

CHAPTER 12: USE OF THE MEDIA

Background

The ACCC has established a high media profile over the past decade. In particular, that profile increased when, with the introduction of the goods and services tax, the ACCC was given legislative responsibility for monitoring price exploitation for a three year period.

The ACCC typically makes over 300 media releases a year and frequently holds media conferences in conjunction with these releases. The chairperson of the ACCC and commissioners appear in news and current affairs programs on radio and television. The chairperson, commissioners, or representatives of the ACCC are often quoted in the print media or have information attributed to them.

Considerable use is made of other means of communication to publicise trade practices and consumer protection issues. In 2001, Commissioners presented over 54 speeches and attended a variety of forums on competition and consumer issues. The ACCC has issued over 300 publications, which are produced in print, electronic and audiovisual form. Two regular publications are produced. The bi-monthly *ACCC Journal* is distributed to around 800 organisations and is designed to provide up-to-date information on competition and consumer matters. The *ACCC Update* has a circulation of around 10,000 and concentrates on ACCC issues. The ACCC has an extensive internet website where media releases, publications, information on competition policy and links to other related websites can be found.

The news media plays a significant role in contributing to the effectiveness of various ACCC special programs. For example, the ACCC's small business unit operates a Small Business and Rural and Regional Services Program that aims to educate and inform consumers about the Act. This program has established a network of over 300 agencies to assist it in disseminating its message. The ACCC uses media such as press columns, advertisements and radio interviews to supplement the regular field trips and seminar programs it undertakes in this program.

Issues

The ACCC's use of the media was one of the issues most frequently raised with the Committee. Concern was expressed to the Committee about the manner in which the ACCC:

- publicised investigations before they were concluded and before proceedings were instituted;
- publicised prosecutions when no decision had been reached by the court;
- made statements that lacked balance and objectivity, sometimes by reporting a court outcome in a manner that misrepresented the court's decision; and
- linked new and unrelated investigations or prosecutions to other actions in which an adverse finding had been made by the court against another corporation.

The common theme underlying these complaints was that the manner in which the ACCC released information and made comments to the media was neither balanced nor impartial and carried with it the danger that the corporation or individual involved might be denied procedural fairness in proceedings yet to be determined. In short, the suggestion was that the ACCC engaged in trial by media. Whilst conceding the need to release information to educate the public about trade practices matters, it was said that the ACCC on occasions exceeded the proper boundaries, thereby risking damage to the reputation of corporations or individuals, despite the fact that a court had not made findings against them.

On the other hand, it was put to the Committee that the ACCC's use of the media was a cost-effective means of promoting compliance with the Act and of educating business and consumers on competition issues. The general presence and high profile of the regulator was said, particularly by consumer organisations, to enhance consumer confidence in the operation of the Act.

There was widespread support in the submissions made to the Committee for the introduction of a media code to govern the ACCC's use of the media. The ACCC was conscious of the concerns expressed and supported the introduction of such a code in order to address them. There was less agreement on the content of the code. The controversial aspects were the possible effect of the code on the ACCC's enforcement and educative functions, the appropriate

timing of public comments and how the code might be developed and enforced.

Analysis

Section 28 of the Act establishes functions for the ACCC that could not be fulfilled without use of the media. Section 28(1) provides:

'In addition to any other functions conferred on the Commission, the Commission has the following functions:

- (a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act; ...
- (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws; and
- (e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.'

It is appropriate and cost-effective for the ACCC to use the media to educate both business and consumers about their rights and obligations under trade practices law. Increasing community awareness of these rights and obligations can assist in increasing compliance with the Act. The ACCC has been singularly successful in promoting awareness of trade practices matters, their implications for consumers, and the role of the ACCC in relation to them. The Committee was told by trade practices authorities overseas that they regarded the range and quality of the publications issued by the ACCC as exceptional.

The use of publicity in relation to contraventions of the Act may contribute to an understanding of the enforcement process. It is appropriate to report the outcome of proceedings in the courts because this may also contribute to the community's understanding of behaviour that is not consistent with the requirements of the Act. Although such reporting will involve publicising the practices of particular corporations, and may harm their reputation in the market, it may also provide a significant deterrent against anti-competitive behaviour by others.

At the same time, public statements by the ACCC about particular corporations require caution to ensure that no unfairness is involved. It is clear from the submissions made to the Committee that there are widespread misgivings about the ACCC's media practices. The ACCC has stated on a number of occasions that the disquiet caused to some business interests by its activities may simply reflect its effectiveness as a regulatory agency. This is, however, not a sufficient response. It is the responsibility of the ACCC to ensure that its provision of information to the media is consistent with due process and that there is confidence in the way in which it conducts itself. This extends beyond information supplied through formal printed media releases and includes informal commentary. It also involves information relating to proposals from corporations, for example in relation to mergers, which may not involve the contravention of the Act but are commercially sensitive.

The use of adverse publicity by the ACCC for enforcement purposes was recently considered in a paper by Yeung¹ (see Box 12.1). The paper recognised the positive contribution of publicity to the enforcement of the Act, but noted problems associated with media use, particularly at the investigative stage of the enforcement process. However, the analysis showed that in its formal media releases, the ACCC referred to investigations infrequently. It was found that there was a reference to an investigation in only 1.5 per cent of the media releases issued in the year 2001. The paper acknowledged a limitation of the analysis was that it was confined only to media releases, thus ignoring a significant volume of other media activity.

The ACCC acknowledged in its submission to the Committee that public comment in the course of the enforcement process may have an impact in the minds of some on the reputation of the party being investigated, but submitted that most members of the public know the difference between an investigation, an allegation and a court finding of unlawful behaviour. The Committee doubts whether the public always maintains those distinctions, particularly where the comment emanates from a regulatory body such as the ACCC. The ACCC itself, in its submission, says that its practice is not to publicise an investigation 'subject to some exceptions where a public policy purpose is involved'.² The exceptions identified by the ACCC are where the investigation is made known by the complainant, the firm under investigation or some other person.

1 Yueng, K. 2002, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* Paper presented to the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002.

2 ACCC, Submission No. 56, p. 177.

The Committee notes that, while the risk of damage to a corporate name from the publicising of an investigation is high, the likely educational benefit to the public is low. The risk of damage is underlined by the fact that the public perception of the implications of an investigation will be influenced by the manner in which it is reported. That is not, of course, within the control of the ACCC. In the Committee's view, whilst there may be circumstances in which it may be necessary for the ACCC to confirm or deny the existence of an investigation, the ACCC should avoid any comment on investigations it may be undertaking, even when the media has learnt of the investigation from another source.

Box 12.1: An analysis of ACCC media processes

Dr Yeung's recent research paper sought to explore the question – *Is the use of informal adverse publicity a legitimate regulatory compliance technique?* The study was based on the ACCC's 2001 media releases and did not consider the ACCC's other means of conveying information through the media.

The paper considered that media releases describing investigations and proceedings relating to alleged contraventions of the Act have the most potential to call the integrity of the trial process into question. It was found that around 1.5 per cent of the ACCC's 2001 media releases concerned the investigation stage of the process while 40 per cent concerned the litigation stage. Around three-quarters of these releases reported either a court judgment on matters or a settlement negotiated between the parties. The paper found that while claims of trial by media might have been overstated, there was clearly some scope for improvement.

Analyses of the balance and tone of the ACCC's media releases found that very few of the ACCC's pre-trial litigation press releases emphasised that the allegations were unproven and did not equate to judicial findings of guilt. It was also noted that the views of the defendant were represented in only one-quarter of the releases on litigation cases. On the other hand, where formal court proceedings were announced, it was found that the ACCC took a cautious approach in generally not offering an opinion on the matter in question.

Box 12.1: An analysis of ACCC media processes (continued)

It was also found that the ACCC has a tendency to ‘... provide a rather one sided view of individual cases, rather than providing an objective, factual account.’³ For example, it was reported that 95 per cent of the 2001 media releases announcing court outcomes declared the ACCC the ‘winner’, even where the case had been won on technical grounds.

The study concluded that while the ACCC actively used media releases to promote its enforcement activities, ‘... its pursuit of publicity may have a tendency to undermine its credibility as an even-handed law enforcement agency committed to ensuring that those at risk of violating the Act are fairly treated.’⁴

It may be desirable for the ACCC to inform the public when court proceedings are commenced and when the court has determined a matter. This is consistent with the public nature of the court process and the desirability of informing and educating the community about trade practices matters. However, the ACCC must exercise careful judgment in determining what it should say at each stage of the enforcement process. This is particularly so in relation to the commencement of court actions when the fairness of court procedures must not be impaired.

The ACCC’s media commentary on proceedings has been the subject of judicial comments. For example, Justice Hill in the Federal Court recently declined to make orders against a party for corrective advertising because the ACCC had publicised the alleged contravention before the Court had finished dealing with the matter. Justice Hill noted that the contravention was not deliberate and observed:

‘It might be said that while the Commission is entitled to tell the public that proceedings have been brought and the general nature of those proceedings, there is a danger that wide dissemination of the fact before a hearing might in a particular case injure, perhaps irreparably, the person against whom the proceedings are brought.’⁵

3 Yueng, K, op. cit., p. 52.

4 Yueng, K, op. cit., p. 53

5 *Cassidy v. Medical Benefits Fund of Australia (No. 2)* [2002] Federal Court of Australia 1097th decision at para. 94, 9 September 2002.

The nature of the problem had previously been outlined by Justice Smithers, who criticised the then Trade Practices Commission in 1977 for the early publicising of a matter:

‘Adverse publicity is often one of the inevitable consequences of wrongdoing ... But adverse publicity initiated by the prosecuting authority itself requires special consideration. If the matter is publicised ahead of trial, and widely, and in terms likely to induce public censure of the parties concerned and those parties are in day-to-day business relationships with the public, then there is obvious danger of injury to the lawful business of the parties which from a practical point of view may have the effect of effectuating a cumulative punishment.’⁶

On both occasions the court noted that, in the particular circumstances, adverse publicity generated by the ACCC or its predecessor had caused harm to reputation and that the court’s orders were accordingly less extensive.

The need to ensure procedural fairness requires that a balance be maintained between keeping the public informed and protecting the rights of those against whom proceedings have been brought. It is therefore desirable that, if there is comment about a matter before it is resolved, it should acknowledge that the allegations against the defendant have yet to be proved. The best way to achieve an appropriate balance is for the ACCC to ensure that any announcement of the commencement of proceedings is no more than factual. In addition, the ACCC should establish a strict policy of not providing any commentary beyond the terms of its formal media release and avoid commenting on a case once court proceedings have commenced.

This approach would remove the potential for the ACCC to be seen as contributing to unfair adverse publicity either through its own comments or through the use made of information it provides to the media. The Committee was made aware of some media reports from which the reader might reach a conclusion adverse to a party against whom proceedings had been commenced, but where the ACCC’s media releases were merely factual and did not convey any such impression.

Some submissions have questioned the tone and balance of the ACCC’s statements on the outcome of some court cases. They suggest that media releases in relation to a particular corporation should be cleared by that corporation prior to release. The Committee considers such a course would be

6 *Eva v. Southern Motors Box Hill Pty Ltd* (1977) Vol. 15 Australian Law Reports, p. 428 at p. 437.

impractical – it would be difficult to reach agreement on what was acceptable in a particular case. In considering the terms of its media releases the ACCC should, nevertheless, ensure that they accurately convey the outcome of proceedings. In particular, the ACCC should acknowledge all aspects of a judgment, including those parts that may not have favoured the ACCC. It should also avoid the reporting of judgments in terms of winners and losers. The analysis of the ACCC's 2001 press releases, referred to above, confirms the tendency for some media releases to present cases in this way. The focus of the ACCC in publicising a court judgment should not be to score points but to inform the public of the issues resolved in order to improve their understanding of the requirements of the Act. Unbalanced reporting of results will only serve to colour the message at the risk of clouding its educative and informative value.

For example, in a recent judgment Justice Finn was critical of public comments made by the ACCC about legal advice that was relied on by the defendants. Justice Finn concluded that he was unable to make certain orders restraining the ACCC, but commented that the ACCC's past statements:

'... may constitute good public theatre. Whether they represent good public administration is another matter. There is a very real prospect that the view the ACCC has taken of [the relevant provision of the Act] will be found to be incorrect ... there can be respectable opinions on both sides of the argument.'⁷

The ACCC's media release after the judgment made no reference to Justice Finn's concerns about the ACCC's conduct or his decision that both the ACCC and the Electricity Supply Association of Australia (ESAA) were entitled to their own views of the legal questions in dispute. Instead it claimed that the judgment:

'... endorse[s] the ACCC's ability to make public its views as to the rights and obligations of consumers and electricity suppliers under the Act ... [and] vindicates the position taken by the ACCC in defending the proceedings taken by the ESAA.'⁸

The Committee considers that the ACCC's relationship with business and consumers would be assisted by the development of a code of conduct governing the ACCC's use of the media. Whilst recognising the benefits to the ACCC and to the community from the publicising of the objectives of the Act

⁷ *Electricity Supply Association of Australia Limited v. ACCC* [2001] Vol. 189 Australian Law Reports, p. 109 at p. 143.

⁸ ACCC Media Release No. 225/01, 14 September 2001.

and the way in which they might be achieved, a media code would provide a standard to be applied by the ACCC in individual instances. In particular, the adoption of clear rules to govern public comment should engender a fair and balanced approach in all cases. The observance of a media code of conduct would, the Committee considers, work to the ACCC's advantage, particularly if its terms were agreed with interested parties. The Committee suggests that assisting the ACCC with the development of the media code be a priority for the consultative committee which it has proposed in Chapter 11. Adherence to the media code could be reviewed by the consultative committee but would no doubt also be considered by the relevant Parliamentary Committees.

The Committee also notes that these principles regarding the use of the media could be considered for inclusion in the Legal Services Directions issued by the Attorney General relating to Commonwealth Legal Services which include the Model Litigant obligations.

Conclusions

- The ACCC's high media profile reflects, in part, the success of the ACCC in increasing community awareness of the importance of competitive markets and of the role of the ACCC in enforcing the Act and encouraging compliance with it.
- There is at the same time considerable concern on the part of business about the use made by the ACCC of the media.
- The ACCC needs to exercise care in publicising individual matters to ensure that there is no unfairness to the parties involved.
- The ACCC should develop a media code of conduct in consultation with interested parties to govern its use of the media, particularly in relation to enforcement proceedings.
- The media code of conduct should be developed through the consultative committee structure that is being proposed by the Committee.

Recommendations

12.1 A media code of conduct should be developed through the proposed restructured consultative committee.

12.2 The media code should be based on the following principles:

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- 12.2.1 the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties;
- 12.2.2 the code should cover all formal and informal comment by ACCC representatives;
- 12.2.3 whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations;
- 12.2.4 with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts; and
- 12.2.5 reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision.