

The Commission is responsible for ensuring that payments system arrangements comply with the competition and access provisions of the Trade Practices Act, in the absence of specific RBA initiatives. Under its adjudication role the Commission may grant immunity from court action for certain anti-competitive practices if it is satisfied that such practices are in the public interest. It may also accept undertakings in respect of third party access to essential facilities.

The RBA may designate a payments system as being subject to its powers. Following public consultation it may then impose an access regime on the participants and/or determine standards for that system. Where the RBA has taken such initiatives, members of that system will not be at risk under the Trade Practices Act by complying with the RBA's requirements.

In effect, the Commission retains responsibility for competition and access in a payments system unless the RBA imposes an access regime or sets standards for it. Designation does not, by itself, remove a system from the Commission's coverage.

The Commission and the RBA will work closely together to ensure that a consistent approach is taken to regulatory policy in the payments system. The MOU sets out an agreed basis for policy coordination and information-sharing between the two bodies in respect of the payments system.

Court orders compliance program: WD & HO Wills

On 23 February 1998, WD & HO Wills, one of Australia's largest cigarette manufacturing and distributing companies, became the first company in Australia to be ordered by the Federal Court to implement a trade practices compliance program in line with the newly developed Australian Standard for Compliance Programs AS 3806-1998.

The Commission had instituted proceedings against Wills for its part in an attempted price fix between two of its South Australian distributors.⁸ At the time of the offence, Wills

had a compliance program in place. Von Doussa J of the Federal Court ordered Wills to revise its existing program in accordance with the standard and to submit details of its revised program to the Commission to enable it to review that program.

Although it has been common practice for the Commission to seek orders obliging a company to institute a compliance program, this is the first time that a company has been ordered to institute a program in line with the newly developed Australian Standard. The order sought by the Commission against Wills signals a new Commission approach to orders that relate to compliance programs.

AS 3806 was launched by the Commission's Chairman, Professor Fels, on 5 February 1997. The standard, which was developed by Standards Australia at the request of the Commission, forms part of an ongoing Commission strategy to improve trade practices compliance. It was drafted by a committee of representatives of corporate compliance professionals, government and the consumer movement. It provides a set of objective criteria against which a firm may assess its system for dealing with compliance issues. AS-3806 stresses the need for full organisational commitment to compliance, starting with the company board.

Like many companies asked to explain their compliance activities to the Commission, Wills initially tendered a training manual to the Commission. However, while a training manual may form part of a compliance program conforming to the standard, the existence of a training manual in itself is insufficient evidence of a compliance program. To demonstrate compliance with AS-3806 a firm must show much greater evidence of commitment to compliance and have the necessary systems in place.

The revised Wills compliance program includes the following essential elements:

- a senior executive officer with overall responsibility for trade practices compliance is to sit on the Wills board;
- a review to identify critical compliance issues within the company;

⁸ See ACCC Journal 13, pp. 31-2.

- an active reporting mechanism;
- a complaints handling and record keeping system;
- systems to address procedural and behavioural compliance problems;
- compulsory annual training sessions and induction training for all new staff; and
- a policy of disincentives for staff who fail to comply with the Act (dismissal and a statement to staff that the company will not assist staff in paying any penalty personally ordered against them).

One of the most significant improvements in Wills' existing program will be the implementation of compulsory induction and annual training in compliance issues for staff. Staff members working in areas where compliance is crucial, such as sales, missed out on training when they first joined the company and others had not been required to attend catch-up sessions if they were absent during the training session. The staff member principally involved in the conduct which led to Commission action had not attended training for up to two years before the attempted price fix.

Failure to have or maintain an effective compliance program is one of the matters that the court will consider when determining the magnitude of the penalty for a breach of the Act.

While the implementation of a program in itself may not ensure 100 per cent trade practices compliance, the standard provides a structure and procedures which, if successfully implemented and maintained, may help an organisation identify its compliance risks and so be able to take steps to avoid compliance failures.

Further information about compliance and compliance programs can be found on the Commission's website.

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