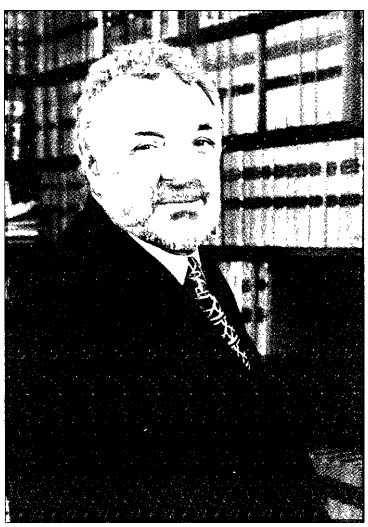
From the Commission's perspective it also articulates the increasingly central role that Australia's competition and consumer protection laws have in the culture of Australian society.

With his Honour's and ACPA's permission his opening address is reproduced below for the benefit of all those working to achieve compliance with, or advise on, compliance with Australia's competition and consumer protection laws.

At the cutting edge of compliance



A transcript of a speech by Justice Alan H Goldberg, Federal Court of Australia. It was given as the opening address of the Fourth Annual Conference of the Association for Compliance Professionals on 23 November 2000.

What do domestic violence, drink-driving and price-fixing have in common and what is the relevance of that commonality for such a gathering of professionals as we have today?

Before you decide you have come to the wrong session or the speaker has been badly briefed or has completely misread his audience — hear me out.

When I came into the legal profession almost 40 years ago the following situations generated the following social comment:

- A violent husband or father severely chastised his wife and children. The police were called, they perceived they had been called to a 'domestic'. They pacified the parties, albeit usually temporarily, and left the 'domestic', without any charges having been laid. The conduct, which was plain assault, was viewed in the context of a 'domestic situation' and not recognised or acknowledged as criminal conduct.
- A person drank ten beers or so in the space of an hour or so, went to drive home, was apprehended by the police, charged and convicted of driving under the influence. The attitude of those around him — wasn't he stiff to get caught. No suggestion that he had indulged in criminal or serious conduct.
- Companies got together and agreed upon uniform prices or divided up the market agreeing not to charge less than an agreed price and not to do business in specified areas. That wasn't a crime. It was prudent business conduct. Certainly it was orderly marketing.

Just on 40 years later what has changed?

- Domestic violence is recognised for what it is — plain violence. It is no longer shrugged off by the community and swept under the carpet, least of all by the police. The general community condemns violence in the home and has particular structures in place to deal with it — such as intervention orders.
- A person convicted of driving under the influence is not regarded benevolently by his or her peers on the basis — wasn't that bad luck. Such a person is not only described in the words of the Victorian Transport Accident Comission advertisements as 'a bloody idiot', he or she is roundly condemned.
- Price-fixing and market sharing is no longer regarded as orderly marketing and prudent or reasonable commercial practice. It is likewise condemned and regarded by the general community as a breach of the law to be penalised substantially and seriously.

The commonality? A change in communal and societal culture. Not only have the laws changed in each scenario. More importantly, community attitudes and the culture of society has changed. Hand-in-hand with changes in the law, there has occurred behaviour modification and a change in the attitude of society to particular breaches.

The relevance of this to the members of your association I would expect is self-evident but let me elaborate. There are many areas of commercial and professional activity which are the subject of regulation and the prescription of standards of conduct.

The area frequently given prominence and publicity is the area of trade practices law, but of equal significance is corporations law, income tax law, environmental law, food standards regulations, occupational health and safety regulations, equal opportunity law, sex and disability discrimination law and numerous others.

Each of these areas has its own particular framework of regulation with which compliance is required. I venture to suggest that a competent and experienced professional skilled in the particular area would be able, with some over- time, to structure standards to be observed by his or her organisation which could be held up as a paradigm of responsibility for ensuring that its workforce is being directed to observe the law.

But here lies the paradox; and let me use the Trade Practices Act as a model as it is the one with which I am most familiar. A compliance program only becomes relevant to a court where the program has failed; that is, someone has failed to comply with prescriptive standards of conduct which the compliance program has sought to enforce. Conduct which should have been captured was let out. When I say it was not successful and that it failed, I am not thereby awarding no marks for its quality as a mitigating factor; rather I am saying it has not achieved its purpose in a particular case. The nature of the reason why it did not achieve its purpose will dictate the degree and extent to which it is nevertheless taken into account as a mitigating factor.

The paradox is easily resolved from a court's point of view by looking at a compliance program at two levels, structural and behavioural:

- Is there a compliance program in place?
- In what manner has the program been implemented?

And then asking the question: Why then did the program not capture and contain the conduct before it ripened or blossomed into illegal conduct?

I think the answer, not infrequently, throws us back to my earlier examples of domestic violence and drunk driving in particular.

A structure of compliance is not enough — there has to be a culture of compliance, a willingness to accept the proposition that certain conduct is, to put it colloquially, 'just not on'.

I would expect that we would not look kindly on persons who had committed a theft, a sexual assault or arson and we would disavow similar conduct on our own behalf. Should there not be similar responses to price-fixing, market division, tax evasion, improper use of inside information, and so on?

For a court assessing a penalty for contravention of the Trade Practices Act a culture of compliance is as significant as, if not more significant than, the existence of a compliance regime. In *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076, 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.

This factor has been accepted in numerous subsequent cases. It is a relevant matter for the purposes of s. 76 of the Trade Practices Act.

What this factor involves is acceptance of the fact that more than lip service must be paid to a compliance program. It must be shown that the organisation not only does not condone conduct in breach of the law, but that it also actively seeks to inculcate in its workforce a rejection of association with, or participation in, such conduct.

The CSR case is an example of a compliance program which failed to reach such a standard. French J said at 52,155:

> 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 as indicated by the evidence appeared desultory and in need of reinforcement. No indication of any corrective measures or devitalisation of that program was offered.

Contrast Trade Practices Commission v TNT Australia Pty Limited (1995) ATPR 41-375 at 40,168:

> It is a most important factor in mitigation of the amount of a penalty that, in a particular case,

> there may be acceptable evidence of a corporate culture of compliance and of concern to ensure that the contravention which has occurred will not be repeated.

A corporate culture of compliance is obviously a mitigating factor on penalty but I have been using the notion of culture, and changing culture, in a somewhat different sense. An adequate corporate culture of compliance is demonstrated by considerations such as:

- commitment by the Board of Directors and senior management;
- establishment of systems which enable identification of problems at an early stage;
- the laying down of clearly identified lines of responsibility so that it is clear where the buck stops and where it is not passed;
- programs of instruction and education to field staff; and
- immediate access to expert advice on relevant issues.

However, I believe that these matters, albeit efficiently implemented, will still have the potential for failure unless employees really believe that breaches of trade practices legislation, discrimination legislation and the like are socially unacceptable. That is the culture which I believe needs to be reinforced. React to a price-fixer like one reacts to a thief or a sexual offender.

The stated purpose of Australian Standard AS 3806-1998 on Compliance Programs is:

> ... to provide a framework for an effective compliance program, the performance of which can be monitored and assessed.

The standard tells us that a compliance program should 'promote a culture of compliance within the organization', that is a culture of ensuring that the requirements of relevant laws and standards are met.

The standard defines 'culture of compliance' as:

> ... the promotion of a positive attitude to compliance within the organization.

What I am seeking to emphasise is that compliance professionals should not only be seeking to ensure that employees are actively motivated to observe the law; they should also be seeking to ensure that staff embrace the concept that certain commercial conduct is unacceptable and will be viewed with disdain by their colleagues and peers.

Let me turn briefly to other aspects of compliance. I do not think one can over-emphasise the importance of compliance programs and compliance regimes in today's commercial environment. There are at least two aspects I want to consider. One aspect is the undoubted fact that the existence of an adequately constructed and implemented compliance program is a mitigating factor which a court will take into account in determining the amount of a penalty to be fixed for contravention of a legislative provision even though the program may not have captured the conduct. Decisions under the Trade Practices Act make this quite clear. I would also suggest that the corollary of the proposition is that organisations who refrain from introducing an adequate compliance program do so at their peril. If a contravention occurs in the absence of a compliance program then that factor ought to be taken into account in determining the appropriate penalty. As was stated in *ACCC v Nissan Motor Company* (Australia) Pty Ltd (1998) ATPR 41-660 at 41,351:

> The shortcomings in the compliance program operating at the time of these offences contributed to the happening of each offence. In fixing penalty, this factor is an important one ...

In another case *(ACCC v Alice Car & Truck Rentals Pty Ltd* (1997) ATPR 41-582) one of my colleagues said at 44,050:

> The absence in any of the corporate respondents of a program to secure compliance with the Act up to the time of this conduct is surprising, and a factor adverse to each in penalty. However, the undertakings now offered to the Court by each of them will involve each establishing and maintaining a significant compliance program to the satisfaction of the Commission in the future. That of itself is a significant mitigating factor in penalty.

These observations demonstrate the advantages and benefits of self-regulation. It can avoid significant penalties.

My reference to self-regulation leads me to the second aspect I want to consider in relation to the value of an adequate compliance program. It has an enormous cost–benefit aspect.

If you need to sell the desirability of setting up an adequate compliance program to a finance director who is apprehensive about the cost of doing so, consider the cost advantages of the compliance program. The maximum penalty for corporations under the Trade Practices Act is now $10 million — it was increased forty-fold from $250 000 in 1993. That change sent a clear legislative message to the community and to the courts.

Courts have in recent times imposed penalties running into millions of dollars with deterrence as a major factor in mind. I am reminded of the observations of members of a Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR at 294–295:

> The Court should not leave room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also of others who might be tempted to think that contravention would pay, and detection lead merely to a compliance program for the future.

In some areas companies like to be role models. I expect this is one area where they would prefer otherwise. What is the commercial advantage of being known as an organisation who was penalised $2 million for a contravention of the Trade Practices Act?

From a cost–benefit point of view an investment in an adequate compliance program can return an avoidance of heavy penalties. Let me demonstrate by a recent example.
Representatives of a company tried to arrange for two retail outlets to agree on the retail price of some biscuits. The benefit to the company, namely avoiding a markdown claim on it was, at the most, $5500 and probably less.
A compliance program was in place but it did not capture the contravention. The penalty fixed was $900 000.

I suppose the theme I am propounding is analogous to the biblical edict 'physician, heal thyself'. A culture of compliance, in both senses in which I use the term 'culture', must start at the top of an organisation. I note that in the conference brochure there is a section 'Who should attend', and there is then listed 14 categories of persons. The category which caught my eye was 'All directors and managers with a compliance responsibility or interest'.
I would delete the reference to 'with a compliance responsibility or interest', my thesis being that a director or a manager, must by definition, role and function have a compliance responsibility or interest in one form or another.

Today legislation requiring compliance reaches into most areas of industrial, commercial and financial organisations. As is apparent from my earlier observations, I take the view that the requisite culture must be inculcated at all levels of industrial, commercial and financial organisations from the top down.

I commend the Association for its existence, its informative publications, such as *Compliance News*, and for organising a comprehensive conference such as this which I am pleased to declare open Consciousness raising is all important today in those areas where commercial activity is subject to more and ever-increasing regulation. Ignorance of the law is no excuse — a litany you've heard for many years. But I defy anyone to profess to know all the Income Tax Law, the Corporations Law or for that matter some of the intricacies of the Trade Practices Act.

When I came into the profession, the Companies Act was around half an inch thick and the Income Tax Assessment Act was not much thicker. Today the Corporations legislation and the Income Tax legislation run into a number of substantial volumes. In 1979 Russell Miller published the first volume of his annotated text on the Trade Practices Act and by this year the 21st edition had expanded almost five-fold in size. You may not be in a position to know all the law, but as a compliance professional you should be able to raise consciousness and awareness of those areas which will be impacted by legislative proscription.

I note that the last session tomorrow is entitled 'The crystal ball — Where does compliance go from here?' I would venture to suggest a tentative answer — it goes onto the agenda for every periodic board meeting and every periodic management meeting where the state of the organisation is overseen. Compliance cannot be left only to the compliance professionals. Every director and every executive, indeed all staff, must be evaluating their conduct by reference to compliance principles. The important thing to remember is that compliance is not static, it is dynamic. It is your role to keep that process current.