15 second and 30 second advertisements are commonly used.

The far more salient point to be made in relation to RG 000.34 Example 1 is that an advertisement for an expected rate of return is an advertisement regarding a future matter to which section 769C of the *Corporations Act* and section 12BB of the ASIC Act will apply. The Paper should instead focus on those risks, including the now reasonably extensive law on what constitutes “reasonable grounds” and that promoters bear an increased risk if making such representations.

RG 000.48 suggests that warnings, disclaimers and qualifications that are shown on television only for a short period are less likely to be understood by consumers. Free TV suggests that this statement is unhelpful, because television advertisements are often only 15 seconds or 30 seconds in length and all advertising content will necessarily be of short duration. The key issue is the overall effect of the presentation of disclaimer- for example, a disclaimer which appears very briefly, such as “conditions apply”, will usually be well understood by consumers.

In RG 000.56 Example 17 the comparison between a bank deposit and a debenture rate is unacceptable only if the advertisement contains no other information about the debenture investment (thus implying that the two investments are comparable). This should be made clear.

In RG 000.107 reference could be made to media codes of practice which already require a distinction between advertisements and other content (as appears in RG 000.108, albeit only in relation to commercial radio).

As to RG 000.113 to RG 000.115, see the comments previously made section 6 above.

Like other sections of the Paper, Section D suggests that media has “legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct”, when that usually will not be the case due to the operation of the publisher’s defence.

As to Section E, “Publishers and media outlets”, see the comments previously made above, particularly at section 4 and 8.

## **11 The publisher’s defence where media involved in advertising**

RG 000.163 was drafted before the judgement in *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* [2011] FCA 1086 (22 September 2011) and now requires reconsideration. The paragraph states that:

Where a publisher contributes to the content of an advertisement (e.g. in writing advertorials) or otherwise has an active involvement in the promotion of a financial product or advice service (e.g. through co-branding, or where a media personality uses their influence to promote a product), we regard the publisher to be in the same position as the promoter in terms of their responsibility to take into account the good practice guidance in Sections B and C. We consider that this level of active involvement may mean that the defence for publishers in s1044A is unlikely to apply.

As ASIC is aware, in the *Trading Post* case the ACCC unsuccessfully argued that the involvement of Google in the compilation of an advertisement had the effect that the publisher’s defence did not apply. The judge held to the contrary, finding that an advertisement need not be in complete form when provided to a media outlet and that the outlet’s involvement in the advertisement did not cause the advertisement to

fall outside the defence. This accords with common experience. For example, it has been common for media to have some involvement in production of an advertisement. In radio, the practice of a “live read” is as old as radio itself. In newspapers, a media employee will often assist an advertiser to ensure that its text fits within a set number of column inches (and therefore cost). Similarly, for many years commercial television has provided production or studio facilities for the production of advertisements.

There is nothing in the judgement of Mr Justice Nicholas to suggest that there is a distinction between the Google case and any of the other forms of advertising described above, all of which existed at the time of enactment of the publisher’s defence in the then *Trade Practices Act*. The finding made by his Honour is of general application.

In Free TV’s submission, RG 000.163 must be rewritten in its entirety to accord with the law, as found in the *Trading Post* case.

Quite separately, it is also incorrect in RG 000.163 as presently drafted to suggest that “where a media personality uses their influence to promote a product”, the publisher’s defence will not apply. This statement is much too broad, even leaving the *Trading Post* case to one side. Media personalities are usually contractors, not employees, and they are usually free to contract to promote a product, in the same way as any celebrity or sportsperson. To take a simple example, if a television personality quite separately from any television network commitments, contracts to be the “front person” for a third party’s advertisements, it is very clear that the publisher’s defence can apply to the television network when broadcasting those advertisements. The personality’s involvement in the advertisement will usually have nothing to do with the television network and the television network will have had no involvement in the creation of the advertisement.

Similarly, given the outcome of the *Trading Post* case, at paragraphs RG 000.164 and RG 000.165 it cannot be said that “sponsored content” does not attract the publisher’s defence. These paragraphs now need to be reconsidered. If ASIC considers that there is a distinction between the *Trading Post* case and sponsored content, the difference between the two now needs to be stated in the Paper, in order to give proper guidance. However, no relevant distinction appears from the judgement. As Mr Justice Nicholas held at paragraph 200:

In my opinion the defence may be relied upon by a publisher which has published an advertisement in the ordinary course of business even if the publisher has had a substantial involvement in its compilation. This is because the advertisement need only be received in the sense of having been accepted for publication. Of course, the other elements of s 85(3) must also be satisfied.

A “substantial involvement” in compilation of an advertisement will often encompass a higher level of involvement than “sponsored content” such as a “feature”. In the former case, Google clearly had substantial editorial involvement in the advertisement, whereas in the case of a “feature”, it may well be that the relevant



medium remains no more than the “mouthpiece” for the promotion or advertisement. However, even when the medium exercises editorial control, that appears to accord with the *Trading Post* case. In that regard there is no relevant distinction between “compilation” of the advertisement in *Trading Post* and production or editorial integration of an advertisement by a television, radio or newspaper outlet.