Trade practices compliance: current issues and new perspectives

Following is a summary of a presentation by Commissioner Jennifer McNeill to the Gilbert and Tobin Competition Law Seminar, Sydney, 25 November 2002.

Commissioner McNeill's aim was to leave her audience with the key messages that:

- *the Commission believes its encouragment of effective compliance programs is a critical element of its strategy to prevent contraventions of the Act*
- *while the Commission does not always get the compliance program orders it wants, its achievements over the years have greatly improved business practices*
- *it is keen to push for improvements in compliance programs and is actively engaged in seeking reform of the ability to measure and enforce compliance as well as encourage the 'compliance industry' to take a responsible approach to developing compliance programs.*

The *Australian Financial Review* commented on a recent survey, the Ernst & Young National Compliance Survey, which targeted the top 500 companies listed on the Australian Stock Exchange as follows:

> Australian companies are all talk and little action when it comes to ensuring compliance with the laws regulating how they treat their customers, employees and competitors.
>
> 96 per cent of company directors said that they were committed to implementing compliance systems, but less than a third backed that claim with cash.
>
> Almost half of the 150 respondent companies still did not consider compliance management standard business practice.

Corporate compliance is not always easy, but it is both necessary and worthwhile. Justice Keely 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.[19]

However, a structure of compliance is not enough—there has to be a culture of compliance, a willingness to accept the proposition that certain conduct is, to put it colloquially, 'just not on'.

But what do judges mean when they refer to a 'culture of compliance'?

In 1995, Justice French indicated that a compliance culture can be:

> evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.

However, courts are now more likely to want evidence that training has been effectively implemented.

Although there is no legislated requirement under the Act for companies to implement a trade practices compliance program the Commission generally seeks one as part of an administrative settlement or court orders (in either contested matters or an application for order by consent), in matters relating to Part IV or V of the Act. It supports the use and implementation of compliance programs through education and training.

The Commission generally only sees and examines compliance programs when there has been an s. 87B undertaking to provide them to the Commission or when preparing penalty submissions to the court on a breach of the Trade Practices Act.

The importance of corporate strategies fostering compliance with the Trade Practices Act has been recognised by the courts and an effective (or otherwise) compliance program is considered by the courts in determining the quantum of penalty.[20]

The scope of the court's powers to make orders for compliance programs that extend beyond the subject of the contravention itself has not been without controversy.

For example, in *ACCC v Z-Tek*,[21] the court found that it could not grant an injunction pursuant to s. 80 of the Act in relation to consent orders for a compliance program that was broader in its scope than the relevant conduct.

---

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

20 *ACCC v NW Frozen Foods Limited* (1996) ATPR 41-515 at 42,444.

21 (1997) ATPR 41-580.

Nevertheless, in the *Z-Tek* matter, Justice Merkel made an important distinction between what he considered possible for a court to order, and the scope of a compliance program that may be agreed between the Commission and parties:

> My decision relates to what is 'appropriate' for a Court to order under s. 80 as part of an agreed settlement of a proceeding in the Court. It is not intended that the decision govern, influence or limit a trade practices compliance program which might be the subject of agreement between the Commission and a party to a proceeding rather than subject to a court order under ss. 80(1) or 80(1AA).[22]

So s. 80 does not prevent the Commission from accepting an s. 87B undertaking providing for a comprehensive compliance undertaking. However, Justice Merkel's comments about court orders may raise doubt in the minds of some as to the appropriateness of such undertakings.

Does s. 86C solve the problem?

The new s. 86C, which came into effect in 2001, allows courts to make a 'probation order' directing a person to establish a compliance program to ensure awareness of responsibilities and obligations in relation to the contravening conduct, similar or related conduct.

On the face of it s. 86C looks like it might be a good way of encouraging broader compliance programs through the use of probation orders. However, the explanatory memorandum states that:

> A probation order is aimed at the internal operations, management and environment of the corporation in addressing the areas of non-compliance. As the order is non-punitive in nature, it should directly or reasonably relate to the conduct that contravened the Act.

In the light of this, there is real uncertainty about the utility of s. 86C in securing wide-ranging compliance programs; however, the breadth of the section has yet to be tested.

Use of AS3806-1988 as the standard for compliance programs

Orders and undertakings on compliance programs need to be clear enough for courts to effectively enforce them.

Regulators, including the Commission and ASIC, have adopted the Australian standard on compliance, AS3806-1988. The standard has been in place for four years and has proven a good starting point for implementation of compliance programs.

However, the use of AS3806 has recently received some questioning from the courts.

In *ACCC v REIWA*, Justice French highlighted the problem of enforcing compliance programs which were 'likely to involve vague evaluative judgments or significant debates on their interpretation'. His Honour further stated that compliance with AS3806 'imposes standards which are aspirational in their expression and not readily measured in application'. Therefore requirements should not be expressed in 'best endeavours form'.[23]

But Justice French did not dispute the legitimate public interest in implementing wide ranging compliance programs.

Inherent problems with the use of AS3806 as the basis for orders for compliance programs also arose in the matter of *ACCC v Rural Press*[24] which involved breaches of ss. 45 and 46 of the Act. The court declined to agree to the orders sought by the Commission requiring Rural Press to implement a compliance program in accordance with AS3806 as the respondent had already implemented a program. The court also questioned the validity of the Commission's approach in using AS3806 as the requisite standard for all compliance programs. The concerns raised by Justice Mansfield included concerns that AS3806 'does not have statutory recognition' and is a 'guide only' and individual corporations should 'use the system best suited to their operations'.

The issue of whether such programs can be successfully measured or audited, and the Commission's role in this, was also addressed by Justice Mansfield in *ACCC v Rural Press*.[25] He stated:

> I also have reservations about ordering, as an element of a trade practices compliance program, that the person or entity the subject of the order notify the Commission of steps taken to comply with that program ... such a direction highlights that the Court is being asked to make an order which requires ongoing or regular supervision to ensure it is being complied with ... The reporting process which the Commission suggests is clearly aimed at providing a mechanism by which an external third party may measure the performance of the primary obligations proposed. Presumably, then, if it were

22 At 44,035.

23 *ACCC v REIWA*, op cit at 42,606–42,608.

24 (2001) ATPR 41-833.

25 *ACCC v Rural Press Ltd* (2001) ATPR 41-833 at 43,294.

> not satisfied that the trade practices compliance program was being properly implemented, the Commission would then move the Court for an order that the non-complying party would be dealt with for contempt of Court. It should not be a means of empowering the Commission to negotiate privately about the proper means of implementing the order of the Court.

The cases discussed indicate significant uncertainty about the ability of courts to order comprehensive compliance programs, the appropriate standard for such programs, and the Commission's role in the development and auditing of programs.

However, the Commission does not see that it is in conflict with the courts on the orders that it has sought regarding compliance programs. As you know, we are always trying to get clarification of the law and to improve overall compliance of the Trade Practices Act. One should ask: would there be such a big, and growing, compliance industry if not for the actions of the Commission and previously the Trade Practices Commission in pushing compliance issues to the forefront of the courts and boardrooms around the country?

The recent matter of *ACCC v Wizard*[26] concerned some advertising of a particular loan product which the Commission alleged (and the court found) was misleading. Between the time of the advertising and the time of the hearing, Wizard had taken some steps to improve its compliance program.

However, Justice Wizard did not produce any documents backing up its claims and Justice Merkel stated that:

> I regard Wizard's reliance on generalities, rather than specifics, and its failure to provide any internal documentation concerning its 'trade practices compliance' program as evidence of an unsatisfactory and inadequate response to the Commission's legitimate concern to prevent a repetition of the contravening conduct.[27]

However, Justice Merkel did not order a compliance program or program audit. Instead, he determined that an 18-month injunction was an appropriate remedy.

Justice Merkel observed that he may well not have granted an injunction, had he been satisfied about the adequacy of Wizard's compliance program.

On one level the Commission was disappointed not to get an order for a compliance program. However, on another, it is pleased. The judgment still serves to demonstrate the importance courts can attach to effective compliance programs.

Conclusion

The Commission is committed to working with the compliance industry to secure improvements to the way compliance programs are implemented, audited and measured.

In the Commission's submission to the ALRC on its Discussion Paper 65, *Securing compliance: civil and administrative penalties in Australian federal regulation* we stated that we would support proposals that would enhance the profile of compliance programs as part of any codification of the French factors.[28]

The Commission believes that there is a case for amending the Trade Practices Act to further recognise the importance of compliance programs and to clarify that they are empowered to order firms to undertake them.[29] This would heighten awareness of the importance of trade practices compliance programs, and therefore increase the general level of compliance within the community.

Looking forward, I must say that it is difficult to see that the importance of compliance will diminish over time. Just as environmental compliance has become an issue for shareholders, I foresee that trade practices compliance issues will make their way onto a broader stage. I am reminded of the Biblical proverb—faithful in little, faithful in much. If you can't get your processes right—your advertising, your sales pitches, your dealings with competitors—how can you get the big things right and be trusted with shareholder funds.

Insurance in Australia: the role of the ACCC

*The following is a summary of a presentation by Commissioner Jennifer McNeill to the Australian Competition and Consumer Commission to the AFR (*Australian Financial Review*) Insurance Summit on 28 November 2002.*

Public dissatisfaction over what some see as excessive increases in premiums, and limited

[26] *ACCC v Wizard Mortgage Corporation Limited* (2002) FCA.

[27] At paras 21 and 22.

[28] See the judgment of Justice French in *TPC v CSR Limited* (1991) ATPR 41-076.

[29] ACCC submission to ALRC report 65, 14 October 2002 (unpublished).