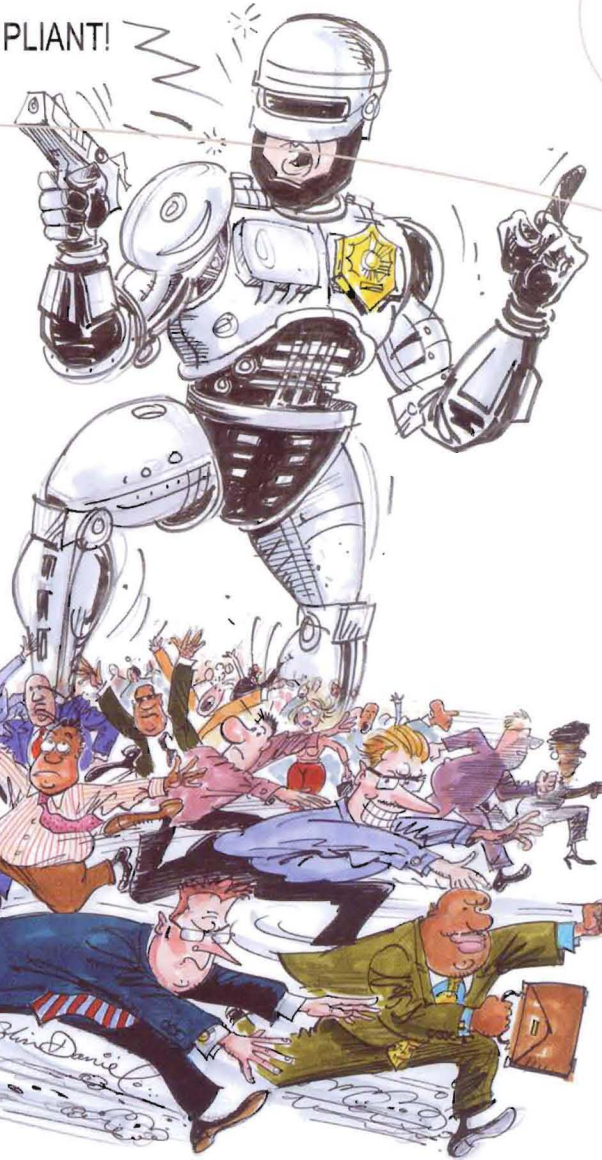


STOP!  
YOU ARE NOT COMPLIANT!

# Harnessing administrative law in encouraging compliance



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**Having the enforcement shotgun behind the door is important for every regulator, even in industries where non-compliance is the exception.**

The FSB uses criminal prosecutions<sup>1</sup> and registrar's penalties<sup>2</sup> in its enforcement armoury. However, additional and more effective enforcement became necessary.

## Background

In 1999, on the advice of the King Commission,<sup>3</sup> the FSB was given the responsibility to combat insider trading in South Africa. With this came the

opportunity to experiment with a new enforcement tool in the form of a statutory civil action<sup>4</sup> to disgorge profits and claim penalties from offenders. This process proved to be very successful and penalties in excess of R50 million<sup>5</sup> were recovered.

In February 2005, the Capital Markets Enforcement Committee was established as an administrative body to adjudicate on all forms of market abuse.<sup>6</sup> The FSB decided to extend the jurisdiction of this Committee to all the industries it regulates.<sup>7</sup> On 1 November 2008, the FSB Enforcement Committee was established by an amendment to the FI Act, 2002.<sup>8</sup>

## Jurisdiction of the Committee

If the Registrar or the Directorate of Market Abuse<sup>9</sup> determines that any law administered by the FSB has not been

complied with, he may refer the case to the Committee. This includes non-compliance with subordinate legislation like regulations and codes of conduct. However, cases in which the Registrar has the authority to impose penalties cannot be referred to the Committee.

## Process

Referral to the Committee is initiated by the Registrar filing a notice setting out the details and nature of the alleged contravention, and the recommended administrative sanction.<sup>10</sup> The Registrar must file an affidavit setting out the facts and documents supporting his case.

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## Compliance continued from p 3

The respondent(s) has 30 days to deliver an answering affidavit.<sup>11</sup> This affidavit must state which allegations the respondent admits or denies, as well as the respondent's version of the facts.<sup>12</sup> Pleadings are closed by the filing of the replying affidavit of the Registrar.<sup>13</sup>

Within 30 days of close of pleadings, the Committee must determine a hearing<sup>14</sup> and appoint a panel of at least three of its members to consider the case.<sup>15</sup>

The panel must consist of an attorney or advocate of more than ten years standing, or a judge to act as chairperson,<sup>16</sup> and additional members.

At the hearing all parties get the opportunity to argue their case. Parties may address the panel on whether a law has been contravened and what the appropriate administrative sanction should be.

The matter is decided on the papers before the panel, taking into account arguments by the parties. However, in exceptional cases, if a matter cannot be properly decided on the papers, the panel may order any person to appear before the panel to give evidence or furnish additional documents.<sup>17</sup>

### Committee determinations

The Committee may impose an unlimited penalty on respondents.<sup>18</sup> The penalty must be sufficient to deter the respondent from repeating the contravention. It must convince the industry that the game is not worth the candle and be far greater than any benefit derived from the unlawful conduct.

The Committee will also take into account other factors such as the nature, duration, seriousness and extent of the contravention, any loss or damage suffered, the effect of the unlawful conduct on the industry, previous contraventions, previous penalties and the degree of co-operation by the respondent.<sup>19</sup>

The Committee may award a compen-

sation order in cases where there is a link between the unlawful conduct and calculable damages suffered by another party.

The Committee may make cost orders extending beyond the traditional order for legal costs. Cost orders may include the investigation and preparation costs of the FSB. The Committee may also order the respondent to pay the remuneration costs of panel members.<sup>20</sup> Enforcement increases the cost of regulation. Where possible, the increased costs should be borne by the offenders.

### Enforcing Committee orders

A determination by the Committee has legal force as if it was made by the High Court. The FSB enforces these orders in cases of non-payment, by lodging a certified copy of the order with the High Court. Civil execution steps are then available to the FSB.

### Appeal against a Committee decision

A determination may be taken on appeal to the High Court.

The appellant does not need to apply for leave to appeal. The launching of appeal proceedings does not suspend the execution of a determination of a panel, but the appellant may apply to the chairperson of the Committee for such

suspension.

### Double jeopardy

Committee proceedings do not affect any person's right to seek legal redress in other appropriate forums. A respondent may therefore be penalised by the Committee and sued by a victim in the civil courts.

Similarly, Committee proceedings do not limit the possibility of criminal prosecution or disciplinary proceedings. This does not offend against the principle of double jeopardy, but a latter tribunal must take into account any administrative sanction imposed by the Committee.

The establishment of an Enforcement Committee has been a major step forward for FSB enforcement. If the process is used with vigour and discretion it will have a substantial effect. The purpose of the administrative penalties is to encourage compliance with the law. In fairness towards compliant industry professionals, offenders' penalties should be substantial.

The purpose of these penalties is not to fund the FSB's operations. Penalties are paid into a trust fund and used for the funding of special consumer education or enforcement projects.

### References

<sup>1</sup>The FSB hands over cases to the prosecuting authorities from time to time. The decision to prosecute is the prerogative of the Directorate of Public Prosecutions.

<sup>2</sup>The registrar imposes penalties for late submissions of returns, etc.

<sup>3</sup>The first King Commission that published their report in October 1997.

<sup>4</sup>This civil action was set out in the now repealed Insider Trading Act, 1998, and provided for the FSB to issue civil summons for profits made or losses avoided as a result of transactions that offended against the insider trading prohibition, and a maximum penalty of three times such amount.

<sup>5</sup>In terms of the Insider Trading Act, 1998, these funds were distributed to persons that could have been prejudiced by the unlawful conduct of the defendant.

<sup>6</sup>Insider trading, price manipulation and false or

misleading reports relating to listed companies.

<sup>7</sup>Through the now repealed sections 97 to 105 of the Securities Services Act, 2004.

<sup>8</sup>Financial Institutions (Protection of Funds) Act, 2001 - by the insertion of sections 6B to 6I.

<sup>9</sup>The DMA has the authority to decide on the referral of market abuse cases.

<sup>10</sup>See section 6B(1) of the FI Act, 2002.

<sup>11</sup>See section 6B(2) of the FI Act, 2002.

<sup>12</sup>See section 6B(3) of the FI Act, 2002.

<sup>13</sup>See section 6B(4) of the FI Act, 2002.

<sup>14</sup>See section 6C(1) of the FI Act, 2002. The parties must be given at least 30 days notice to prepare.

<sup>15</sup>See section 10A(2)(a)(iii) of the FSB Act (Financial Services Board Act, 1990).

<sup>16</sup>See section 10A(1)(a)(ii) and (iii), read with 10A(2)(b) of the FSB Act, 1990.

<sup>17</sup>See section 6C(3) of the FI Act, 2002.

<sup>18</sup>See section 6D(2)(a) of the FI Act, 2002.

<sup>19</sup>See section 6D(3) of the FI Act, 2002.

<sup>20</sup>See section 6D(5) of the FI Act, 2002.