This note is submitted by the Delegation of Australia in the Working Party No. 3 FOR DISCUSSION on 23 October 2000.
ROUNTABLE DISCUSSION ON COMPLIANCE PROGRAMS
CONTRIBUTION BY AUSTRALIA

Introduction

1. The Australian Competition and Consumer Commission (‘ACCC’) is Australia’s national competition and consumer protection regulator responsible for administering the Trade Practices Act 1974 (TPA) and the Prices Surveillance Act 1983.

2. In performing its role, the ACCC’s mission is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection.

3. In fulfilling this mission, the ACCC seeks to achieve:
   - compliance with the TPA;
   - improvements in market conduct;
   - competition enhancing regulation;
   - a community informed about competition, consumer protection, fair trading and public utility legislation and their implications for businesses and consumers; and
   - efficient and effective use of resources.

Compliance role

4. The ACCC’s primary responsibility is for securing compliance with the Trade Practices Act. As is the case with most other competition regulators, this compliance role is very broad encompassing a wide range of compliance mechanisms including for example:
   - encouraging appropriate self-regulatory responses to systemic problems;
   - emphasising the commercial value of compliance;
   - promoting understanding of how to achieve internal compliance;
   - development of practical guidance on how to comply with the TPA;
   - liaison and cooperation with relevant industry and consumer stakeholders; and
   - effective education and enforcement action.

5. One of the ACCC’s most powerful compliance instruments is its enforcement strategy. However, in order to gain the greatest levels of compliance, the ACCC seeks to integrate its enforcement
activities with alternative means of gaining compliance to ensure a flexible approach and the optimisation of effective competition in fair markets.

6. The available ‘tools’ in addition to litigation are varied – administrative settlement, adjudication, promotion of self-regulation, compliance programs, information and liaison. Frequently the most appropriate response to a particular market problem is a combination of these tools in an integrated strategy. For example, completed litigation invariably triggers information and liaison activities to maximise its deterrent and educative effect.

7. In broad terms, the ACCC’s compliance strategy consists of:
   1. Enforcement activities;
   2. Guidance and information;
   3. Compliance Education;
   4. Industry Co/Self Regulation; and

8. In this note, a broad overview of the ACCC’s compliance activities will be provided with a more comprehensive discussion of those aspects of the ACCC’s compliance strategy that are perhaps more unique to Australia.

1. Enforcement

9. The ACCC receives many thousands of complaints and inquiries every year and therefore must be necessarily selective in its choice of enforcement action. It must give priority to action that is likely to have the greatest positive influence on compliance generally and, where possible, will achieve redress or compensation for those adversely affected.

10. The objective of the ACCC in its enforcement and litigation work is to obtain swift, timely results in the most effective and efficient way possible by:
   - stopping the illegal conduct;
   - obtaining compensation or redress for those adversely affected;
   - minimising the risk of repetition by the offender or anyone else;
   - encouraging the use of effective compliance systems; and
   - in some instances, punishing the wrongdoer.

11. The ACCC’s enforcement strategy is achieved through:
   - appropriate case selection;
   - professional and efficient investigation and assessment of potential breaches;
− the use of measured enforcement responses to relevant conduct;
− strategic assessment of priority areas; and
− liaison and cooperation with other relevant law enforcement agencies.

12. The ACCC has a range of responses available to it in any enforcement action. Most complaints are handled administratively, however, in determining the appropriate level of response, the ACCC has regard to a number of factors including whether there is:

− apparent blatant disregard of the law;
− a history of previous contraventions of the law, including overseas contraventions;
− significant public detriment and/or a significant number of complaints;
− the potential for action to have worthwhile educative or deterrent effect;
− a significant new market issue; and
− a likely outcome that would justify the use of resources.

13. Enforcement action is taken by the ACCC where appropriate, for example, where a compliance approach has proved or is likely to be ineffective, or where there is serious, re-occurring non-compliance with the TPA.

1.1 Enforceable undertakings

14. Increasingly businesses in Australia have been opting for settlements under s87B of the TPA which provides for the ACCC to accept court enforceable undertakings rather than pursue litigation.

15. Section 87B gives the ACCC a large amount of flexibility. Through using such a mechanism, the ACCC is able to design, for any given situation, a remedy that delivers the best outcome for those affected.

16. Frequently this approach affords quicker and less costly resolution, tangible benefits for affected parties, and the prospect of lasting improvement in market conduct by the business involved.

2. Guidance and Information

17. Guidance and information activities play a vital role in the ACCC’s work. As a result, the ACCC devotes considerable resources to programs and activities designed to improve community awareness of the TPA’s requirements.

18. In general terms, the objective of these programs is to improve compliance with the law and thereby reduce the need for enforcement.

19. To achieve the widest possible dissemination of information, the ACCC uses a variety of means, including:
− the mass media;
− seminars and speeches delivered by ACCC Commissioners and staff;
− publications;
− articles published in trade and industry association journals;
− Internet exposure;
− contact with business, professional and consumer organisations; and
− telephone advice and information.

20. A degree of flexibility is necessary in planning guidance and information programs in order to ensure a prompt response to new or unexpected issues.

2.1 ACCC Media Strategy

21. Use of the mass media is one of the ACCC’s most powerful compliance tools. In fact, the ACCC is confident that it is thanks to publicity that every business in Australia is now far more careful about complying with the TPA.

22. The ACCC has a policy of actively publishing the outcome of its settlements and court cases in the belief that such publicity has an important deterrent effect. Use of the media is also an important aspect of the ACCC’s education and information dissemination strategies.

23. The principal way in which the ACCC publicises its message is through press releases. Press releases cover a wide range of diverse topics from merger and adjudication decisions, details of current court action and major speeches to highlighting new publications. The ACCC’s Chairman and Commissioners are also frequently interviewed by the television and radio media in relation to particular decisions which provides a further opportunity to publicise the ACCC’s compliance message.

2.2 Speeches

24. Another important way in which the ACCC seeks to disseminate its message is through speeches delivered by ACCC staff.

25. The Chairman, Commissioners and operational level staff from the ACCC all give speeches at public events including for example a wide range of commercial and industry conferences. These speeches provide an opportunity to educate stakeholders about the TPA and the activities of the ACCC. The ACCC’s presentations are generally in response to requests from industry associations.

2.3 Publications

26. The ACCC has a comprehensive publications program which aims to provide all businesses with the information they need to comply with the law, either for free or at a nominal cost. Some of the ACCC’s publications are general while others are concerned with specific aspects of the law or the way the ACCC enforces it.
27. In addition to paper-based publications, the ACCC has also worked with industry to develop various computer based training programs, compliance videos and audio cassettes. These have generally been targeted a specific industries, however, some general material is also available.

2.4 Internet site

28. The ACCC’s Internet website continues to grow rapidly and has become an important adjunct to the ACCC’s extensive print publications program.

29. In addition to the basic information about the work of the ACCC and how to contact it, the site includes:

- on-line versions of the ACCC’s no-charge publications (and an order form for pay publications);
- on-line text of media releases and other public statements;
- discussion papers on which the ACCC seeks public comment; and
- links to related sites, especially those of agencies which are often more appropriate sources of information or help to people making inquiries to the ACCC.

30. The web site is updated almost daily to make new and sought after information available quickly to the public. The ACCC is also in the process of re-vamping its on-line complaints facility to further improve the effectiveness of this facility.

2.5 Liaison

31. At regional, national and international levels the ACCC and its staff are in continuing contact with a wide variety of private sector organisations and government agencies. These contacts are especially important to the ACCC’s work for fostering information flows, cooperative ventures and reducing duplication of effort.

2.6 Telephone advice and information

32. The ACCC receives thousands of telephone complaints and inquiries every year. Being the first point of contact with a captive consumer audience, it provides an excellent opportunity to encourage compliance with the TPA and also plays a key role in our information dissemination strategy.

33. Each state capital has a telephone complaints and inquiries ‘hotline’. A number of actions can result from such an inquiry or complaint, including:

- provision of oral / written information;
- investigation into matters raised;
- referral of the matter to another body;
- provision of further information in the form of ACCC publications; or
organising delivery of a speech from ACCC staff.

2.7 Other techniques

34. The ACCC gives high priority to developing cooperative ventures with business, consumer and government organisations, especially where they afford access to established networks or target audiences of importance to the ACCC’s work.

35. A continuing challenge is to reach the estimated 800,000 small businesses in Australia and provide them with the information they need both to comply with the TPA and make it work for them.

36. Much ACCC contact with the small business sector flows naturally from its day-to-day work, especially in enforcement. For some years, the ACCC has also run an informal ‘outreach’ program with appearances at small business oriented trade shows and exhibitions and assistance to small business programs. This will continue as part of an expected significant expansion of the ACCC’s presence in this sector.

2.7.1 Complaints handling and dispute resolution

37. The ACCC also encourages businesses to provide mechanisms for adequate and responsive complaint handling and industry based dispute resolution. Such mechanisms ensure that many disputes can be resolved without the need for ACCC involvement.

2.7.2 Guidance on the TPA

38. The ACCC often works with stakeholders to establish vetting systems or guidelines to give greater clarity as to how the ACCC will interpret the TPA with respect to certain practices. This is a way of preventing breaches occurring in the first place. Guidelines are not intended to limit the interpretation of the law. Generally a guideline will be developed in response to a request from the industry, or perhaps, in response to an escalation of complaints received by the ACCC.

3. Compliance Education

39. A very important facet of ACCC’s work is its assistance, in the form of both education and training, to associations and other agencies developing programs to help improve compliance with the TPA. Compliance programs help to foster and promote a national business environment of competitive conduct and consumer orientation.

40. In performing this role, the ACCC:

– responds to requests from companies over particular compliance questions;

– presents compliance talks to companies of a general nature;

– provides compliance training for industry associations; and

– speaks at general conferences.
3.1 Corporate compliance programs

41. The ACCC strongly encourages businesses to implement effective compliance programs in-house to prevent breaches of the TPA.

42. Under Australian trade practices law, a company is responsible for the conduct of employees undertaken with the actual or apparent authority of the company. In addition, individuals can also be liable for breaches of the TPA. This is further reason for employers to take all reasonable steps to inform relevant staff of the provisions of the TPA so as to avert misconduct by staff.

43. There are essentially eight forms of damage that can result from a breach of the TPA and thus be possibly avoided or minimised by an effective compliance program. They are:

- penalties;
- cost of litigation;
- damages;
- adverse publicity and public relations;
- disruption to management;
- damaged staff morale;
- unwanted disclosure of information; and
- ACCC supervision.

44. While the implementation of a compliance program therefore represents good business sense, the large penalties involved for breaches of the TPA are also a very compelling reason for adopting and maintaining an effective compliance program.

45. The ACCC has developed its own compliance package titled Best & Fairest to assist business and government business enterprises in developing their internal compliance programs.

46. Best and Fairest is a self-teach compliance training package developed by the ACCC which is aimed at helping businesses understand and comply with the TPA. It was designed as the basis for comprehensive corporate trade practices education with its main objective being to impart a basic grasp of the philosophy, provisions and administration of the TPA. It is framed in easy to understand modules which are aimed at educating staff on an individual or group level.

47. The ACCC’s goal in publishing Best & Fairest is to meet the needs of as wide a range of companies as possible: big or small, on one site or hundreds, dealing directly with the public or with a small group of resellers.

48. It was previously the case that the ACCC would provide specific advice and assistance to business in developing tailored compliance programs. Such programs were devised by ACCC staff in conjunction with businesses on the basis of a risk analysis of the business to determine its particular compliance training needs.
49. It is now the case that, if a business wishes to develop its own individual compliance program, there are independent compliance professionals in Australia who are able to fulfil this role.

50. The ACCC has close ties with the Association of Compliance Professionals Australia (ACPA) to whom companies interested in having a compliance program tailored to their particular needs are usually referred. The ACPA keeps a register of Trade Practices Act compliance trainers and was formed to promote the interests of the emerging ‘compliance professional’. Many legal firms are also beginning to provide advice to business on TPA compliance.

3.2 Australian Standard on Compliance Programs

51. In Australia businesses also now have objective benchmarks against which they can judge the effectiveness of their internal compliance programs.

52. The ACCC initiated the development of the relevant standard, the Australian Standard on Compliance Programs A3806, by approaching Standards Australia to see if some objective benchmarks could be developed to determine the hallmarks of an effective compliance program.

53. The Standard, launched in 1998, was drafted by a committee constituted by representatives of corporate compliance professionals, government and members of the Australian business community. While the ACCC’s main concern in promoting the creation of the Standard was to improve the standard of trade practices compliance, the Standard itself is generic and can be applied or used in any regulatory setting.

3.2.1 Contents of the standard

54. The standard sets out the essential elements for establishing, implementing and managing an effective compliance program within an organisation and provides guidance on using these elements. The program described is intended for guidance only and to complement any other existing management system that an organisation may have in place.

55. The essential elements outlined in the standard include:

- Commitment
  Most crucial to the success of any compliance program is that there is a total commitment to compliance throughout an organisation. Integral to this is demonstrable commitment to and involvement with the entire program by the Board of Directors and senior management.

- Compliance Policy
  Companies should have a well defined, visible and ‘up front’ policy which all staff are aware of and observe. It is also important that others who are employed by the company (eg agents, distributors) are also bound by the policy.

- Line Management Responsibility
  Management responsibility is an important element of effective compliance. Responsibility for the compliance program should be assigned to a named senior manager.
- **Resources and Authority**
  Companies must allocate adequate resources to ensure effective compliance. Further, officers with compliance responsibility within the organisation must have adequate authority to ensure the company is not committed to a course of action that may breach the TPA.

- **Continuous improvement**
  Compliance is a dynamic process and organisations should therefore adopt a philosophy of continuous improvement in compliance performance.

- **Identification of Compliance Issues/Operating Procedures for Compliance**
  An organisation’s compliance requirements need to be systematically identified and managed. Once compliance requirements have been identified, operating procedures and practices need to be designed and implemented.

- **Complaints Handling System**
  An effective complaints handling system is one of the principle means by which an organisation’s compliance failures are identified and appropriately rectified. Businesses are encouraged to use the *Australian Standard on Complaints Handling AS4269* as a reference when designing such a complaints handling system.

- **Record Keeping, Identification and Rectification**
  Businesses should keep a register of complaints/compliance failures and classify failures so that all, including systemic and recurring problems, can be rectified.

- **Monitoring and Review**
  Regular independent audits of the program should be conducted to ensure its continued relevance and effectiveness.

- **Liaison**
  Ongoing liaison with regulatory authorities is seen as an important maintenance element and companies are encouraged to approach the ACCC with requests for further information or particular queries.

- **Reporting and Accountability**
  Permanent procedural reporting mechanisms should be established to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management.

56. It is further recognised in the Standard that whilst some of the basic concepts of compliance are fundamental to companies regardless of size, their application will vary.

57. To this end, the standard has an appendix specifically targeting small business. Under the standard, small business compliance programs still need to meet the essential elements outlined above, but it is recognised that such a program could be organised in a simplified way in proportion to the combination of the degree of risk and the business’s resources and structure.
3.3 The ACCC’s role with respect to corporate compliance programs

58. In seeking to secure compliance with the TPA, when breaches occur, the ACCC focuses on ensuring the party concerned takes compliance action to ensure the offending action is not repeated and mechanisms are put in place to prevent future breaches.

59. The importance and relevance of corporate compliance programs is therefore often reinforced when the ACCC seeks remedies through court orders and Section 87B undertakings. The ACCC will regularly insist that offending companies must implement a compliance program (or strengthen one that is already in place) as one of a number of conditions contained in administrative undertakings or court orders.

60. In many settlements under s87B, the ACCC will require the company to undertake a program to improve its overall compliance with the TPA. At a specified time after a settlement, the business may also be required to report to the ACCC on the steps taken to implement the compliance program.

61. The ACCC will normally expect the company concerned to use the Australian Standard on Compliance AS3806 in the design and implementation of its compliance program. It may also list a number of specific issues that must be dealt with within the program. The ACCC will usually also require that the compliance program be regularly audited by an independent consultant to determine whether the program is effective and that it be provided with copies of such audits.

62. As noted above, the ACCC will not involve itself directly in the actual implementation or assessment of tailored compliance programs, including those resulting from s87B undertakings or court orders.

3.4 The Courts and corporate compliance programs

63. The courts in Australia are increasingly examining companies’ compliance activities in the context of an assessment of penalties for breaches under the TPA. It is now well accepted in Australia that in the event of a contravention of the TPA, the courts will take into account the fact that a company has a compliance education program in place when assessing whether or not a penalty against it should be mitigated.

64. Mr Justice Goldberg in his decision in ACCC v Australian Safeway Stores Pty Ltd indicated that one needs to look at a company’s compliance program in two respects. First, whether there was a substantial compliance program in place which was actively implemented and second whether the implementation of the compliance program was successful.

65. Most recently, the court reaffirmed the importance to business of installing an effective compliance program in ACCC v. Nissan Motor Company (Australia) Pty Ltd.

66. In that case, the court paid particular attention to the fact that Nissan, despite having been convicted in the Federal Court for breaching the TPA previously, had failed to implement an effective compliance program to ensure potential breaches were detected.

67. It noted that:

... [a]n effective compliance program should have included checks which picked up negligent errors and oversights ... the shortcomings in the compliance program operating at the time of these offences contributed to the happening of each offence.
68. Subsequent to the ACCC investigation, Nissan developed and implemented a trade practices compliance program which met with the ACCC’s approval. The court noted that:

    ... extensive efforts ha[d] now been made [by Nissan] to devise and implement a compliance program that should ensure that errors of the kind which occurred will not happen in the future.\(^5\)

4. **Industry Co/Self Regulation**

69. Another important aspect of the ACCC’s compliance role is its work in developing mechanisms for industry co-regulation and self-regulation.

70. The ACCC is increasingly looking at codes of conduct, charters and voluntary standards as a light handed, market sensitive means of gaining compliance with the TPA. The ACCC has found that many trade practices issues can be dealt with on the spot by the businesses concerned and that in some industries disputes between businesses or between a business and its customer(s) can be effectively resolved through industry-based schemes such as mechanisms contained in codes of conduct.

71. The ACCC has two roles in relation to codes of conduct. Its main role over the years has been to authorise industry codes, the application of which would otherwise be prohibited under the competition provisions of the TPA. For example if the code of conduct provides for expulsion from the industry in the event of a breach of the code. In such cases the ACCC has a statutory duty to assess whether the public benefit of a code submitted for authorisation outweighs any detrimental effects on competition.

72. The ACCC is also involved in developing codes of conduct. The ACCC will help an industry formulate a code of conduct where it is satisfied that the code will provide cost-effective and industry-wide fair trading outcomes and that the industry concerned has the capacity to regulate its own affairs. In some cases the ACCC does more than establish a code. It may for example, send a representative to observe and advise meetings of the committee or body administering the code to advise on, and participate in, evaluation of a code’s performance.

5. **Contribution to Law Reform**

73. Another important aspect of the ACCC’s work involves contributing submissions to public and parliamentary inquiries which reflects the rapidly evolving environment in which the ACCC operates.

74. For example, The ‘Hilmer’ Inquiry\(^6\) was a public inquiry which instigated the development of a national competition policy in Australia and the ‘Wallis’ Inquiry\(^7\) involved a comprehensive examination of the Australian financial system.

**Conclusion**

75. The ACCC has observed over the years that alternative compliance mechanisms provide a far more efficient means of achieving compliance than solely pursuing anti-competitive practices after they have occurred, confirming the age old cliche that ‘prevention is better than cure’.

76. It is for this reason that the ACCC therefore aims to create a culture of compliance in the Australian business community and therefore achieve the object of the TPA in enhancing the welfare of all Australians.
NOTES

1. As defined by Section 2 of the TPA.

2. (1997) 75 FCR 238.


