



LAWYERS

GILBERT + TOBIN

**IMPLEMENTING AN EFFICIENT
COMPLIANCE PROGRAM**
Best Practice and Practical Solutions

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Compliance Programs – Objectives

- **“Compliance” too limited a concept**
- **“Risk management” focuses on assessment of relevant risks and responsive *managerial* controls**
- **“Liability control” focuses on systems to guard against corporate and personal liability for penalties and remedies**
- **“Asset protection” and “Intellectual Property Asset Management” (IAM)**
- **Crunch issues:**
 - **What are the risks?**
 - **What are the management controls?**

AS 3806 - Framework

- **Significance of AS 3806 *Compliance Programs* (1998) to date:**
 - **Guidance for ACCC, ASIC and other regulators**
 - **Guidance for companies**
 - **Guidance for courts**
 - **See further McNeill, “Trade Practices Compliance” (2003) 43 ACCC Journal 8**
 - **Guidance for advisors**
- **However, AS 3806 suffers from many gaps/limitations for organisations concerned to have effective “compliance programs” in place – AS 3806 prism is misleading**

AS 3806 Framework

- **Structural elements under AS 3806
*Compliance Programs (1998)***
 - **Compliance policy**
 - **Management responsibility**
 - **Resources**
 - **Continuous improvement**

AS 3806 Framework

- **Operational elements under AS 3806 *Compliance Programs (1998)***
 - Risk identification
 - Standard operating procedures
 - Implementation
 - Complaints handling
 - Record keeping
 - Failure identification and rectification
 - Systemic and recurring problems
 - Reporting
 - Supervision by management

AS 3806 Framework

- **Maintenance elements under AS 3806 *Compliance Programs* (1998)**
 - **Education and training**
 - **Monitoring and assessment**
 - **Review of efficacy of program**
 - **Liaison with industry and regulators**

AS 3806 Framework

- **AS 3806 is not user-friendly**
 - **Prolix drafting**
 - **Many elements to cover**
 - **Guidelines on AS 3806 often add prolixity without cutting through red tape**
- <http://www.accc.gov.au/compliance/faqs>
more humane treatment but ...
- **Many companies use a basic matrix to convert AS 3806 into operational language, consolidate/simplify what needs to be done and to have paper trail evidencing that AS 3806 has been considered and systematically applied**

AS 3806 – Gaps/Limitations

- **Risk reporting:**
 - **AS 3806 does not deal adequately with risk reporting (see 2.3.8 and 3.3.8)**
 - **Lesson from the US antitrust electrical equipment conspiracies (1959-61)**
 - **See Fisse & Braithwaite, *The Impact of Adverse Publicity on Corporate Offenders* (1983) ch 16**
 - **Installing antennas that capture bad news in time**
 - **“Free route to top” v one-over-one reporting relationship**

AS 3806 – Gaps/Limitations

- **Document Control:**
 - **AS 3806 is weak on document control – no focus on avoidance or management of potentially incriminating documents and emails**
 - **Hot docs**
 - **Consider *Boral* (2002) and how one would advise Boral managers to discuss business strategy on same facts today**
 - **Email hazards, eg:**
 - **Enron – The Shredding of Arthur Andersen**
 - **Microsoft case**
 - **Brinkley & Lohr, *U.S. v. Microsoft* (2001) 67-9**
 - **HIH**
 - **Merrill Lynch**
 - **Bailey, “What Litigators Should Know About Email” (2002)**

AS 3806 - Gaps/Limitations

- **Handling ACCC, ASIC and other regulator inquiries:**
 - **AS 3806 reflects genesis as ACCC initiative – does not cover this important practical dimension of “compliance”**
 - **routine inquiries**
 - **“dawn raids”**
 - **Peter & Crosbie, “ACCC-Rules” (2002, Sept) Aust Corp Lawyer 7**
- **Interactive conditioning of regulators**
 - **Glazer, “Ten Ways to Annoy a Regulator” (2000)**
 - **Sigler & Murphy, *Interactive Corporate Compliance* (1988)**

AS 3806 - Gaps/Limitations

- **Legal professional privilege**
 - **AS 3806 does not cover – again reflects ACCC genesis and regulator mind-set**
 - **Implications of *Daniels* (2002) for managing/channelling sensitive inquiries**
 - **Crosbie & Kumar, “Power versus Privilege” (2003) 31 ABLR 7**

AS 3806 - Gaps/Limitations

- **Internal disciplinary action:**
 - **AS 3806 does not deal specifically with important issue of internal disciplinary action as a responsive reaction to breaches of law or company policies/rules**
 - **Nuremburg principle**
 - **Out of step with corporate practice**
 - ***Colonial Mutual Life* case (1991) illustrates one-time ACCC focus on internal discipline in compliance undertakings – see Fisse & Braithwaite, *Corporations, Crime & Accountability* (1993) ch 7**
 - **Out of line with *US Sentencing Guidelines* which treat internal disciplinary action as a key element of mitigation for having an “effective compliance program”**

AS 3806 - Gaps/Limitations

- **Training:**
 - **AS 3806 sets out recommendations for training (eg, use of relevant examples to guide employees in day to day work) but leaves many questions unanswered**
 - **Learning by doing?**
 - **Schrage, *Serious Play* (2000)**
 - **Schank, *Designing World-Class E-Learning* (2002) ch 1**
 - **Online compliance training?**
 - **mix with face to face training?**
 - **extent of customisation?**
 - **retention of results - which, & for how long?**

AS 3806 - Gaps/Limitations

- **Models/constructive examples:**
 - **AS 3806 and the Guidelines do not project real life models or exemplary examples**
 - **Where are the success stories and detailed case studies of effective compliance programs?**
 - **Allied case study**
 - **Fisse & Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) ch 6**
 - **Intel case study**
 - **Yoffie & Kwak, “Playing by the Rules” (2001) Harvard Business Review 119**

AS 3806 - Gaps/Limitations

- **Crisis control**
 - **AS3806 does not extend to this dimension of “compliance”**
 - **Many useful practical guides, eg:**
 - **Mitroff, Pearson, Harrington, *The Essential Guide to Managing Corporate Crises* (1996)**
 - **McConnell, *Challenger: A Major Malfunction* (1987)**

AS 3806 - Gaps/Limitations

- **Getting employee buy-in:**
 - **AS 3806 and Guidelines little help on this key factor in effective compliance**
 - **Management commitment**
 - **Signalling likelihood of internal disciplinary action**
 - **Effective user-friendly training and well-designed SOPs**
 - **Message that compliance program is there to protect employees as well as company**
 - **“Infusion” techniques to remind and reinforce**
 - **Case studies of individuals targeted by ACCC and hit hard**
 - **Use of positive incentives**
 - **Fisse & Braithwaite, *The Impact of Adverse Publicity on Corporate Offenders* ch 6**
 - **Cf Kohn, *Punished by Rewards* (1999)**

AS 3806 - Gaps/Limitations

- **Cost efficiency:**
 - **AS 3806 and Guidelines duck practical issue of cost**
 - **Cynical “wait & see” approach?**
 - **Parker, “Regulator – Required Corporate Compliance Program Audits” (2003)**
 - **Softly, softly approach of Privacy Commissioner**
 - **Winning with integrated streamlined processes, eg:**
 - **rethinking SOPs and learning by doing**
 - **complaint handling as training**
 - **performance reviews and monitoring and continuous improvement**

AS 3806 - Gaps/Limitations

- **Cost efficiency cont:**
 - **Efficiencies of scope, eg:**
 - **multiple training needs and combined/interlocked solutions**
 - **industry associations and portals**
 - **Cost saving implications of online compliance training programs**
 - **reduced staff downtime**
 - **ubiquitous delivery**
 - **low maintenance**
 - **competitive market**

AS 3806 - Gaps/Limitations

- **Cost saving implications of business process re-engineering**
 - **Online business processes pull towards integrated control of compliance, risk management and liability control**
 - **Examples:**
 - **FCAI Online Advertising ToolKit**
 - **Online Continuous Disclosure and Insider Trading management**

IMPLEMENTING AN EFFICIENT COMPLIANCE PROGRAM

File Edit View Favorites Tools Help

FCAI - Advertising Law Toolkit

Resources for Managing Our Advertising Compliance Obligations

Admin • Contact • Help • Home

AdLaw Toolkit Menu

Start the Advertising Clearance Control Panel

Control Panel

Hall of Fame & Shame

Look below for examples of exemplary as well as misleading advertisements

- Price
- Danger words
- Disclaimers
- Finance
- Print size
- Comparative ads
- Bait advertising

Compliance Training Tools

- Privacy
- Trade Practices
- Smart Contracting
- Net Control
- EEO
- OH&S

Legal Resources

Please select a link below

- Legal Resources
- About FCAI Legal Affairs
- Legal Organisation
- External Lawyers
- Subsidiary Information
- Business Conduct Materials
- Legal Policies & Procedures
- Legal Training Manuals
- US Approvals
- FCAI Intellectual Property Procedures

Welcome to the FCAI AdLaw Toolkit

Welcome to the FCAI advertising Law Toolkit. This site will help any person involved in the production of advertising material to ensure that it does not contain any misleading or deceptive content. The ACCC and State Fair Trading Departments can, and have, imposed substantial penalties where advertisements have been illegal



What is Advertising ?

"Advertising" and "promotional" material is any external communication which draws attention to, or describes favourably, our products or services in order to promote sales or make people aware of what we do on radio or television, in print or on the Internet. Promotional material includes incentive advertising such as competition offers, as well as brochures.

How do use this Toolkit ?

This browser-based, expert system for the drafting and reviewing of advertising copy will report whether the advertising copy would breach relevant trade practices and State advertising laws. This report, together with a copy of the proposed advertisement can then be sent to in-house counsel for approval and signoff. An audit trail can also be automatically constructed for compliance purposes.

Frequently Asked Questions

- When, if ever, can we say "free"?
- When can we safely say "limited offer"?
- Many of our deals have quite a few strings attached. How do we cover those without killing the key selling points in the ad?
- For the price in an ad, what excluding do we need to cover? GST? On-road costs? Dealer charges? Optional accessory pricing?
- How closely do photos of vehicles in ads need to correspond to the actual vehicles on sale?
- What disclosures are needed when we advertise demonstrators or vehicles repaired after hail or other damage?
- What is the difference between misleading ads and hype?

Clause Library

Expand the headings by clicking on the +.

- Disclaimers
- Comparative Advertisements
- Finance Clauses
- Danger Words

QuickLinks

Choose a quick link

Select a link

Site Search Cube

Enter your search terms below, and press the 'Search' button. Use * as a wildcard.

Search

FCAI Adlaw News

Click on a story to read more

FCAI Releases Advertising Law Toolkit

The Federal Chamber of Automotive Industries has released an innovative tool for managing legal compliance issues associated with member's advertisements.

NSW Department of Fair Trading Updates Advertising Checklist

The NSW Department of Fair Trading has released a new version of its advertising checklist.

Dictionary Lookup

Please enter your search word.

Lookup **OneLook**

Google Search Cube

Enter a search term.

Search **Google**

http://p1000/adLaw/html/content.asp?z_url=more_news.asp#16&content_title=Latest+News+in+Detail Local intranet



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Clause Library

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Current Jobs

Trade Practices Clearance Checklist

Please complete the following checklist prior to the release of promotional material.

Part 2

Question	Answer
<p>7. Future Promises or Predictions</p> <ul style="list-style-type: none"> • Are any promises, predictions and/or representations made ? 	<p><input type="radio"/> Yes <input checked="" type="radio"/> No</p>
<p>8. Availability of Product or Service</p> <p style="color: #0056b3; font-size: small;">Guidance Notes</p> <ul style="list-style-type: none"> • Is "while stocks last" or "at participating outlets only" stated ? • Is the product/service available in all relevant outlets ? • Is ample stock available in all States for the promotion or sales period ? 	<p><input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> NA</p> <p><input checked="" type="radio"/> Yes <input type="radio"/> No</p> <p><input checked="" type="radio"/> Yes <input type="radio"/> No</p>
<p>9. Visual Illustrations of Products</p> <ul style="list-style-type: none"> • Do the visual depictions of the product correspond with the written text and description ? 	<p><input type="radio"/> Yes <input type="radio"/> No <input checked="" type="radio"/> NA</p>
<p>10. Price</p> <p style="color: #0056b3; font-size: small;">Guidance Notes</p> <ul style="list-style-type: none"> • Are prices given ? <ul style="list-style-type: none"> • Are all prices correctly stated ? • Have they been checked ? • If so, by whom ? [Please state] • Have discounts been offered ? • If discounts are offered, are they true discounts from the regular price ? • Has the sale period been specified ? 	<p><input checked="" type="radio"/> Yes <input type="radio"/> No</p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> NA</p> <p><input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> NA</p>



AdLaw Toolkit Menu

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Clause Library

Expand the headings on the +.

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Trade Practices Checklist Guidance

Guidance on... Advertising Prices

Likely to be unlawful

- A price in the form of "\$X + Y", where Y is an additional compulsory component of the price would breach 53C where the cash price is not specified. For example, in the Signature case, a representation that an alarm system was available "from \$295 plus GST" was found to be in contravention of section 53C of the Act as this representation did not adequately specify the cash price.
- A price in the form of "\$X*", where in a place that is not prominent, the asterisk qualifier details additional components of the price contravenes sections 52, 53(e) and 53C of the Act. For example, in the Signature case, a representation that an alarm system was available "from just \$295*" where elsewhere the asterisk qualifier stated "*plus GST where applicable" was found to be in contravention of sections 52, 53(e) and 53C of the Act.
- A price in the form of "\$X", where X is not the total price and where any additional components of the price are not stated contravenes sections 52 and 53(e) of the Act. For example, in the Signature case, a representation that the base price for an alarm system was \$295, without reference to an additional \$29.50 which was payable as a result of the GST was found to be in contravention of sections 52 and 53(e) of the Act.

Likely to be lawful

- A price in the form of "\$X", where X is inclusive of all components of the price (for example, \$324.50 including GST).
- A price in the form of "\$X including \$Y" (for example, \$324.50 including \$29.50 GST).
- A price in the form of "\$X + \$Y = \$Z" (for example, \$295 + \$29.50 GST = \$324.50).
- A price in the form of "\$X + \$Y" (for example, \$295 + \$29.50 GST).

Note, however, that if the price had many components causing confusion, this

l material.

	Answer
	<input type="radio"/> Yes <input checked="" type="radio"/> No
	<input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> NA <input checked="" type="radio"/> Yes <input type="radio"/> No <input checked="" type="radio"/> Yes <input type="radio"/> No
ttten text	<input type="radio"/> Yes <input type="radio"/> No <input checked="" type="radio"/> NA
	<input checked="" type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Yes <input type="radio"/> No



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Case Library

Expand the headings by clicking on the +.

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Current Jobs

View a Job

Details for the job selected can be found below.

JOB DETAILS

Job Id:	4277
Project:	Subaru Mentone Wagon Clearance
Project Number:	23
Material Deadline:	03/06/2003
Approval Needed:	
Project Owner:	David Golding
Medium:	Press
Description:	Subaru Mentone Wagon Clearance sale for 2003. Starts 05/08/2003. Ends 12/08/2003. All wagons sold with free 5 year extended warranty and three months worth of petrol (1000 litres maximum).
Creation Date:	07/02/2003
Status:	Waiting Approval
Approved Date:	

CHECKLIST

Date	User	Result
06/05/2003	David Golding	Complete
05/05/2003	David Golding	Incomplete

Trends

- **Professionalism (eg via ACLA, ACPA)**
- **Court scrutiny of compliance programs**
- **Cost reduction imperatives within companies**
- **Innovation**
- **Lawyers as gatekeepers?**
 - **Coffee, “Understanding Enron: It’s About Gatekeepers, Stupid” (2002)**
- **Increasing [mindless] focus on punishment as means of inducing compliance, eg:**
 - **Dawson Committee Report and spectre of fines based on turnover**
 - **Genzyme swallows £6.8 million turnover-based fine under *Competition Act 1998 (UK)* (2003)**