



**Australasian Compliance Institute 13th
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Compliance makes good business

**Sarah Court, Commissioner
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Well good morning to you all and thank you very much for this opportunity to persuade you as to why a rigorous and robust compliance program makes good business sense.

While unfortunately I haven't been able to attend the conference more generally over the last day or so, I know that you have already heard from the Minister and a number of industry representatives about how to successfully institute compliance policy.

This morning I would like to give you a slightly different perspective – that from the regulator – and discuss the following:

1. Why you should worry about compliance,
2. The benefits of compliance, and
3. How your firm can achieve trade practices compliance.

I would also like to touch on the principles of a good compliance program, the approach taken by the ACCC to compliance and enforcement, and identify some current compliance issues. At the end of the session there should be ample time for some questions and answers.

However, before we get started on all of that, a few words of introduction.

As most of you will be aware, the ACCC is responsible for the administration and enforcement of the Trade Practices Act.

The main purpose of the Act is to promote competition and efficiency in markets, and to protect consumers from unlawful conduct and unlawful market practices. This means that broadly speaking our scope is twofold:

- we seek to ensure that markets are competitive and that firms do not engage in anti-competitive practices, and
- we seek to protect consumers by ensuring that firms do not engage in misleading and deceptive, or unconscionable, conduct.

We aim to do this by achieving widespread voluntary compliance with the Act. And I will talk a bit later about how the ACCC goes about encouraging and assisting companies, irrespective of their size, to achieve trade practices compliance.

Before I move on it may be worthwhile outlining to you my role at the ACCC, and where my perspective comes from. I was appointed to the Commission about 18 months ago as the Commissioner with responsibility for enforcement matters. This means that I chair the Enforcement Committee of the Commission, which is the committee that makes broad recommendations to the Commission about enforcement outcomes.

In practice this means that the Committee sits around a table and deliberates on a set of facts before us, and determines what the most appropriate enforcement outcome for a particular trader should be – should we litigate, accept a court enforceable undertaking or resolve the matter administratively – and if so, what parameters should we put around the resolution – including should we insist on a compliance program and reporting, and if so, what should the compliance program contain.

Given that my perspective on compliance is formed within that context, it's fair to say that at times I have a fairly jaded view of how well companies are managing their corporate compliance regimes – but of course, speaking broadly, we of course well know that the majority of companies do not have regular dealings with the enforcement arm of the Commission, and that is a very good thing.

So, first and foremost – why should you worry about compliance?

Firstly, the risk of your firm's reputational damage and associated loss of business.

If your firm does breach the Trade Practices Act, and the ACCC takes enforcement action, one of the principles of our enforcement practice is *transparency* in our approach – this means that we do not do private deals, and that all of our enforcement outcomes are made public. In our experience consumers and the press are very interested to know when companies have been found to have engaged in misleading or deceptive conduct, and the risk of brand or reputational damage is one of the prime motivators for companies in seeking to achieve compliance. This is particularly so in respect of large and well-known companies or brands – but protection of reputation seems also to play a significant role with small business.

Obviously damage to a firm's reputation brings with it a potential loss of business – both through reputational impact but also if your customers have poor consumer experiences.

The cost for the firm of remedying any wrongs

Even if legal action is not taken, there is always a cost associated with remedying trade practices contraventions – these can be indirect costs associated with wasted management and staff time, or direct costs such as customer refunds, legal costs and engaging independent auditors or reviewers.

The potential results of legal action - significant financial penalties, injunctions and other remedial measures

While the ACCC takes legal action in a very small percentage of cases that it investigates, the impact of legal action can be very significant – court orders may include significant financial penalties, injunctive relief, corrective advertising and community services orders, together with the publicity that goes with these results. Contraventions of consumer protection provisions can also result in criminal prosecution, as can contraventions of the new cartel offence provisions.

The impact on management time, staff and individuals involved in any breach

Finally, as already noted, there can be a significant impost on any business involved with even a potential breach of the Act if the ACCC elects to investigate – the ACCC's investigatory powers are broad, and include coercive statutory powers that compel the production of information and documents, or compel employees and directors to answer questions under oath. This has an obvious impact on those staff involved. Finally, the investigation and remedying of any breach can involve significant unproductive downtime for all involved.

But it is not all bad news – there are other reasons to establish a compliance program beyond the avoidance of risk. Let's turn now to the broad benefits of compliance.

Management confidence that the business is operating within a lawful framework

If management can be confident that the corporate governance and compliance processes are in place and effective, management time can be devoted to growing the business and pursuing other worthwhile endeavours, rather than putting out compliance spot-fires whenever they emerge.

Reduction in customer complaints and improved business reputation

If your systems are working properly, this is also in your customers' interests – which means that complaints and disputes should lessen and the firm's business reputation will be enhanced. This saves time in dealing with and resolving complaints, and in dealing with regulators if customers or your competitors have made complaints to the ACCC.

Efficient and effective dispute resolution processes

Our experience suggests that companies that pay close attention to the feedback they receive – from customers and suppliers, are more likely to be successful in building their reputation.

An effective complaints handling mechanism – as part of a broader compliance program – can be an invaluable resource. It is another way to improve processes that reduce complaints.

Avoidance of wasted resources on regulatory and enforcement investigations

And as already noted, enormous amounts of internal resources may have to be expended when responding to an ACCC investigation. If a company can readily demonstrate to the ACCC an active compliance program and demonstrate its due diligence processes to achieve compliance with the Act, the ACCC will take this into account when considering the range of enforcement responses available to it.

For example, a recent case study:

Case Study 1:

A service industry operator had a spike in ACCC complaints numbers over a period of 2–3 weeks, emerging into the ACCC’s ‘top ten’ complaints data in our second year of monitoring the firm’s compliance program. We were a little alarmed at this, as the company normally had a low complaints profile.

When we went to the company to investigate we found that their own compliance program – through an internal complaints handling system – had identified the problem. In response the company had already engaged an independent reviewer to investigate the problem. This review had ascertained that the underlying issue related to payment arrangements for the firm’s outsourced telemarketing agency – remuneration was paid on sales, not on time. This meant that there was an incentive to engage in high pressure selling by an overseas call centre which was overriding the training, scripts and other measures that had been put in place by the company for those agents.

When the ACCC came calling the company was able to provide the independent reviewer’s report and advise of the action taken to remedy the problem – which included changing the agent’s remuneration arrangements. Complaints to the ACCC almost immediately ceased.

The company’s proactive commitment to identifying and resolving the problem, and being able to evidence that commitment by the documented

evidence, demonstrated to the ACCC that the company was serious about its compliance obligations. In that circumstance, despite the high complaint levels, the ACCC took no further enforcement action because it was satisfied any consumer detriment had been proactively resolved by the company and that steps had been quickly taken to ensure that the problem did not arise again.

Case Study 2:

In early 2007 a major manufacturer voluntarily reported to the ACCC an isolated instance of conduct which it considered may have contravened the resale price maintenance provisions of the Act. The conduct related to dealings with a small retailer that it had entered into an agreement with to retail some of its products.

Under the agreement, the retailer was prohibited from wholesaling these products to other retailers and in an effort to ensure this, two relatively junior staff of the company provided the retailer with an agreement that contained, amongst other things, terms which set a minimum price for the sale of particular products.

The company detected the conduct by way of its own compliance processes, and after recognising the potential implications, engaged its lawyers to conduct a thorough and detailed investigation. It then voluntarily reported the conduct to the ACCC, and offered to enhance its trade practices compliance program to help reduce the risk of similar conduct occurring in the future.

Good corporate governance recognises the benefit of voluntarily reporting to the ACCC and the benefit of doing so for consumers, other traders and also to the corporation making the report.

Given the actions taken by the company in identifying, investigating and

reporting the conduct, the ACCC resolved the matter on an administrative basis requiring, amongst other things, that the company improve its trade practices compliance training.

Compliance theory meets the real world

Compliance programs provide a practical preventative mechanism to reduce risk.

In the ACCC's experience, a considered and well-documented compliance program is a very effective tool in reducing the risk of non-compliance. An effective compliance program is designed to:

- identify and reduce the risk of breaching the Act – in particular, in those areas of the law that the firm is most exposed to;
- rapidly and effectively remedy any breach that may occur; and
- inculcate a culture of compliance such that playing by the rules becomes business as usual.

A company that claims to take compliance seriously should ask the following questions:

- Is the design of the compliance system relevant to the actual risks facing the organisation?
- Have the compliance systems and policies actually been implemented throughout the organisation?
- Has the compliance system actually made a difference to behaviour, attitudes or the number of breaches made?

If your firm can answer 'yes' to those three questions, it is likely to be well on the way to achieving ongoing compliance.

ACCC compliance program templates

In 2005 the ACCC developed a series of compliance program template undertakings which provide firms both with an example of what the ACCC considers advisable in compliance programs generally, and with an indication of those kinds of programs the ACCC is likely to accept in circumstances where it is investigating a potential breach of the Act.

These templates are based on the principles of the Australian Compliance Standard, but aim to set out a more prescriptive set of commitments to give firms additional practical guidance – while at the same time recognising that compliance programs must be flexible and adaptable to the size and particular circumstances of each firm.

The four principles of compliance

Commitment

For my part this is by far the most important principle for effective compliance – all the other principles are to some extent dependent on it, and the success or otherwise of a compliance program turns on it.

By commitment I mean that the company's governing body and senior management must be *genuinely* committed to compliance, and this commitment must be dispersed throughout the organisation, such that there is a genuine corporate culture of compliance.

I emphasise 'genuinely' committed – because all the systems and procedures and checklists and manuals will be meaningless unless there is commitment and leadership from the most senior personnel of the firm on the issue. The courts have regularly confronted cases where there has been a major compliance failure and the contravening parties have put on evidence of their compliance programs in mitigation of any penalty orders – and the courts have repeatedly said that merely having a compliance program in place is not sufficient, it must be meaningful and effective.

In the now infamous case involving the Visy/Amcor cartel prosecuted by the ACCC in 1997, Justice Heerey noted that:

“The corporate culture of Visy in relation to its obligations under the Trade Practices Act was non-existent. None of the most senior people hesitated for a moment before embarking on obviously unlawful conduct. There was in evidence a Visy document entitled "Trade Practices Compliance Manual" ... On the front cover it is said:

“This is an important document. It is essential that it be read and understood by you. Visy Industries requires strict compliance with its policy on the Trade Practices Act.”

The document included the stern warning that price fixing and market sharing (the conduct for which Visy was being prosecuted) were "strictly prohibited" and that readers of the document "must never make (such) arrangements with a competitor".

His honour then concluded, based on the evidence before the court, that “The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.” He went on to award record penalties against the company in the order of \$36 million.

Unfortunately, we still see companies that claim to have compliance programs but which are the subject of frequent and regular complaints to the ACCC. This begs the questions about the genuineness of the commitment to properly identifying and managing relevant risks.

Implementation

Commitment *always* means the allocation of appropriate resources – without adequate resources, successful implementation of a good compliance system is unlikely.

Successful implementation requires clearly assigned – and well-documented – roles and responsibilities for implementation and the compliance outcomes within the

organisation. This includes assessing the competencies of existing personnel , and where necessary developing or recruiting in the required competencies to enable employees to fulfil their compliance obligations.

The leadership that I talked of earlier must ensure that behaviours that create and support compliance are encouraged and rewarded, and that behaviour that compromise compliance are held accountable and not tolerated.

Monitoring and reporting

To ensure successful implementation the compliance program must be monitored, evaluated, measured and reported on. This inevitably means some paperwork, but it is impossible to conclude that a compliance program is effective unless the firm really understands how well the program is understood by its employees, and how effective it is in practice.

Sometimes compliance programs enforced by the ACCC require independent auditing and reporting, and the ACCC sees reviewer independence as a vital element of compliance program development for medium to large companies. Independent reviewers provide a fresh outside perspective and do more than confirm that that a compliance program is being implemented as required by the undertaking. Independent review recommendations are an integral part of the compliance systems prescribed by the TPCP templates.

In the unfortunate event that your business is ever investigated or prosecuted by the ACCC, this documentary evidence of a compliance program, and also of its evaluation, will be invaluable in persuading the ACCC or a court that a genuine culture of compliance exists and that the lapse was a one-off and isolated event.

Continual improvement

Finally, a compliance program should never be a static document – it must be regularly reviewed and continually improved to respond to any compliance failures and to take account of changing business conditions including new regulations and legislation, staff changes and market conditions. The monitoring, reporting and evaluation already talked about should feed back directly into this process.

A critical review from a well qualified compliance practitioner can also be an opportunity for the reviewer to point out design and implementation flaws and for the company and the reviewer to develop innovative strategies for improvement. The review can also act as a prompt for management with regular evaluations of effectiveness, so ensuring that management maintains commitment to the compliance program's ongoing implementation.

The ACCC's compliance strategy

As I noted at the outset, the ACCC has as its objective widespread voluntary compliance from firms with the Trade Practices Act. We use three integrated strategies to help achieve this:

- enforcement of the law, including resolution of possible contraventions both administratively and by litigation;
- encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Act; and
- working with other agencies to implement these strategies.

Our compliance pyramid

The 'compliance pyramid' summarises the ACCC's approach to compliance and enforcement – it represents a sliding scale of enforcement and compliance measures.

Education, advice and persuasion

At the base of the pyramid is the ACCC's comprehensive use of educational campaigns to provide information and advice to consumers and businesses by which we seek to persuade firms that compliance with the Act is a business imperative and makes good business sense. Much as I am doing here today. This is because we take the firm view that prevention of a breach of the Act is always preferable to taking action after a breach has occurred. To this end we provide targeted and general publications (about 800,000 each year) and liaise broadly with business about trade practices compliance.

However, going back to the main point I made earlier, education and advice are of little value if there is no commitment to compliance within the business. All the brochures and guidance in the world are of little practical effect if they are simply plonked in a file named 'compliance' or 'risk avoidance' and not considered in the context of the firm's business risks.

Voluntary industry self-regulation codes and schemes

As I hope has become apparent from what I have said today, the ACCC strongly encourages and assists genuine voluntary compliance initiatives by individual businesses and industry wide sectors. These initiatives range from individual trader compliance programs to sector-wide initiatives, including industry charters and voluntary codes of conduct that apply the requirements of the Act to the specific circumstances of a particular industry sector.

Administrative resolution

In some matters that we investigate—for example, where the ACCC assesses potential risk flowing from conduct as low—the ACCC may accept an administrative resolution. Depending on the circumstances, administrative resolutions can range from a commitment by a trader in correspondence to a signed agreement between the ACCC and a trader setting out detailed terms and conditions of the resolution.

Court enforceable undertakings

This is where the majority of compliance programs that the ACCC is involved with arise – in undertakings provided by firms as part of the resolution of an enforcement investigation with court-enforceable undertakings. These undertakings usually contain elements that:

- remedy the mischief;
- accept responsibility for their actions; and
- establish or review and improve their trade compliance programs and culture.

Court cases

Finally, at the apex of the compliance pyramid is legal action. In a small proportion of cases that the ACCC investigates it takes legal action taken where, having regard to all the circumstances, the ACCC considers litigation is the best way to deliver an effective outcome.

The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious, where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

Even in circumstances where the ACCC proceeds to litigation the court may take into account trade practices compliance program when considering the option of possible remedies.

Current compliance issues

The global financial crisis

The current economic situation presents additional risks for compliance failure for two main reasons – firstly, as sales and revenue decrease there may be a financial imperative and added incentive on your staff to test the legal boundaries in an attempt to market and grow sales. And furthermore, in the same environment, firms have less ability to invest the resources necessary to ensure that compliance programs remain relevant and up to date, and are properly implemented. The

ACCC's message is that it is business as usual for us –our mandate is to ensure the efficiency of markets and to protect consumers – and well-managed firms must be able to maintain good corporate governance in good times and in bad. The GFC will not be considered a mitigating factor by the ACCC for any conduct when we are assessing an appropriate corporate response.

Another response to the GFC has been the opposite way – for there to be a tightening of regulation. In the compliance area this is sometimes expressed as a need for there to be a statutory requirement for all firms of a particular size to have a compliance program. There are a range of views on this and personally, while not reflecting any particular ACCC position, I suspect that any amount of statutory requirements and red tape will not fix those companies where there is a compliance problem – I go back to my earlier statements that it is all about genuine commitment and the corporate culture – without those positive elements being present, additional regulation will not in my view solve the issues.

Management or board changes

We regularly see matters where there has been a compliance failure and there are subsequent changes to senior management or the board (whether as a result of the failure or otherwise). In these situations the new personnel are sometimes reluctant to offer court-enforceable undertakings to the Commission or rigorous compliance programs on the basis that they were not responsible for the compliance failure in the first place.

While we have some sympathy with this, the legal entity responsible for the corporate failure is the company itself, and this is larger than any sum of the individuals involved – any new management should, in our view, take as a first step to promptly remedy past failures and demonstrate a commitment to good corporate governance moving forward.

Lack of genuine commitment to compliance

This again reflects the theme I have come back to on several occasions – that we see many firms who, when faced with a Commission investigation, proudly produce to us their thick compliance manuals as evidence of their commitment to compliance.

But many of these manuals it becomes apparent, with further probing, have not seen the light of day since they were produced many years earlier. As the Visy example that I gave earlier demonstrates, all the manuals in the world are irrelevant if there is not a genuine commitment to compliance.

Some case studies

To illustrate the genuine commitment to compliance issue I'd like to discuss two case studies in which the companies involved took quite different approaches to the ACCC's involvement.

Case Study: compliance problems

The first retailer offered the ACCC an undertaking in 2004 following potential breaches of the Act in relation to catalogue was/now pricing. As a result, this undertaking directed the retailer to implement a compliance program to address this breach and minimise the chances of it occurring again.

This retailer implemented the compliance program as required, focusing specifically on was/now pricing, and electing not to use the opportunity to review and address all of its business and trading practices.

The compliance program did not identify any broader trade practices risks and, as a result, following another investigation a second undertaking was accepted by the ACCC from this retailer the following year, this time in relation to product safety concerns.

Again the retailer addressed this issue as part of its compliance program and did what it needed to do to satisfy the specific requirements of the undertaking but did not expand the program to address broader trade practices risks.

Following a third complaint and investigation the ACCC accepted a third undertaking in 2006 from the retailer, this time for potential product content labelling misrepresentations.

These chains of events led to many negative impacts on the retailer throughout the period and into the future. These include:

- the legal expense and time required by the retailer to negotiate and cooperate with the ACCC throughout each of the three investigations into the conduct of concern;
- the repeated negative media attention surrounding the retailer's brand;
- the lack of commitment to improving overall business practice and the limited focus on the conduct in question each time left other areas of the retailer's business exposed to potentially increased risk of breaching the law; and
- increased attention from the ACCC and other regulators given the repeated trade practices breaches, and reduced likelihood of leniency by the ACCC or mitigation of penalties as the retailer would be less likely to be able to demonstrate that it was trying to minimise the risks of breaches.

Perhaps as significantly, any trust that the ACCC may have had in relation to dealings with the firm had well and truly evaporated by the time of the third breach.

In a second case study, a major retailer had an undertaking accepted by the ACCC for price fixing related conduct in 2002. However, contrary to the first retailer, throughout the period of the undertaking, instead of doing the bare minimum required to meet its undertaking obligations, this company decided to use the situation as an opportunity to learn from its mistakes and to integrate compliance with the Act throughout its business.

The retailer, having offered the undertaking to the ACCC, undertook an extensive risk assessment and review of its business model including its policies and procedures, the way it deals with suppliers, and the treatment of customers. Having identified its areas of risk it then developed an organisation-wide plan of how compliance within the business could be attained, and began rolling out systems and processes to achieve this. The retailer understood that in order to ensure its compliance program had the best chance of success it needed to instil compliance as part of the internal behaviour and culture.

This retailer also approached compliance as not just a legal issue, but as a way to improve customer satisfaction. In fact, the compliance initiative implemented related back to how it would improve customer satisfaction and relations. The retailer has also set about improving its customer relations by making them the focus and purpose behind each of the compliance elements and processes, and promotes the fact that it is proactive in the area of compliance to promote its brand image accordingly.

Some of the actions taken by the retailer to change the culture and implement the compliance program included:

- implementation of a central compliance and customer satisfaction team;
- review of a range of policies and practices to ensure compliance with the law, and that relevant staff were trained and aware of the rights of consumers;
- included compliance and customer satisfaction criteria into the KPIs used to assess all management staff (accountability);
- implementation of revised policies and sign-off documents to ensure the compliance team and relevant senior management review advertising before it is approved;
- the introduction of a process of regular audits and risk assessments;
- the introduction of regular trade practices training;
- development of processes to ensure the safety of its retail products and new guidance on how to recall products should the need arise;
- establishment of a compliance committee involving very senior managers within the organisation;
- implementation of an anonymous and external hotline for staff to be able to report potential compliance breaches, and published a whistleblower policy;
- made compliance the responsibility of every staff manager in every store, reported by line managers to store managers, who report to area and state managers, who then report to the compliance team and the board.

Despite this extensive program there have been some compliance failures in the company - however because of the compliance program it has been able to identify

these issues internally and propose suitable action to address the issue appropriately while working with the ACCC. Because of the extensive nature of the program, the ACCC is far more likely to allow the company to self-manage its compliance and work with the company to assist it manage compliance issues, rather than commence enforcement action.

A new strategic approach to compliance

And further, it is appropriate for me to conclude with some examples of a new more strategic compliance approach to achieving industry wide compliance.

You may be aware that the ACCC has recently accepted undertakings from the three major telecommunications companies in relation to their advertising practices. These undertakings were negotiated after the ACCC became frustrated by advertising practices in the telecommunications industry generally.

We felt that there was a 'race to the bottom' of advertising standards, with each industry player going slightly further than the next in terms of pushing the boundaries of the law in advertising. And so we called in the CEOs of the three major companies and negotiated with them a comprehensive and multi-party court-enforceable undertaking to address our concerns and, we hope, set a clear new industry standard for the next tier of providers about what the ACCC expects in that industry.

We have taken a similar approach with Coles and Woolworths in relation to restrictive covenants in supermarket leases.

These kind of solutions are not appropriate in all circumstances, but can have a major market and behavioural impact in a quick and effective manner.

Conclusion

In conclusion I come back to what I hope has emerged as a theme throughout this presentation – corporate compliance must come from the top, and all the compliance manuals, programs and systems in the world will not work unless your company has a genuine culture of corporate compliance. The ACCC has a range of publications

and guides available to business of all sizes which are freely available on our website. I wish you all the very best of luck in achieving compliance within your firm, and I hope that the ACCC never has to come calling.

Thank you.