

Compliance – Depends on who's asking

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This paper was first presented at GEMG Environmental Management Workshop, 18-20 May 2016.

Abstract

Every company has one, but can they stand by their statements of compliance and do their employees really understand what is expected of them? How can companies demand compliance when often the very notion of compliance is misunderstood or subject to individual interpretation? Compliance with social and environmental obligations underpins an organisation's licence to operate, often referred to as the "minimum" in performance expectations. However, when asked what their compliance requirements are, many operational staff often respond with averted gaze or the standard response of, "Ask the enviro, that's their job".

Operational compliance is no longer the responsibility of discipline specialists, and the effective dissemination and communication of compliance activities across the workforce is crucial to a sustainable compliance model.

So what is compliance?

- Adherence to all external and internal requirements, including but not limited to applicable regulatory requirements, corporate requirements, and requirements contained in authorising documents. Put simply, the execution of activities in accordance with commitments and obligations
- For an effective compliance model to succeed, employees must **understand, own** and **lead** the business:
 - o **Understanding** – an operation must know its obligations and translate those obligations into compliance activities
 - o **Ownership** – responsibility and accountability must be assigned to ensure individuals at all levels of the organisation understand what is expected of them, and how to satisfy these commitments, respond to deviations and improve performance
 - o **Leadership** – every person has compliance responsibilities, and they must communicate concerns, deviations or opportunities for improvement.

This paper will draw on experiences gained implementing compliance models across a variety of operations both within Australia and abroad. I will reflect on the influence cultural setting has the implementation of a compliance model and tips on how to strengthen relationships with operational staff during the process. Establishing a compliance model is a challenging journey often interrupted by detractors or "budget constraints"; however, when paired with a robust stakeholder engagement process, the implementation of a sustainable compliance model can present significant cost saving across the organisation.

Introduction

The need to protect the environment is without question; the environment has paid the price for our relentless quest for an improved standard of living. In response, regulations have evolved to protect the natural environment and its resources, but at what cost? With the ever growing list of complex and at times conflicting environmental regulations, the cost of compliance is rising, with achieving and maintaining compliance increasingly challenging. There is no dispute that these laws, regulations and standards are

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essential to the long term health and protection of the natural environment; however, we must acknowledge the significant challenges and financial cost associated in achieving this (Welch, 1998).

In the mining industry today, social and environmental responsibility has continued to become entrenched in organisational language. Responsible mining has in many cases become a foundation of an organisation's business strategy and is often a key driving force behind their operational approach and business success.

Despite the consistent rhetoric regarding "social responsibility", "beyond compliance" and "social licence", many organisations still struggle with embedding a true compliance culture within their operations.

Why is this? On face value, complying with a set of licence conditions or approval commitments should be fairly simple, yet it is rarely achieved in full, with substantial compliance becoming the norm.

In my experience there are two key reasons for this. Firstly, competing values play a significant role in the level of compliance achieved. Secondly, the misunderstanding or uncertainty around what is required leads to a failure in completing compliance activities appropriately.

Competing Interest

Incentive based remuneration programs have existed in some form or another within most organisations for a long time. The metrics used generally reflect an organisation's public commitments to stakeholders (production, costs etc.); over time, these metrics have evolved to reflect the maturity of an organisation and their alignment with growing stakeholder expectations.

Like most performance objectives, when an organisation develops strategies to motivate employees around these social metrics (e.g. compliance), they often "add on" to the standard performance pay or take a "at risk remuneration" approach, whereby a portion of an employee's remuneration is contingent on successfully achieving established performance targets (Stone, 2010).

Unfortunately, it can be argued that in doing so, certain behaviours can be disproportionately rewarded, with many of these new values or behaviours directly challenging traditional objectives such as production, profitability and growth.

As an environmental professional in the mining industry, I have seen firsthand the struggle between "social responsibility" and "profitability" (read - immediate) of the business. Over time, we have seen the evolution of performance metrics to include social objectives; however, they are often an afterthought, coming a distant second to the traditional targets, with little impact on the financial reward received for meeting the traditional metrics.

Furthermore, it could be argued that in lieu of a robust compliance model, applying social performance metrics will only lead to internal conflict and potential for these social metrics to be met via questionable means that directly oppose the desired behaviour.

Historical metrics

The oldest and most common performance metric within the mining industry is production of saleable product. The predominately production focused performance metric was supplemented with a nominal "other" metric covering Safety, Environmental and Social measures (generally lag indicators). In these early stages, the percentage of at risk remuneration associated with non-financial metrics was minor, and presented management with a dilemma – should they push the envelope overlooking "non-production based metrics" and focus on production, or curtail production to address these "other" metrics for nominal gain?

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Unfortunately, the resource sector is littered with examples where production numbers were met at the expense of legal compliance.

The introduction of HSE “performance” metrics

As this ratio of non-financial metrics increased, the evidence of conflicting behaviour continued to rise; no more so was this true than with use of the lag indicator “number of incidents” (commonly used as the primary HSE metric), with annual incident “thresholds” established to measure performance. Unfortunately, it was not uncommon for operations to challenge their reporting requirements as they approached these annual thresholds – a move which was counterintuitive to the intent of the metric. The notion of compliance metrics

As the understanding of social licence grew, newer performance metrics were established; this included the all-encompassing “compliance” metrics. These metrics were loosely based around an operation demonstrating compliance with its legal obligations linked to their operational activities. These obligations originated from operational permits and licence, impact assessments, lending criteria and social commitments to name a few.

Historically, the responsibility for compliance was assigned to the environmental professionals; however, as the accountability was distributed throughout the operation via “compliance” metrics, an unwanted consequence was increasing pressure being applied to operational staff to “ensure compliance”. This ill-informed or misguided pressure resulted in situations occurring where staff manipulated controls to ensure compliance was maintained, and avoiding having an impact on the manager’s performance targets. Again, the resulting behaviour counters the behaviour intended.

The challenge with linking reward & compliance

Whilst incentive based remuneration does have its proponents, there is equally opposing criticism for its use. This criticism extends to the complexity or potential misalignment with organisational culture (Stone, 2010). Furthermore, it is argued that merit pay often leads to results precisely the opposite of those desired (Campbell, Campbell and Chia, 1998).

One criticism of performance remuneration implies that by compensating on the basis of short-term performance, organisations can incentivise greed which historically has been incorrectly associated with value creation (Stone, 2010). The unintended consequence includes single-mindedness and inflexibility, and illustrates that organisations “get what they measure”; that is, profit at the expense of social morals (Campbell, Campbell and Chia, 1998).

The challenges facing the implementation of incentive based remuneration are seemingly exacerbated when social or non-financial metrics are incorporated. As previously indicated, the introduction of incentive based remuneration can lead to unintended behaviours, with certain targets met through questionable tactics or certain objectives focused on at the expense of others.

Several practitioners have argued that reward schemes should be long term, with increased accountability for performance, covering a broader scope of the operation (all contributing aspects) and the introduction of independence during the evaluation process (Stone, 2010). This is particularly evident with compliance metrics, as often the lead time for demonstrated compliance is significant, with negative consequences not apparent for several years (e.g. contamination). Most environmental professionals can recall a situation where an issue was identified and the party responsible had long gone.

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Cultural influence on a Compliance Model

Culture influences the way information is expressed and processed, and how groups of people understand and interpret the world. Specifically, it can contribute to how people in certain groups understand, interpret and react to information around them. In countries where universalism is dominant, such as North America and Australia, rules generally override relationships (Naude, 2004a). Conversely, in countries where particularism is dominant, such as Asian and Latin American countries, the focus is on personal respect, where the preference is protect relationships irrespective of the rules (Naude, 2004; Osland et al., 2007).

The tug of war between these two cultural settings is notable in Latin America; a historical study (Osland, 2007) observed the struggle to treat everyone equally (universalism) vs making personal exceptions based on individual circumstances (particularism).

Furthermore, Latin American cultures can be viewed as collective cultures, where loyalty to the group is paramount; in return, this loyalty is extended to each individual (Osland et al., 2007). This conflict was observed first hand in many compliance related issues, whereby an individual made a judgement call regarding a group's action based on cultural influence, at the expense of compliance.

The cultural influence status in Asian, Latin American and African settings can also not be underestimated – authority is obeyed without question (Naude, 2004a). This often led to supervisors placing pressure on their direct reports to perform inappropriate activities.

When considering the influence of culture in the context of a compliance model and applying this in the context of an organisation's cultural diversity, the importance of incorporating these variables is essential to its success.

EMS and Compliance

At the heart of any Environmental Management System (EMS) are what I call the foundation elements

- Leadership, Planning Controls and Monitoring – which all contribute to the management and mitigation of risks associated with the proposed activities. More specifically, an EMS should:
 - Identify aspects that can result in significant environmental impacts,
 - Establish systematic processes which consider the operational context, significant environmental aspects, the risk associated and the compliance obligations;
 - Establish operational controls to manage the significant environmental aspects and compliance obligations; and
 - Evaluate the performance of controls and taking actions, as necessary.

When we further delve into the compliance component, it becomes apparent that an organisation must identify and determine how these compliance obligations apply to their organisation and ensure their employees have access to the compliance obligations. It is here that, despite an organisation's best intentions, we see a failure to implement a robust compliance model.

Syndication & Dissemination of Compliance Obligations

Within most Environmental Policy and EMS standards, it is common to see phrases and commitments along the lines of, "We strive to enhance our operational excellence by meeting and exceeding standards, with the commitment by every employee to conduct business in accordance with all regulatory and industry-recognized standards, as well as meeting, and where possible exceeding applicable environmental laws and

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regulations wherever we operate”, yet the tools and processes to achieve this are often overlooked or significantly discounted in importance. Put simply, people’s behaviour is reflective of the processes around them.

With the distribution of accountability comes the need to ensure appropriate supporting processes are in place, firstly to disseminate legal obligations, but also to translate these into “compliance activities”. Much of the wording found within permits and approval documents can be wordy and weighted with legal terminology, which can result in personal interpretation. This interpretation can lead to an operation investing time and resources into what is believed to be the correct actions, only to discover the licence or permit was misinterpreted and that, in fact, the operation is out of compliance.

If we consider that an EMS is founded on the notion of a Plan-Do-Check-Act cycle, we can apply a systematic approach to the management of legal compliance. Whilst it is acknowledged that the flow diagram in Figure 1 does simplify the steps, it outlines the basic process in disseminating legal obligation and assigning compliance activities.

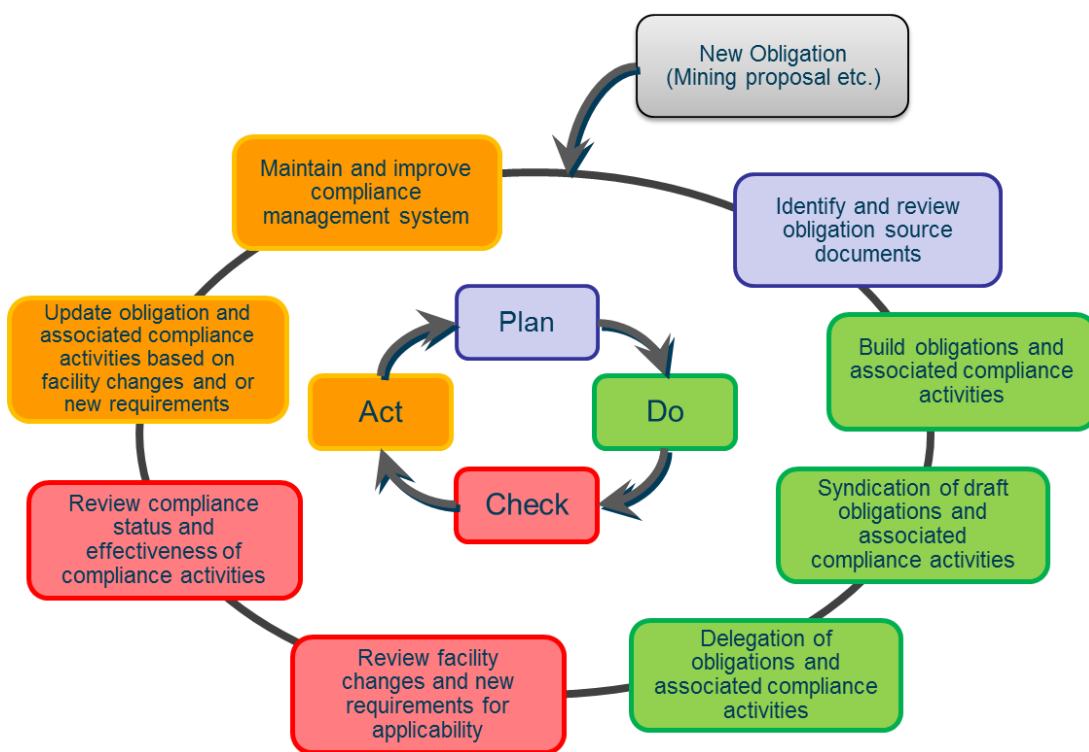


Figure 1: Example of Compliance Model

Some notable steps that must be reinforced during this process include the syndication of draft obligations and compliance activities, and the reflection of operational changes. It is imperative that those responsible for executing the compliance activities are intimately aware of the origins of the obligation and the compliance requirements. Having front line involvement in this process will ensure the establishment of ownership and increase the likelihood of success. This process also allows the “obligation register” be tailored to suits the audience i.e. only obligations and compliance activities related to that area of the operation are communicated, reducing confusion and risk of deferred accountability.

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Reviewing and updating compliance activities to reflect operational changes is equally important, with stories of controls being ineffective due to misalignment with operational impacts not uncommon. Regular operational reviews help identify changes to an operation, and allow for confirmation of the effectiveness of controls. It is equally important to ensure the involvement of associated operators during this review process, as their input and experience is vital in ensuring any minor changes are considered.

Discussion

The adoption of non-financial metrics for compensation is an area of significant growth, with research indicating that this is becoming the norm. It appears, however, that whilst these metrics are being considered, how they are measured or weighted is still evolving.

In my experience, the evidence of target favouritism is apparent, where employees focus their efforts on what they understood and believed could be influenced. In addition, historical weighting of these rewards inadvertently added further emphasis to the traditional targets, with failure to meet social targets resulting in minimal impact to an employee's overall reward. It could also be argued that this was further exacerbated due to the lack of disciplinary consequence for unwanted behaviours, with reward the only form of motivation.

When combined with an employee's misunderstanding of the desired behaviour or how they related to their compliance responsibilities, we have seen examples of employees acting in what they believed was appropriate, given it was what management "wanted". In one example, the anecdotal evidence suggested that when compliance issues were raised, management responded with the comment, "I don't want to see any more exceedances". This resulted in employees ensuring that compliance issues were no longer reported and governance reports were being doctored to reflect this.

This by no means defends their actions, but rather highlights how people's behaviour reflects the surrounding environment. It is easy to reflect on these types of incidents and cast blame; however, these events reinforce the need for an integrated approach to compliance management.

Conclusion

Despite the debate around the merits of incentive based remuneration, one can conclude that the detractors of this approach generally challenge the aspects associated with their implementation or application, and not the basic premise that this approach can help organisations motivate employees to achieve objectives.

In my experience, the use of incentive based pay has been successfully applied for many years to motivate employees to achieve financial objectives, including cost and production. It was not until the introduction of non-financial metrics that conflicting behaviours started to be seen.

These conflicting behaviours have the potential to detract from the objective of compliance, and should only be applied once a robust compliance model has been established. This is exacerbated when we consider the influence of cultural settings; the notion of compliance is very different from country to country.

It is often stated that compliance is expected, yet companies then proceed to reward substantial compliance, using a risk matrix to discount/diminish the significance of the compliance issues. I challenge that this approach provides merit to an employee "choosing" what they comply with. We all bend the rules every now and then, but as mining professionals; we need to ensure that the processes established all work towards a common objective.

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