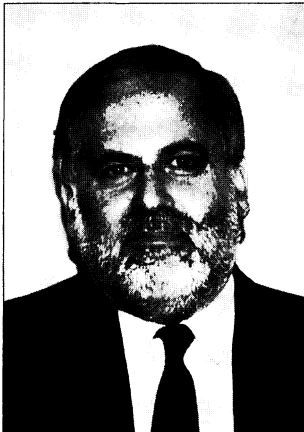


Characterising conduct as 'behavioural' or 'procedural': a new paradigm



The following article was written by Bill Dee, Director Liaison, ACCC. The views expressed are not necessarily those of the Commission.

The history of trade practices compliance by Australian companies indicates that there is no great understanding of how effective compliance is achieved. One reason for this is that compliance in Australia is still a developing 'art'. This may be due to the fact that trade practices compliance has until recently been regarded by some as a nuisance, a genuine failure to understand how to go about achieving compliance, or an ignorance of what constitutes a contravention and, consequently, the need for a compliance program.

This situation is changing due not only to the fact that companies can now be fined up to \$10 million and responsible executives up to \$500 000 but also to the fact that breaches of the consumer protection provisions can be costly in other ways — as demonstrated by a leading insurer's agreement to a potential payout of \$50 million in refunds to affected consumers for misleading policies. In addition to penalties, private action may result from contravening conduct.

With the convergence of consumer protection laws with good customer service principles in a competitive market, it makes added commercial sense for companies to have in place effective fair trading compliance mechanisms.

Many companies when asked to explain their compliance activities to the Commission or a court will tender a training video and/or manual and little else, thinking that they have satisfied their compliance requirements. This paper argues that this approach falls way short of demonstrating effective compliance.

Effective compliance requires a structured and intelligent approach. To a certain extent it can be likened to taking out an insurance policy where the premiums are relatively small and the potential savings relatively great.

The Commission's suggestion to Standards Australia for the development of an Australian Standard for Compliance Programs was born out of its desire to see some objective benchmarks developed by representatives of a number of relevant interests to make some impact on the level and effectiveness of compliance. The Australian Standard on Compliance Programs (AS 3806) will be launched on 5 February 1998.

The starting point for a company undertaking trade practices compliance is an audit of its separate business units, as different units give rise to different trade practices risks within an organisation. The audit needs to be undertaken by someone who not only has a good understanding of the Trade Practices Act but also understands what conduct within a firm's different units will raise trade practices issues and which staff members are more likely to commit the corporation to a breach merely by acting within their perceived authority.

Typically, a sales unit may put a company at risk of conduct such as price fixing, market sharing, resale price maintenance and misleading sales talk. On the other hand a 'revved up' market department may put its company at risk of the misleading and deceptive conduct provisions of the Trade Practices Act and related fair trading legislation.

Once the trade practices risks in the separate business units have been identified in the audit, the next step is to identify or characterise which risks are more behavioural and which are more procedural in origin.

Some breaches are more behavioural in nature, i.e. caused by the behaviour of an individual or individuals, and some are more procedural, i.e. caused by the lack of appropriate checking systems or procedures which 'build in' or 'embed' compliance.

For example, unlawful conduct under the competition provisions of the Act could predominantly be characterised as follows:

- price fixing (behavioural);
- market sharing (behavioural);
- boycotts (behavioural);
- other anti-competitive agreements (behavioural);
- predatory pricing (behavioural and procedural);
- illegal refusal to supply (in terms of misuse of market power) (behavioural);
- contractual supply on anti-competitive terms (procedural);
- exclusive dealing — territorial (procedural);
- exclusive dealing — product based (procedural);
- third line forcing (procedural);
- cutting off supply for failure to meet the supplier's price (behavioural); and
- threatening to cut off supply for failure to meet the supplier's price (behavioural).

Most breaches of the fair trading provisions could be characterised as procedural. For example, some consumer protection issues involve labelling, while others may involve advertising and promotional material. Misleading conduct will occur when no

procedures are in place to check whether the product in a package matches the representations about it on the label, or advertising or promotional material is incorrect because no checking for correctness took place. Safety and information standards and product safety require adequate and appropriate procedures in place to ensure compliance.

What is the point of doing a characterisation test on the trade practices conduct arising in the various business units? By properly characterising the particular conduct as behavioural or procedural the most appropriate methods of obtaining effective compliance can be put in place.

Behavioural compliance is achieved through mechanisms such as:

- regular and ongoing training which is validated;
- trade practices being part of induction courses and annual development;
- penalties for breaches of the law, including dismissal or disciplinary measures and a high profile campaign to ensure that the policy is understood throughout the enterprise, particularly by those employees whose everyday activities may result in behavioural breaches of the Act;
- giving incentives for compliance (e.g. making compliance implementation an element of job selection criteria or part of performance review), i.e. a corporate ethos that does not begrudge the payment of incentives for compliance in recognition that any incentive provided would be a fraction of the liability saved;
- not giving incentives for non-compliance (e.g. denying bonuses where increased sales result from price fixing); and
- ensuring that compliance with the Act is included as part of the annual performance review.

On the other hand **procedural** compliance is based more on systems and operating procedures and could include:

- checking contracts for trade practices compliance (e.g. ensuring that they don't include illegal exclusive dealing terms, ensuring that they don't offend the unconscionable conduct provisions);
- having checking systems for labels (e.g. the Commission's News for Business on fruit juice labelling recommends the establishment of a mechanism to ensure that any changes to the production process and/or labelling and other promotional material following a trade practices and Food Standards Code audit are cleared by the compliance expert and the senior manager responsible for compliance, and to ensure that contract/order forms for products from other suppliers stipulate that the product complies with relevant laws and regular testing to ensure that those stipulations are met);
- having a clearing system for promotional and advertising material (for example, having a 'sign off' procedure by a trade practices lawyer, or an 'advertising standards committee' which involves someone with trade practices expertise. For example, American Express has an internal Advertising Review Board made up of representatives from relevant units to ensure that all of the company's communications are accurate, honest and do not create misleading impressions in any way); and
- having checking systems which test for compliance with standards.

In the past, where production of a manual and video was paraded by a company as satisfying trade practices compliance requirements, there was more often than not a number of real deficiencies. First, training sessions were not conducted on an ongoing and regular basis nor were they part of the induction process. Nor were the training sessions validated or otherwise following the approach suggested in clause 3.4.1 of the Australian Standard on Compliance Programs (AS 3806).

Second, the targeting of employees was indiscriminate. Relevant employees needed to be targeted with the relevant trade practices message to ensure that they were aware of conduct that would land them and their company in hot water. Third, this approach didn't address what are essentially procedural compliance issues. Procedural inadequacies need to be identified and separated from behavioural inadequacies and appropriate compliance mechanisms developed to ensure ongoing compliance.

Another reason for undertaking the characterisation test is to ensure that the appropriate skills are brought into play. While lawyers play an important part in interpreting or 'translating' legal requirements with which appropriate company people should comply, compliance itself may require an array of different skills depending on the particular rule or legislation to be complied with. Quite often it will require a 'compliance team' approach where no two teams are made up of the same players. Take, for example, product liability under Part VA of the Act which requires procedural compliance. Apart from a lawyer to interpret the provisions of the Act, requisite professionals could include:

- an industrial designer to design safety features into the product;
- a communications expert who can write and design labels and instructions in such a way that they can be understood by the average customer;
- a toxicologist, a specialist in occupational/environmental medicine, or an occupational hygienist in the case of substances or consumer products which may affect health (e.g. food or other products that are taken orally);
- a compliance manager/product liability lawyer and/or regulatory affairs officer who is conversant with the legal requirements for product liability;
- a quality control expert who is responsible for ensuring products meet safety benchmarks during and after the processing/manufacture of the product;

- a customer relations/consumer affairs officer who can bring a practical consumer perspective to the process and whose duties often include the complaints handling process; or
- someone from the marketing section who can give guidance on developing a marketing angle for the safety feature of the product.

Many procedural compliance issues often require the skill of people who can design systems that by their very nature 'build in' compliance.

Behavioural compliance on the other hand requires those with good communication skills (e.g. adult education training skills), psychologists and others who have an expertise in behavioural issues and management skills.

Some conduct may require a mix of both behavioural and procedural compliance mechanisms to lessen the risk of breach. This requires an appraisal of conduct which may amount to a breach to determine whether it is behavioural, procedural, or a mix of both, and designing the compliance system most appropriate to address it.

This characterisation test while discussed in a trade practices context, would, it is submitted, be suitable to gain effective compliance with other regulations or company standards.