



## Submission to Review of the Trade Practices Act

Prepared by NUD'AY Consult Pty Ltd

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*Dear Justice Dawson,*

*I apologise for the lateness of this submission, and I acknowledge that my views are unlikely to be taken into account. Today, however, I have sent a letter to the Australian Financial Review bemoaning the inability of your review – given its terms of reference and the nature of submissions made to it – to consider one of the matters set out below.*

*I realised that my comments were quite unfair in the light of my own failure to raise these issues, and this is my belated and inadequate attempt to remedy that. Perhaps the brevity and (I hope) persuasiveness of my submission will partially compensate for these failures.*

*My qualifications to make the observations set out below come from my:*

- *occupancy of the role of Director Compliance Programs at the Trade Practices Commission ("TPC"), and subsequently the Australian Competition and Consumer Commission ("ACCC"), from 1991 to 1997; and*
- *subsequent conduct of a compliance consultancy business serving over 50 Australian companies and associations*

### **C O M M E N T S   A S   T O   A C C C   M E D I A   S T R A T E G Y**

*Many submissions to date have focussed on the ACCC's use of news media: the Franchise Council, Telstra, Minter Ellison. The press have covered these submissions at some length, and various views have been put as to the merits of the ACCC's strategy. Based on this reportage, it appears that the focus of every writer – whether detractor or supporter – is on ACCC Media Releases.*

*The Telstra submission, for example, analysed the incidence of releases and articles; while the Minter Ellison submission proposed a Code of Conduct which would require the ACCC to give 48 hours notice of any release to its "target".*

*Both these submissions, and all others I have seen reported, are based on fantasy. They utterly misunderstand and/or misrepresent the process by which newspapers and broadcast news bulletins are assembled. In reality, press coverage of the ACCC, other than one-para newsbriefs, is driven in one or more of the following ways:*

- *by a company or companies with an interest in the matter*
- *by what one might euphemistically call "sources close to the Chairman"*
- *by enterprising journalists with informants of some kind.*

*Media releases are used to bring the rest of the media up to speed on matters that are already "running", or to obtain coverage for issues of minimal interest to the reading or viewing public. Mr Switkowski's tabulation may have sorted out the humdrum from the newsworthy – I have not seen it yet – but as an avid reader of ACCC Media Releases I suggest around 3 "yawners" to every scoop.*

*It is still unclear to me whether this ignorance on the part of legal advisors is genuine or feigned, but it is nothing new. During my seven years at the ACCC, I dealt with many out-of-court settlements in which the guilt of the corporate target was beyond dispute. I still recall my hysteria when \$3,000-a-day lawyers counselled their clients not to sign any settlement without a concession from the ACCC in the terms proposed by Minters as its "Code" – ie 24 to 48 hours notice of any press release that might be issued.*

*This would permit the lawyers to apply their "PR expertise". Mostly this involved them putting pressure on ACCC staff to remove a "very" here and there, then charging top dollar for the hours it took to do so. Meanwhile, for any story of actual interest, key journalists had been well and truly briefed; the subsequent "release" amounted to a signal that the pre-written story could now be printed.*

*Frankly, corporate discomfort with the ACCC's media strategy is not surprising; the journalists working in the ACCC give much better PR advice to their employer than the lawyers and rocket scientists used by its opposition.*

*In my submission, this subject is a total furphy that threatens to waste your scarce and precious time. Those who have raised it deserve nothing more than a one-line scolding that draws attention to their ignorance of media processes. If you accept my submission, you might have time to address the topic set out in the next section – despite its absence from your terms of reference!*

**C O M P L I A N C E   P R O G R A M S   A N D   T H E   A C C C**

*Since 1988, the TPC/ACCC has sought to include undertakings or Orders as to future compliance in the matters it selects for enforcement action. From 1988 to 1993 it used "deeds of settlement", the enforceability of which was questionable. From 1993 onwards, it has used its newly-granted power to accept enforceable undertakings (section 87B).*

*In recent years, the ACCC has tended to prefer Consent Orders over enforceable undertakings; but whatever the process, the objectives as I understand them have been as follows:*

- *to give due recognition to the mutual interest of regulators and the regulated by directing resources away – in what might be termed "open and shut cases" – from pointless adversarial combat towards mutually beneficial outcomes*
- *to increase the ACCC's caseload, and better utilise its scarce resources, by facilitating the rapid, out-of court disposal of such cases*
- *to obtain from each "target" company an enforceable promise to introduce compliance measures into its business activities, or upgrade those that already exist – thus improving corporate behaviour in both the target company (by way of the measures) and the business community generally (by way of example).*

*This approach was largely driven by the former Deputy Chairman of the TPC/ACCC, Allan Asher. It has been adopted by several other regulators, and has been included in certain legislation: eg Managed Investments Act. A whole new industry has been spawned from this aspect of the ACCC's work, along with an industry association (the Association for Compliance Professionals of Australia, known as "ACPA") and an Australian Standard (AS3806-1998).*

*Throughout this period, and including the several years in which I was nominally responsible for this activity, the ACCC has failed to meet its responsibilities in the supervision of "trade practices compliance programs", as they are now known. Its failure in this regard is very easy to understand and it is unfair, albeit unavoidable, to single out one agency: most enforcement agencies, as the name suggests, would have a bias towards enforcement.*

*There's nothing glamorous about supervising settlements, and in enforcement agency culture it is a dead end street. Those who are responsible for such work, and again I include myself in this analysis, represent one of five "types": junior (waiting for "proper" work), senior (waiting for retirement), headed for private practice ASAP, unpromotable (eg unskilled or insane), or driven by zealotry. This is, I am sure, the reason for the profound errors of policy and practice that have characterised the ACCC's compliance work for at least a decade.*

*Before proposing a solution to the problem, I would like to share some examples from the public record (ie reported cases) and my consultancy experience. For the sake of brevity and to avoid any accidental defamation, I will leave out most identifying details; but I can supply them on request*

1. *A Federal Court Consent Order obtained by the ACCC required a company to engage a compliance expert; that expert had to be approved by the aforementioned ACPA. It follows that despite its constitutional incapacity to provide any such approval, ACPA was bound – on pain of contempt – to do so. At no point in the process did the ACCC inform ACPA of its plans, or indicate on what basis ACPA could be joined to the action or the Order.*
2. *In at least one recent case the ACCC has required a "trade practices compliance audit" to be undertaken – by the same advisor who was responsible for the breach of the law that was the subject of the case.*
3. *In ACCC v Rural Press (original decision), the Court rejected the ACCC's submission that it should order Rural Press to adopt a program based on AS3806. This decision effectively shredded the Standard that has guided such programs since 1998.*
4. *In one instance I was present as a company hastily complied with an enforceable undertaking made three years earlier, with a time limit of one year – ie they were two years behind schedule. They needed to do this because they hoped to negotiate another such undertaking, in respect of a subsequent breach of the law. But they needn't have bothered: ACCC enforcement staff were unaware of the original undertaking, and were not about to change their strategy upon being informed of it.*
5. *And in ACCC v Universal Music, the ACCC's "compliance expert" was unable to give the Court any insight into the flaws the defendant's compliance program may have had, and to which the breach might, by inference, be attributed. So inadequate was this testimony that the Court declined to make any compliance-related Order at all!*

*I could cite scores of similar examples, but these should suffice to illustrate my point. In any case, such matters are outside the scope of your Review. But I will take this opportunity to offer some possible solutions.*

### *Option 1*

*One approach would be to mandate a proportion of ACCC resources to be expended on the supervision of compliance programs – on an annual or case-by-case basis. It is unlikely that this would work: rubbery resource accounting, along with “emerging enforcement priorities” would soon swallow any notionally earmarked resources. Hardened bureaucrats are adept at this, and in any case the public prefers its enforcers to be out there enforcing.*

### *Option 2*

*A better approach, in my view, would be to recognise that all enforcement agencies have the same cultural difficulties with the supervision of compliance programs as the ACCC does. I therefore recommend the establishment of a specialist agency whose role would be single and specific: the supervision of compliance undertakings submitted to Commonwealth enforcement agencies.*

*Now my consultant colleagues would say, and I agree, that the actual work to be done in relation to a compliance undertaking ought appropriately to be done by private sector professionals. The problem is that without some credible reporting mechanism at the end of the road, we professionals get sloppy. For example: large sums of money are currently expended on “trade practices compliance audits” even though there is no technical definition of what such an audit should include, and no two audits are likely to resemble one another.*

*The proposed agency would by definition be lean and mean, since its fundamental task is quite simple: the oversight of competent, ethical professionals from the private sector. But as a one-role specialist it would have sufficient motivation and resources to:*

- *ensure that private sector compliance providers, especially auditors, are genuinely independent of the original lawbreakers;*
- *develop an Australian Standard with measurable, concrete elements instead of motherhood statements; and*
- *contribute to a career path for compliance professionals in government.*

*As previously noted, the above issues are not included in your terms of reference. If you nevertheless find some merit in these observations, I trust you will forward them to the appropriate institutions and/or individuals.*

*Greg d'Arville  
PRINCIPAL  
23 July 2002*

