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Our File Ref FT07/06417

Department of
Tourism, Fair Trading and
Wine Industry Development

Mr Grahame Wheeler
18 Banks Court
TORQUAY QLD 4655

Dear Mr Wheeler

I refer to your complaint and various correspondence about the progress of the Office of Fair Trading's (OFT's) investigation against Writeway Research Service Pty Ltd (Writeway) and Writeway's director, Mr John Tilbrook, for an alleged contravention of the *Security Providers Act 1993*.

After consultation with OFT's Principal Legal Officer, and advice from external legal counsel, a decision has been made to discontinue the investigation against Writeway and Mr Tilbrook.

As you are aware, Writeway are engaged by the Department of Veteran Affairs (DVA) to research specific claims by veterans and submit reports to DVA. OFT's enquiries indicate that when researching a veteran's claim the veteran is informed that witnesses may be contacted to verify their legitimacy to a claim.

The issue of whether a security provider's licence is, or has been, required for a person conducting an overt investigation, where the parties are aware of proceedings, has been a matter of some conjecture. This was due to inadequacies in the definition of who is deemed to be a "private investigator" under the provisions of the *Security Providers Act 1993* (the Act).

In March 2007, Parliament passed amendments to the Act which clarify this issue. As of 1 October 2007, the new definition of a private investigator is:

- "A *private investigator* is a person who, for reward—
- (a) obtains and gives private information about another person, without the other person's express consent; or
 - (b) carries out surveillance for obtaining private information about another person, without the other person's express consent; or
 - (c) investigates the disappearance of a missing person."

Under this definition, if an investigator is given the consent of the person who is the subject of the investigation, they will not be required to hold a private investigator's licence. In circumstances where the person being investigated has not consented to the investigation, a licence under the Act is required.

DVA's process involves gaining the veteran's permission to conduct enquiries. Therefore, under the newly enacted provisions, no breach would be present and no proceedings commenced.

Listed below are a number of points OFT also considered prior to finalising its investigation:

- to pursue prosecution action OFT must establish contact with reliable witnesses who have provided information to an identifiable researcher working on behalf of Writeway in the past 12 months;
- any witnesses must be prepared to provide an affidavit, attend Court and give evidence under Oath in a potentially defended matter;
- witnesses must have evidence that the identified Writeway researcher was seeking information "about another person" and not information about an incident or military policy or procedure; and
- it must be able to be proved that the Writeway researchers acted for "reward".

To this point and despite OFT's best efforts to contact various sources, no potential witnesses have been identified who are able to provide sufficient evidence to prove all essential elements of the alleged offence. In addition OFT has been unable to obtain any invoice for services provided by Writeway to the DVA. DVA is not legally obliged to provide OFT with documentation containing such evidence and in any event may breach privacy legislation unless suitable clearance were obtained from the parties involved.

OFT's Compliance and Enforcement Framework lists a number of issues which can and should be considered in relation to the public interest in undertaking a prosecution. These considerations are based on those of the Director of Public Prosecutions and include:

- the level of seriousness or triviality of the alleged offence, or whether or not it is of a technical nature only;
- the existence of any mitigating or aggravating circumstances;
- the degree of culpability of the alleged offender in connection with the offence;
- the prevalence of the alleged offence and the need for deterrence;
- the likelihood of obtaining a conviction; and
- obsolescence or obscurity of the law (or a particular provision).

Although all of the above issues were taken into consideration by OFT, the most significant amongst them was the relative obscurity (and now obsolescence) of the previous law, and the fact that Parliament provided clarification to this grey area prior to the initiation of any possible prosecution.

A meeting about the Writeway matter was held on 10 August 2007 and was attended by Mr Bob Richards of Advocacy for Veterans, the Commissioner for Fair Trading, and other representatives of both organisations. The meeting explored in some detail the difficulties confronting OFT in taking this matter to prosecution.

At the meeting, the Commissioner confirmed OFT's willingness to consider any further evidence that could be provided relative to the case. This included the possible identification by Advocacy for Veterans of a party who may be able to assist in furthering the investigation and be willing to sign a clearance to the DVA for relevant information to be released to OFT. Nothing relevant to the matter has been received subsequent to the meeting.

Given this, and the commencement on 1 October 2007 of the relevant amendments to the Act, it has been decided to close the file.

If you remain concerned that the decision making process may not be transparent, or has not taken into account all relevant matters, you may seek to have the Queensland Ombudsman review the process. You can contact the Queensland Ombudsman by writing to GPO Box 3314, Brisbane QLD 4001 or by telephoning 3005 7000.

I trust this information has clarified the issues for you. If you have any questions, please do not hesitate to telephone Mr Garry Gillard, Manager of the Investigations Branch on (07) 3115 1710.

Yours sincerely



Anthony Johnson
Executive Manager
Compliance Division
Office of Fair Trading

25/10/07