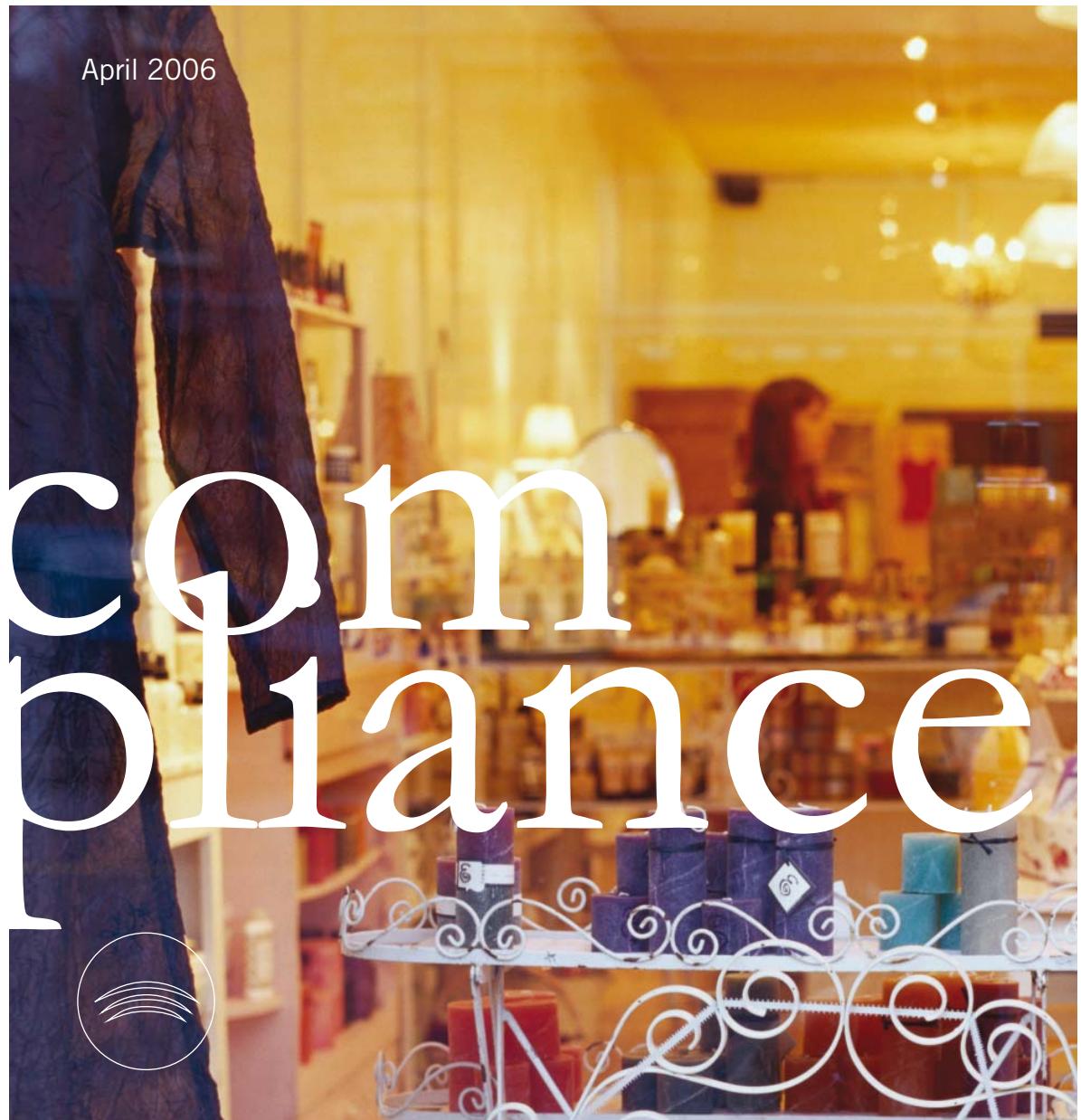




Australian
Competition &
Consumer
Commission

Small business guide to trade practices compliance programs

April 2006



A photograph of a shop interior, likely a candle store, with warm lighting and various candles on display. The word "compliance" is overlaid in large, white, serif capital letters across the center of the image.

compliance



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ISBN 1 920702 93 8

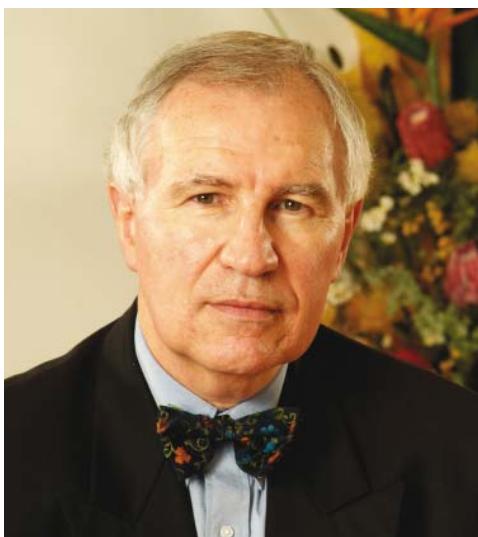
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Important notice

This publication is a summary designed to give you basic guidance on the ACCC's views of trade practices compliance programs. It is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible, there may be some generalisations. Consequently, *Small business guide to trade practices compliance programs* is not to be construed as legal advice.

Produced by the ACCC Publishing Unit 04/06.

Foreword



In the ACCC's experience, one of the major challenges confronting small business is deciding how much time to devote to running the business and how much attention to direct towards ensuring that the business complies with its regulatory obligations. The ACCC understands that, despite the best efforts of its owners, small businesses are not able to devote the same levels of time and resources to compliance issues as large businesses.

Nevertheless, small businesses that are determined to succeed should make a commitment to compliance, obtaining some professional trade practices risk assessment and compliance advice.

The *Small business guide to trade practices compliance programs* is designed to promote awareness of trade practices compliance issues in the small business sector and offer guidance to small business operators in their efforts to comply with trade practices obligations.

This guide goes on to provide information on what the ACCC is likely to require from a small business in the event that it has failed to meet its trade practices obligations.

When the ACCC considers that a company may have breached the Trade Practices Act, it has the option to resolve the matter by accepting a court enforceable undertaking from the business. These undertakings may require the company to implement, maintain and regularly review a trade practices compliance program. The ACCC may also seek similar outcomes if the matter goes to court.

The ACCC does not seek compliance programs as a punishment. Its purpose in requiring the implementation of compliance programs is to ensure that the business develops the skills and capacities it needs to minimise the risk of future compliance failures.

I encourage small businesses to use this guide and to seek professional advice on what requirements they need to satisfy, whether they are developing a compliance program as a result of a settlement with the ACCC or whether they are implementing a compliance program voluntarily.

You can call the **ACCC small business helpline** on **1300 302 021** if you require any further assistance or guidance. The dedicated ACCC small business team is available to answer your questions.

A handwritten signature in black ink, appearing to read "John Martin".

John Martin

Commissioner

*Australian Competition and
Consumer Commission*

Contents

What's in this guide.....	3
What is a trade practices compliance program?	3
Trade practices training	7
Complaints-handling system	7
Product safety	8
Appointment of compliance officer	9
Review and reporting	9
ACCC monitoring and administrative processes	11
Further information	11
Appendix A.....	13
Trade practices compliance program template undertaking level 1	13
Trade practices compliance program template undertaking level 2	15
ACCC contacts	19

What is a trade practices
compliance program?

program



What's in this guide

This guide explains the key concept—what a compliance program is—and provides a brief overview of the trade practices compliance elements all small businesses should consider implementing to minimise their risk of a trade practices breach.

It then presents a detailed discussion of the compliance program elements the ACCC considers essential to enable small businesses to address their trade practices risks. It also sets out the elements of the ACCC level 1 and 2 trade practices compliance program template undertakings and what small businesses should be aware of if they become subject to compliance program requirements under a section 87B undertaking or a court order. This discussion details the obligations prescribed by each of the compliance program elements.

Finally, the guide explains the ACCC's compliance program monitoring function.

What is a trade practices compliance program?

For small business it is important that the risks of contravening any legislation are comprehensively assessed at the business start-up stage and at intervals as the business develops, and that strategies are adopted to minimise those risks. An initial risk assessment is something that can be undertaken by a professional business/legal adviser.

The business/legal adviser may recommend a tailored trade practices compliance program to manage any identified risks.

A trade practices compliance program is a mechanism that can both assist in reducing the risk of breaching the Trade Practices Act and in remedying any breach that may have occurred. It contains a number of essential elements and can only be effective if they are correctly implemented and operational. It is not enough to simply have a compliance program 'on paper'. It must be incorporated into the business and become part of the way the business functions.

The ACCC considers that an effective small business compliance program can be as simple as implementing:

- > **regular trade practices training for all relevant staff (those employees that may place the business at risk of a trade practices breach)**

Training underpins the development of any compliance program. Small business staff must be provided with regular training to reinforce the trade practices compliance dimension of their work and to be able to prevent inadvertent breaches of the Act. Effective training can also enable employees to identify trade practices breaches by competitors.



> **an effective complaints-handling system**

As well as having a positive impact on the small business' relationship with its customers, effective complaints handling provides an early warning system if the complaint gives rise to a systemic trade practices issue. Well-trained staff and a capable person entrusted with the responsibility for compliance (see below) should be able to remedy the issue and take measures to minimise the chances of a similar failure recurring.

> **an effective product safety and recall program (if applicable)**

Some products are subject to mandatory standards. All businesses need to comply with the standards relevant to their products. An effective product safety and recall program will help identify any potential risks, the relevant product safety obligations and, in the event of the risk arising, a means to remedy the problem.

> **a position responsible for compliance within the small business, i.e. a compliance officer**

The appointment of a compliance officer¹ means the responsibility for the business' compliance with its regulatory obligations rests with that person. It also makes it their job to ensure the business is up to date with all regulatory developments and its products are in accord with the relevant mandatory standards. The ACCC considers that the compliance officer should be supported in their job by all staff as, ultimately, compliance with the law is everyone's responsibility.

> **regular compliance reviews to ensure continual improvement**

Regular reviews of all compliance elements are highly recommended as they help ensure the compliance program continues to meet its purpose, i.e. to be effective in minimising the risk of a trade practices breach by the business.

All of the elements listed above feature in the ACCC level 1 and 2 trade practices compliance program template undertakings. The range of template undertakings (levels 1 to 4) was developed by the ACCC primarily to clarify its expectations of companies subject to trade practices compliance program requirements under section 87B undertakings or court orders, and to offer guidance to businesses seeking to implement compliance programs voluntarily.

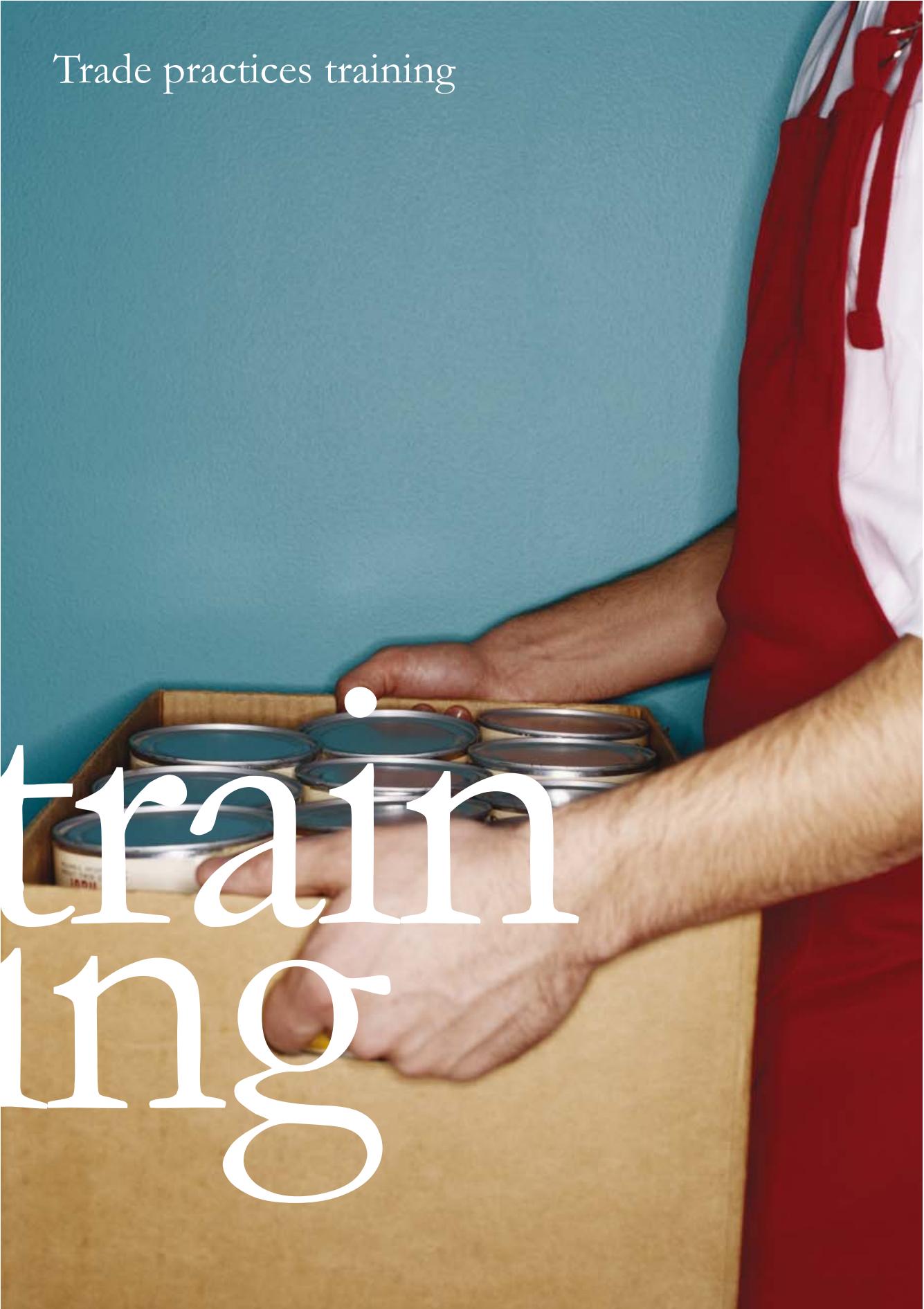
The level 1 template undertaking contains the requirements the ACCC considers suitable for micro businesses; level 2—requirements suitable for small businesses; level 3—medium businesses; level 4—large businesses.

Template undertakings level 1 and 2 are the focus of this guide and are discussed in detail in the following section.

1. In the small business environment a compliance officer may be a director of the company or a person appointed by a director to ensure that the business complies with its regulatory obligations.

Trade practices training

train
ing



Trade practices training

In the ACCC's experience, a significant number of trade practices contraventions by small businesses occur through a lack of awareness of their obligations under the law. For this reason targeted trade practices training is considered the core element of small business compliance programs and will always be sought by the ACCC.

Small business proprietors looking to set up trade practices training for their employees may choose to use the services of a trade practices lawyer or a qualified compliance professional to visit the business and conduct training for all staff. Proprietors may also choose to undergo trade practices training themselves and then instruct their employees on the relevant sections of the Act. It is the ACCC's experience that regardless of what shape the training takes it should be thorough and tailored to the specific needs of the business.

Small businesses subject to a legal obligation to undergo trade practices training may be required to comply with either a level 1 template undertaking or a level 2 template undertaking. Please contact the ACCC or speak with your lawyer if you are uncertain about your precise obligations. The requirements for trade practices training in levels 1 and 2 ACCC template undertakings are explained below.

Level 1 template undertakings require the director(s) of a business to attend trade practices training carried out by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law. On successful completion of the training the business must supply the ACCC with a certificate from the training provider confirming the training has been completed. The certificate must be sent to the ACCC within 14 days of the completion of the training.

Level 2 template undertakings require the director(s) of a small business to attend trade practices training carried out by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law. As in the level 1 template undertaking, the business must provide the ACCC with a certificate from the training provider. Once trained, the director is then required to carry out regular (at least once a year) trade practices training for all relevant employees.

Complaints-handling system

In a competitive environment a business that does not have a system for dealing with legitimate customer complaints and feedback on how its goods and services are performing in a marketplace risks being at a competitive disadvantage.

The ACCC does not expect small businesses to develop complicated systems for managing complaints. Instead, it recommends that small businesses tailor complaints-handling systems to their needs. In doing so, they should remember to ensure that the final system is capable of recording, storing and responding to trade practices complaints.

Recording and storing complaints can be as simple as keeping a book or an excel spreadsheet and ensuring that a record of the complaint is kept whenever a complaint is received.

The information that should be recorded might include the complainant's contact details, the good or service that they are complaining about, details of their specific complaint and the action that the business (compliance officer if applicable) took in response to the complaint—including when the action was taken. Below is a sample complaints-handling spreadsheet suitable for small businesses. There is no requirement that your complaints recording system be exactly like the one in table 2, as long as it is capable of recording all necessary information.

Table 2 Example of complaints-handling spreadsheet

Complainant	Contact details	Date	Product	Complaint details	Category	Escalated	Action taken to resolve the complaint

Supporting documentation should also be kept. This might include copies of receipts, copies of letters and copies of purchase orders. Effective record-keeping practices are essential to demonstrate that the complaints-handling system and the compliance program are working. If a compliance failure should occur, effective record-keeping practices may serve to protect the business and make it quicker and easier to provide evidence of a satisfactory resolution.

Responding to complaints can be done by all staff members, or if the complaint is of a more serious nature, it may be escalated to a specific ‘responsible’ person, such as a director or compliance officer.

Small businesses subject to a legal obligation to implement a complaints-handling system may need to comply with the following requirements.

Level 1 and 2 template undertakings require the business to develop procedures for recording, storing and responding to trade practices complaints and to provide the ACCC with an outline of the complaints-handling system. The outline of the complaints-handling system should demonstrate how the company records, stores and responds to trade practices complaints.

Product safety

It is in the best interests of suppliers and consumers to make sure that unsafe consumer products are removed from the marketplace quickly and competently. Consumers may suffer serious injury from unsafe products and

suppliers can be liable under the product liability provisions of the Trade Practices Act or at common law for any injuries caused by a product that fails to meet a mandatory product safety/information standard.

The task of identifying all prescribed consumer product safety standards and prescribed consumer information standards that may apply can be difficult, depending on the number and nature of products the small business supplies. It is prudent for small businesses, particularly those subject to an undertaking, to obtain specialist legal and compliance advice in relation to these matters.

The ACCC maintains a register of mandatory consumer product safety and information standards prescribed under the Act on its website at www.accc.gov.au. Guides on each mandatory standard are also available from the website.

However, there are other sources of legal obligations in relation to product safety under different regulatory regimes, for example state or territory legislation or customs legislation. These may include specific legislation in relation to therapeutic goods, food, agricultural and veterinary chemicals and motor vehicles. The ACCC recommends that your specific product safety obligations should initially be explained to you by your business adviser or lawyer.

Information about product recalls, both mandatory and voluntary, is available at www.recalls.gov.au. The publication *Product recall—a guide for suppliers* may be of particular assistance when designing recall procedures.

It also contains references to other sources of information including different regulators and state and territory legislative obligations.

Section 87B undertakings and court orders may contain specific product safety and product recall requirements. These may differ on a case-by-case basis. Any small business that is unsure of its product safety obligations should consider contacting a lawyer, a business adviser and the ACCC small business team.

Appointment of compliance officer

In the small business environment a compliance officer may be a director of the company or a person appointed by a director to ensure that the business complies with its regulatory obligations.

In those cases where a director performs the role of compliance officer, they will first need to ensure that time is devoted to thorough trade practices training. It may follow that this training will enable the compliance officer to carry out a risk assessment process that will identify existing and potential areas of exposure to a compliance failure. It may also follow that the compliance officer will then be able to train other employees to recognise and remedy trade practices risks.

Please note that the appointment of a compliance officer should not be seen as absolving directors and other managers (where those positions are present in the business) from compliance responsibilities. Everyone has a role to play.

Small businesses subject to a legal obligation to appoint a compliance officer will be required to appoint (generally within one to two months) a director or a senior manager as its compliance officer. The compliance officer should be responsible for the development, implementation and maintenance of the compliance program. If the compliance officer is a person other than a director of the business, the compliance officer should regularly report to the director on the progress of the compliance program.

Review and reporting

A critical review from an experienced trade practices lawyer, or a well-qualified compliance professional, provides an opportunity for the reviewer to determine if there are design and implementation deficiencies in a compliance program and to make suggestions on how to improve them. Compliance program reviews (if they are not a requirement of s. 87B undertakings) can also be carried out by an internal person, for example a compliance officer and discussed with the business director (if applicable). However, it has been the ACCC's experience that independent reviews are more effective than those conducted by internal staff.

Annual compliance reviews help small businesses ensure they are up to date with all their regulatory obligations and that their compliance programs are operational and effective.

The level 1 template undertaking does not prescribe a trade practices compliance program review. Small businesses subject to a legal obligation to carry out an annual compliance program review may be required to ensure that the review is undertaken in accordance with the parameters outlined for the level 2 template undertaking below.

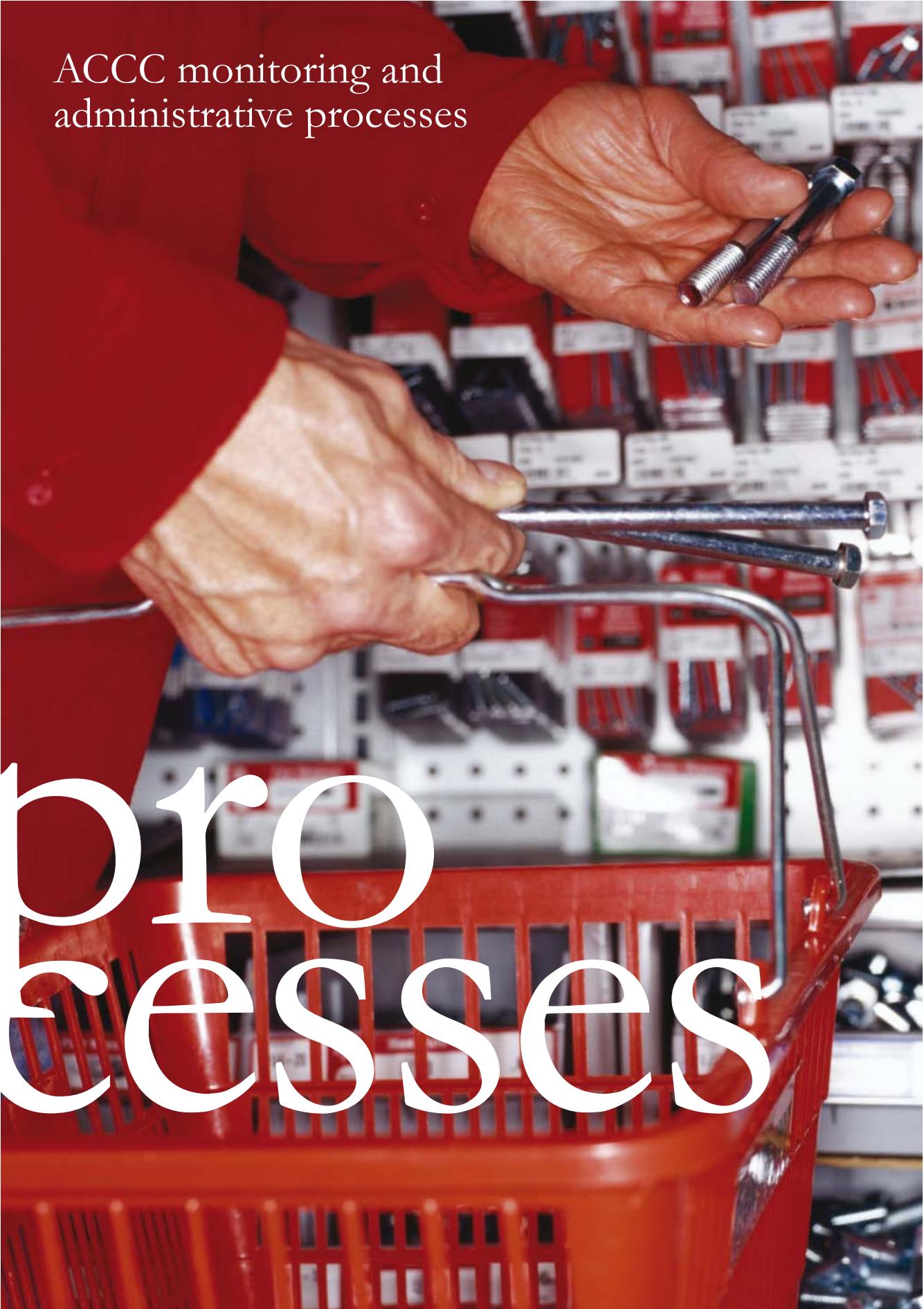
Level 2 template undertaking sets out the:

- > scope of the review
- > appointment of a compliance reviewer
- > reviewer independence
- > details of reviewer access to business information
- > reporting obligations.

For further details see the template undertakings in appendix A.

ACCC monitoring and
administrative processes

processes



ACCC monitoring and administrative processes

When compliance programs are implemented under enforceable undertakings or court orders the ACCC will carefully monitor each aspect of the trade practices compliance program requirements. Compliance program monitoring for small businesses is performed by the Compliance Section of the ACCC small business team.

If you have any questions regarding the process of implementing your small business compliance program or you believe that you may be unable to meet an agreed deadline you should contact the **ACCC small business team (1300 302 021)** for assistance. Staff will offer guidance on the ACCC's requirements and expectations to small businesses and their reviewers and advisers.

Further information

Visit the ACCC website at www.accc.gov.au.

Contact the **ACCC small business helpline 1300 302 021** and ask to speak to a staff member of the **ACCC small business team**. Staff are able to provide general guidance to companies who are considering implementing a compliance program. However, the ACCC cannot provide legal advice and their guidance cannot be considered to constitute legal advice.

Appendix

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Appendix A

Trade practices compliance program template undertaking

Level 1

[COMPANY NAME] and [DIRECTOR'S NAME] undertake, to the Australian Competition and Consumer Commission (ACCC), for the purposes of section 87B of the *Trade Practices Act 1974* (the Act) that [COMPANY NAME] will design and implement a trade practices compliance program covering [INSERT: *relevant sections or parts of the Act*] in accordance with the requirements set out below and will maintain and continue to implement the trade practices compliance program for a period of [X] years from the date of the undertaking coming into effect.

1. Training

- 1.1 Within [X] months of this undertaking coming into effect, and thereafter at least once a year for the period of the undertaking, [DIRECTOR'S / OTHER EMPLOYEE(S) NAME(S)] will attend practical trade practices training focusing on [INSERT: *relevant sections or parts of the Act*].
- 1.2 [COMPANY NAME] will ensure that the training referred to in paragraph 1.1 above is administered by a suitably qualified, compliance professional or legal practitioner with expertise in trade practices law.
- 1.3 [COMPANY NAME] will provide a written statement or certificate from the trade practices professional who conducts the training referred to in paragraph 1.1 above to the ACCC within 14 days of completion of the training verifying that such training has occurred.

2. Complaints handling

- 2.1 [COMPANY NAME] will:
 - 2.1.1 develop procedures for recording, storing and responding to trade practices complaints within two months of this undertaking coming into effect
 - 2.1.2 provide the ACCC with an outline of the complaint handling system developed within two months of the undertaking coming into effect.
3. If requested by the ACCC, [COMPANY NAME] will provide, at its own expense, copies of any other documents or information in respect of matters which are the subject of the undertaking.

[INSERT 4 ONLY IF THE MATTER IS RELATED TO PRODUCT SAFETY ISSUES]

4. Product safety

- 4.1 [COMPANY NAME] will maintain up-to-date copies, at its business premises, of all prescribed consumer product safety standards and prescribed consumer information standards that relate to products [COMPANY NAME] supplies.
- 4.2 [COMPANY NAME] will ensure that the products supplied that are subject to a prescribed safety and/or information standard under the Trade Practices Act, comply with the relevant standard.
- 4.3 [COMPANY NAME] will maintain recall procedures that enable products supplied by [COMPANY NAME] that do not comply with prescribed safety and/or information standards under the Trade Practices Act to be efficiently and effectively withdrawn from the market and returned to [COMPANY NAME].

Acknowledgments

1. [COMPANY NAME] acknowledges that the ACCC will make this undertaking available for public inspection.
2. [COMPANY NAME] further acknowledges that the ACCC will from time to time publicly refer to this undertaking.
3. [COMPANY NAME] further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Trade practices compliance program template undertaking

Level 2

Compliance program

1. [COMPANY NAME] and [DIRECTOR'S NAME] undertakes to the Australian Competition and Consumer Commission (ACCC) for the purposes of section 87B of the *Trade Practices Act 1974* (the Act) that it will:
 - 1.1 establish and implement a trade practices compliance program in accordance with the requirements set out in Annexure A for the employees or other persons involved in [COMPANY NAME]'s business, being a program designed to minimise [COMPANY NAME]'s risk of future breaches of [INSERT: *relevant sections or parts of the Act*] and to ensure awareness of its responsibilities and obligations in relation to the requirements of [INSERT: *relevant sections or parts of the Act*], within [X] months of the date of this undertaking coming into effect
 - 1.2 maintain and continue to implement the trade practices compliance program for a period of [X] years from the date of this undertaking coming into effect
 - 1.3 provide, at its own expense, a copy of any documents required by the ACCC in accordance with annexure A.

Acknowledgments

1. [COMPANY NAME] acknowledges that the ACCC will make this undertaking available for public inspection.
2. [COMPANY NAME] further acknowledges that the ACCC will from time to time publicly refer to this undertaking.
3. [COMPANY NAME] further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.
4. [COMPANY NAME] further acknowledges that a summary of the *Trade practices compliance program review report* referred to in annexure A of the undertaking may be held with this undertaking on the public register.

Annexure A

TRADE PRACTICES COMPLIANCE PROGRAM

[COMPANY NAME] will establish a trade practices compliance program (the compliance program) that complies with each of the following requirements:

1. Appointments

- 1.1 Within one month of the date of the undertaking coming into effect [COMPANY NAME] will appoint a director or a senior manager of the business to be responsible for the development, implementation and maintenance of the compliance program (the compliance officer).

2. Compliance officer training

- 2.1 [COMPANY NAME] will ensure that, within [X] months of the undertaking coming into effect, the compliance officer attends practical trade practices training focusing on [INSERT: *relevant sections or parts of the Act*].
- 2.2 [COMPANY NAME] shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
- 2.3 [COMPANY NAME], within 14 days of completion of training, will provide the ACCC with a written statement from the compliance professional or legal practitioner confirming the completion of the training conducted in accordance with 2.1 and 2.2 above.

3. Staff training

- 3.1 [COMPANY NAME] will cause all employees of [COMPANY NAME] whose duties could result in them being concerned with conduct that may contravene [INSERT: *relevant sections or parts of the Act*] to receive regular (at least once a year) practical training administered by the compliance officer (once trained) or a qualified, compliance professional or legal practitioner with expertise in trade practices law, that focuses on [INSERT: *relevant sections or parts of the Act*].

4. Complaints handling—[COMPANY NAME] will:

- 4.1 develop procedures for recording, storing and responding to trade practice complaints within 2 months of the Undertaking coming into effect; and
- 4.2 provide the ACCC with an outline of the complaint handling system within 2 months of the undertaking coming into effect.

[INSERT 5. ONLY IF THE MATTER IS RELATED TO PRODUCT SAFETY ISSUES]

5. Product safety—the [COMPANY NAME] will:

- 5.1 maintain up-to-date copies, at its business premises, of all prescribed consumer product safety standards and prescribed consumer information standards that relate to products [COMPANY NAME] supplies
- 5.2 ensure that the products supplied that are subject to a prescribed safety and/or information standard under the Trade Practices Act, comply with the relevant standard
- 5.3 design, implement and maintain recall procedures that enable products supplied by [COMPANY NAME] that do not comply with prescribed safety and/or information standards under the Trade Practices Act to be efficiently and effectively withdrawn from the market and returned to [COMPANY NAME].

6. [COMPANY NAME] will ensure that the compliance officer reports to their director(s) or governing body every [X] months on the continuing effectiveness of the compliance program.

7. **Review**—[COMPANY NAME] shall, at its own expense, cause an annual review of the compliance program elements (the review) to be carried out in accordance with each of the following requirements.
 - 7.1 **Scope of the review**—[COMPANY NAME] shall ensure that the review is broad and rigorous enough to:
 - 7.1.1 provide [COMPANY NAME] and the ACCC with a supportable verification that [COMPANY NAME] has in place a compliance program that complies with the requirements of the undertaking and is suitable for the size and structure of [COMPANY NAME]
 - 7.1.2 provide the review report and opinions detailed at point 8 below
 - 7.1.3 [INSERT IF THE MATTER IS RELATED TO PRODUCT SAFETY ISSUES] provide [COMPANY NAME] and the ACCC with a supportable verification that [COMPANY NAME] has in place a product safety compliance program that complies with the requirements of the undertaking and is suitable for the size and structure of [COMPANY NAME].
 - 7.2 **Independence of reviewer**—[COMPANY NAME] shall ensure that the review is carried out by a suitably qualified, independent compliance professional with expertise in trade practices law (the reviewer). The reviewer will qualify as independent on the basis that he or she:
 - 7.2.1 did not design or implement the compliance program
 - 7.2.2 is not a present or past staff member or director of [COMPANY NAME]
 - 7.2.3 has not acted and does not act for [COMPANY NAME] in any trade practices related matters
 - 7.2.4 has not and does not act for or consult to [COMPANY NAME] or provide other services on trade practices related matters other than Compliance Program reviewing
 - 7.2.5 has no significant shareholding or other interests in [COMPANY NAME].
 - 7.3 **Evidence**—[COMPANY NAME] shall use its best endeavors to ensure that the review is able to be conducted on the basis that the reviewer has access to all relevant sources of information in the [COMPANY NAME]'s possession or control, including without limitation:
 - 7.3.1 inquiries of any employees, representatives, agents and stakeholders of [COMPANY NAME]
 - 7.3.2 documents created by [COMPANY NAME]'s consultants, legal practitioners and accountants for use in [COMPANY NAME]'s compliance program
 - 7.3.3 [INSERT IF THE MATTER IS RELATED TO PRODUCT SAFETY ISSUES] all documents required to assess [COMPANY NAME]'s compliance with the relevant product safety/information standards under the Trade Practices Act.

7.4. [COMPANY NAME] shall ensure that the first review is completed within one year and one month of this undertaking coming into effect and that each subsequent review is completed within one year thereafter.

8. Reporting

8.1 [COMPANY NAME] shall use its best endeavours to ensure that the reviewer sets out the findings of the review in a *Trade practices compliance program review report*, which will provide particular and specific information regarding the scope of the review and the effectiveness of the trade practices compliance program including:

- 8.1.1 details of the evidence gathered and examined during the review
- 8.1.2 the name and relevant experience of the person appointed as [COMPANY NAME] compliance officer
- 8.1.3 the reviewer's opinion on whether [COMPANY NAME] has in place effective staff training, complaints-handling programs that comply with the requirements of the undertaking
- 8.1.4 actions recommended by the reviewer to ensure the continuing effectiveness of [COMPANY NAME]'s compliance program.

8.2 [COMPANY NAME] shall ensure that each *Trade practices compliance program review report* is completed and provided to [COMPANY NAME] within one month of completion of the review.

8.3 [COMPANY NAME] will cause the *Trade practices compliance program review report* to be provided to the ACCC within 14 days of its receipt from the reviewer.

8.4 [COMPANY NAME] shall implement promptly and with due diligence any recommendations made by the reviewer or required by the ACCC that are reasonably necessary to ensure that [COMPANY NAME] maintains and continues to develop the compliance program elements in accordance with the requirements of this undertaking.

9. If requested by the ACCC [COMPANY NAME] shall, at its own expense, provide copies of documents and information in respect of matters which are the subject of the compliance program.

10. In the event the ACCC has sufficient reason to suspect that the compliance program is not being implemented effectively, [COMPANY NAME] shall, at its own expense and if requested by the ACCC, cause an interim or additional review to be conducted and cause the resulting *Trade practices compliance program review report* to be provided to the ACCC.

ACCC contacts

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