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Ms Serena Beresford-Wylie
Director
NADRAC Secretariat

By email: nadrac@ag.gov.au

Dear Ms Beresford-Wylie

NADRAC Enquiry into Alternative Dispute Resolution and Civil Proceedings

Thank you for the opportunity to comment on NADRAC's Issues Paper *Alternative Dispute Resolution in the Civil Justice System*. Please find below our comments, focused in particular on questions 7.1 and 7.2 of the Issues Paper, namely: in what types of matters the ACCC uses ADR; and what are the characteristics of disputes where it is inappropriate to use ADR.

Background

The ACCC (incorporating the AER) is an independent Commonwealth statutory authority, which was formed in 1995 to administer the *Trade Practices Act 1974* (TPA) and other acts. The ACCC promotes competition and fair trade in the marketplace to benefit consumers, business and the community. It also regulates national infrastructure services. Its primary responsibility is to ensure that individuals and businesses comply with Commonwealth competition, fair trading and consumer protection laws.

Despite its wide-ranging functions, the ACCC is a relatively small regulatory agency of approximately 750 staff across Australia.

Enforcement and Compliance

In terms of its enforcement and compliance activities, the ACCC considers the use of a broad range of possible compliance responses (including, but not limited to, litigation), which provides considerable scope to tailor responses to the particular circumstances under assessment. We are aware of, and utilise ADR in certain circumstances, as outlined below. However, we would be very concerned if the

ACCC's discretion to determine the appropriate compliance response in any given case were to be curtailed.

The path taken by the ACCC upon receipt of a complaint or inquiry generally depends upon the seriousness of the alleged breach of the law – for example, its impact on consumers and the economy, and whether it was a blatant breach of the law.

Most matters can be resolved administratively. This can vary from a letter to the firm by the ACCC through to a court enforceable undertaking by the trader. Sometimes firms are unaware that they have acted in a way that raises trade practices issues. Some firms take up compliance programs to bridge the gap.

However, in a small proportion of matters, the ACCC institutes legal proceedings to enforce the law. This constitutes less than 1% of the complaints and inquiries received by the ACCC. In accordance with our obligations under the *Legal Services Directions 2005*, legal proceedings are only instituted after consideration has been given to ADR.

The discussion paper advises that ADR includes an 'umbrella of processes' whereby an impartial person assists those in dispute to resolve the issues between them (p3). Such a formal mechanism, where a third party is asked to assist the ACCC and another party to resolve issues, is mainly used by the ACCC in or around stages of litigation.

Legal proceedings are utilised by the ACCC to stop the offending conduct and to achieve deterrence. In some circumstances, proceedings may be significant in terms of their precedent value. It is often because the trader is unwilling to stop the conduct that the ACCC is compelled to take the matter to court – at times, alternative dispute resolution may be ill suited to the object that the ACCC is trying to achieve. Other approaches, such as the use of the new fast track procedures in the Federal Court, may be better suited to achieve a quick resolution in such circumstances.

However, there is scope for the ACCC to use ADR, and we do use it in particular cases. For example, it may assist the ACCC to narrow the issues with a party – particularly when they are willing to accept there may have been a contravention of the TPA. Formal mediation or information negotiation with parties has, in certain instances, resulted in a narrowing of contested issues.

Regulatory functions

The ACCC's regulatory functions give rise to a different type of litigation: namely, administrative law appeals against our decisions, most commonly judicial review in the Federal Court and merits review in the Australian Competition Tribunal. We have found that there is relatively little scope for the use of ADR in these cases because:

- the disputes are frequently multilateral, involving various industry participants;
- it is highly unusual for the parties to be able to negotiate an agreed Statement of Facts due to different technical approaches to issues (both legal and technological);
- the ACCC is generally constrained in its role by the *Hardiman* principle; and

- guidance is often sought from the Court/Tribunal on the validity of a particular approach (including economic methodologies and models) or a question of statutory interpretation.

Future discussions

I understand that ACCC staff will be meeting soon with NADRAC representatives to explore these issues further, and we will be happy to provide more details in this context. If we can be of any further assistance in the meantime, please do not hesitate to contact Elissa Keen, on 02 6243 1072.

Yours sincerely



Brian Cassidy
Chief Executive Officer