

Fair Trading Compliance: Developing and Implementing an Effective Compliance Programme¹

Introductory Remarks

I am honoured to be here today to address the members of the Barbados Institute of Chartered Secretaries and Administrators on this your seventh (7th) Annual General Meeting.

The role of the Chartered Secretary is pivotal in the dynamics of the changing business environment where we will operate within the rules and confines of the Caricom Single Market and Economy, the Free Trade Area of the Americas and the WTO. These new arrangements will result in a significant transformation in our trading environment with increased market access to our domestic markets.

Carrying out Board/Institution policy and providing Board members with competent advice and guidance, that meets all the legal and regulatory requirements occasioned by these new realities poses considerable challenges.

The role of the corporate secretary in assisting institutions in navigating the uncharted waters of the new fair trading laws will be critical and it is indeed a pleasure to be able to speak to you on the new laws which came into force in January this year. The topic that I have chosen to address this afternoon is "Fair Trading Compliance: Developing and Implementing an Effective Compliance Programme".

¹ Feature Address to the Annual General Meeting of the Institute of Chartered Secretaries and Administrators of Barbados, Michelle C Goddard, Chief Executive Officer, Fair Trading Commission. 31 May 2003

I would like to focus on the strategies and tools that can be used for promoting effective compliance with fair trading laws. But first, allow me to provide some background information on the Fair Trading Commission.

Role and responsibilities of the Fair Trading Commission

The Fair Trading Commission is responsible for directing a new mandate in regulatory control in Barbados. It is a unique institution designed specifically for a small economy grappling with issues in a regional single market economy influenced by global dictates.

The Fair Trading Commission grew out of the Public Utilities Board (PUB) which was established in 1955 to establish rates for public utilities. The PUB was responsible for the regulation of monopoly utility providers in the electricity and telecommunications sectors and for a limited period of time was also responsible for setting bus fares in the transport sector.

Regulatory reform of this institution was driven by our new trading realities and the desired policy imperative of making the Barbados economy more competitive in the global environment.

Liberalisation in the telecommunications market occasioned by obligations in the WTO Agreement on Services; the facilitation of the development of local businesses; ensuring that industry inputs such as energy could be provided at more competitive prices and the importance of providing a transparent, equitable domestic business environment for local, regional and international companies to operate were all factors which contributed to the establishment of a new economy wide, multi-sector regulator - the Fair Trading Commission.

The Fair Trading Commission of Barbados was established on 2nd January 2001 to:

- a) safeguard the interests of consumers;
- b) regulate utility services supplied by service providers;
- c) monitor and investigate the conduct of service providers and business providers; and
- d) promote and maintain effective competition in the economy.”

The Commission was charged with responsibility for the administration and enforcement of several pieces of legislation including the Fair Trading Commission Act 2000-31, the Utilities Regulation Act 2000-30, the Telecommunications Act 2001-36, the Consumer Protection Act 2002-20 and the Fair Competition Act 2002-19.

As an independent statutory corporation the Commission is headed by a Chairman together with a Deputy Chairman and five other Commission members appointed for periods of up to five (5) years. All Commissioners are appointed on a part-time basis. The Commissioners are responsible for adjudicating on matters and providing overall strategic direction and policy guidance. Management of the Commission rests with the Chief Executive Officer who is an *ex officio* member of the Commission.

The Commission has a lean organisational structure with a staff complement of 28 persons, across the functional areas of the Commission's remit, who are responsible for investigating cases and providing advice to the Commission on matters before it.

The Commission seeks to make markets work by:

- replicating market forces in monopolistic utility environments such as electricity through price and quality regulation;

- facilitating competitive environments in business and potentially competitive utility sectors such as telecommunications; and
- setting, monitoring and enforcing limits on fair trading practices.

Compliance Programmes

The most important tool for businesses, their directors, officers and professional advisors in this new regulatory environment is the development and implementation of an effective compliance programme.

A compliance programme is an in house checking system developed to pick up mistakes and oversights which could otherwise land the business in trouble through breaches of the law.

An effective compliance programme, that minimises the risk of breaching the laws, is an indispensable tool for managing business practice risks. These risks include

- the risk of breaching the law and the consequent imposition of heavy company fines, personal fines and imprisonment terms on individual officers.
- the cost of court proceedings with the high cost of litigation and legal fees and consequential monetary claims by aggrieved consumers are additional risks that must also be considered.

These factors, together with the cost of cancelled promotions, management distraction and use of human resources and the likely adverse publicity occasioned by court proceedings and damage to business reputation are possible outcomes from failing to ensure that business practices are fair trading compliant.

Imagine the headlines occasioned by a breach of the Act such as “MR. SHIFTY JAILED FOR SIX MONTHS FOR MISLEADING CONSUMERS” “RIPOFF LTD. SCAMS ELDERLY CONSUMER”. Negative publicity can dissuade customers from dealing with a business, thereby reducing profit margins. Substantial sums of money may also have to be spent to counteract the negative publicity and the images created in the public mind.

The human resource costs involved in a breach of the law are significant and relate not only to staff diversion from core business issues, through time spent in locating information and collating it in order to answer regulators’ inquiries, but also to the human impact of employee stress on productivity.

It must be stressed however that the primary reason for implementing an effective compliance programme should not be for institutions to minimise and effectively manage their business risk but also to facilitate the delivery of stakeholder benefits and a competitive edge through improved customer service and an enhanced corporate profile.

A good compliance programme can foster customer goodwill particularly if the business has a sound complaints handling system which helps to improve customer service standards and retain customers who encounter problems.

Compliance is wider than fair trading compliance and can also be applied to laws that affect a company’s relationship with:

- its employees (through occupational health and safety practices and laws, industrial relations laws); and
- its shareholders (through companies legislation and securities laws).

Companies have to stay within the parameters of all of these laws and an effective compliance programme and observance of good governance norms will help corporations to keep within the legal limits.

A good compliance program may benefit all of the stakeholders who have an interest in and are affected by business activities.

The essential starting point for the design and implementation of an effective compliance programme is a sound understanding of the new laws. Advisors and corporate officers must familiarise themselves with the laws so that they are able to:

- understand the broad ambit of the provisions;
- have sufficient knowledge to recognise those circumstances where professional advice is appropriate and warranted; and
- integrate the legal obligations into the way in which the institution does business.

I intend to provide an overview of some of the major provisions of both the Consumer Protection Act and the Fair Competition Act before setting out some recommendations for implementing an effective compliance programme.

Consumer Protection Laws

The package of consumer legislation which includes the Consumer Protection Act and Consumer Guarantees Act is aimed at ensuring that consumers are accurately informed about deals before they agree to them, that they are given sufficient information to make informed choices and that there are minimum quality and safety standards for goods distributed to Barbadian consumers.

The provisions apply to all enterprises engaged in trade/business. This includes the one person store front as well as the large conglomerates. Businesses involved in website/electronic transactions are also covered by the Act. The Consumer Protection Act covers distance selling, product safety standards, product recall, product liability and industry codes. I will deal this afternoon with the provisions in the Consumer Protection Act that addresses unfair trade practices and unfair contract terms as these are of particular interest to corporate advisors.

Unfair Trade Practices

The provisions on unfair trade practices set out in Part III of the Consumer Protection Act prevent businesses from making false or misleading representations. Representations are made at all parts of a transaction - discussions, demonstrations and displays are all part of the transaction and must all be accurate.

It is illegal for suppliers to

- Falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;
- Falsely represent that services are of a particular standard, quality, value or grade;
- Falsely represent that goods are new;
- Falsely represent that a particular person has agreed to acquire goods or services;
- Falsely represent that goods have sponsorship, approval, performance, characteristics, accessories, uses or benefits they do not have;
- Falsely represent that the supplier has a sponsorship, approval or affiliation it does not have;

- Make false or misleading representations with respect to the price of any goods or services;
- Make false or misleading representations concerning the place of origin of goods
- Make false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy

Specific offences are also created to deal with particular sales techniques and practices:

- Dual pricing - two or more prices are appended to goods unless the lower price is charged;
- Bait advertising – advertising goods at special price with no intention to offer goods at that price; and
- Falsely accepting payment - accepting payment with no intention to supply goods

The Act also ensures that there is greater transparency in the business process through stipulating the basic information that must be given to consumers. There is a specific offence on full cost to be stated which sets out the information that all businesses must provide to consumers where goods are being sold on the basis of part payments. This includes the total sum to be paid, interest rate, number of instalments and deposit if any that must be made. The Commission is pleased to note that there has been increased compliance with businesses in this area and advertisements now carry greater detail where credit transactions are being promoted.

Penalties for breach of the Act are imposed by the courts and include fines on individuals of up to \$10,000 or two years imprisonment and fines for persons other than individuals of up to \$100,000. Directors and officers are also liable to fines of up to \$25,000.

Unfair Contract Terms

Information disclosure is an underlying principle of the protection afforded to consumers under the Act. Sufficient information must be presented to consumers in an intelligible format which allows them to make an informed choice. This applies not only to advertising and promotional material as discussed in the provisions on unfair trading practices but also to contractual documents. Part II of the Consumer Protection Act which deals with unfair contract terms in consumer contracts provides that that terms in consumer contracts must be presented in “plain and intelligible language” i.e. Plain English.

The legislation deals with terms in standard form contracts, i.e. pre-printed contracts that are not negotiated by individual consumers with suppliers such as credit card agreements, insurance policies, terms on airline tickets.

It provides that contract terms in consumer contracts should be fair and reasonable and sets out an illustrative list as to those terms that would be considered unfair.

Examples of unfair terms are:-

- Exclusion and limitation clauses – including no liability for death or injury, no liability for breach of contract
- Suppliers right to unilaterally change what is supplied

- Entire agreement clauses and formality requirements – A term which allows the supplier to dishonour promises made by sales staff would be considered unfair
- Hidden Terms – binding consumers to terms which they did not have an opportunity to review. Consumers must be made aware of contract documents and be given an opportunity to read and understand them prior to entering into the contract.

Terms that define what the consumer gets and how much the consumer pays are “core terms” which are not covered by the legislation unless they are unclear i.e. not plain and intelligible.

Whilst a term that is unfair is not binding on a consumer, the other terms of the contract will continue to bind the parties once the contract is enforceable without that unfair contract term. The Court decides which terms are unfair. The Fair Trading Commission is however empowered to take action to prevent the continued use of unfair terms by suppliers.

Consumers can enforce these provisions directly as unfair terms will be void and unenforceable against them. The Commission is also empowered with the investigation and monitoring of the use of unfair terms and can seek injunctions to prevent continued use of the same.

Businesses must therefore review all contracts to ensure that they comply with these provisions paying attention to:-

- Appearance – font and print type and size need to be legible
- Use of language – technical words and legalese should be avoided
- Balance – Terms should not be unduly skewed against the consumer

Consumer Guarantees

Significant rights are conferred on consumers through the Consumer Guarantees Act. This legislation greatly strengthens the rights of consumers in consumer contracts by detailing quality expected for goods and services and the instances in which consumers can get refunds, replacements and/or damages for faulty goods. The Act is self-enforcing through individual consumer actions before the Consumer Claims Tribunal but must be considered in developing a full framework for compliance with fair trading laws.

Fair Competition Laws

A competitive market works for the benefit of all consumers. Encouraging firms to compete, to attract their customers by offering better products, better service and better prices is part of the competitive process.

The Fair Competition Act seeks to build a competitive business environment. Under the Act the Commission is charged with:

- Promoting, maintaining and encouraging competition in Barbados;
- Preventing anti-competitive practices; and
- Ensuring that all businesses irrespective of size have the opportunity to participate equitably.

Collective and unilateral business behaviour is covered under the Act which addresses collusive behaviour including agreements between competitors; anti-competitive practices, abuse by dominant companies in the market; interlocking board directorates; and anti-competitive mergers.

I will briefly highlight some of the anti-competitive conduct and practices prohibited under the Act.

Collective anti-competitive behaviour

Anti-competitive collective collusive behaviour includes cartel activity such as price-fixing e.g. all Internet Cafes agreeing to charge same rates for access or agreements between competitors that prevent or limit dealings with a rival.

Unilateral Anti-competitive behaviour

Bid-Rigging is an agreement where in response to a call or request for bids or tenders, one or more bidders agree not to submit a bid or two or more bidders agree to submit bids that have been pre-arranged among themselves.

Resale Price Maintenance (RPM) is prohibited outright. RPM occurs where a supplier takes action to ensure that an independent dealer does not resell goods below a price specified by the supplier. There is no prohibition on recommending prices the breach occurs where action is taken to enforce a price recommendation. Clearly this is prohibited as it means that consumers are unable to benefit from possible lower prices being offered by alternative suppliers.

Abuse of dominance

The size of a business, even one that dominates a market, is not of itself a matter of concern to the Commission. Particularly in our small economies it is expected that the markets will be heavily concentrated with a few large players. However where a business exploits its market power in away that hurts competition the Fair Competition Act comes into play e.g. cutting off essential supplies to rival companies, using long term contracts to stop consumers changing suppliers.

Anti-competitive Mergers

The Act provides for mandatory pre-notification of mergers by enterprises which cease to be distinct and that together control more than 40% of any market.

Whilst the FCA contains merger control provisions it is important to note that the Act does not seek to prevent domestic companies from merging. It is recognised that mergers may be necessary to achieve economies of scale. The only mergers that are likely to be prohibited by the Commission are those that are anti-competitive and provide no public benefit.

Interlocking directorates

Directorates between significant competitors that weld together policies are prohibited. The Commission will take action to ensure that the director serves on only one of the boards of the relevant companies.

Penalties

Breaching the legislation exposes company to significant penalties including fines of up to 10% of turnover, \$150,000 fines on individuals and \$500,000 fines for businesses.

Enforcement

Whilst enforcement is by the Fair Trading Commission and the courts private rights of action have also been granted and individual businesses can also take action to ensure the competitive process is maintained.

In examining your corporate practices for possible breaches of the Fair Competition Act there are several areas to focus on and questions to ask yourselves:

- Do you enter into agreements with competitors and if so are they caught by the Act? Avoid getting together with competitors to decide which person or business you will not sell to or buy from.
- Do you price your goods or services independently of your competitors or suppliers? Agreements over price are illegal whether in writing or not.

- Is your sales unit engaged in conduct such as price-fixing, market-sharing or resale price maintenance?
- Is a more powerful business deliberately trying to run you out of business? They may be abusing their power.
- If you are restructuring your business have the merger control provisions been triggered?
- Do your company directors on the board sit on the boards of competing companies? Excusing themselves from meetings on certain issues does not suffice as sitting on the board itself is prohibited by the Act.

Designing and implementing the Compliance Programme

The enactment of these new laws will result in a significant transformation in the conduct of business in Barbados. Greater care has to be taken in advertising goods and services, designing sales promotions, drafting consumer documents, meeting with and entering into agreements with other business.

To ensure that your organisation meets the challenge and fulfils its responsibilities under the new legislative it is imperative that an effective compliance programme be designed.

Three elements are critical – commitment, overall compliance policy and an efficient process.

Step One – Make the Commitment

Get the commitment of senior management to the development and implementation of a compliance policy.

Commitment must be driven from the top by the CEO or a Compliance Committee of the Board who should take direct responsibility for implementation.

Adequate resources – human, financial and technical must be provided for compliance to be successful.

Step Two – Develop a clear compliance policy and ethic

Ensure that the importance of compliance with the Act is communicated to all staff members and that it is made clear that you support a compliance ethic. A Compliance ethic will include ongoing educational programmes and the imposition of disciplinary and corrective measures when breaches occur.

The main principles of the compliance policy need to be distilled and set out in simple, plain language that is easily understood. The policy must be widely distributed and communicated to all staff.

Step Three – Involve and train frontline staff

Identify those persons involved in the presentation of goods or services to customers and train, train and re-train them.

Step Four – Examine risk areas of your business and integrate the processes

Businesses must determine what the primary risk areas are e.g. financial institutions may need to pay particular attention to consumer contracts and agreements; retailers will need to examine advertising and promotion campaigns.

Establish comprehensive in-house processes and integrate them into your operations with systems for vetting promotions, checking prices, labelling.

A complaints handling system must also be established to deal with consumer complaints in a timely manner. The scheme should be visible, accessible, easily understood and responsive to consumer needs.

Step Five – Continuous improvement

Always ensure that your compliance systems represent current best practices.

Review and continuously improve. The system must remain relevant, comprehensive and effective.

Concluding Remarks

It has been said that

“Reading about ethics is about as likely to improve one’s behaviour as reading about sports is to make one into an athlete”²

Similarly one may surmise that “hearing a compliance lecture is about as likely to improve one’s behaviour as hearing Gabby perform will make one into a calypsonian.” I encourage you to use the information gleaned today as a base for effective action within your institution.

Developing an understanding of the laws and the promotion of compliance with the provisions will ensure that the Commission can work - hand in hand with institutions - in ensuring that our markets work fairly.

I thank you.

² Mason Cooley