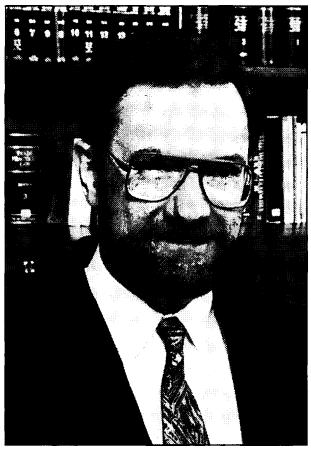
For all of the reasons outlined, compliance is becoming more and more important. Compliance programs help companies to avoid harm but can also help to improve business performance. Successful compliance programs can even benefit the community beyond the company itself, in that they ensure observance of laws designed to protect a variety of third-party interests.

Corporate compliance is not easy, but it is both necessary and worthwhile. Keely J acknowledged this in 1980 when he said:

> Sheer size of operations may result in problems in ensuring compliance with the Act or any other law, but the likelihood of those problems has to be recognised by management and the problems have to be solved.[9]

Almost 20 years on, this statement still rings true. I therefore commend any initiative that strives to meet the challenges of achieving compliance.

The regulatory safeguards provided by product liability and consumer protection laws



The following is an edited version of a speech given by Commission Deputy Chairman Allan Asher to the APEC Seminar on Good Regulatory Practices at Rotorua, New Zealand on 6 August 1999.

I think we would all agree that in today's global environment good regulatory practice cannot be regarded as domestically confined. There has to be development or continued development of relationships with other countries that facilitate and support as far as possible regulatory practices in the areas of product liability and consumer protection law. While the challenge is to **get it right** in your own backyard, the greater challenge is to achieve good regulatory practice on an international scale where there are many participant jurisdictions willing to be involved and stay involved.

Accordingly, when formulating product liability and consumer protection laws, careful attention must be given to ensuring that the consequent regulatory safeguards to consumers are realised without unduly disadvantaging suppliers, industry and international markets.

I will return to this theme of what I call homogeneous or universal good practice later in the presentation.

The Trade Practices Act and the role of the Commission

The Commission is an independent statutory authority that administers the *Trade Practices Act 1974* and the *Prices Surveillance Act 1983*. It also has additional responsibilities under other legislation. The Trade Practices Act covers anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability and third party access to facilities of national significance.

Section 2 of the Act in setting out its objectives states that the aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. These goals are in part achieved through consumer protection provisions dealing with misleading/deceptive conduct, false representations, product safety and information standards and product liability.

The Commission has a wide range of administrative and enforcement options available to it to secure compliance with the Trade Practices Act. I will consider these later in my presentation but note at this point that the Commission uses these options creatively.

Product liability provisions of the Act

Good regulatory practice aims to strike a balance between the interests of consumers and suppliers. It must cut both ways. The laws must

9 Trade Practices Commission v Dunlop Australia Ltd & Anor (1980) *ATPR* ¶40-167 at 42,320

not be so intrusive or prescriptive as to stifle innovation and product development. The laws must act as an incentive to manufacturers and other suppliers to produce and supply safe products. When the wheels fall off and a person is injured then the laws must enable appropriate redress without undue evidentiary complication.

It is suggested that the Trade Practices Act's mandatory standards and the product liability provisions achieve this aim. Anecdotal evidence suggests that the product liability laws have generated a change in attitude to product safety in most large and many small-to-medium enterprises. The number of voluntary product safety recalls has been rising steadily in Australia in recent years. One reason for this increase may be that companies are seeking to avoid liability with products already supplied to the market.

Product liability provisions of the Act in relation to defective goods and the specific regulatory safeguard features

These product liability provisions deliver what are essentially private rights to persons harmed by defective goods. The law says that goods are defective if they do not provide the level of safety that the community is entitled to expect. This standard is objective and is based upon the expectations of the public at large rather than any particular individual. For example, the community expects a pram to be free of defects that might cause injury to a child.

In essence, these provisions give a person who is injured, or whose property is damaged by a defective product a right to compensation from the manufacturer of the product. Say you are riding your brand-new bicycle, careering down a hill, the brakes fail and you crash over a fence into someone's prize petunia patch. You can claim for your injuries and the property owner can claim for petunia losses.

Individuals can bring actions or the Commission can bring representative actions on behalf of one or more persons.

I point out that the term **manufacturer** for the purposes of these provisions is not given limited construction. The term can apply in appropriate circumstances not only to the maker of the goods but to the importer of those goods. If the manufacturer cannot be identified, the term will be applied to mean the party who supplied the defective good to the consumer.

I note that this regime of product liability originated in large part from the EC Directive of July 1985, relating to liability for defective products. This directive is regarded as setting a foundation for the reform of product liability law and has been recognised by several countries in the Asia–Pacific region such as the Philippines, Japan and of course Australia. Countries such as Hong Kong and Taiwan have also embraced the worldwide trend over recent years to impose strict liability for dangerous or defective goods.

The preamble to this EC directive states its underlying rationale. It provides:

> Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.

Part VA of the Trade Practices Act provides many regulatory safeguards. I am pleased to note that many of the benefits of this Part of the Act are largely consistent with the position put forward in the APEC draft *A Guide to Good Regulatory Practice.*

The Act's product liability provisions do not require proof of negligence as an element of a successful action nor do they require the existence of a contract between the parties.

To succeed in establishing negligence a person needs to establish that the manufacturer owed a duty of care, that the duty was breached and that loss or damage flowed as a result of that breach. Even if these elements apply, the injured party will only be compensated in a negligence action if the type of damage sustained was reasonably foreseeable and could not be disregarded based on remoteness.

To sue under contract law, there must usually be a relationship of privity of contract between the parties. Therefore, third parties or bystanders who may have suffered cannot take action on the contract as they are not in a contractual relationship.

The Trade Practices Act product liability laws do not require the injured party to prove that the manufacturer was negligent nor that a contract was in existence. The person, in effect, will need to demonstrate that the

defective good was supplied in trade or commerce and that the loss or damage arose because of that defect. Once issues of this type are established, liability will be **strict.** The fact that the person did not purchase the goods from the manufacturer is not a bar to liability. These product liability provisions recognise that it is the incidence of the injury that is important and not any contractual or tortious connection between the parties.

This feature of the product liability provisions is very important as it takes into account that persons who suffer injury or damage may often be persons who were simply in the wrong place at the wrong time. It would be difficult for these people to found an action in tort or contract and they might otherwise be left without recourse. Any product liability law that seeks to provide a regulatory safeguard to consumers and others persons affected by defective products should consider these factors.

Application of the product liability regime must be finite and flexible

It would be grossly unfair when creating a regime of strict liability in this area to extend unduly the circumstances under which these provisions would apply. Thus which goods will be covered by these laws and what will be regarded as defective must be carefully considered.

It would not be appropriate to try to cover the field by having the legislation apply to all types of goods. In the case of the product liability provisions of the Trade Practices Act only those goods that are regarded as **consumer** goods are covered. This is a sensible limitation upon the application of these provisions. It is generally more fitting to intervene in consumer transactions than business deals where concepts of relief through contractual provisions would appear to be more readily available. Also, consumers are likely to have less sophisticated product knowledge and information than parties transacting in a business environment.

As previously noted the goods must be considered **defective.** Again, it is important to apply limits to what may be regarded as defective. The term cannot be open-ended and subject to the perceptions and expectations of the individual consumer. If this were the case, the liability of manufacturers would be broadened significantly and probably to an unreasonably onerous degree. This in turn might stifle productivity and even act as a barrier to market participation, as manufacturers might become loath to enter a market for fear of exposure to a product liability action.

By the same token, the term **defective** must possess a degree of fluidity and be capable of **re-invention** over the years. This will ensure that the larger community expectations are accommodated as far as possible to maintain ongoing legislative relevance to the public and an appropriate level of continuing regulatory safeguard to consumers. A static approach cannot be supported and is unfair to consumers and manufacturers alike. Thirty years ago a car without seat belts fitted would not have been deemed defective; these days it would.

The product liability provisions of the Trade Practices Act allow for the notion of **defective** to be re-defined as time passes to meet the public expectations of the day. It achieves this by drawing on community expectations of a reasonable level of safety for a product. It also goes further and specifically provides that **all relevant circumstances** shall be taken into account along with a range of specific matters including:

- the manner in which and the purposes for which the goods have been marketed;
- the packaging of the goods;
- any instructions or warnings for using the goods;
- what might reasonably be expected to be done with the goods; and
- the time when the goods were supplied by the manufacturer.

The product liability regime should adequately provide for various forms of loss or damage that may be suffered. It should also enable action to be taken against relevant parties in the supply chain.

Loss or damage that may flow from a defective product will often encompass more than economic loss. Loss or damage to a person's

property and injury to one's self are factors that must be recognised as compensable heads in a product liability system that seeks to provide a suitable level of regulatory safeguard to affected persons.

Under the product liability provisions of the Trade Practices Act, a person injured by a defective good has a right to be compensated for losses suffered as a result of injury. Further, the owner of personal property acquired and used for personal, domestic or household use has a right to recover loss where the defect causes damage to that property. There is also a similar provision that enables recovery of losses that are sustained where the defective goods damage real property such as land, buildings and fixtures.

As these product liability provisions are in essence a consumer protection measure, damage to commercial property, whether personal or real, is not covered. Additionally, these provisions are not intended to create rights of a commercial nature or to provide an alternative form of compensation that may be more appropriately covered by other legislation. For example, the product liability provisions do not cover loss caused by work-related injuries. There is no need for the regulatory safeguard to be extended in these circumstances as existing workers' compensation systems cover the field for these forms of injury and loss.

It is important in this context to provide avenues of recovery against those involved in the supply of the defective product. Genuine safeguards are delivered where all participants in the supply chain may potentially be liable. While normally the manufacturer will be primarily liable for damages caused by defective goods, liability under the product liability provisions of the Trade Practices Act may attach also to:

- a corporation that holds itself out to be the manufacturer;
- a corporation that sells **home brand** goods manufactured for it under licence;
- a corporation that permits another party to promote the goods as that corporation's;
- a corporation that imports the goods; and
- a retailer or supplier who is unable to identify the manufacturer or supplier within 30 days of being requested by the claimant to do so.

In addition to providing a broad range of potential defendants to a product liability action, Part VA allows for more than one party to be liable for the same damage. It permits the affected person to claim damages against any one of those parties. If it is the case that a defendant considers liability should be shared, then that defendant will be at liberty to join the other party to the action by third party proceedings.

The breadth of compensable loss and the wide range of potential defendants are two important components of a good product liability system.

The conduct of the party suffering the loss must be taken into account

While it is appropriate to impose a form of strict liability upon the manufacturer, it must also be recognised that damages for this liability may be reduced or even negated if the acts of the affected person contributed to or caused the loss suffered. It is appropriate to hold the manufacturer responsible for damage caused by the defect in the good but not for loss arising as a result of accidents caused by a person's misuse of those goods. Car maintenance at home can be a hazardous pastime — a home mechanic who, ignoring warnings on the car jack, gets under a car that is parked on a slope without the wheels chocked, could not expect full compensation from the manufacturer if the jack collapses and the car falls on him.

Time for commencing actions

Suppliers of goods generally need to be given a degree of certainty with regard to the time during which they may be potentially exposed to liability for action. To this end, there are time limitations within which an affected person is entitled to bring a product liability action.

Under the product liability provisions of the Trade Practices Act a person who suffers loss as a result of defective goods must commence the action within three years of first becoming aware (or when deemed to have become

aware) of the loss, the defect and the identity of the manufacturer. An overall requirement is that the liability action must be commenced within 10 years of the time that the manufacturer first supplied the allegedly defective product.

While such a period may generally be adequate to cover the vast majority of instances of damage caused by defective products there may be some instances where the damage will not manifest itself until many years after first use. This may apply to the use of pharmaceutical products or goods containing chemicals whose affects may lie dormant for many years. The regulatory safeguards offered by the product liability provisions may then be found wanting.

A way of improving the position for persons suffering loss from goods having delayed effects may be to consider adopting provisions similar to the Japanese legislation in this area. I understand that, while it adopts a 10 year statute of repose it goes on to provide that where damage is caused by substances that are injurious to human health if they stay or amass in the body **or** the symptoms of such damage appear after a latent period, then the 10 year time for commencing the liability action is calculated from the time when the damage arises.

Liability must not be open-ended — suitable defences must be afforded to manufacturers

Legislators need to ensure the regulations do not stifle product development and improvement. The rigours imposed on manufacturers by a strict liability system may in part be overcome by providing a range of statutory defences. These should enable continued product innovation but at the same time not unduly water down an affected person's right or opportunity to claim compensation. Thus, a balance is sought between allowing business to go forward and protecting the ability of a person to commence suitable liability actions.

For example, it would be somewhat unfair to impose liability on a manufacturer whose products may contain dangers that were not discernible when the goods were supplied. It is then reasonable to provide manufacturers with a **development risks** defence. Such a defence in effect moves liability from manufacturers to consumers where the risks cannot be ascertained at the time of supply.

The product liability provisions of the Trade Practices Act provide a **state of the art defence.** If it can be demonstrated that the state of technical or scientific knowledge was not such as to enable the manufacturer to discover the defect then this factor will constitute a defence in a product liability action. Failure to have such a defence may deter manufacturers from creating new and innovative products.

Other features of a product liability system that assist in providing regulatory safeguards

The Trade Practices Act product liability provisions contain a number of other elements that promote regulatory safeguards in this area. In particular, these provisions can facilitate a consumer's access to the law and smooth the path to obtaining relief. They do this by:

- enabling the Commission to take representative proceedings on behalf of persons who may not otherwise be in a position to enforce their rights. This form of action achieves savings of court resources and party costs. These would not be achievable if a manufacturer was subject to a number of separate proceedings from aggrieved individuals; and
- saving other laws and remedies. The product liability provisions of the Trade Practices Act do not limit the operation of State or Territory laws. Affected persons can still bring actions based on contract, tort or other legislation.

An extension to the liability laws

Legislation in this area has mainly centred on the liability for injury caused by defective goods. It is clear, however, that services rendered in a defective manner can also pose high dangers. Think, for example, of the bungee rope that is a metre longer than the drop it is being used for, or a merry-go-round that spins at 30 miles an hour. There is a propensity for problems arising from defective services to increase in

circumstances where society has the ability (or tendency) to spend more of its disposable income on services and/or where a greater number of service providers are entering or may enter the market.

The provision of liability for the rendering of defective services may warrant greater consideration. It may be appropriate for such liability to supplement consumer protection provisions implying warranties that services will be rendered with due care and skill. In some instances it may be preferable to impose a form of strict liability on a service provider even though care and skill were exercised, as the provider may be in the better position to cover the loss (e.g. through access to resources or policies of commercial insurance).

Product liability case example

Having examined what I consider to be the hallmarks of a good product liability system, I would now like to discuss a recent product liability case. The matter is known as the *Glendale Chemical Products case.*[1] It is a good example of the product liability provisions at work. In bringing this case the Commission focused on outcomes for the affected consumer. In deciding the case, the Federal Court established case law on issues not previously dealt with.

Facts

Glendale bought caustic soda in bulk from a manufacturer. It then repackaged, labelled and distributed that caustic soda under the name of 'Glendale Caustic Soda' (the product).

A consumer bought the product to unblock his shower drain. The consumer read the label on the product twice. He noted that the label advised him to dissolve the product in water before pouring it down the drain and to **always wear rubber gloves and safety glasses when handling caustic soda.** However, the consumer disregarded the advice on the label. Instead, he followed the advice of an acquaintance who had told him to pour boiling water down the drain and then pour the caustic soda in afterwards. Caustic soda is extremely reactive when mixed with hot water and releases considerable heat when mixed in this fashion. When the consumer followed his acquaintance's advice, a column of water shot up from the drain and burned his face and eyes. The consumer did not wear safety glasses when using the product.

The consumer admitted that, in using the product in the fashion described, he relied on his acquaintance's advice. He did not rely on anything on (or not on) the product's label. However, he stated that he would not have used the product as he did if the label had warned him against using hot water.

Action and results

This was the first product liability representative action case in Australia whereby the Commission instituted a liability action representing the consumer who suffered loss caused by a defective product.

The key outcomes of the case as disclosed in the court's findings were:

- a distributor of a product can be held accountable for injuries to a consumer even where the distributor did not physically create the product but instead merely repackaged the product and provided insufficient instructions for safe use;
- a product may be 'defective' if it does not contain adequate warning against foreseeable dangerous uses of the product; and
- lack of a warning where a warning is necessary can effectively 'cause' consumer injuries.

Product safety provisions of the Trade Practices Act — Mandatory standards or technical regulation

The Commonwealth Minister has the power under the Trade Practices Act to:

- declare mandatory safety and information standards;
- ban the supply of unsafe consumer goods;

1 *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission* (1999) ATPR para 41-672; *Australian Competition and Consumer Commission v Glendale Chemical Products Pty Ltd* (1998) ATPR para 41-632.

- order suppliers to recall consumer goods with safety related defects in circumstances where a voluntary recall is considered to be inadequate; and
- issue public warning notices about goods with safety related defects.

The need for and creation of mandatory standards (in Australia)

Safety Standards: These require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging rules (e.g. construction of toys for children under three years).

Information Standards: These require prescribed information to be given to consumers when they purchase specified goods (e.g. labelling for tobacco products).

The provision of regulatory safeguards through the creation of uniform standards

(i) The WTO Agreement on Technical Barriers to Trade tries to address difficult issues that mandatory and voluntary standards pose for international trade. Rules developed under these agreements in relation to the present multilateral trading system encourage use where possible of internationally harmonised standards. If a country intends to use standards that differ from harmonised ones or that may significantly affect trade, other countries are to be informed and given the opportunity for comment;

(ii) The EU has set in place arrangements whereby Community Directives on product standards are scrutinised for their compatibility with the WTO and, in particular, the TBT Agreement;

(iii) The OECD recognises the importance of product safety in a global market place and the need for countries to cooperate on consumer policy. It encourages joint research and information sharing on safety related issues. OECD literature clearly recognises the need for an international consumer policy forum to take into account and manage globalisation from the perspective of standards harmonisation with a view to removing non-trade barriers and improving the regulatory safeguards at an international level;[2]

(iv) In Canada, guidelines have been issued that require regulatory authorities to follow international obligations imposed under the WTO and other rules; and

(v) In Australia, mandatory standards proposed must be considered in a document known as a Regulatory Impact Statement. This statement consists of an assessment, analysis and justification of the proposed regulation including an assessment of the regulation's impact on international trade.

Ways to achieve uniform standards include the following:

- Adopting international standards as the basis for the mandatory standard. I note this aspect is of special significance to APEC member economies that have committed to aligning their standards fully or in some cases to the extent possible within certain time frames.
- Accepting other countries' mandatory standards.
- Prohibiting by national legislation export of goods that do not meet mandatory safety standards, that are banned or are declared unsafe.

Some examples where Australia has adopted or may accept the standard of overseas jurisdictions include the following:

- The product safety standard for disposable cigarette lighters recognises and accepts American tests on the child resistant features of a lighter.
- The standard for bicycle helmets is presently being reviewed. Consideration is being given to recognising the American Snell B95 standard as being acceptable for the purpose of complying with the Australian standard.
- Mutual Recognition Arrangement with New Zealand — the basic principle of this MRA is that Australia will recognise New Zealand standards for products and occupations and vice versa. This means that goods sold legally in New Zealand may be sold in Australia. This type of agreement aims to

2 For example, Note by Mr Nils Ringstedt Chairman of the Working Party on Consumer Safety. Note titled *Product Safety in a global marketplace — possible future work.* DAFFE/CP 97/12.

enhance the international competitiveness of Australian and New Zealand firms, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business.

This form of agreement adheres to the principle of 'once approved, accepted everywhere'. Such a principle should improve trade opportunities between participant countries and deliver improved regulatory protection to consumers.

The quality of the regulatory protection provided by mandatory standards are affected by the manner in which these are enforced by the regulator

As noted earlier, the Commission enforces mandatory product safety standards and information standards. Also enforced are bans of unsafe goods declared under the Trade Practices Act.

The Commission actively enforces safety standards and bans with manufacturers, importers and retailers by undertaking random market surveys, responding to complaints and acting promptly against offending suppliers. However, I wish to stress that the Commission does not inspect or approve goods before they are marketed.

Adoption of Risk Management approach to enforcement of mandatory standards

The Commission adopts a risk management approach to enforcement of mandatory standards as this facilitates good regulatory practice both from the perspective of consumers and businesses. The Commission adopts a risk assessment model that takes into account various criteria including injury severity, recognition of the danger, likelihood of hazard occurrence and the product's availability in the market.

The Commission takes care to identify more serious risks that are likely to occur. A classification or scaling of these risks according to perceived levels of importance assists in channelling resources to areas where the greatest problems have been identified.

As may be expected, the Commission takes a vigorous approach to enforcement particularly where a significant risk to the public safety has been identified. This is especially so for matters involving mandatory safety standards.

The point I would like to make about the Commission's enforcement of mandatory standards is that in almost every case the Commission will have acted before any consumer has been injured by the product. The Commission is empowered to take steps to have the product pulled off the market before any widespread damage can occur. The legislation therefore acknowledges the principle **prevention is better than cure.** If this did not occur, the efficacy of regulatory safeguards would be severely diminished.

A flexible approach to enforcing mandatory standards promotes regulatory safeguards.

To increase regulatory flexibility, the Commission takes a wide range of factors into account when looking at certain conduct that may breach the Trade Practices Act. The Commission does not enforce blindly. It carefully considers how its action will affect the supplier, its competitors and consumers.

The Commission is outcome oriented. This means the Commission opts for the approach that appears likely to achieve the best results. The Commission adopts an enforcement pyramid. It considers the broadest possible remedies available to it ranging from the harshest remedy (criminal prosecution), followed by civil action with substantial penalties, then enforceable undertakings from parties or compulsory education campaigns. At the base of the pyramid lies administrative action which normally takes the form of a letter. This letter will seek to bring the problem to the supplier's notice, advise of the position under the Trade Practices Act, outline possible consequences of contravention and request rectification of the problem.

If the administrative remedies are unsuccessful or do not suit the conduct in question then more stringent sanctions will be considered. Administrative resolution will generally be bypassed if the conduct shows a blatant disregard for the Trade Practices Act and/or is of a serious nature. The Commission will also consider whether the action has a reasonable prospect for success. Success here can be measured in terms of outcomes that include:

stopping the conduct, securing a penalty against the party concerned, deterring similar conduct in the future or securing a result that will protect/benefit consumers.

Regulatory safeguards provided through mandatory safeguards are also reinforced when the regulator has the ability to seek substantial penalties for non-compliance. Under the Trade Practices Act all suppliers, whether at the wholesale or retail level, must ensure that their goods and services meet relevant Australian standards. Treating all levels of the supply chain equally under the law gives a neat flow-on effect. Retailers ensure the goods they receive from distributors comply, distributors ensure compliance by manufacturers, etc. Penalties for breaches of product safety and product information provisions of the Act involve monetary penalties of up to $200 000 for companies and $40 000 for individuals. Potential for liability under the product liability provisions of the Trade Practices Act provides an additional compliance incentive.

Instances where the Commission has taken action to enforce mandatory standards

(i) Motorcycle Helmets Case — MHG Plastic Industries Pty. Ltd.[3]

(ii) Toy abacus case — Morientaz Pty Ltd t/a Sinia Imp & Export Company

(iii) Children's swimming aids, sunglasses importer penalised — MNB Variety Imports Pty Ltd

Other consumer protection provisions of the Trade Practices Act that provide a regulatory safeguard

To some degree, regulatory safeguards may be found in general consumer protection provisions that prohibit misleading or deceptive conduct and falsely claiming goods to have certain performance characteristics. The Trade Practices Act contains such prohibitions.

An obvious example of how these prohibitions could be relevant is when a supplier makes an untrue statement that its product satisfies a certain mandatory (or voluntary) standard or that the product has certain features rendering it safe for particular use.

Another example is where an untrue statement itself adds to the hazard. One notable instance involved a girl's nightdress which, apart from failing to comply with the mandatory flammability standard and not carrying a red label warning of fire danger, was labelled as being of low fire danger. This exacerbated the breach of the standard by giving consumers a false sense of the safety of the garment. Charges were laid under the sections of the Act relating to false representations and penalties increased to take account of these factors.[4]

Compliance

Of course, the regulatory safeguards provided by the product liability and consumer protection provisions of the Trade Practices Act would be of little effect without a significant rate of compliance with these laws. I would now like to spend some time discussing the role of compliance. The obvious questions here are: 'How does a regulator ensure compliance with the laws that it has to administer?'. Further, we must ask: 'How does a regulator do this in a way which keeps the amount of regulatory intervention to a minimum and ensures the maximum benefit to consumers and to the community in general?'.

To answer the above questions — the Commission takes a 'carrot and stick' approach to compliance with the Trade Practices Act. Previously, I mentioned aspects of the 'stick' approach — the substantial penalties, court and administrative actions which businesses risk should they breach the Trade Practices Act. I turn now to a discussion of the educative compliance activities of the Commission — the carrot approach.

The Commission adheres to the notion that 'prevention is always better than cure'. This is particularly relevant in the context of consumer protection and product liability laws where the consequences for consumers of non-compliance by manufacturers or businesses can be severe.

To prevent breaches of the Trade Practices Act, and avoid consequent detriment to consumers, the Commission has for many years allocated a

3 *Australian Competition and Consumer Commission v MHG Plastic Industries Pty Ltd* (1999) FCA 788 (15 June 1999).

4 *O'Bryen v Coles Myer (trading as Kmart) (1993) ATPR 41-209.*

significant part of its own resources to making consumers and businesses aware of their rights and obligations under the Trade Practices Act. Whenever amendments are made to the Trade Practices Act affecting rights and obligations, or when there is a clear need for more trade practices information in a particular industry, the Commission engages in intensive education programs. These education programs are targeted toward both consumers and businesses. They include the production of guides and giving presentations relating to the Trade Practices Act. More recently, the Commission has been active in the production of compliance materials designed to assist business. The Commission has offices in every capital city as well as in Townsville and Tamworth and these offices provide compliance information and education.

The Commission also recognises the invaluable role which voluntary industry codes can play in relation to consumer protection. The Commission has been instrumental in assisting various industries to develop voluntary codes, such as those covering supermarket scanning, fruit juice dilution and adulteration, price advertising of jewellery, and the promotion and advertising of therapeutic goods.

For some time now the Commission has focused on ensuring that when breaches of the Act occur, the party concerned undertakes compliance action. The aim here is to ensure that the offending action is not repeated and that other breaches of the Act will not occur. In the context of a breach of the product liability or consumer protection provisions, the party concerned might be required to implement business systems and procedures that ensure compliance of the goods with the requirements of either a mandatory standard or the broad consumer protection provisions of the Trade Practices Act.

Recently, the Commission and businesses have been able to use the Australian Standard on Compliance AS 3806-1998 as a benchmark in designing and implementing trade practices compliance programs. This standard sets out the hallmarks of an effective compliance program. The standard is generic and can be applied or used in any regulatory setting.

This combined educative and punitive approach to ensuring compliance with the Trade Practices Act has, over the years, proved to be very effective.

Conclusion

I would like members to take away two important elements from my presentation today. First, effectively functioning product liability and consumer protection laws clearly provide regulatory safeguards to consumers **and** suppliers. Second, continuing global harmonisation or adoption of these efficiently operating laws optimises the benefits that can be derived in terms of international consumer protection and trade across national boundaries.

Solicitor breaches of the Trade Practices Act

The following is an edited version of a presentation by Commissioner Sitesh Bhojani at the Annual Commercial Law Conference in Melbourne, 17 September 1999 on solicitor breaches of the Trade Practices Act. The article includes examples of accessorial liability of professional/business advisers in Commission litigation under the Trade Practices Act. These were provided by Commissioner Bhojani to the Trade Practices Workshop conducted by the Business Law Section, Law Council of Australia 13–15 August 1999.

Introduction

This paper focuses on the application of competition policy and the Trade Practices Act to the professional sector of the Australian economy.

While there may not be a universally accepted definition of 'a profession', the following is considered appropriate for present purposes.