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The Australian Approach to Competition Law Compliance Programs

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Compliance and Complaints Advisory Sevices

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I. INTRODUCTION

Competition law in Australia is set out in the *Competition and Consumer Act 2010* which essentially picked up the competition law provisions of its precursor legislation, the *Trade Practice Act 1974*.

The enforcement agency in Australia is the Australian Competition and Consumer Commission ("ACCC"), which argues the case for a breach of the competition law in the Australian Federal Court. The Court determines whether a breach has been established and, when it has, determines the appropriate penalty. These are the two players, then, when it comes to compliance law and the role of compliance programs.

II. THE ACCC'S APPROACH TO COMPLIANCE PROGRAMS

The ACCC's approach to compliance programs is set out in some detail in its publication, *Corporate Trade Practices Compliance Programs*, published in November 2005. Rather than coming straight out and stating what it considers desirable features in a compliance program, the publication lists the essential features of a compliance program included in its enforceable undertakings. Therefore, by inference, the ACCC suggests what it considers desirable in a compliance system and, by implication, what amounts to due diligence. These include:

- reporting to the Board,
- appointment of a qualified Compliance Advisor and undertaking of a risk assessment and implementation of controls,
- trade practices training,
- a Compliance Policy,
- a complaints handling system/whistleblowing system, and
- appointment of a director or a senior manager as its compliance officer.

In a speech[2] to the Australasian Compliance Institute, ACCC Commissioner Sarah Court had the following to say on the ACCC's approach to compliance programs:

> If a company can readily demonstrate to the ACCC an active compliance program and demonstrate its due diligence processes to achieve compliance with

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[2] Commissioner Sarah Court, *Compliance makes good business*, Australasian Compliance Institute 13th Annual Conference – 2009, p. 5 (October 14, 2009).

the Act, the ACCC will take this into account when considering the range of enforcement responses available to it.

Commissioner Court cited an example involving an alleged breach of the resale price maintenance provisions of the Trade Practices Act where the company detected the conduct by way of its own compliance processes and, after recognizing the potential implications, engaged its lawyers to conduct a thorough and detailed investigation. The company 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. Given the actions taken by the company in identifying, investigating, and reporting the conduct, the ACCC resolved the matter on an administrative basis requiring, among other things, that the company improve its trade practices compliance training.

The ACCC's website (www.accc.gov.au) has a section covering cartels. Under the heading "what business can do" there is a link to "Compliance Programs." Under this heading it states that larger companies, where cartel activity may be harder to detect, usually need to set up a more comprehensive regime, including:

- a specialist consultant,
- a dedicated team,
- an effective complaints-handling process,
- targeted staff training, and
- an independent audit process.

This would tend to suggest that, if a company were to ask the ACCC to take into account its compliance program, it would have to demonstrate the above features. It took me a bit of navigation on the ACCC's site to find this.

In a document entitled *Compliance and Enforcement Policy*, published on December 21, 2010, the ACCC states that it encourages the use of effective compliance programs but other than Commissioner Court's statements there is *no easily accessible* document which states: (a) what it considers are the essential elements of a compliance program, or (b) the fact that the ACCC will actively consider submissions on a compliance program when considering enforcement action.

Interestingly, the ACCC has just released a brochure, *Cartel conduct—how it affects you and your business*, but there is no mention of a compliance program, opting instead for the following advice:

- Prevent your business from becoming a victim of a cartel.
- Vigorous competition is the natural enemy of cartels. Your actions can make it harder for businesses to collude.
- Take measures to prevent cartel conduct, including:
  - ✓ remain alert to arrangements between competitors in your industry,
  - ✓ try to use a wide range of suppliers and do not discuss your supply arrangements in detail with others,
  - ✓ seek quotes from a number of different suppliers,
  - ✓ take note of sudden significant and unexplained price changes,

- ✓ consider including anti-collusion clauses in tender documentation and requiring suppliers to warrant that they have not colluded with any of their competitors, and
- ✓ monitor tender outcomes and consider whether any strange patterns are cause for concern.

And later....

- Avoid your business being drawn into a cartel.
- Take the following steps to avoid being drawn into a cartel:
  - ✓ make decisions about prices independently,
  - ✓ do not discuss tenders with competitors before they are submitted,
  - ✓ make decisions about your market and product independently of other companies, and
  - ✓ do not agree to stay out of certain areas or stay away from another company's customers.

III. ENHANCING THE ACCC'S ADVICE

While the above is sound advice the document could have been greatly enhanced if it included the structural, operational, and maintenance elements of a compliance management system along the following lines:

Necessary structural elements would include:

- board/top management involvement,
- adequate resources,
- compliance policy,
- risk assessment,
- allocation of responsibility,
- appointment of a Compliance Officer/Manager,
- establishment of a Compliance Committee,
- management supervision,
- creation of a compliance calendar and compliance plan, and
- a system of documentation of all compliance material.

Necessary operational elements would include:

- operating procedures,
- education and training,
- regular communications designed to secure compliance,
- performance appraisals, and
- access to expert advice.

Necessary maintenance elements would include:

- monitoring systems,
- reporting systems, and
- identification of compliance failures, with their causes analyzed and rectification action taken.

IV. THE JUDICIAL VIEW OF COMPLIANCE PROGRAMS

Unlike the United States, Australia does not have formal Sentencing Guidelines, but judicial considerations on factors mitigating penalties work to the same ends. In Australia, the Federal Court has been looking at compliance programs, and the related issue of compliance culture when assessing a penalty in competition law cases, since 1991. In *Trade Practices Commission v CSR Ltd*,[3] French J regarded as a relevant factor in assessing a penalty under the *Trade Practices Act*:

> Whether the company has *a corporate culture conductive to compliance* with the Act, *as evidenced by educational programs and disciplinary or other corrective measures* in response to an acknowledged contravention [emphasis added].

This factor has been accepted in numerous subsequent cases. This means that the court is looking to assess the substance of compliance and not some detached formal compliance.

Perhaps the leading decision of the Federal Court looking to compliance programs as a mitigating factor in competition law cases was the judgment of Mr Justice Goldberg in *ACCC v Australian Safeways Stores Pty Ltd*,[4] during which His Honour said:

> One needs to look at the compliance program in two respects. Firstly one must ask whether there was a *substantial compliance program in place* … Secondly, one must ask whether the *implementation of the compliance program was successful* [emphasis added].

It is interesting to note later comments[5] of Mr Justice French[6] who indicated that a *concise checklist of essential elements* [my emphasis] can be very useful to a court in analyzing the effectiveness of a compliance program. He added that no such checklist can be exhaustive and cover all circumstances, but it can set a framework for analyses which are of practical benefit.

Mr Justice French gave no clues as to what should be included in the checklist, nor did Mr Justice Goldberg in his reasons give much guidance on what he considered a *substantial* compliance program and what *successful implementation* amounted to. Maybe the "French's Checklist" approach could tick Goldberg's *substantial* and *successfully implemented* "boxes."

Justice French did give his line of thinking regarding a checklist in the decision in *Australian Securities and Investments Commission v. Chemeq*, in the Australian Federal Court, where he clarified the notion of a corporation's "culture of compliance" (as a mitigating factor in deciding the quantum of penalty in competition law cases). His Honour said:

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[3] (1991) ATPR 41-076.

[4] (1997) 75 FCR 238.

[5] Justice RS French, Federal Court of Australia, *The Culture of Compliance—A Judicial Perspective*, Australian Compliance Institute, National Conference, p. 12 (September 3-5, 2003).

[6] Now Chief Justice of the High Court of Australia.

> In considering the appropriate penalty for the contravention by a corporation of a regulatory requirement, whether it be a requirement imposed by the Act or the *Trade Practices Act 1974* (Cth) or other regulatory frameworks, it is relevant to consider whether the corporation has in place policies and procedures designed to achieve compliance with such requirements.
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> *The Court will consider the form and content of the policies and procedures and also the measures adopted by the corporation to ensure that they are understood and applied* [emphasis added]. A well drafted set of policies and procedures will mean little if there is no follow up in terms of training of company officers (including directors) and, where appropriate, refresher training. In the present case there is provision for induction training but no clear evidence of follow-up and refresher training.
>
> Compliance policies and procedures will not be effective unless there is, within the corporation, a degree of awareness and sensitivity to the need to consider regulatory obligations as a routine incident of corporate decision-making. This kind of general sensitivity to the issues underpins what is sometimes called a 'culture of compliance'. It does not require a risk averse mentality in the conduct of the company's business, but rather a kind of inbuilt mental checklist as a background to decision-making.[7]

V. SUMMING UP

Pleading compliance programs as a mitigating factor in an enforcement action is not clear cut in Australia. At the enforcement agency level there is no easily accessible document produced by the ACCC which states: (a) what it considers are the essential elements of a compliance program or (b) the fact that the ACCC will actively consider submissions on a compliance program when considering enforcement action. One has to do a deal of homework to find sources from the ACCC itself where one could make a case to the ACCC.

At the Federal Court level there are developments towards identifying indicia of compliance programs as constituting mitigation factors for a competition law breach, but these are still awaiting further judicial development.

[7] *Australian Securities and Investments Commission, in the matter of Chemeq Limited (ACN 009 135 264) v. Chemeq Limited (ACN 009 135 264)* [2006] FCA 936 (24 July 2006) (Federal Court of Australia matter no. WAD 294 of 2004). Information *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/ 2006/936.html.