Forum

The following speech on the importance of corporate compliance programs was presented by Commission Deputy Chairman Allan Asher at the Inaugural Annual Conference of the Association of Compliance Professionals of Australia on 29–30 May 1997 in Sydney.

Carrot and stick — recognising compliance

Introduction

Today I have been asked to give a presentation about compliance from a regulator's perspective, in my case the ACCC. In particular, I have been asked what weight enforcement agencies should give to corporate compliance programs.

I am still amazed that, here we are, nearly 25 years into the existence of the Trade Practices Act and there are still some companies that have widespread wholesaling or retailing operations that have either no compliance program or a 'program' that has the facade and not the substance of compliance. This is not a smart approach and is ultimately doing a company's shareholders a disservice because it not only puts a firm at risk from action by the Commission but it is open for an injured private party to bring an action for damages. In some instances it may be a 'double whammy', with penalty action by the Commission followed by damages action by an affected party. It also does customers a disservice as it increases their risk of exposure to conduct in breach of the Act, and the likelihood that they will transfer their loyalty to a competitor.

ACCC attitude

In looking at the impact of compliance programs the Commission only has to look at its charter. The Act tells us that we are to enhance the welfare of Australians through the promotion of competition, fair trading, and provision for consumer protection. When the Commission is deciding the approach to take in regard to a particular breach of the Act the approach it takes is the one that best promotes consumer welfare gains.

The Commission, faced with over 5000 complaints and inquiries a month, effectively has the capacity to deal with just 2000 or so. In order to establish priorities, the Commission has developed an internal set of enforcement goals. These are:

- to stop the unlawful conduct;
- to provide compensation for any consumers or competitors who have suffered loss or damage;
- to ensure future compliance with the Act; and
- to provide for deterrents or punishment for wrongdoers.

The Commission strongly supports those companies which implement effective compliance programs so that the risk of breaching the Act is reduced. If a company breaches the Act and this is discovered by those responsible for compliance (e.g. the relevant line manager or compliance staff), it may be prudent practice to come to the Commission and inform us of the breach. However, in these circumstances the company would be best

served to come with a prepared brief when seeking leniency from the Commission. Similarly, where the Commission discovers a contravention of the Act and the company or person in breach of the Act seeks leniency from the Commission, there are a number of considerations the Commission will have regard to when assessing leniency, as outlined below.

Immediately end the conduct

Steps must be taken to immediately cease the infringing conduct and to initiate a program to ensure such conduct is not going on elsewhere. For example, if some products are being sold that have misleading stickers on them about special promotions but the stickers do not disclose the fact that the promotion has an early end date, the company needs to check that stickers are not being used in a similar manner on other products.

Restitution

Where loss or damage results from the contravention, there needs to be swift, genuine and effective restitution. Having this restitution program administered or at least audited by an independent third party who then reports to the Commission would greatly add to the credibility. It should be noted that restitution needs to be made obvious to affected consumers but also to any competitors damaged by the conduct. Steps will need to be taken to inform affected persons by appropriate means which may include newspaper ads, letters and web site notices.

Self-investigation

Where a breach of the Act has occurred, the Commission will be concerned to establish the source of the breach. Did it arise from a conscious act, wilful disregard, or wrongdoing by a member of staff or was the breach the result of poor training or supervision of staff? A company genuinely wishing to put right any deficiencies in its system of internal control should be willing to make these inquiries to expose any weaknesses in the management system that caused the breach in the first place.

Disciplinary action/training

Where employees are responsible for a breach of the Act, the Commission would expect that there should be some form of disciplinary action or other action (e.g. retraining) to ensure the wrongdoers, including line management, are aware of their obligations.

No indemnities

There should be no indemnities offered by the company for wrongdoers, and the company's policy should be visible and unequivocal on this matter.

Cooperation

The company must also be able to demonstrate cooperation with Commission investigations once the breach has been brought to the attention of management.

Public policy

Where a breach arises from pressure applied by a supplier or customer, steps should be taken to make other suppliers and customers aware of the new company policy and the risks they face in participating in a breach.

Continuous improvement

A company should also demonstrate its commitment to continuous improvement of its trade practices compliance program and general attitude to compliance.

Similar considerations may arise even where the Commission becomes aware of a breach through other means, such as a complaint, or information received from a staff member without authority of the company.

It should be noted that these principles do not apply to a situation where a company employee reports to the Commission, on a confidential basis or otherwise, that their company is engaging in conduct in breach of the Act. This is an entirely separate issue which I do not propose to deal with today.

Compliance programs

When a company comes to the Commission seeking agreement on submissions to the court concerning remedies, the Commission will be putting the company's compliance program under the microscope.

Companies must be able to demonstrate that they have a genuine commitment to an active program of compliance with the Trade Practices Act.

The mere assertion of the existence of a compliance program or a promise to implement one is completely inadequate.

There must be demonstrated commitment from the Board and the CEO that the company wishes to comply with the law, and this message must be conveyed to appropriate targets. This should be demonstrated by a staff commitment to compliance.

The recent publication by Standards Australia of the Draft Australian Standard (DR 97019) gives, for the first time, effective benchmarks for compliance programs. The reason for the standard in the first place was the recognition by business and enforcement agencies of the need for some form of objective compliance program criteria.

Key elements of the draft standard are:

- Board and CEO endorsement;
- a clear written policy reflecting the company's commitment to compliance;
- encouragement of 'whistleblower' action by staff;
- line management responsibility for compliance; and
- those responsible for compliance within the organisation must have sufficient clout to ensure that compliance issues prevail.

What also needs to be demonstrated to the Commission is that:

- procedures have been set in place for the identification and management of compliance needs created by the organisation's operations;
- compliance is embedded in everyday company practices;
- any compliance system needs to be consistently enforced and provided with appropriate remedial measures and continual training; and
- any compliance system, to be effectively maintained, needs to be appropriately monitored and regularly reviewed.

Action, not words, is what will count in the Commission's consideration.

It is not only the Commission that is looking at the substance of compliance but also the Courts. In *Trade Practices Commission v. TNT Australia Pty Ltd* the Court said:

> It is a most important factor in mitigation of the amount of a penalty that, in a particular case, there may be acceptable evidence of a corporate *culture of compliance*, and of concern to ensure that the contravention which has occurred will not be repeated (1995 ATPR 41,375 at p. 40,168 — emphasis added).

So it's important to note that the Court spoke of a corporate 'culture of compliance'. Clearly, that goes beyond just a few education seminars and some booklets. The challenge for compliance professionals is to focus on the means of creating a 'corporate culture of compliance'. The Draft Australian Standard is a good start to help compliance professionals with that challenge.

In the recent Full Federal Court decision imposing penalties of almost $1 million in *North West Frozen Foods Proprietary Limited v. Australian Competition and Consumer Commission*, the Federal Court again emphasised the importance that an effective compliance program has in mitigating penalty. The Court amplified the importance of this issue as follows:

> Where, in addition, acceptable evidence is adduced, or the Commission agrees, that a program has been instituted the purpose of which is to ensure an understanding by

> executives of the requirements of the Act and of their obligations under it, and where a corporation has committed itself to future expenditure upon such a program, there is the more reason to reduce the penalty. Where the Commission established to administer the Act is satisfied that an appropriate program has been undertaken, or the undertaking of it is proved to the Court, this is a most important matter to take into account on penalty (1996 ATPR 41-515 at p. 43,583).

The Commission is of the opinion that the Court's views are equally applicable to the consumer protection provisions of the Act.

Unless companies are committed to the philosophy of continued improvement, compliance programs will fall behind and won't have any future. This is really a necessity because the frontiers of compliance are changing all the time, including the technological developments in compliance education and tracking, and the innovative methodologies being developed to ensure compliance. Evidence demonstrating a genuine commitment to a philosophy of continued improvement of compliance programs will greatly assist a company in showing the Commission or a court a corporation's desire to create and maintain a 'culture of compliance'. Similarly, evidence of a lack of commitment to a philosophy of continued improvement of compliance programs may indicate only a 'half-hearted' (or less than serious) approach by a corporation towards developing and maintaining a corporate 'culture of compliance'.

To sum up, the Commission believes that implementing an effective compliance program will always be a wise investment.

Commission's commitment

Recognising the importance of compliance, the Commission has for many years allocated a significant part of its own resources to making consumers aware of their rights and obligations under the law. Whenever amendments are made to the Trade Practices Act affecting rights and obligations, the Commission engages in intensive education programs including the production of guides and speaking engagements to make people aware of any changes. More recently, the Commission has been active in the production of compliance materials such as 'Best and Fairest', and for several years the Commission has had a dedicated unit providing tailored compliance advice for corporations. The Commission has offices in every capital city as well as in Townsville and Tamworth and these offices have, as a prime task, the provision of compliance information and education.

Summary

If a breach of the Trade Practices Act is observed in-house, or a company is being investigated by the Commission and is seeking to negotiate a joint approach to the Courts on appropriate level of penalties or other remedies for a contravention of the Act, the Commission would advise the firm concerned to approach the Commission with a written brief which sets out:

- that the conduct has ceased;
- restitution action which has been taken or is in train;
- action taken to prevent recurrence of the particular breach and other similar breaches;
- action taken against parties responsible; and
- details of the company's compliance program as measured against the criteria in the Draft Australian Standard.

The Commission is ready, willing and able to work with those companies wishing to comply with the law. However, the Commission is equally ready, willing and able to work against those who don't.