and some court cases — the Commission also regards very highly its role of education and guidance to help people better understand the application and implications of the Act.

The Commission initiatives have generally included:

- contacting relevant associations to inform them of the need for their articles, codes, and/or by-laws to be amended to comply with the Act;
- presenting addresses at health sector forums; and
- meeting with representatives of health sector participants to discuss issues particular to their members.

In November 1995 the Commission published a guide to the Trade Practices Act for the health sector, which was widely distributed, and it has since introduced other education initiatives.

Most recently, however, the Commission has been working with groups to develop a comprehensive guide on the Act for general practitioners. Discussions have so far been held with the Australian Division of General Practice, the Commonwealth Department of Health and Aged Care, the College of General Practitioners, the AMA (Federal), and the Rural Doctors Association of Australia. The Commission has also participated in workshops around Australia, including rural and regional areas, to ensure GPs are accurately informed about the implications of the Act and the Commission's priorities.

The draft guide is available on the Commission's website at <http://www.accc.gov.au> and is expected to be published within the next month or so.

The Commission is pleased with the constructive approach taken by many of those within the health sector and will continue to work with them to ensure a sensible outcome. Namely, that all participants in the health sector have a properly informed and better understanding of the application of Australia's competition and consumer protection laws to the sector.

Trade practices compliance — a regulator's perspective

Following is an edited version of an address by Sam Di Scerni to the Association of Compliance Professionals of Australia's Meet the Regulators *seminar on 28 August 2001.*

Introduction

Compliance is a word that is increasingly appearing in the lexicon of Australian business, and company directors and senior management will ignore it at their peril. There is a recognition that compliance, as a business practice, is an emerging discipline in its own right, as evidenced by the activities of the Association of Compliance Professionals and the publication of the *Australian Standard on Compliance Programs AS 3806* in 1998.

Regulators and enforcement agencies such as the Commission are placing more emphasis on making compliance happen in the marketplace by encouraging a greater understanding of the elements of effective compliance. At the same time, the Federal Court is looking at the effectiveness of corporate compliance systems in determining the appropriate level of penalty in trade practices cases.

Commission priorities

In deciding whether it will pursue an enforcement action the Commission will take account of factors such as:

- apparent blatant disregard of the law;
- a history of previous contraventions;
- significant public detriment and/or many complaints;
- a national or across-state-boundaries coverage;
- the potential for action to have a worthwhile educative or deterrent effect; and
- a significant new market issue.

Institutional framework for compliance

As you are aware, Commission Chairman, Professor Allan Fels, launched the *Australian Standard on Compliance Programs* in 1998 and

the Commission was closely involved in its development.

The standard is another manifestation of the growth of compliance as a 'discipline' which is being recognised by regulators, the courts and the marketplace. Compliance can therefore help those in the marketplace to implement any form of regulatory arrangement, be it legislative, industry self-regulation, or in-house company standards.

As the purpose clause of the standard highlights, a compliance system is an important element in the corporate governance and due diligence of an organisation, and should help an organisation to become a good corporate citizen.

What the courts say

The courts are also taking a closer look at companies' compliance activities. In assessing the level of penalty to be imposed in the *ACCC v Safeway* case, Justice Goldberg stated that one needs to look at:

- whether there was a substantial compliance program in place which was actively implemented; and
- whether the implementation of the compliance program was successful.

AS3086 — benchmarks

The standard provides some useful benchmarks in achieving effective compliance.

For example, it emphasises that a company that has, or wishes to develop, a culture of compliance will only do so through a CEO and a board that have a total commitment to compliance. This can be demonstrated by the appointment of managers who both intuitively and consciously support a compliance culture.

Compliance these days is essentially a management discipline needing specialist skills. For a small- to medium-sized business, a manager or supervisor should be given this compliance responsibility provided they have direct access to, and the support of, the managing director. Larger businesses can foster a culture of compliance by setting up a compliance or audit committee at board level (or, at the very least, having compliance as a standing agenda item at board meetings) so that managers are provided with broad strategic directions.

The Caremark case, which is the leading American authority on this issue, indicated that for a compliance system to be adequate, it must be:

> ... reasonably designed to provide to senior management and to the board itself, timely and accurate information sufficient to allow management and the board, each within its scope, to reach informed judgements concerning both the corporation's compliance with law and its business performance.

Clearly, also, a company's compliance activities need to be adequately resourced.

Another essential part of the compliance infrastructure is the compliance policy. A compliance policy needs to include a clear statement of the company's commitment to compliance with applicable laws, regulations, codes, and organisational standards. This policy needs to be understood and acted on by those who work for the company, whether internally or externally.

Assessing the problem areas

Once the appropriate compliance infrastructure has been set in place, a company should undertake a systematic audit of its operations/ business units. This audit should identify both the conduct and people most likely to put the company at risk of breaching the relevant provisions of the Act.

Typically, a sales manager anxious to increase profits or protect market share may put a company at risk of conduct such as price fixing, market sharing, or resale price maintenance. A 'revved up' marketing area may resort to using misleading sales pitches in promotional campaigns. As well, there is always the risk that over-zealous negotiators for big businesses may put their company at risk by dealing with smaller businesses in an unconscionable manner.

Implementing an effective program

Once the conduct and the potential perpetrators have been identified, the next step is to undertake a 'characterisation' test to gauge the extent to which the conduct is essentially behavioural, or procedural.

Put simply, behavioural conduct (e.g. price fixing, market sharing, boycotts, and resale price maintenance) requires compliance mechanisms such as training, disciplinary procedures and incentive schemes.

Procedural conduct

Procedural conduct (such as misleading promotional material, illegal exclusive dealing clauses in supply contracts, and unconscionable conduct) is addressed by a systems-based approach, such as:

- in-house vetting committees with trade practices expertise;
- checking of contracts by trade practices practitioners; and
- product testing.

Once the characterisation test has taken place then a customised compliance system can be set in place for each business unit.

Maintenance of the compliance program

Establishing a compliance system is not a one-off activity — it requires a continuing commitment and mechanisms that include the following.

- The adoption of a complaints handling system. *The Australian Standard on Complaints Handling* is a useful guide to establishing a good system. Ideally records should be maintained which include training attendance records, and hotline records of what areas the complaints came from, when, and why.
- Record keeping to ensure all complaints are recorded and all compliance failures classified, and investigated, to determine their cause and enable their rectification. The standard also recognises that compliance failures need to be reported to those with sufficient authority to correct them.
- Regular in-house auditing to be undertaken to ensure that compliance failures are identified and addressed on a pro-active basis.
- Independent reviews (e.g. every two years or so) to ensure that the system is properly maintained and meeting current regulatory requirements.

A system is also needed to ensure sustained liaison with the relevant regulatory authorities.

Developing a relationship with the Commission

In its policy statement on compliance called 'Carrot and Stick — Recognising Compliance' the Commission has stated publicly that it strongly supports those companies which implement effective compliance programs to reduce the risk of breaching the Act.

If a company breaches the Act, particularly a serious breach, and this is discovered by those responsible for compliance (for example, the relevant line manager or compliance staff), the Commission believes that it may be prudent to front up to the Commission and inform us of the breach; and to come with a prepared brief when seeking leniency.

Leniency considerations

The Commission will assess leniency in various ways.

Immediately end the conduct

Steps must be taken to immediately cease the infringing conduct and to initiate a program to ensure similar 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 the same sort of stickers are not being used in a similar manner elsewhere.

Restitution

Where loss or damage results from the contravention, there needs to be swift, genuine and effective restitution. This restitution program should be administered, or at least audited, by an independent third party. It should be noted that restitution not only 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, or website notices.

Self-investigation

Where a breach of the Act has occurred the Commission will be concerned to establish the source of the breach and will ask: (i) did it arise from the conscious act, wilful disregard, or wrongdoing, by a member of staff or (ii) was the breach the result of poor training or supervision of staff? A company genuinely wishing to rectify any deficiencies in its system of internal control should be willing to make their own inquiries to answer those questions and expose any weaknesses in the management system that caused the breach in the first place.

Disciplinary action/training

Where an employee is 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 wrongdoer and 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 any Commission investigation once the breach has been brought to the attention of management.

Public policy

Where a breach arises from pressure applied by a company's supplier or major 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.

Prevention is better than cure

Prevention is always better than cure. Anybody who thinks that they can come to the Commission with an 'off the shelf' compliance manual and a training video, and think that they have satisfied their total compliance obligations needs to think again. The Commission is more interested in the substance and outcomes of a company's program than in the form the program takes.

Liaison with the authorities

On the issue of liaison with regulatory authorities, the standard suggests:

> There should be ongoing formal and informal liaison by the organisation and its compliance professionals with regulatory authorities and other bodies, so that the organisation is aware of current problem areas and compliance methods.

The clause then suggests that it may be useful to hold regular meetings with (i) State, Territory and Federal regulatory authorities; and (ii) also with the relevant industry and community organisations.

It also states that:

> Liaison should be supplemented by the ready availability of relevant information, such as industry and regulatory newsletters and publications.

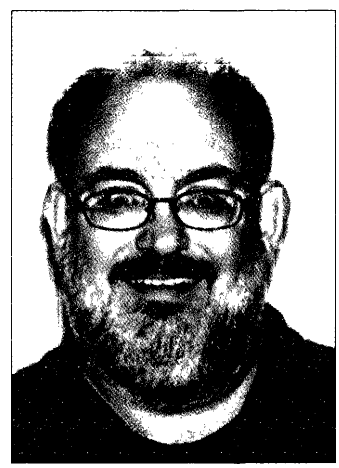
How can we assist

The Commission has a website <http://www.accc.gov.au> which contains information about our publications and current activities.

The Commission also has a compliance strategies section that specifically deals with issues of compliance. And its staff in regional offices are available to discuss issues of concern — note, however, that the Commission and its staff cannot give legal advice, which must be obtained from the legal profession.

I will leave you with my observation that the *Australian Standard on Compliance Programs* is an essential reference document for anyone who is serious about their compliance obligations.

Involving stakeholders in the making of subordinate legislation



Following is an edited version of a paper written by Peter Williams, Consumer Affairs Division, The Treasury, on consultation processes and recent regulatory initiatives in the making of subordinate regulation with emphasis on product safety regulations.[1]

[1] The views expressed and any errors in this paper are those of the author. The views presented in this paper should not necessarily be interpreted as representing the views of the Treasury, the Minister for Financial Services and Regulation or the Government, or the ACCC.