



Is Your Organisation Complying?

Introduction

A new Australian Standard (AS3806-2006) has been developed to supersede AS 3806-1998 in relation to Compliance Programs. The new standard provides a set of principles and guidance for designing, developing, implementing, maintaining and improving a flexible, responsive, effective and measurable compliance program within an organisation.

The new standard clearly states that it is intended to be a guide only as to what the Courts may have regard to in ascertaining whether a sufficient compliance program is in place for an organisation. The new standard emphasises that a compliance program will differ for each organisation depending on the size, structure and nature of their activities.

Why a new standard?

The previous standard (AS3806-1998) was beginning to attract criticism from the Courts. In *ACCC v Real Estate Institute of Western Australia* (1999) ATPR 41-673 pp42, 606-7 the Court commented that AS3806-1998 was "likely to involve vague evaluative judgments or significant debates on their interpretation", and 'imposes standards which are aspirational in their expression and not readily measured in application.'

Businesses subject to Court orders or section 87B undertakings struggled to understand and comply with the requirements of the standard when implementing trade practices compliance programs. Some medium and small business enterprises felt that they were receiving little or no guidance from the standard or from the ACCC and were often forced to pay large sums for the design and implementation of compliance programs that may not have been suitable for their particular business.

How does the new standard differ from the old standard?

The previous standard set out a multitude of elements of an effective compliance program in relation to structural, operational and maintenance elements. The new standard clearly identifies the overriding principles and sets out guidance in relation to each principle. The following is a summary of some of the additions and changes to the previous standard.

1. Commitment (Principles 1-5)

Principle 1 of the new standard, and in our view the key principle, emphasises the importance of commitment by senior management to the compliance program and the need for that commitment to permeate the organisation.

Principle 2 of the new standard provides more detail than the previous standard in relation to the requirements of a compliance policy and details what the organisation should have regard to when developing a policy. Compliance obligations need to be identified which are appropriate to the organisation. The new standard identifies the possible sources of compliance obligations for example, common law, legislation, voluntary codes.

In the new standard there is an increased focus on the organisation assigning and requiring accountability for compliance to relevant management levels across the organisation. The compliance policy sets the level of responsibility and performance required within the organisation against which actions will be assessed.

Clear targets need to be established to achieve the compliance objectives that are measurable, time-related and indicate the level of performance required.

An organisation should identify compliance risks and rank the likelihood and consequences of potential compliance failures and allocate resources for their treatment accordingly.

2. Implementation (Principles 6-9)

This part of the new standard is much more detailed than the previous standard in outlining the specific responsibilities of senior management, the compliance manager, line management and employees. The compliance manager should identify compliance obligations and integrate these into existing practices and procedures of the organisation. Employees should be actively encouraged to report compliance failures and to work with the compliance manager to put procedures in place to achieve the compliance obligations. Controls need to be put in place to ensure that the organisation's compliance obligations are met.

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The new standard emphasises that when implementing a compliance policy, behaviour which compromises compliance should not be tolerated and should be disciplined accordingly. The previous standard did not address these issues.

3. Monitoring and Measuring (Principles 10 and 11)

Principles 10 and 11 provide a more comprehensive summary of the requirements of monitoring, measuring and reporting the performance of the compliance program. Monitoring the compliance system is essential, as it involves checking whether the system is being observed properly. How much monitoring is done is a matter of judgment. Indicators should be developed to assist the organisation in quantifying its compliance obligations. Problems and deficiencies disclosed by monitoring must be included in a Compliance Report.

The standard also emphasises that where there are reportable breaches, regulatory authorities should be informed.

4. Continual Improvement (Principle 12)

Principle 12 emphasises the importance of regular review and continual improvement to ensure the compliance program's continued suitability, adequacy and effectiveness. The findings and recommendations of the review should be documented and provided to the governing body and top management.

What should your organisation do now?

Your organisation should be aware of the changes to the standard and how it will affect your organisation.

With the introduction of the Criminal code and proposals to introduce criminal penalties for cartel conduct under the *Trade Practices Act 1974* (Cth), it is important that Boards and senior management take an active role to ensure that there is a culture of compliance operating throughout the organisation.

This newsletter details briefly some of the changes to the standard but is not intended to be an exhaustive list of all the changes to the standard. We recommend that your organisation obtain copies of the new standard (see <http://www.saiglobal.com/shop> and enter 3806 in search box)) in order to assess the impact of all the changes on your organisation.

It is important to seek legal advice to tailor compliance solutions to an organisation's particular and specific needs and to ensure that appropriate consideration is given to protection of legal rights.

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