



## A CULTURE OF COMPLIANCE

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Businesses have an obligation to comply with numerous pieces of legislation, and this can certainly prove challenging. But the importance of putting in place a proper process for requiring and monitoring compliance cannot be underestimated.

### CURRENT FOCUS

In 2015, the Chairman of ASIC, Greg Medcraft, said:

*Culture is an issue that has been on my mind for a while now. This is because, since the global financial crisis, we have seen example after example of financial institutions behaving in a way where customers come off second best. And that behaviour is often linked to the culture of those organisations.*

In March 2016, ASIC stepped up the culture war when it issued proceedings for \$100 million against the ANZ Bank for allegedly manipulating the bank bill swap rate.

The ACCC and the courts have also emphasised the importance of having a compliance culture which is conducive to compliance with the legal obligations of the business, evidenced by educational programs and disciplinary, or other corrective, measures in response to a contravention. Those in control must make sure there is a culture of compliance with the law which is deeply ingrained into the processes of the organisation.

Professor Patrick Hudson of Delft University of Technology in The Netherlands has given the following example which neatly encapsulates the point:

*In 2007, Exxon Mobil's drillers asked if they could call a halt on drilling the Blackbeard West well just 2,000 feet short of their 32,000 foot target that promised to be massively profitable. Those on the spot felt it was just too dangerous for them to continue any deeper. At the same time the geologists wanted to go deeper to reap expected massive rewards, especially in the light of the investment already made in drilling that deep. The decision whether to halt or proceed was passed right up to Exxon Mobil CEO Rex Tillerson. Rex decided to go for safety saying, "It'll only cost \$170 million." ... He could easily have given in to the Wall Street analysts, but that would not have been safety leadership. .... In contrast, BP's similar Macondo well, also in the Gulf of Mexico, was drilled on to disaster in 2010. No one at BP called a halt. Eleven lives were lost, the Gulf massively polluted and BP was nearly ruined. Tony Hayward, BP CEO, admitted he had known nothing about the well and its increasing difficulties leading to the explosion. While some of BP's contractors voiced their unease on the Deepwater Horizon, BP's own staff carried on regardless. .... What made the difference? Deep down, the two companies have very different cultures and very different leaders. One took safety seriously as well as making money.*

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## AUSTRALIAN STANDARD

The Australian Standard for Compliance Systems AS3806-2006, defines "compliance culture" as "the values, ethics and beliefs that exist throughout an organisation and interact with the organisation's structures and control systems to produce behavioural norms that are conducive to compliance outcomes".

It identifies 12 key principles to support compliance programs. In practice, companies need to not only show they have various compliance documentation, policies and manuals in place, but also that they actually work in practice.

Whilst the cases discussed below focus on compliance with trade practices obligations, the same principles apply in relation to compliance with any legal obligations.

For example, the National Compliance and Enforcement Policy of Safe Work Australia provides that prosecutors should have regard to a number of issues when prosecuting a breach, including the following:

- the culpability of the duty holder, that is, how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk;
- the compliance history and attitude of the duty holder; and
- any mitigating or aggravating circumstances, including efforts undertaken by the duty holder to control risks.

## IMPACT ON PENALTIES

Being able to demonstrate a culture of compliance exists within the business can be important in avoiding a large penalty for any potential contraventions.

In *ACCC V Visy Industries Holdings Pty Ltd (No. 3)*, a Federal Court decision in 2007, the court had to consider the following circumstances:

- Visy admitted it had engaged in price fixing and market sharing in the market for the supply of corrugated fibreboard packaging with Amcor for a period of about 5 years.
- There was an understanding pursuant to which Amcor and Visy agreed to maintain their respective market shares and not to deal with each other's customers' and, if a customer changed suppliers, 'the firm receiving that new customer would provide one of its own to the

other by way of "compensation". The customers were not to know about this. Visy and Amcor collaborated with each other in order to increase prices.

- In imposing a record penalty of \$36 million on Visy and its board, the court made reference to the non existence of a culture of compliance with the law.
- Whilst noting there was a trade practices compliance manual which indicated Visy required strict compliance with the law, the senior management did not hesitate in embarking on unlawful conduct. The judge noted "*The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it*".

## WHAT DOES A CULTURE OF COMPLIANCE REQUIRE?

*Chemeq Limited* is a 2006 decision of the current Chief Justice of the High Court, Robert French, when he was a member of the Federal Court. He imposed penalties on Chemeq for breaches of the continuous disclosure rules, and in doing so, made some important observations about compliance cultures:

- The company had not convinced him it had a degree of awareness and sensitivity to the need to consider regulatory obligations as a routine incident of corporate decision making.
- It does not require a risk averse mentality, but rather a kind of inbuilt mental checklist as a background to decision making. This may be more difficult to achieve where there is a positive obligation (in this case, the continuous disclosure rules) that is not related to any particular decision.
- The conduct of a corporate business may involve consideration of the many shifting circumstances that make up a dynamic business environment. Sometimes the correct path to follow will not be clear, so the process is important to identify and deal with matters that arise.
- It will require detailed and concrete evidence to persuade a court that the relevant culture exists. This is particularly so when there has been a contravention of the law, because the fact there was a contravention implies at least the possibility that a culture of compliance may not exist.

## SUBSTANCE OVER FORM

It is not enough to show that a compliance guide exists or that training has taken place. It must be shown that these things were effective in establishing a compliance culture.

In *Trade Practices Commission v CSR Ltd*, a 1991 decision of the Federal Court, CSR admitted to taking advantage of its market power in relation to the supply of ceiling materials in an anticompetitive way. In determining the penalty, the court considered:

- There was evidence of a corporate compliance program. In 1980, CSR had produced a guide to the Trade Practices Act and conducted staff seminars in 1985. However, there was no evidence that the guide had been updated and nothing to suggest that any subsequent educational program had been undertaken.
- One of the officers responsible for the breach had attended the training session but gave evidence that he found the provisions of the Trade Practices Act difficult to understand.
- In fixing a penalty close to the maximum, the court said there was little convincing evidence of a corporate culture seriously committed to the need to comply with the requirements of the Act. The compliance program was half hearted and in need of reinforcement. There was no indication that corrective measures were taken when a breach was identified.

## FACTORS THAT WILL INFLUENCE THE COMPLIANCE PROGRAM

There is no "one size fits all" prescription for effective corporate compliance programs. What is necessary will depend upon a variety of factors including:

- The nature of the law concerned including its subject matter, complexity and moral clarity.

- The size and complexity of the company involved.
- The management structure and geographical dispersion of the company; and
- In the case of companies selling goods or services, the level of education and training of those responsible for marketing of the company's products and the rate of turnover of sales staff.

## CONCLUSION

Some laws reflect commonly held values, such as laws prohibiting dishonest conduct or discrimination. In the case of such laws, a culture of compliance may be relatively easy to establish.

However, competition laws can be more difficult to understand because they try to strike a balance between acceptable commercial self interest and anticompetitive behaviour. The answer to whether or not a particular set of behaviours breaches the law is not always simple.

Regardless of the nature of the laws or regulations that govern the business, if a breach occurs, then having a well documented compliance plan that is deeply ingrained in the culture of the organisation will assist the business in defending any action by a regulator and minimizing the penalty that is imposed.

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