I note that chief executive officers of the Western Australian Government are required to enter into performance agreements with their minister. I understand that this obligation is set out in the WA *Public Sector Management Act 1994*. A proforma of the performance agreement for 30 June 1999 sets out under 'Part C — Financial Management' a requirement that as a CEO I will provide:

> ... confirmation of an audit of the agency's exposure to the competition laws and the implementation of an effective compliance program for identified high risk areas by 30 June 1999.

This requirement imposed in CEOs' performance agreements is clearly an important and commendable leadership signal from the leaders in the Western Australian Government, demonstrating the seriousness with which the Government views its obligation to comply with and manage the legal risks of exposure to the competition laws. It also helps to demonstrate a desire on the part of the WA Government to be accountable for its compliance objectives and activities.

Conclusion

By their nature it is likely that businesses or business activity undertaken by the Commonwealth Government or agencies will have a public interest component or underpinning rationale. It is also likely that taxpayers funds will be utilised at least to some degree in most if not all such business activities.

Commonwealth, state and territory governments and parliaments have enacted laws also in the public interest, to ensure that governments involved in businesses are subject to the same competitive disciplines as private sector businesses. The community would therefore expect that, at the very least, public sector businesses including Commonwealth public sector businesses comply with the law.

The community would also expect that the law is enforced even handedly and without fear or favour by the Commission. It seems only sensible therefore that Commonwealth departmental secretaries or agency CEOs provide a leadership role in actively ensuring, establishing or maintaining a culture of compliance with the requirements of Australia's competition laws to manage the legal risks of the Commonwealth Government's exposure to the competition laws.

In a more general sense it seems clear that creating a 'culture of compliance', to use the judicial terminology, starts at the top. Without strong leadership and commitment at the highest levels of an organisation it will not be possible to create an effective compliance program or system, let alone an organisational culture of compliance.

It is inevitable that the spotlight will focus on the leaders and senior executives if the effectiveness of a compliance program or organisational culture of compliance is being assessed. Ultimately, compliance focuses on the behaviour and choices of individuals when confronted by challenging choices. That is, choices or circumstances that require an individual to implicitly or explicitly consider 'whether the end justifies the means'.

It is at those critical decision-making moments that the context provided by an organisation's culture as well as the context of the individual's circumstances will be crucial in measuring the effectiveness of a compliance program or system. To borrow from the words of Dr David Kemp, achieving an organisational culture of compliance that is integrated with the performance of the organisation will require leaders who can establish a shared vision and sense of purpose, and inspire, coach and enable their achievement.

Consumer protection, advertising and the ACCC

Following is a summary of a presentation by Commissioner Sitesh Bhojani to the Australian Federation of Advertising Forum in Melbourne on 25 October 2001 and Sydney on 29 October 2001.

After outlining the aims and relevant provisions of the Trade Practices Act, Commissioner Bhojani demonstrated the interaction between advertising and consumer protection laws and some cases for which the law and advertising conduct have come into conflict.

Mobile phones

Nationwide News conducted a promotion in its newspapers and also in advertisements on television and radio offering a 'free' mobile telephone. However, as a condition of receiving the 'free'

phone, the reader was required to enter into a contract which involved a total expenditure of over $2200. Nationwide News was convicted and fined $120 000. It appealed against the conviction and level of fines. The Full Court of the Federal Court dismissed the appeal and said:

> 1. An advertiser relies on common understandings of the word 'free' at its peril. Any respect in which goods or services offered as 'free', may not be free should be prominently and clearly spelled out so that the magnetism of the word 'free' is appropriately qualified.
>
> 2. An offer to a newspaper reader of a 'free' mobile phone without any reference to conditions, was an offer to cause the reader to become the owner of such a phone without his or her first having to outlay money or to undertake to do so. The addition of the words 'conditions apply' did not detract from that position: rather, they indicated that after satisfying conditions, the reader would be entitled to become the owner of a mobile telephone, still without his or her having had to outlay money or undertaking to do so.
>
> 3. A reader, viewer or hearer of the advertisement might reasonably have expected that there would be, for example, (i) a limit on the number of free mobile phones on offer, (ii) a prescribed mode of and time for acceptance of the offer, (iii) perhaps even an obligation to buy a small number of newspapers at their standard price, (iv) or to send a number of coupons from the newspaper. Conditions of that kind would not be understood to detract from the 'freeness' of the mobile phone. However, a reader, viewer or hearer of the advertisement would not have expected the conditions referred to in the advertisement to compel him or her to enter into a contract of a particular kind with a particular service provider requiring outlays such as those payable here totalling $2294.90.

The Federal Court added:

> In truth the conditions meant that a person would have to part with a substantial sum of money before he or she could get a phone. The true effect of the conditions were thus misrepresented.

The important lesson is that an asterisk, or the words 'conditions apply', is not enough to inform consumers that they must actually pay to get the 'free' good or service.

Women's fashion

In the lead-up to Christmas 1994, the fashion house Cue was fined $75 000 for attaching misleading price tags to its garments, an offence under two-price advertising.

The Commission initiated the action against the fashion house, alleging that in the week before Christmas, Cue released nationally a new range of shorts, skirts, vests and tops from its warehouse in Sydney. Swing tags attached to each garment showed two prices; the higher price was crossed out and prices from $13 to $56 lower were written underneath.

The Commission alleged this would lead shoppers to believe that the garments had previously been sold at the higher prices and had now been discounted. In fact, the garments had never been sold before.

In Cue's submissions to the court, it said that it 'had no intention to mislead or deceive' and that, by using dual-priced tags, it had only intended to inform interested purchasers that the higher prices were those at which the garments 'would ordinarily' have been offered for sale had it not been for the December management decision to change the sales policy for the Christmas period.

Justice O'Loughlin was not impressed and said, in imposing the penalties:

> In my opinion, the natural and probable consequence of a dual-priced swing tag is that members of the buying public would assume that the garment had previously been offered for sale at the higher of the two prices and was now available at the lower price.
>
> I regard the conduct of the defendants as serious breaches of the TPA. It was conduct that preyed on the gullibility of the public. I believe that this type of conduct is viewed with distaste by the public. So much is evident from the significant drop in sales that the defendants suffered; their conduct calls for penalties that will reflect that distaste and constitute a deterrent to others.

Obviously, two-price advertising can be a powerful competitive tool for retailers and a valuable source of market information for consumers. It is not illegal in itself. If a price comparison is accurate, not misleading, and can be substantiated, there is no problem. However, where the price comparison is not accurate, or it is misleading, consumers are unable to make informed choices about the products they buy.

Sex

While sex is always an interesting topic, the interest in the On Clinic case is because of the issue of the impact of some key words and phrases.

The court held that the Commission had made out its case that groups of representations made by On Clinic were misleading and deceptive on a fair and

reasonable reading. The representations were made in newspaper advertisements relating to the (i) efficiency; (ii) costs; (iii) comparative advantages of treatment; and (iv) advice offered by On Clinic for men suffering from impotence. The representations were as follows.

- The ONLY Impotence Treatment Ever Proven to Work!; or Improve your SEX LIFE with the ONLY impotency treatment EVER proven to work.
- Bulk Billing. (No charge to you only medicare); or all visits 100% Bulk Billed. Medicare (No cost to you).
- 4 treatment programs with GUARANTEED RESULTS, in just 2 visits, and PROVEN AND GUARANTEED to work.
- Can be diagnosed and treated by medical doctors in only 2 consultations.

In reaching the conclusion that the respondents' conduct was misleading and deceptive, Tamberlin J made the following instructive comments:

> In relation to the advertising:
>
> The words 'only' and 'ever' are quite unequivocal and admit no exceptions.

On the costs and effectiveness of the program he said:

> In relation to the representation concerning bulk bulling, it was said that if the representation was read as relating to the cost of consultations only, then it was correct, but if it was read to include the costs of the course of treatment, in addition to consultations, then it was false.
>
> In my view, a reasonable, and indeed the more likely construction of the words 'without any charge to the patient' or 'at no cost', would be that the total treatment is at no costs to the patient. There is no suggestion that the clinics' services are **partly** 'at no costs'. The words 'no costs' like the word 'free' have a certain allure and will almost always attract a strong favourable attention to a product or service. (emphasis in original)

In relation to the 'guarantee' claim:

> The reference to 'guaranteed' strongly connotes the certainty of a positive result and the assertion that successful treatment can be effected in '**only**' two consultations reinforces this message. While there is a large component of truth in these assertions, they are nevertheless capable of being read in such a way as to be misleading and deceptive. (emphasis in original)
>
> The evidence indicates that in a high percentage of cases, the treatment is successful. Nevertheless, the reference to the treatment being 'guaranteed' travels beyond the truth and is therefore false and likely to deceive or mislead.

In defending the case, On Clinic had argued to the court that the representations were only ambiguous and that if they were 'read one way they were true, but if read in another way, although they had a "core of truth", they had "a misleading aspect to them"'.

Justice Tamberlin responded:

> Language which can reasonably suggest either a true proposition or a false one can come within the ambit of misleading conduct. It has been held, for example, that a statement that a product will relieve pain will be misleading if it relieves only one type of pain but not another.

Tamberlin J also referred with approval to comments made by the court in another case in the following terms:

> Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct of placing the advertisement in a newspaper is misleading or deceptive conduct, must be tested against each meaning which is reasonably open. This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error ...

Finally Tamberlin J made a general statement worth bearing in mind — he said:

> If it is sought to attract public attention and custom by the use of **unqualified** assertions of fact, then such assertions should be true as a matter of fact, if they are not to mislead and contravene the norms of conduct prescribed by the Act. (emphasis in original)

Four-wheel drives

In an advertising campaign a vehicle described as a Nissan Patrol RX Turbo Diesel was for sale at a price of $39 990. The model of the vehicle displayed in the advertisement was in fact a Nissan Patrol RX 4.2 Litre Diesel, styled with over-fender flares and wide wheels, whereas the actual vehicle offered for sale at the stated price was a Patrol RX 2.8 Litre Diesel.

The first charge alleged that the representation was false in that a Patrol RX 4.2 Litre Diesel was not offered for sale at $39 990 and there was no standard Patrol RX 2.8 Litre Diesel with over-fender flares and wide wheels unless these were fitted as

optional extras. In short, the pictorial representation of the vehicle advertised showed the wrong vehicle.

The second charge arose out of a television broadcast on Channel 7 in Adelaide on 10 November 1996. The advertisement represented that consumers would save 'a whopping $6290 on a brand new RX Turbo Patrol at only $39 990 including free air-conditioning'. The representation described the amount of $6290 as 'end of year' savings.

The charge alleged that the advertisement would have led a reasonable person likely to buy a four-wheel drive vehicle to believe that the savings offered to consumers for sale before 1 Oct 1995 at the price of $44 065 had, since 1 Oct 1995, been offered for sale through dealers at $39 990. The advertisement was therefore false or misleading in that the only true 'end of year' saving was the value of the free air-conditioning, being $2195.

The third charge arose from the same pictorial representation of a Patrol RX 4.2 styled with over-fender flares and wide wheels being depicted in an advertisement, and erroneously described as for sale at $39 990. The advertisement contained, in small print running vertically up the right-hand side of the advertisement adjacent to the picture of the Patrol RX 4.2, the disclaimer that the picture was for 'illustration purposes only'.

Action was also instituted against the advertising agency involved in this last charge, Wightmans of Adelaide. It was alleged that Mr Wightman had aided and abetted Nissan by suggesting the addition of the disclaimer to the advertisement adjacent to the incorrect photograph of the Patrol RX 4.2.

The Commission accepted that the mistakes in the advertisements were not deliberate and that neither Nissan nor Mr Wightman had intended to mislead or deceive. Nonetheless, Nissan was convicted and fined a total of $130 000, and Mr Wightman $10 000 for the charge against him.

Wightman is an Adelaide-based advertising agency and the family business of Mr Wightman. Substantial information was given to the court about the personal circumstances of Mr Wightman. He has been a successful businessman. He is of good character and has involved himself extensively in the affairs of his community. He cooperated with the Commission in its inquiries, and has expressed remorse for what happened.

It is Mr Wightman, not his company that is charged, and in this type of case, the seriousness of the offence and its potential to harm consumers must be the primary concern, not the financial benefit received from the transaction by the offender.

The court said:

> I accept Mr Wightman's evidence that he was under the belief at the time that the disclaimer would have the consequence that no breach of the law occurred. However, that belief was the result, or a want of adequate thought or consideration of the circumstances on his part. In the advertising industry, advertising agents are 'gatekeepers' who have a responsibility to consider whether advertising material prepared by them for their clients, complies with consumer protection legislation. I do not think that the basis for Mr Wightman's belief, that such a disclaimer could be used in the case of a new vehicle, justified his belief. Had he reflected on the situation he should have realised that the disclaimer he inserted in the advertisement would not draw attention to the misleading or deceptive features of the representation of the vehicle. Notwithstanding Mr Wightman's character and antecedents, I consider that a conviction should be recorded, and a punishment imposed. There will be a conviction recorded and fine of $10 000.

Retailing

To underscore the importance with which the Federal Court regards the issue of misleading or deceptive advertising and to give you an idea of the consequences — just imagine if you were the advertising agent whose client was ordered by the court to broadcast the sort of corrective advertisement published by Target (see *ACCC Journal* no. 34).

The Commission has no doubt the apology from Target is sincere and it acknowledges that Target's cooperation in ultimately resolving the matter saved considerable time and cost. The point of raising the issue is twofold.

First, to let you know what the court thought of Target's television ads — Justice Malcolm Lee of the Federal Court said:

> In relation to the television advertisements, the impression to be gained by consumers from the advertisements was that no item of clothing or houseware was excluded from the respective sales.
>
> The voice-over, which often in television advertisements adopts an authoritative and informative role did not mention that any item would be excluded. That impression was reinforced by the voice-over statement '25 per cent off every stitch of clothing', and '15 to 40 per cent off all housewares including tableware, furniture, kitchen

appliances, cookware and lighting'. The effect created by this latter statement was reinforced by the listing of items that constituted part of the class of goods on sale.

Consumers who relied on the sound content of the television advertisements, not attentively watching the television, would not have known that any item was excluded. And, as far as the visual images were concerned, the size of the words containing the qualifying advice, compared with the size of the Target name and rondel, was not sufficient to distract attention from the latter. That information was given at the end of each advertisement when the viewer's attention may not have been as keen as at the beginning. Furthermore, it is often the case that the first impression will be the lasting impression.

Second, consider how you would feel and what you would do if your advertising agency had to explain to a client, such as Target, why it was not your concern that they had such a court order against them for an ad campaign you were involved in creating.

In October 2000 the Commission instituted proceedings against Medibank Private Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive advertising of its health insurance products.

The Commission alleges that:

- in one advertising campaign, Medibank Private advertised 'no rate increase in 2000' in relation to its Package Plus insurance products when the rates for those products increased on 1 July 2000;
- Medibank Private's call centre staff made representations to consumers that the rates for its Package Plus products would not increase until next year; and
- in a second campaign in newspaper advertisements in August 2000, Medibank Private advertised an offer to consumers who switched from another fund to Medibank Private of 'any waiting periods waived' and 'get 30 days free if you change to Medibank Private'. It is alleged the offer failed to disclose, or it inadequately disclosed that, in fact, only the two-month general waiting period and the six-month optical waiting period were waived; and conditions applied to the offer of 30 days free health insurance.

This matter is continuing through the court processes and Medibank Private is defending the case.

In February this year the Commission instituted proceedings against Medical Benefits Fund of Australia Limited in the Federal Court, alleging false, misleading and deceptive advertising of its health insurance products. John Bevins Pty Ltd, the advertising agency involved in formulating MBF's campaign, has been joined in this action as it is alleged that the agency was knowingly concerned in the contraventions.

The Commission alleges that MBF, in print and television advertisements, showed pregnancy-related images to entice consumers to transfer to, or join MBF private health insurance. The Commission alleges that the advertisements contained representations to the effect that pregnant women joining or transferring to MBF would be covered for medical and hospital expenses arising from the pregnancy.

In fact, pregnant women joining or transferring to MBF would not be covered because of a 12-month waiting period for pregnancy-related services. The Commission alleges the 12-month waiting period was referred to in the advertisements in fine print disclaimers and that these disclaimers were inadequate and unlikely to be noticed by consumers.

The matter is going through the court processes and MBF and John Bevins Pty Ltd are defending the case. As an aside to this case, the Commission instituted court action in November 2001 against NRMA Health Pty Ltd (through the SGIO stable) and Saatchi & Saatchi Australia Pty Ltd for similar conduct. A directions hearing was held on 30 November 2001 and a further one listed for 22 February 2002.

Hardware

In September 2001 the Commission instituted proceedings against Mitre 10 Australia Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive conduct in television, newspaper and radio advertising in connection with a discount sale.

The Commission alleges that Mitre 10's '15% OFF STOREWIDE' and '15% Off everything' advertising campaign run in connection with its sale held on 15, 16 and 17 June 2001:

- failed to disclose, or to disclose adequately, that the usual or marked price of everything at Mitre 10 outlets was not reduced by 15 per cent; and/or
- failed to disclose, or to disclose adequately, that the usual or marked price of all goods at Mitre 10 outlets was not reduced by 15 per cent storewide.

The first directions hearing of this matter is scheduled in the Federal Court in Melbourne on 7 December 2001. At this stage these are only Commission allegations of a breach by Mitre 10.

In an attempt to explain, or perhaps excuse, their behaviour, businesses often tell the Commission they relied upon their advertising or marketing agencies to make sure the ads were correct in the first place. The effect on businesses can be quite damaging if they get it wrong. These effects include:

- the loss of corporate credibility in the marketplace and the embarrassment and loss of reputation that comes with an adverse court finding;
- potential for contracts to be cancelled; and
- legal obligation. both from a corporate and individual aspect, of having to comply with court orders which might include pecuniary penalties as well as damages or compensation.

Compliance

There is an *Australian Standard on Compliance Programs* and I would urge you to study it. But we prefer to focus on creating or engendering a 'culture' of compliance — that is, concentrating on those skills, beliefs and customs of a group of key people within your company and ensuring that they are disseminated within the company and passed on from one generation to another. This culture is principally developed or improved through your leadership and then education and training.

When we talk about a program or system we are talking about much more than just a manual, video or attendance at seminars.

The eight key parts of a compliance system or program I would urge you to focus on are as follows.

1. A total commitment from the board and/or CEO — leadership is important and leading by example is critical.
2. Recognise the different mix of skills needed to achieve a 'system' (legal skills, training skills, management skills, auditing skills, etc.).
3. Set up a team with necessary skills chaired by the CEO and/or reporting to the board.
4. Identify and assess competition and consumer protection law risks.
5. Public commitment — develop a stated policy.
6. Make sure you have adequate resources to implement and maintain the system.
7. Conduct a regular audit to check effectiveness.
8. A continual review to maintain currency of your system and continuous improvement.

The checklist on the next page is a list of questions to help advertisers or their advertising agencies avoid engaging in misleading or deceptive conduct when advertising or promoting products or services. Businesses that cannot answer 'yes' to these questions should reconsider their actions.

In concluding I would like to remind you that:

- the Trade Practices Act extends to cover the conduct of advertising agencies, not just the retailers or advertisers;
- the Commission is ready, willing, and able to work with businesses in the advertising industry wanting to comply with the law; but
- the Commission is equally ready, willing, and able to take action against those businesses failing to comply with the law.

Checklist

- ❑ If comparisons are made with other products or services, are these comparisons fair, accurate and current?
- ❑ Have we understated/overstated the likely effects or results of using a product or service?
- ❑ Have we thought about the appropriate media for this advertisement?
- ❑ Is the content of the promotional message appropriate for the media chosen?
- ❑ Have we thought about our target audience and how they are likely to receive the promotional message? In particular, have we considered any special characteristics or vulnerabilities of our target audience?
- ❑ Have we considered the fact that the media chosen to reach our target audience may also reach other consumers?
- ❑ Can our claims be substantiated on an objective basis?
- ❑ Do we have reasonable grounds to make statements about future matters, including the effects of treatments?
- ❑ Have we clearly explained all limitations and qualifications on promotional offers?
- ❑ Are all material terms and conditions located in the main text of promotional material?
- ❑ When disclaimers and qualifications have been used, are they clearly drawn to the consumer's attention?
- ❑ When reference has been made to certification or approval, is this reference accurate?
- ❑ Is the certification or approval relevant to the claim being made or implied?
- ❑ Have we disclosed the full costs of products or services?
- ❑ Are claims about the time taken for services or treatment and/or the possible effects accurate?
- ❑ Is the overall impression accurate?
- ❑ Have we used key words or phrases accurately?
- ❑ Have we considered the overall impression of the advertisement from a consumer's perspective?