

**Advertising Federation of Australia
Presents**



***“Consumer Protection, Advertising and the
ACCC”***

***Commissioner Sitesh Bhojani
Australian Competition and Consumer Commission***

Sydney 29 October 2001



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Good evening ladies and gentlemen. Just as Greg's (Sam Miguel's) Law of the Jungle on-line compliance package is not intended to turn commercial, creative or accounting people into lawyers - my presentation is not intended to turn you into lawyers either!

I want you to walk out of here as better informed - commercial creative or accounting people.

So as we go through our journey into cases to look at the sharp end - where the law and advertising conduct have crossed paths - I would urge you to focus on the insights into human behaviour and the law's approach to various types of advertising conduct to gain a better understanding of the interaction between advertising and the consumer protection laws.

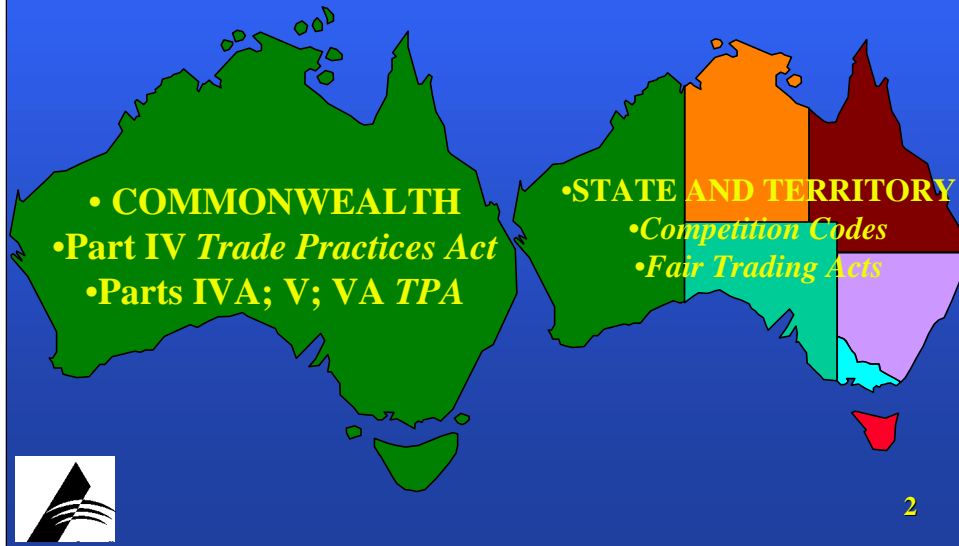
Ladies and gentlemen as we go through our journey into the law tonight we will visit -

- telecommunications - or the mobile phone sector;
- Women's fashion;
- SEX (believe it or not!)
- the rugged world of 4 wheel drives;
- retailing;
- health insurance; and
- hardware -

before landing on the crucial issue of compliance.

Let me start with some preliminary matters to put the issues in an appropriate context....

Australia's Competition and Consumer Protection Laws



What are we talking about when we talk about Australia's competition and consumer protection laws?

Well at the Commonwealth level when we talk about competition laws we are essentially talking about the sections in Part IV of the *Trade Practices Act* and at the State or Territory level we are talking about the *Competition Codes* of the State or Territory. For example, the Competition Code of Queensland.

When we talk about consumer protection laws - at the Commonwealth level we are essentially talking about the sections in Parts IVA, V and VA of the TPA and at the State/Territory level we are generally talking about the Fair Trading Acts .

Tonight's focus will be on the consumer protection side.

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Policy Objective of the *Trade Practices Act 1974*

“...to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”



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Before turning to that consumer protection focus, let me highlight in an *overall sense* what this piece of legislation known as the Trade Practices Act is trying to achieve. Why has the Commonwealth Parliament made this law?

Well, the overall policy objective of this law is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

So as you can see 3 general aims

- to promote competition;
- to promote fair trading; and
- to ensure consumers are protected

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It may surprise some of you to know that the Commission **supports** honest and accurate advertising and selling practices for at least 3 reasons:

First, they provide valuable information to consumers about products and services;

Secondly, they allow consumers to make informed choices, between competing products and services; and

Thirdly, they are good for competition, by allowing businesses to promote their goods and services and even differentiate their goods and services from those provided by their competitors. Remember, we are a competition agency as well as a consumer protection agency.

However, to achieve these objectives the advertising and selling practices must be honest and accurate.

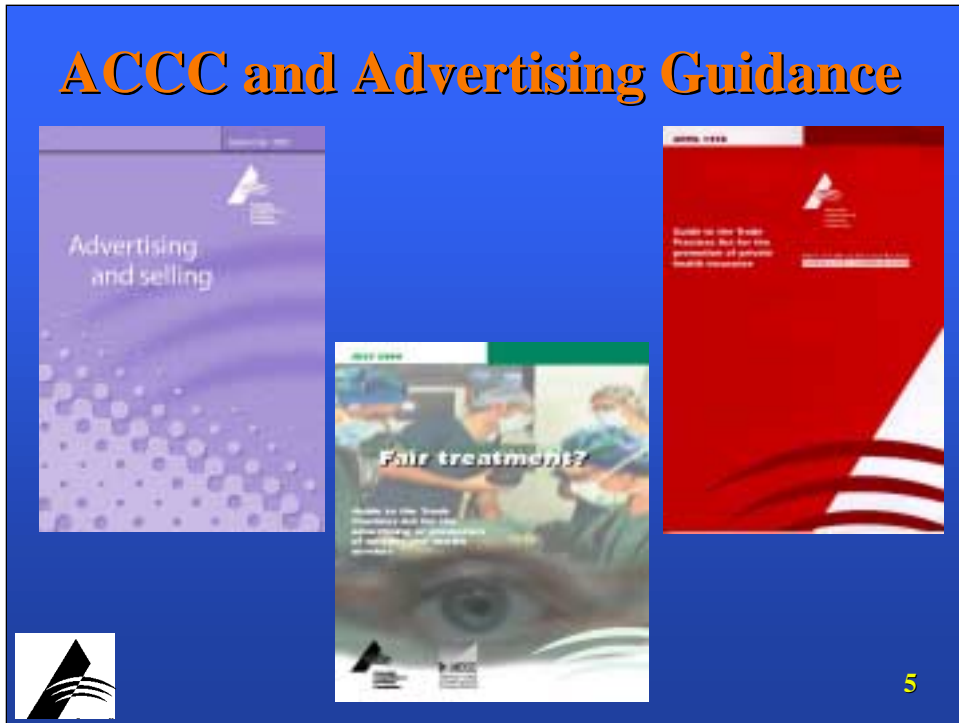
False, misleading or deceptive advertising and selling practices do not achieve those objectives and are of course illegal under the Commonwealth Trade Practices Act and also under State and Territory Fair Trading Acts.

If problems arise, the Commission will generally deal with or take action against advertising and selling practices having an international or national impact or involving more than one State or Territory.

Our colleagues in the State and Territory Fair Trading offices will generally deal with matters having a local concern.

We have good liaison arrangements with State and Territory consumer agencies to ensure a

ACCC and Advertising Guidance



It is also important for everyone here to appreciate that the Commission has spent a lot of time and effort assisting advertisers and their advisers on how the TPA applies and the issues of concern from an ACCC perspective. That's because an **overall objective is to achieve compliance** with the law.

For many years the Commission has issued guidelines on the advertising and selling provisions of the Act. These have been generic [e.g the ACCC “best seller” publication Advertising and Selling and specific to various sectors [e.g. health insurance sector, and medical and health sectors].

However, it must be reinforced that any guidelines issued by the Commission are not a substitute for the law.

A few years ago the Commission the Commission specifically conducted a series of seminars in each capital city (except Darwin) on the application of the TPA to advertisers and advertising agencies. The Commission is of course happy to participate in these seminars organised by the Australian Federation of Advertisers - as part of its continuing educational and guidance role.

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ACCC and Consumer Protection



- ACCC focus on conduct not just advertisements

“TPA & Accessorial Liability”

- The law applies to advertisers and business advisors or persons who aid & abet or induce or are knowingly concerned in a contravention



The final preliminary comments I want to make in setting the context are to remind you that although we will focus on advertising for tonight’s session the law and the ACCC is focused on misleading or deceptive **‘conduct’** no just misleading or deceptive **‘advertising’**. And that the TPA extends to cover your conduct as advertising agencies acting on behalf of advertisers through legal principles known as “accessorial liability”. For example, the law applies equally to those advertising agencies who aid & abet, or induce or are knowingly concerned in a contravention by an advertiser.

In a nutshell - your conduct as advertising agents is covered by the TPA.

Ok - so, lets start that journey into the case law for valuable insights.

We begin with an advertising promotion for mobile phones.

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ACCC and Advertising Cases

■ *TPC v Nationwide News Pty Ltd*



[1996] ATPR 41-519
[1997] ATPR 41-543

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Nationwide conducted a promotion in newspapers published by it and also in advertisements on television and radio. The promotion concerned an offer to readers of a “free” mobile telephone. As a condition of receiving the phone, the reader was required to enter into a contract which involved a total expenditure of \$2,294.90. Nationwide was convicted only on 6 charges and fined \$120,000. It appealed against the conviction and level of fines. The Full court of the Federal Court dismissed the appeal and said:

An advertiser relies on common understandings of the word “free” at its peril. Any respect in which goods or services offered as “free” may not be free should be prominently and clearly spelled out so that the magnetism of the word “free” is appropriately qualified.

2. An offer to a newspaper reader of a “free” mobile phone without any reference to conditions, was an offer to cause the reader to become the owner of such a phone without his or her first having to outlay money or to undertake to do so. The addition of the words “conditions apply” did not detract from that position: rather, they indicated that after satisfying conditions, the reader would be entitled to become the owner of a mobile telephone, still without his or her having had to outlay money or undertaking to do so.

3. A reader, viewer or hearer of the advertisement might reasonably have expected that there would be, for example, a limit on the number of free mobile phones on offer, a prescribed mode of and time for acceptance of the offer, and perhaps even an obligation to buy a small number of newspapers at their standard price, or to send a number of coupons from the newspaper. Conditions of that kind would not be understood to detract from the “freeness” of the mobile phone. However, a reader, viewer or hearer of the advertisement would not have expected the conditions referred to in the advertisement to compel him or her to enter into a contract of a particular kind with a particular service provider requiring outlays such as those payable here totalling \$2,294.90.

4. The conjunction of the asterisk and its reference to the expression “conditions apply” with the word “FREE” did not distinguish some advertisements from others. What was

ACCC and Advertising Cases contd

■ *TPC v Cue Design Pty Ltd & anor*



[1996] ATPR 41-475

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Moving on to women's fashion. The fashion house, Cue, was fined \$75,000 for attaching misleading price tags to its garments. The offences occurred in the lead-up to Christmas in 1994.

Two companies in the Cue group were convicted in the Federal Court on 30 charges of having made false and misleading representations about the price of their garments. The companies, Cue Design Pty. Ltd. and Cue & Co. Pty. Ltd, were fined for breaches of section 53(e) of the *Trade Practices Act*, after the companies pleaded guilty to the charges.

The Cue group designs and manufactures fashion garments for young women. It has a retail chain comprising 80 stores located across Australia. The charges involved Cue stores in Adelaide, Perth, Melbourne, Brisbane, Canberra and Hobart.

The Australian Competition and Consumer Commission initiated the action against the fashion house, alleging that in the week before Christmas Cue released nationally a new range of shorts, skirts, vests and tops from its warehouse in Sydney. Swing tags attached to each garment showed two prices; the higher price was crossed out and prices ranging between \$13 and \$56 less were written underneath.

The ACCC alleged this would lead shoppers to believe that the garments had previously been sold at the higher prices and had now been discounted. In fact, the garments had never been sold before. In imposing the fines

Justice O'Loughlin also said:

“There are other mitigating factors that must be mentioned. For example, it is not suggested that the higher prices on the swing tags were false prices. They were the prices at which the garments would have been offered for sale were it not for the December management decision to change the sales policy for the Christmas period. In addition, there was no advertising only signs that were used in relation to the garments (in addition to the swing tags) were promotional aids within the shops such as “Cue Designs Just Arrived”, “New Cue” and “Cue Design Specially priced”. It should also be mentioned that there is no suggestion that staff were instructed or encouraged to engage in any subterfuge. This was clear from some of the witness statements in which staff readily disclosed that it

ACCC and Advertising Cases contd

■ *ACCC v On Clinic Australia Pty Ltd & Ors*



As I said our journey would touch on sex.

This case also raises the issue of some key words and phrases:

The Court held that the Commission had made out its case that five groups of representations made by On Clinic were misleading and deceptive on a fair and reasonable reading. The representations were made in newspaper advertisements and related to the efficiency, costs, comparative advantages of treatment, and advice proffered by the respondents' clinics for men suffering from impotence. The representations were as follows:

- (a) (i) "The **ONLY** Impotence Treatment Ever Proven to Work!"; or
(ii) "improve your **SEX LIFE** with the **ONLY** impotency treatment **EVER** proven to work";
- (b) (i) "Bulk Billing. (No charge to you only medicare)"; or "All visits 100% Bulk Billed. Medicare (No cost to you)";
- (c) (i) "4 treatment programmes with **GUARANTEED RESULTS**, in just 2 visits ..."; or
"... can be diagnosed and treated by medical doctors in only 2 consultations.";
- (d) (i) "4 treatment programmes with **GUARANTEED RESULTS** ..."; or
"**PROVEN AND GUARANTEED** to work"; and "Diagnosis using unique medical equipment."

In reaching the conclusion that the respondents' conduct was misleading and deceptive Justice Tamberlin made the following comments which are instructive: for the topic of advertising:

"The words "only" and "ever" are quiet unequivocal and admit no exceptions"
and as to costs for the patient and to the efficiency or speed of outcome he said:



The advertising campaign represented that a vehicle described as a Patrol RX Turbo Diesel was for sale at a price of \$39,990. The model of the vehicle displayed in the advertisement was in fact a Nissan Patrol RX 4.2 Litre Diesel (a “Patrol RX 4.2”), styled with over fender flares and wider wheels than the Patrol RX Turbo Diesel which was offered for sale in the advertisement. The vehicle offered at the stated price was a Patrol RX 2.8 litre Turbo Diesel (a “Patrol RX 2.8”)

The first charge alleged that the representation contained in the advertisement would have led a reasonable person likely to be buying a four wheel drive vehicle to believe that the vehicle offered for sale at \$39,990 was styled with over fender flares and wider wheels. However, the representation was false in that a Patrol RX 4.2 was not offered for sale at \$39,990 and there was no Patrol RX 2.8 with over fender flares and wider wheels unless these were fitted as optional extras. In short, the pictorial representation of the vehicle advertised showed the wrong vehicle.

The second charge arose out of a television broadcast which occurred on Channel 7 in Adelaide on 10 Nov 1996. The advertisement represented that consumers would save “a whopping \$6,290 on a brand new RX Turbo Patrol at only \$39,990 including free airconditioning”. The representation described the amount of \$6,290 as “end of year” savings. The charge alleged that the advertisement would have led a reasonable person likely to buying a four wheel drive vehicle to believe that the savings which had been offered to consumers for sale prior to 1 Oct 1995 at the price of \$44,065, had since 1 Oct 1995 been offered for sale through dealers at \$39,990. The advertisement was therefore false or misleading in that the only true “end of year” saving was the value of the free air conditioning, being \$2,195.

The third charge arose out of further advertisements concerning a Patrol RX 2.8. The same pictorial representation of a Patrol RX 4.2 styled with over fender and wide wheels was again depicted in the advertisement, and erroneously described as for sale at \$39,990. The advertisement contained, in small print running vertically up the right hand side of the advertisement adjacent to the picture of the Patrol RX 4.2, the disclaimer that the picture was for “illustration purposes only”. The third charge was laid as a representative one covering

ACCC and Advertising Cases contd



To underscore the importance with which the Federal Court regards the issue of misleading or deceptive advertising and to give you an idea of the consequences that could happen - just imagine if you were the advertising agent whose client had to broadcast this sort of corrective advertisement by order of the Court.

Play Target Video (- 40 seconds)

Ladies and Gentlemen, the Commission has no doubt the apology from Target is sincere. The Commission also acknowledges that Target's co-operation in ultimately resolving the matter saved considerable time and cost.

The point of raising the issue tonight is twofold first, to let you know what the Court thought of Target's television ads - well Justice Malcolm Lee of the Federal Court said this

“In relation to the television advertisements, the impression to be gained by consumers from the advertisements was that no item of clothing or houseware was excluded from the respective sales. The voice-over, which often in television advertisements adopts an authoritative and informative role did not mention that any item would be excluded. That impression was reinforced by the voice-over statement “25 percent off every stitch of clothing”, and “15 to 40 percent of all housewares including tableware, furniture, kitchen appliances, cookware and lighting”. The effect created by this latter statement was reinforced by the listing of items that constituted part of the class of goods on sale. Consumers who relied on the sound content of the television advertisements, not attentively watching the television, would not have known that any item was excluded. As far as the visual images were concerned, the size of the words containing the qualifying advice, compared with the size of the Target name and rondel, was not sufficient to distract attention from the latter. That information was given at the end of each advertisement when the viewer's attention may not have been as keen as at the beginning. Furthermore, it is often the case that the first impression will be the lasting impression”.



ACCC Alleges Misleading Conduct by Medibank Private

In October, 2000 the Commission instituted proceedings against Medibank Private Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive advertising of its health insurance products.

In one advertising campaign, the ACCC alleges Medibank Private advertised 'no rate increase in 2000' in relation to its Package Plus insurance products when the rates for those products increased on 1 July 2000. The ACCC further alleges that Medibank Private's call centre staff made representations to consumers that the rates for its Package Plus products would not increase until next year.

In a second campaign, the ACCC alleges that Medibank Private's advertised an offer to consumers who switched from another fund to Medibank Private of 'any waiting periods waived' and 'get 30 days free if you change to Medibank Private' in newspaper advertisements in August 2000 but:

- failed to disclose, or adequately disclose, that only the 2-month general waiting period and the 6-month optical waiting period were waived; and
- failed to disclose, or adequately disclose, that conditions applied to the offer of 30 days free health insurance.

PLAY VIDEO - (~3-4MIN)

The matter is continuing through the Court processes and Medibank Private is defending the case.

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ACCC Alleges Misleading Conduct by MBF: Advertising Agency Joined

In February this year the Commission instituted proceedings against Medical Benefits Fund of Australia Limited in the Federal Court, alleging false, misleading and deceptive advertising of its health insurance products.

John Bevins Pty Ltd, the advertising agency involved in formulating MBF's campaign, has been joined in this action as it is alleged that the agency was knowingly concerned in the contraventions.

The ACCC alleges, MBF print and television advertisements contained pregnancy related images in an endeavour to entice consumers to transfer to or join MBF private health insurance. The ACCC alleges that the advertisements contained representations to the effect that pregnant women joining or transferring to MBF would be covered for medical and hospital expenses arising from the pregnancy. In fact, pregnant women joining or transferring to MBF would not be covered because of a twelve month waiting period for pregnancy related services. It alleges the twelve month waiting period was referred to in the advertisements in fine print disclaimers. The ACCC alleges the disclaimers were inadequate and unlikely to come to the attention of consumers. The ACCC alleges that readers and viewers of the advertisements were unlikely to appreciate that a twelve month waiting period applied to pregnancy related medical and hospital expenses.

The matter is going through the Court processes and MBF and John Bevins Pty Ltd are defending the case.

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■ *ACCC v Mitre 10 Australia Limited*

Federal Court VIC File No 1033 of 2001

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Moving on to hardware, in September 2001 the Commission instituted proceedings against Mitre 10 Australia Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive conduct in television, newspaper and radio advertising in connection with a discount sale.

The ACCC **alleges** that Mitre 10's '15% OFF STOREWIDE' and '15% Off everything' advertising campaign run in connection with its sale held on 15, 16 and 17 June 2001:

- failed to disclose or to disclose adequately that the usual or marked price of everything at Mitre 10 outlets was not reduced by 15%; and/or
- failed to disclose or to disclose adequately that the usual or marked price of all goods at Mitre 10 outlets was not reduced by 15% storewide.

The ACCC **alleges** that Mitre 10 Australia Limited breached section 52 of the *Trade Practices Act 1974*, which prohibits conduct by a business that is misleading and deceptive, or likely to mislead or deceive, and section 53(e) of the Act, which prohibits a business from making false and misleading claims about the price of goods.

The first directions hearing of this matter is scheduled in the Federal Court in Melbourne on 7 December 2001. So at this stage these are only ACCC allegations of a breach by Mitre 10.

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Risks for Advertising Agencies

- Embarrassment/loss of reputation
- Cancelled contracts/loss of work
- Legal liability/corporate & individual



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Embarrassment/loss of reputation

Businesses tell ACCC they relied totally on the ad agency

- “they’re the professionals” & “we pay them huge fees”

including : declarations of unlawful conduct,

- convictions
- injunctions - orders restraining you from or requiring to take specified action
- pay damages/compensation
- take corrective Action/advertising up to \$220,000 for individuals
- Pay fines [up to \$1.1 M for corporations & costs]

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Creating “Culture” of Compliance



- “Culture” - Skills, beliefs & customs of a group of people, passed on from one generation to another; development or improvement by education or training.



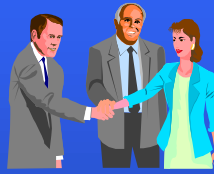
Ok so let me touch on the key issue of Compliance. Given what you have already heard I'll limit my comments to some key points.

Yes, there is an Australian Standard on Compliance Programs or Systems and I would urge you to study it. The focus has to be on creating a 'culture' of compliance.

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Compliance **SYSTEM** or **PROGRAM**

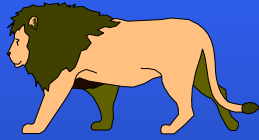
- “System” - A combination of things or parts forming a complex whole; ordered body of methods; scheme or plan; orderly way of doing something.
- “Program” - Plan to be followed
- That is, **MORE** than just a manual, video or seminar



When we talk about a “Program” or “System” we are talking about much more than just a manual, video or attendance at seminars.

[Next slide]

Elements of an effective compliance system or program



- Total Commitment from Board and/or CEO - Leadership is important *and* leading by example is critical.



- Recognise the different skills needed to achieve a “system” (Legal skills; Training skills; management skills; Auditing skills; etc)



- Set up a team with necessary skills chaired by CEO &/or reporting to Board



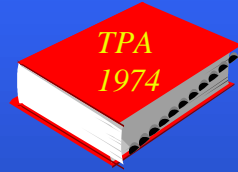
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The 8 key parts of a compliance system or program I would urge you to focus as follows [as per dot points]

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Elements of an effective compliance system contd...

- Identifying and assessing Competition Consumer Protection Law risks
- Public Commitment - stated Policy
- Adequate resources to implement and maintain system
- Regular Audit to check effectiveness
- On going review to maintain currency of system and continuous improvement



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A further helping hand...

Checklist to assist compliance



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To further assist those of you here tonight with compliance issues I have prepared a Checklist to assist with compliance with the *Trade Practices Act* by Advertisers or their advertising agencies.

Copies are available from [Kerry Battersby??] tonight.

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In Conclusion...

- **TPA extends to cover conduct of advertising agencies**
- **ACCC ready willing and able to work with businesses in advertising industry wanting to comply with the law**
- **ACCC ready willing and able to take action against those businesses failing to comply with the law**



[End of presentation]