



***Outstanding governance practices:  
Staying on top through a strong  
and vibrant Trade Practices  
compliance program***

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## **Introduction**

Good afternoon. Today, I'll outline how a strong and vibrant Trade Practices compliance program can help your business achieve outstanding governance practices.

I'll provide some examples of what constitutes a good compliance program and the importance of ongoing monitoring and improvement of such programs once they are in place.

From the ACCC's experience as a regulator, an effective compliance program is one that is designed to identify and reduce the risks of breaching the *Trade Practices Act* (TPA) and remedy any breaches that may occur.

It will also be one that promotes a culture of compliance through all work processes rather than an attitude that compliance is yet another box that has to be ticked.

Additionally, having a strong compliance program allows a company to secure consumer confidence while competing vigorously in the marketplace knowing it is playing within the rules of the game.

I'll now begin by highlighting what may happen if you don't have a suitable compliance program in place.

## **Why worry about compliance?**

The failure to comply with the *Trade Practices Act* can bring with it a vast category of pain that all businesses would hope to avoid.

Companies can face significant financial penalties and this is of course in addition to court actions that include injunctions as well as a variety of other ancillary and remedial measures.

However there could be no greater penalty than the loss of reputation and the tarnishing of your corporate image.

This could ultimately result in a loss of business.

Furthermore, the impact of a TPA breach could flow down to staff and affect morale and be a drain on the company's resources.

As you can see, not investing in a strong and competent TPA compliance program can bring with it serious consequences.

I'll now discuss how the ACCC is assisting businesses in meeting their TPA compliance obligations.

### **Compliance theory**

In 2005, the ACCC developed a series of compliance templates which provided firms examples of what the ACCC considers advisable in compliance programs and an indication of what the ACCC is likely to accept by way of administrative resolution if a breach does eventuate.

The templates were based on the Australian Standard for Compliance Programs (AS3806:2006 – Compliance Programs) which sets out the following key principles:

#### *Commitment – from the top*

The company's governing body and senior management must be committed to effective compliance and this should be evident across the organisation. A commitment can be made easier to implement by aligning the compliance policy with company's business objectives.

Please note commitment requires the allocation of appropriate resources as without them; the program is likely to fail by not anticipating avoidable TPA risks.

#### *Implementation – assign responsibilities*

Companies must clearly assign responsibility for compliance outcomes within the organisation. This includes assessment and development of required competencies to enable employees to fulfil compliance obligations.

Behaviours that support compliance should be encouraged and those that do not should not be tolerated. Controls must be put in place to identify compliance obligations, manage them and achieve desired behaviours.

#### *Monitoring, measuring and reporting*

The compliance program's implementation should be monitored, measured and reported. I will provide some examples later in this address to illustrate how well this can serve companies in practice.

### *Ongoing improvement and regular reviews*

The compliance program must be regularly reviewed and on an ongoing basis. Continual improvement is not only vital to avoid TPA breaches but is essential to the company's competitiveness in the marketplace.

#### **Case Study: Front end and back-room coordination**

A service industry operator had a spike in complaints to the ACCC over a three week period, making the ACCC's 'top ten' in its second year of compliance monitoring. We were a little alarmed at this, as the company normally had a low profile for complaints.

When we sought information from the company, they were preparing to contact us about the problem. They became aware of consumer frustrations and engaged an independent reviewer to assess the company's call centres for complaints handling.

Scoping the problem allowed the company to determine that the underlying issue related to remuneration of call centre staff – they were paid based on sales performance and this resulted in high pressure selling which overrode the training, scripts and other measures that had been put in place to ensure compliance standards were being met. The company informed the ACCC that they had changed its remuneration arrangements and complaints reduced substantially.

As the company identified, escalated and responded to the potential compliance issues, the ACCC was of the opinion the company had implemented an effective compliance program.

### *Credibility – external advice*

A review of a company's compliance program from a qualified compliance professional can be an opportunity to highlight design and implementation issues and suggest measures for improvement. The review can also act as a prompt for management to evaluate the effectiveness of the compliance program.

It goes without saying, such a review is more credible if conducted by a professional or firm independent of the company being audited.

The ACCC views an independent review as a vital aspect to ensuring the success of a corporation's compliance program. Independent reviews also provide an unbiased perspective and do more than confirm that a compliance program is being implemented.

A firm that takes compliance seriously should ask the following questions:

- What evidence is there that the design of the compliance program meets appropriate standards and is relevant to the risks facing the organisation?

- What evidence is there that the compliance program and policies have actually been implemented throughout the organisation?
- What evidence is there to show the extent to which the compliance program has actually made a difference to people's behaviour, attitudes, the number of breaches and the way that decisions are made?

I'd now like to give you an example of a how a company's compliance program dealt with a breach and how the ACCC reacted to its voluntary disclosure.

**Self disclosure case study**

A major manufacturer voluntarily reported to the ACCC an isolated instance of conduct which may have contravened the resale price maintenance provisions of the TPA.

The conduct related to dealings with a small retailer that entered into an agreement with the company to sell 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, an agreement was signed that contained terms which set a minimum price for the sale of particular products.

The Company detected the potential breach and 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 by the company in identifying, investigating and reporting the conduct, the ACCC resolved the matter on an administrative basis.

If a firm does demonstrate its rehabilitation and compliance with the TPA, the ACCC will take this into account when considering the range of actions available to it. This can not only improve a company's outcomes, but also provide greater certainty and clarity under its obligations.

I'd now like to highlight an instance where a company learnt from its compliance breach and changed the way it did its business both internally and with its consumers.

### **Case study: rehabilitation/compliance**

A major retailer had an undertaking accepted by the ACCC for price fixing related conduct. Throughout the period of the undertaking, instead of doing the minimum required, it decided to use the situation as an opportunity to learn from its mistakes and to integrate compliance with the TPA into its entire business.

Since the undertaking was accepted, the retailer had detected other potential breaches of the TPA; however through its compliance program it identified them and proposed suitable action to address the issues while working with the ACCC.

The retailer undertook a risk assessment and review of its business model including its policies and procedures, the way it dealt with suppliers, and the treatment of customers.

Having identified areas of risk it developed an organisational plan of how compliance within the business could be achieved and then began implementing it.

The retailer realised that in order to ensure its compliance program had the best chance of success, internal behaviour had to be shaped by a commitment to compliance.

Another big step forward for the retailer was that it considered compliance, not as just a legal issue, but as a way to improve customer satisfaction.

To change the corporate culture and implement its compliance program, the retailer:

- Established a central compliance and customer satisfaction team;
- Reviewed its warranties and returns policies, ensuring it complied with the law and that staff were trained and aware of the rights of consumers;
- Inserted compliance and customer satisfaction criteria into the key performance indicators (KPI) of all staff;
- Implemented policies to ensure the compliance team reviewed advertising before it was approved;
- Reviewed its pricing policies and practices;
- Began a process of regular audits and risk assessments of its business;
- Upgraded its existing staff training program to include trade practices;
- Developed processes to ensure the safety of products it sells and to provide guidance on how to recall products should the need arise;
- Set up 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.

While the above list is extensive, it took quite some time for all the aspects to be actioned throughout the business.

The retailer now has a system in place which will serve to minimise the chances of a future compliance breaches.

When breaches do occur, it is in a position to identify these before the ACCC becomes involved, then voluntarily report the issue to the ACCC, and suggest ways to resolve the situation.

The retailer has also set about improving its customer relations by making compliance a key element.

By doing this, potential benefits could include:

- Customers placing a lot more trust in the company and its products;
- Reduced legal costs;
- Avoidance of adverse publicity;
- Regulators more likely to work with the retailer if a breach occurred; and
- The retailer would be more likely to be allowed the self-manage its compliance program in contrast to businesses which are constantly being investigated for breaches.

I have already explained the importance of an effective compliance program to rapidly and effectively remedy problems when they occur. Recent experience in the product safety area highlights the difference between an effective compliance approach and one that leaves a company's reputation at risk.

#### **Case Study: Product safety recall in action**

A product safety recall was initiated following the detection of unacceptable levels of lead in a toy playset by the ACCC as part of a national sampling and testing survey of toys.

Following the initial testing of the playset by an accredited Australian testing agency, the ACCC contacted the supplier and requested that the product be immediately withdrawn from sale pending further tests.

The supplier cooperated with the ACCC and immediately directed retailers to remove the product from sale. The supplier also committed itself to conducting a consumer recall if necessary.

To assist this process, the supplier immediately prepared the necessary documentation and advertisements for a consumer recall of the product.

The supplier also began testing for lead content in a range of other toy products it that it supplied.

The final testing of the playset received by the ACCC confirmed that a recall was required and the supplier acted upon this swiftly due to its earlier preparation.

## ***The Compliance Pyramid***

The action the ACCC takes can be expressed as a pyramid or a sliding scale.

The ACCC's first response to a compliance breach is to not to litigate – litigation is in fact the top of our pyramid.

So at the base is the ACCC's continuous campaign to educate, advise and encourage compliance of the TPA. And we work very hard at it. Prevention, after all, is better than cure. That is why we produce publications and have information available on our website ([www.accc.gov.au](http://www.accc.gov.au)) especially catered for small business.

At the next level of the compliance pyramid, we have voluntary compliance initiatives. It is vital for business, through their management to establish corporate compliance programs and to educate staff on upholding them. However we understand small business have fewer resources available to them and that's why we assist in ensuring small business meet TPA compliance responsibilities as well as protecting their rights under the TPA.

Compliance should be part of the culture and fabric of every company doing business in Australia and it starts with the leaders of organisations.

Moving up the pyramid, the ACCC resolves cases through accepting court-enforceable undertakings from companies and/or individuals. In these undertakings, which are on the public record, companies agree to:

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

So, if a business fails to negotiate an effective settlement, the ACCC is likely to pursue enforcement through judicial action.

Court-based enforcement action is particularly directed towards breaches of the Act where there is:

- widespread consumer detriment;
- deliberate breaches of the law;
- emerging trends of misbehaviour in particular industries; or
- recidivist behaviour.

If a company finds it is at the sharp end of one of the Commission's enforcement activities, it can expect quick court proceedings designed to protect the welfare of Australian consumers.

Furthermore, as part of achieving an industry-wide compliance culture, we work with and encourage industry to develop voluntary self-regulation schemes.

However industry self-regulation is not a substitute for compliance with the TPA, nor does such schemes prevent the ACCC taking enforcement action. Rather, they are about putting in place rules and standards of best practices in compliance.

So in summary as ACCC Chairman Graeme Samuel puts it, it comes down to the three Cs:

Compliance culture;  
Communication; and  
Commonsense.

## **Conclusion**

In summary, I hope you now have a basic understanding of the importance of having strong and vibrant compliance programs in place in your organisation.

Compliance should not be simply viewed as tick in a box, it impacts at every level of a company. It must be considered in all of a company's core activities.

The consequences for breaching the Trade Practices Act can be severe so if you don't have a compliance program in place, I'd encourage you to seriously implementing one as soon as possible.

However remember there is no one size fits all approach and compliance is an ongoing process.

As always, the ACCC is will provide you with assistance and guidance on this issue.

Please do not hesitate to contact one of our staff and also visit our website:

[www.accc.gov.au](http://www.accc.gov.au).

Thank you.