

I am an academic with extensive research and consulting experience regulatory enforcement and compliance. Over the last 5 years I have been conducting empirical quantitative and qualitative research on Australian businesses' perceptions and experiences of ACCC enforcement.

In particular my colleague, Dr Vibeke Nielsen, and I surveyed 999 businesses about their opinion of and experience with the ACCC in 2005. I am attaching a paper that we have drafted about our findings in relation to deterrence under the Trade Practices Act. The paper also draws some conclusions about the likely effectiveness of criminalising serious cartel conduct in strengthening deterrence. In particular the paper argues:

1. That it is important to remember that there is no guarantee that the mere criminalisation of serious cartel conduct will automatically strengthen detrence and increase compliance with the law - business perceptions of deterrence rely on a range of interacting factors apart from what the law says.

Therefore it is absolutely crucial to the effectiveness of the criminalisation proposal that adequate resources and thought be given to how the ACCC and DPP will monitor compliance with the new provisions and take enforcement action against breaches. There is no point criminalising if sufficient resources and effort are not going to be put into monitoring and enforcement by the ACCC and DPP, and also ACCC communication with and 'leveraging' of third parties (eg lawyers and compliance advisors, industry associations etc) capacity to influence business people to comply.

Business perceptions that in the past the ACCC has been slow to use the criminal penalties it does have available to it, and that there will be great difficulties with enforcing the new cartel criminal offence, could easily affect business perceptions of the deterrent impact of the new law so that they believe it will be rarely used. This would make it completely ineffective. It is crucial that adequate thought be put into how it should be framed and how it will be implemented in practice (including what investigation powers are available to the ACCC and how the ACCC will work with the DPP), otherwise criminalisation might even be counterproductive - it might decrease the perceived legitimacy and effectiveness of the ACCC.

2. There are already a range of penalties under the TPA that have the potential for a very strong deterrent impact in relation to breaches of the competition provisions of the TPA. However there is a massive hole in the deterrent arsenal available to the TPA in terms of lack of even civil penalties in relation to breaches of the consumer protection provisions (as opposed to the competition provisions) and lack of explicit power to obtain compensation for consumers as part of the remedies it seeks in enforcement actions.

It is very pleasing to see the Labor Government addressing the need for criminal penalties for serious cartel conduct, but our research suggests that in improving the deterrent power of the ACCC penalties for consumer protection provisions and the availability of consumer compensation are likely to be equally as significant in changing business conduct.

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HOW MUCH DOES IT HURT?
HOW AUSTRALIAN BUSINESSES THINK ABOUT THE COSTS AND GAINS
OF COMPLIANCE WITH THE TRADE PRACTICES ACT

CHRISTINE PARKER AND VIBEKE LEHMANN NIELSEN

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ABSTRACT

Law-makers, courts and regulators all assume that businesses' compliance with the law is at least partly influenced by management's rational calculations about the costs and gains of compliance and non-compliance. In this paper we use evidence from a survey of 999 large Australian businesses' experience of compliance and enforcement under the *Trade Practices Act (TPA)* to examine how large Australian businesses perceive the costs and gains of compliance and non-compliance with the *TPA*. First, we look at how seriously they perceive the threat of financial penalties and criminal convictions as well as economic and social losses from a range of stakeholders in the event of non-compliance, and whether they see positive benefits such as organisational learning and better ways of handling customer complaints as gains of compliance. Second, we examine whether ACCC enforcement action or stakeholder criticism changes the way they calculate the costs and gains of compliance and non-compliance. We conclude by drawing some policy conclusions for the TPA and ACCC.

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† Associate Professor, Department of Political Science, University of Aarhus. The authors wish to thank John Braithwaite and DataCol International (especially Malcolm Mearns) for helping set up and administer the empirical research on which this article is based. Thanks also to Natalie Stepanenko for assisting with most of the qualitative interviews for this research and other research assistance. We also thank the ACCC (through its support for the Centre for Competition and Consumer Policy, Australian National University), the Australian Research Council and the Regulatory Institutions Network, Australian National University for funding this research. Substantial parts of the original research for this article were completed while both authors were on secondment at the Regulatory Institutions Network, Australian National University and later while Dr Christine Parker was a Visiting Fellow at the Centre for Socio-Legal Studies, the University of Oxford.

INTRODUCTION

The Federal Court of Australia has long stated that deterrence is the guiding purpose for quantification of penalties in cases of breach of the competition provisions of the *Trade Practices Act 1974 (Cwth)* ('TPA').¹ Recently these penalties have been increased on the basis that the penalties should be high enough 'to take into account the expected gains' from anti-competitive behaviour in breach of the TPA.² Moreover criminal penalties with the possibility of imprisonment for 'serious cartel conduct' have been promised as an additional deterrent.³

Underlying the deterrence approach to penalising breach of the TPA is the assumption that businesses and individuals calculate the costs and gains to themselves of compliance and non-compliance, and go on to behave, to at least some extent, in a way calculated to minimise the costs and maximise the benefits. It is certainly plausible to assume that calculated self-interested thinking does play an important part in motivating business compliance and non-compliance⁴ — although empirical regulatory compliance research

¹ Caron Beaton-Wells, 'Recent Corporate Penalty Assessments under the Trade Practices Act and the Rise of General Deterrence' (2006) 14 *Competition & Consumer Law Journal* 1, 6. See also Anne-Marie Allgrove, 'The Assessment of Penalties Under the Trade Practices Act for Breaches of the Competitive Conduct Rules (1996) 4 *Trade Practices Law Journal* 104. Cf Karen Yeung, *Securing Compliance – A Principled Approach* (2004) 96-101 (arguing that despite the Federal Court's statements that deterrence is the guiding principle for settling penalties for breach of the competition provision of the TPA in fact the Court also refers 'to the importance of penalties being proportionate to the seriousness of the offence' (at p101)), and, similarly, David Round, 'An Empirical Analysis of Price-Fixing Penalties in Australia from 1974 to 1999: Have Australia's Corporate Colluders Been Corralled?' (2000) 8 *Competition & Consumer Law Journal* 83, 88 (arguing that the Federal Court's actual practice in imposing penalties does not reflect a consistent deterrence approach). See below at notes 22-30 and accompanying text for discussion of sanctions available for breach of the consumer protection provisions of the TPA.

² Darryl Dawson, Jillian Segal and Curt Rendall, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, 2003) ('Dawson Review') 160. See description of new penalties at n 18 and accompanying text below.

³ See below n 20 and accompanying text.

⁴ See John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law & Society Review* 7, 10; Diane Vaughan, 'Rational Choice, Situated Action, and the Social Control of Organizations' (1998) 32 *Law & Society Review* 23, 27-28 for a

also clearly shows that self-interested calculation ('deterrence') is not the only factor that explains why individuals and businesses do or do not comply with the law in any particular situation.⁵

This paper uses systematic, representative, quantitative survey evidence collected from mid-2004 to mid-2005 on Australian businesses' experiences of ACCC enforcement and compliance with the *TPA* to examine how large Australian businesses perceive the costs and gains of non-compliance and compliance with the *TPA*. Recent policy discussions have tended to assume that deterrence will automatically increase when legislators increase the amount and range of formal legal sanctions available under the *TPA* (ie increasing financial penalties and introducing jail sentences) and the ACCC increases its enforcement activity. This paper argues, on the basis of the scholarly literature on deterrence and our own empirical data, that this is not necessarily the case. It is necessary to extend our understanding of deterrence beyond the 'sheer deterrence'⁶ of formal legal sanctions. When we do so, we see that business calculations about the costs and benefits of compliance and non-compliance are influenced by a complex range of factors beyond the risk of enforcement action by an official government enforcement agency and the amount of any formal legal penalty. This paper sets out what those factors are and how they figure in Australian business thinking about compliance with the *TPA*.

good summary of the literature and the reasons why this assumption is reasonable (although Vaughan herself argues that reality is more complex).

⁵ Empirical regulatory compliance research generally finds the characteristics of individuals within the business, the organisational structure and governance arrangements of the firm, the normative commitments of leaders and employees and the social and market relationships within which the firm and its leaders are embedded to be equally important in explaining compliance and non-compliance. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Joseph Dimento, 'Can Social Science Explain Organizational Non-Compliance with Environmental Law?' (1989) 45 *Journal of Social Issues* 218; Mark Suchman, 'On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law' (1997) *Wisconsin Law Review* 475; Jon Sutinen and Karen Kuperan, 'A Socio-Economic Theory of Regulatory Compliance' (1999) 26 *International Journal of Social Economics* 174; Søren Winter and Peter May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675.

⁶ We have borrowed this term from Marius Aalders & Ton Wilthagen, 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Health and Safety and the Environment' (1997) 19 *Law & Policy* 415, 416.

In the *first* part of the paper we set out how the provisions of the *TPA* and the enforcement activities of the ACCC attempt to deter non-compliance with the *TPA*. We go on to briefly review the key concepts in the literature on deterrence and rational calculation in relation to regulatory compliance. We show that if we are interested in explaining and, ultimately, influencing the way people in business perceive the costs and gains of compliance, we need to extend our view of ‘deterrence’ beyond merely the likelihood and amount of any legal penalties, to business perceptions of the informal social and economic costs of non-compliance, and also the positive business gains of compliance and the costs of compliance. Moreover since people and firms will generally be motivated to act only on what they subjectively perceive to be true, we also need to understand the factors that affect businesses’ very perception of the risks and benefits of compliance and non-compliance. Since many issues vie for business managers’ attention, a range of internal and external factors are likely to affect the extent to which businesses pay attention to the risks of non-compliance and benefits of compliance, and how they rate those risks and benefits.

In the *second* part of the paper we briefly describe the interview and survey methodology used to gather the empirical data from Australian businesses reported in this paper. We go on in the *third* part of the paper to use our survey and interview data to critically examine how Australian businesses perceive the broader social and economic costs of non-compliance with the *TPA*, as well as the potential for formal enforcement and sanctions in the event of non-compliance. We also examine how Australian businesses who have breached the *TPA* assess the benefits of non-compliance in hindsight, and also how Australian businesses perceive the costs and benefits of positive *TPA* compliance – the ‘business case’ for compliance.

The *fourth* part of the paper examines what factors most influence business perceptions of the costs and benefits of compliance and non-compliance with the *TPA*. Classical deterrence theory assumes that it is mainly the availability of sufficiently high penalties and swift and certain regulatory enforcement action that makes businesses fear non-compliance and value compliance. We also examine the influence of internal factors, such whether firm leaders take a long or short term view of management, external factors, such as the market position of the firm, and the people or agencies who have most communicated awareness of the *TPA* to business on the way different businesses perceive the costs and gains of compliance.

The paper *concludes* with a brief summary of the empirical findings, and their implications for ACCC enforcement and deterrence policies, including criminalisation and the availability of jail penalties for cartel conduct.

It is not our purpose in this paper to test the extent to which calculations about the costs and benefits of compliance and non-compliance are more or less significant than *other* explanations for compliance with the *TPA*.⁷ We start from the assumption that the weighing of costs and benefits is likely to be one (but only one) strand that helps explain business compliance or non-compliance with the *TPA*. Further research is required to go on to consider how much impact, if any, these perceptions of the costs and gains of compliance and non-compliance actually have on Australian businesses' compliance with the *TPA*.

1. THE *TPA*, THE ACCC AND DETERRENCE THEORY

The TPA and Deterrence of Anti-Competitive Conduct

The sanctions available under the *TPA* were not very well suited to deterrence when it was first introduced in 1974. Only civil, not criminal, penalties for breach of the anti-competitive conduct provisions of the Act were and (at the time of writing) are available. In 1974 the maximum penalties were miniscule—only a maximum of \$250 000 for corporations and \$50 000 for individuals.⁸ Indeed one of the business people interviewed for our research who had admitted being part of a cartel commented that:

In that time [that is when the cartel first began before 1993] the fines were relatively small - \$100 000. Fines that small were unquestionably palatable in the

⁷ See Sally Simpson, *Corporate Crime, Law and Social Control* (2002) 22-44 for a thorough review of the literature and empirical evidence on deterrence as an explanation for business compliance against other factors. See also Braithwaite and Makkai, 'Testing a Model of Corporate Deterrence' above n 4; K. Kuperan and Jon G. Sutinen, 'Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries' 32 *Law & Society Review* 309-337; Toni Makkai and John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31 *Journal of Research in Crime and Delinquency* 347; Dorothy Thornton, Neil Gunningham and Robert Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 *Law & Policy* 262.

⁸ Section 76 *TPA*.

context. We never would have done it if we had known what fines we would subsequently receive.⁹

Moreover the actual imposition of penalties by the courts was much lower than the maximum penalties available.¹⁰

In 1993 the civil penalties for breaches of the anti-competitive conduct provisions of the *TPA* were increased to \$500 000 for individuals and \$10 million for corporations.¹¹ This reform is still seen by ACCC staff and trade practices lawyers as a quantum leap in the deterrent power of the sanctions available under the *TPA*.¹² Nevertheless the penalties introduced in 1993 were still paltry compared with the possibility of jail sentences and fines of a percentage of turnover for anti-competitive conduct in other jurisdictions, such as the US, Europe and Japan. Moreover, Round has shown that by the year 2000, the penalties actually levied by the courts had not increased in proportion to 1993's legislative increase in the maximum.¹³ Parker has also found that in three of the most 'successful' ACCC cartel enforcement actions in the period 1992-2002 the penalties did not outweigh the gains made.¹⁴ There are, however, more recent indications that actual penalties are beginning to increase.¹⁵

⁹ Quoted in Christine Parker, Paul Ainsworth and Natalie Stepanenko, Centre for Competition and Consumer Policy, *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases* (2004) 47.

¹⁰ See David K. Round, John J. Siegfried and Anna J. Baillie, 'Collusive Markets in Australia: An Assessment of the Economic Characteristics and Judicial Penalties' (1996) 24 *Australian Business Law Review* 292.

¹¹ Section 76 *TPA* as amended by *Trade Practices Legislation Amendment Act* 1992.

¹² See interviews with ACCC staff and commercial lawyers reported by Christine Parker and Natalie Stepanenko, Centre for Competition and Consumer Policy, *Compliance and Enforcement Project: Preliminary Research Report* (2003)

<<http://cccp.anu.edu.au/Preliminary%20Research%20Report.pdf>> 37, 43-44.

¹³ Round, 'An Empirical Analysis of Price-Fixing Penalties' above n 1. This is partly because the ACCC frequently settles enforcement matters with agreed penalties that include discounts for cooperation.

¹⁴ Christine Parker, 'The "Compliance Trap": The Moral Message in Regulatory Enforcement' (2006) 40 *Law & Society Review* 591, 596-7; see also Parker et al, *The Impact of ACCC Enforcement Activity in Cartel Cases* above n 9, 86-92. In a number of the ACCC's later cartel enforcement actions, they also found evidence that cartel participants were well aware of the penalties levied in

As a result of the recommendations of the Dawson Review in 2003,¹⁶ since 2007 (after the data reported in this paper were collected¹⁷), the penalties available against corporations for cartel offences now include, as an alternative to the maximum of \$10 million, three times the value of the illegal benefit, or when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover in the preceding 12 months.¹⁸ The Dawson Review also recommended in favour of creating criminal offences for ‘serious cartel behaviour’, on the basis that the possibility of jail sentences (which of course are only available for breach of criminal offences) is needed to provide adequate deterrence against cartel conduct.¹⁹ This recommendation was adopted as policy by the then Federal Coalition Government in late 2004,²⁰ and as a priority by the Federal Labor Government upon election to office in late 2007.²¹

earlier cases, but continued their activity anyway: Parker at al, *The Impact of ACCC Enforcement Activity in Cartel Cases* above n 9, 60-61. See also John M. Connor and C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990-2005* (2006) (showing that most penalties for private international cartels discovered anywhere in the world are only 1.45 to 4.9% of affected sales), and; Productivity Commission, *Productivity Commission Submission to the Review of the Trade Practices Act 1974* (2002) 39-45 (showing that the penalties in TPA breach cases rarely outweigh the gains made and therefore their specific deterrent value can be questioned).

¹⁵ Beaton-Wells, above n 1.

¹⁶ See Dawson Review, above n 2, 164-165.

¹⁷ But these increases had been foreshadowed at the time we conducted our survey.

¹⁸ Section 76 (1A) TPA, inserted by *Trade Practices Legislation Amendment Act No 1* (Cwth) 2006. Section in TPA. This change had been recommended by the Dawson Review, 161-165. It does not apply to breach of the secondary boycott provisions. Under the same new provisions, the court can also make an order disqualifying persons from managing corporations as the result of their involvement in a breach of the anti- competitive conduct provisions of the TPA.

¹⁹ Dawson Review, above n 2, 153, 161-163 (‘The committee is persuaded, in light of submissions made to it and growing overseas experience, that criminal sanctions deter serious cartel behaviour and should be introduced’ at 163). See also OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002); OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003).

²⁰ The Hon Peter Costello MP, Treasurer of the Commonwealth of Australia, ‘Criminal Penalties for Serious Cartel Behaviour’, Press Release No. 4 of 2005, 2 February 2005. A consultation version of a draft bill was supposed to be produced soon after this announcement: see Hon Peter Costello MP, Treasurer of the Commonwealth of Australia, and Hon Fran Bailey MP, Minister

The TPA and Deterrence for Breaches of the Consumer Protection Provisions

The possibility of deterrence in relation to consumer protection and fair trading breaches of the TPA has always been considerably more ambiguous than in relation to the competition law provisions.²² Criminal penalties are available for some breaches of the consumer protection provisions, and now stand at \$1.1 million for corporations and

for Small Business and Tourism, 'Government Progressing Trade Practices Act Reforms', Press Release No. 13 of 2005, 10 March 2005 (announcing that 'the Trade Practices Amendment (Cartel Conduct) Bill 2005 is currently being prepared' and that the Government would be 'consulting the states and territories for a three month period commencing 2 February 2005 in relation to the proposals, in accordance with the *Conduct Code Agreement*'). In August 2007, the bill was listed on the Department of Prime Minister and Cabinet's webpage as 'legislation proposed for introduction in the 2007 spring sittings' but an election was called for 24 November 2007 without any bill being made public. For discussion of these proposals see Caron Beaton-Wells, 'Capturing the Criminality of Hard-Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 674; Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31 *Australian Business Law Review* 192; Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 *Australian Business Law Review* 235; Brent Fisse, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique' (2007) 4 *Competition Law Review* 51. On the apparent lack of government commitment to criminalising cartels see Caron Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 3 *European Competition Law Review* 185.

²¹ Ruth Williams, 'Labor Eyes Time for Cartel Crime' *Sydney Morning Herald* (online edition), 4 December 2007; Stephen Moynihan, 'Cartels to Face Jail Over Collusion' *The Age* (Melbourne) (online edition) 10 December 2007. On 11 January 2008 the new Federal Labor Government released exposure draft materials relating to the proposed criminalisation of serious cartel conduct in Australia including a discussion paper including a brief explanatory abstract, and an exposure draft bill.

²² The Productivity Commission is currently reviewing the consumer policy framework in Australia: Productivity Commission, *Consumer Policy Framework: Productivity Commission Issues Paper* (2007). In 2005 the ACCC called for a review of the consumer protection aspects of the TPA including the possibility of civil penalties being available and better provision for the ACCC to take action for damages on behalf of consumers: see Fred Brenchley, 'ACCC to Tighten Consumer Protection' Monday 17 January 2005 *The Australian Financial Review* 1, 6.

\$220 000 for individuals.²³ But criminal prosecutions of these provisions have always been (and remain) rarely, if ever, used.²⁴ In almost all cases where the ACCC takes enforcement action in relation to consumer protection breaches, it does so as a civil matter. The remedies available in these civil enforcement actions are declarations that particular conduct breaches the *TPA*,²⁵ injunctions to prevent the prohibited action continuing or to require some action be taken,²⁶ damages,²⁷ rescission, setting aside or variation of contracts,²⁸ adverse publicity orders,²⁹ and, community service orders, probation orders, and corrective advertising.³⁰ (These remedies are also all available for breaches of the competition provisions of the *TPA*.) No civil penalties or prison terms are available for breach of the consumer protection provisions of the *TPA*.

The ACCC and 'Leveraged Deterrence'

Government policy and court decisions have focused on the deterrent power of the formal sanctions available for breach of the *TPA*. The ACCC, however, especially under the leadership of Chair Allan Fels and his Deputy Allan Asher between 1992 and 2002, realised that the formal sanctions available under the *TPA* lacked sufficient deterrent

²³ Criminal offences in relation to consumer protection and fair trading matters are set out in Part VC *TPA*.

²⁴ See Christine Parker and Natalie Stepanenko, *Preliminary Research Report*, above n 12, 23.

²⁵ Section 163A *TPA*.

²⁶ Section 80 *TPA*.

²⁷ Damages (ie compensation) are only available under the *TPA* where the ACCC takes representative action on behalf of specific named parties with their consent (section 87 *TPA*) or where the people who suffered damage themselves take action (section 82). The ACCC cannot take action under the *TPA* seeking compensation for a class of unidentified people in cases of breach of the consumer protection provisions of the *TPA*: *Medibank Private v Cassidy* [2002] FCAFC 290 (13 September 2002) para 25ff; *ACCC v Danox Direct Pty Ltd* [2003] FCA 1580 (28 August 2003). However there is also the possibility of the ACCC bringing a representative proceeding (ie class action) on behalf of consumers under Part IV *Federal Court of Australia Act* 1976 (Cwth). But for a discussion of the difficulties of this, see ACCC, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework* (2007) 102.

²⁸ Section 87 *TPA*.

²⁹ Section 86D *TPA*.

³⁰ Section 86C *TPA*.

power. Instead the ACCC deployed a range of other de facto ‘deterrents’ through the creative use of investigation and enforcement powers.³¹ Parker has previously labelled this ‘leveraged deterrence’.³²

First, the ACCC leveraged up the deterrence value of the modest penalties available under the *TPA* with the administrative and personal cost and inconvenience of the investigation process and the reputational damage caused by publicity.

Second, the ACCC developed a policy of holding as many parties – individual and corporate (such as industry associations, compliance professionals and potential whistleblowers) - legally liable as actually contributed to the conduct, rather than just focusing on the main corporate participants. Even if penalties against firms are too small relative to the firm’s size and profits to be of deterrent value, this strategy spreads the deterrent threat to individuals who are likely to be more sensitive to smaller penalties, or even just to the shame of having a finding of liability and an injunction against re-offending against them.³³

Third, the ACCC settled potential enforcement matters with alleged offenders agreeing in enforceable undertakings to compensate consumers, undertake compliance reviews, and implement compliance systems to an extent that was often more costly than some of the penalties that were likely to be awarded.³⁴ This was a particularly important way of leveraging deterrence in consumer protection cases where penalties were not available, and the ACCC’s capacity to sue for consumer compensation is limited.³⁵

³¹ See Fred Brenchley, *Allan Fels: A Portrait of Power* (2003) 117-161.

³² Parker, “The “Compliance ‘Trap’” above n 14, 598.

³³ See John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 109-122, Sally Simpson, ‘Assessing Corporate Crime Control Policies: Criminalization versus Cooperation’ (1998) 32 *Kobe Law Review* 101, 121. The ACCC uses injunctions against reoffending extensively as an outcome of its enforcement action. This may seem odd since re-offending would be against the law anyway. But there are two reasons for it. Firstly, it means that if party subject to the injunction re-offends within the injunction period, they will be liable for criminal penalties of contempt, not just the underlying civil offence. Secondly, the granting of the injunction entails a clear statement by the court that the conduct in question is in fact a breach of the law.

³⁴ See Christine Parker, *The Open Corporation* (2002) 250.

³⁵ See above n 27.

Moreover, the ACCC chose not only to leverage its enforcement activity with these broader costs of non-compliance to business, but also did much to build knowledge and understanding in business of the benefits of, or ‘business case’ for, proactive compliance through seeding the development of two professional associations for people working in business to help business comply with the law – the Society for Consumer Affairs Professionals in Business and the Australasian Compliance Institute. Both associations have gone on to become significant advocates of the ‘business case’ for compliance with the *TPA* within business.³⁶

The ACCC’s leveraged deterrence strategy was based on an implicit theory about how business people think about the costs and gains of both compliance and non-compliance that ranged far beyond the simple, ‘mere deterrence’ of legal penalties. As the following sections show, understanding ‘extended’ deterrence and ‘perceptual’ (or ‘behavioural’) deterrence give us a much more realistic understanding of calculative motivations for compliance and non-compliance than ‘mere’ deterrence alone.³⁷

‘Mere’ Deterrence—The Likelihood and Costs of Formal Legal Enforcement

Mere deterrence is concerned only with the costs of formal legal sanctions associated with non-compliance calculated in comparison to the profit to be obtained. Classical deterrence theory sees people as deterred from breaching the law where the legal penalty

³⁶ Parker, *The Open Corporation*, above n 34, 250-1.

³⁷ The labels ‘mere deterrence’ and ‘behavioural deterrence’ are from Sally Simpson, *Corporate Crime*, above n 7, 42, 91-92 (respectively). The label ‘extended deterrence’ is from Harold G Grasmick and Robert J Bursik, ‘Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model’ (1990) 24 *Law & Society Review* 837. “Perceptual’ deterrence is not a different kind of deterrence but in fact a condition for mere and extended deterrence to have any effect at all. Perceptual and extended deterrence are therefore complementary and this paper adopts a perceptual and extended deterrence approach.

they will receive for breaching the law multiplied by³⁸ the likelihood of detection and conviction outweighs the gains to be achieved.³⁹

Courts, legislators, and regulators often seem to assume that it is only mere (or sheer) deterrence that informs business calculations about the costs and gains of complying with the law, and therefore that increasing penalties and stepping up enforcement activity are the main ways to influence calculating businesses to comply with the law. The highly influential recommendations of the OECD in relation to cartel conduct, for example, are explicitly based on this narrow view of how businesses calculate the costs and benefits of non-compliance. It is these OECD recommendations that were adopted by the Dawson Review in recommending the most recent amendments to the penalties available under the *TPA*, and the criminalisation of cartels.⁴⁰

However, there is more to the way individuals and firms think about, and calculate, the costs and gains of compliance than classical deterrence theory suggests.

'Extended' Deterrence – Informal Social and Economic Sanctions

A number of deterrence theorists have argued that when people think about the costs of non-compliance, they think not only of the likelihood and costs of formal legal penalties that might be applied, but also the likelihood and costs of various informal economic and social sanctions for breach, including social embarrassment, that might be imposed by

³⁸ In their overview of empirical deterrence research, however, Grasmick and Bursik, above n 37, 846, note that questions have been raised in the social psychology literature about whether this relationship should be multiplicative or additive.

³⁹ See Paul Robinson and John Darley, 'Does Criminal Law Deter?' (2004) 24 *Oxford Journal of Legal Studies* 173; John Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspectives of Deterrence Theory' (1997) 60 *Law & Contemporary Problems* 253. Note that the swiftness with which the conduct will be discovered and sanctioned is also important in classical deterrence literature although less commonly discussed in contemporary research: see Charles Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (1980) 8.

⁴⁰ See OECD, *Fighting Hard Core Cartels*, above n 19, 72 and text accompanying above notes 2, 3 and 16 to 20.

the various people who they relate to on a personal and business level.⁴¹ It is true that some of these informal sanctions, such as social embarrassment, might *also* influence compliance because they affect people's *conscience and sense of moral obligation* to comply rather than their *calculations* about compliance.⁴² Nevertheless, informal sanctions, including both economic and social sanctions, can affect people's compliance behaviour because they affect their calculations about the costs and gains of compliance and non-compliance.

There is evidence that many informal social and economic sanctions may be more effective at influencing calculative thinking and behaviour than mere formal legal sanctions. This is because they bring to bear a range of costs and benefits of compliance or non-compliance that can be much more salient to an individual or firm's own priorities than the application of a legal penalty.⁴³ Certainly to the extent that potential informal economic and social sanctions 'back up' formal enforcement activity, then we would expect individuals and businesses to be more motivated to comply with the law, at the very least because the mere quantity of costs of non-compliance have increased. Similarly, to the extent that various third parties provide rewards for compliance (for example consumers paying a higher price for compliant products), then we would expect compliance to increase. We would also expect individuals and firms to more consistently comply where they feel they are being watched from a number of different angles rather than just by the official regulatory agency.⁴⁴

⁴¹ Grasmick and Bursik, above n 37; Simpson above n 7, 43; Dorothy Thornton, Neil A. Gunningham and Robert A. Kagan, 'General Deterrence and Corporate Environmental Behaviour' (2005) 27 *Law & Policy* 262, 264.

⁴² Braithwaite calls this the 'moralizing qualities of social control': John Braithwaite, *Crime, Shame and Reintegration* (1989) 9, 71-75. See also Grasmick and Bursik, above n 37, 841.

⁴³ Braithwaite, *Crime, Shame and Reintegration*, *ibid*, 69-70; Tittle, *Sanctions and Social Deviance*, above n 39, 320.

⁴⁴ Neil Gunningham, Robert A. Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (2003) pp. 35-40; Vibeke Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2007) unpublished paper on file with the authors; Søren Winter and Peter J May, 'The Role of Third Parties in Fostering Regulatory Compliance: Lessons from Agro-environmental Regulation in Denmark' Paper presented at the Fourth International Research Symposium on Public Management, Rotterdam, 10-11 April 2000. See also Julia Black, 'Enrolling Actors in Regulatory Processes: Examples from UK Financial Services

In an age where much business is about managing brand value and reputation, we would expect that the financial and moral costs of bad publicity from non-compliance, would loom particularly large in business thinking about the costs and gains of compliance and non-compliance.⁴⁵ As we saw above, the ACCC itself sought to use its enforcement powers creatively to activate business fear of the informal costs of publicity and a poor relationship with the ACCC. Australian businesses are also likely to fear the social and economic reaction of a range of social and economic stakeholders to the discovery of non-compliance. Therefore our paper measures Australian businesses' perceptions of a range of economic and social costs of non-compliance, not just the perceived likelihood and severity of formal enforcement action and sanctions.

Extending Deterrence Analysis to Include the Costs and Gains of Compliance

Where we are examining calculating thinking about compliance it is equally important to consider the way that the costs and gains of *compliance* (not just *non-compliance*) are likely to influence people's decision-making. Organisations are likely to incur costs in becoming aware of their legal responsibilities, understanding how the various actions of individuals and teams within the organisation might lead to breaches of those responsibilities, and making, implementing and monitoring controls to prevent breaches. Moreover compliance with the law, especially the *TPA*, might mean forgoing opportunities for innovation and profit-making. Indeed business sometimes argue that these latter potential costs of compliance might 'over-deter' or 'chill' socially or economically useful

Regulation' *Public Law* (2003) 62; Peter Grabosky, 'Using Non-governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance: An International Journal of Policy and Administration* 527.

⁴⁵ See Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982) 164; Wallace N. Davidson, Dan Worrell, and Louis T. W. Cheng, 'Are OSHA Penalties Effective?' (1995) 92 *Business & Society Review* 25; Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1993) (finding that 'Adverse publicity is of concern not so much by reason of its financial impacts but because of a variety of non-financial effects, the most important of which is loss of corporate prestige' and that 'corporations fear the sting of adverse publicity attacks on their reputations more than they fear the law itself: 247, 249); Neil Gunningham, Robert A. Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (2003) 35-38.

business behaviour by inhibiting ‘responsible risk-taking and commercial decision making’.⁴⁶

If the costs of compliance are too high, or if business sees no benefit of compliance to set against the costs of compliance, then it would be rational not to comply even in the absence of strong sanctions against breach, and low gains from non-compliance. This is why it might be rational for regulators like the ACCC to invest resources not only in legal enforcement and education about the sanctions for breaching the law, but also education and dialogue with business about the positive ‘business case’ for compliance (such as improvements in customer retention and satisfaction), and ways in which compliance can be most efficiently achieved within an organisation.⁴⁷ Moreover businesses that see benefits to compliance with the law, apart from avoiding getting caught, might put more effort into actually complying with the law.

In this paper we measure a range of costs and gains of compliance (not just non-compliance), and do so in a way that is broad enough to incorporate costs and gains relevant to the business’ own internal goals and purposes, as well as relationships with various third parties (not just in relation to the formal legal system).

‘Perceptual’ (or ‘Behavioural’) Deterrence—How Businesses Perceive the Likelihood and Costs of Being Caught

Much empirical and theoretical work has shown that people do not necessarily know the *objective* likelihood and severity of being caught. Even commercial firms that we might expect to be calculating in their thinking about compliance with the law ‘have not been particularly attentive to penalty information, nor have they made special efforts to obtain timely and accurate information’.⁴⁸ Individual personalities, levels of emotionality, and sense of moral obligation to obey the law are likely to play a part in how individuals

⁴⁶ Treasury of Australia, *Review of Sanctions in Corporate Law* (2007) 9. See also Parker & Stepanenko, *Preliminary Research Report*, above n 12, 62-63; Yeung, *Securing Compliance*, above n 1, 65-66 on ‘optimal deterrence’.

⁴⁷ Bardach and Kagan, *Going by the Book*, above n 45, Jay Sigler and Joseph Murphy, *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988).

⁴⁸ Thornton et al, above n 7, 279.

perceive the costs and benefits of non-compliance,⁴⁹ and, indeed, whether they even seek out information about the costs and gains of compliance and non-compliance at all.⁵⁰ Within a firm, the characteristics of the individual officers and employees who are in positions to make decisions and perform behaviours relating to compliance, and the way they interact with one another in different work teams, will all contribute to the firms' thinking on the costs and gains of compliance, and consequent behaviours.

A raft of research in organisational theory, rational neo-institutionalism and behavioural economics shows that apparently rational choices in business decision-making are often less than objectively optimal. This is likely to be equally true of decision-making about compliance.⁵¹ But despite the fact that firms and their managers exhibit 'bounded' rationality, calculations about the costs and benefits of compliance may still be very important to their thinking, decision-making and behaviour. Moreover decision-making and behaviours that are not optimally rational will often still be consistent, predictable and therefore amenable to empirical study.

One lesson of this research is that many business managers do not make cost-benefit calculations about compliance at all until something like a regulatory enforcement action or publicly reported breach or accident, brings the risks of non-compliance to their

⁴⁹ See for example Makkai and Braithwaite, 'Dialectics of Corporate Deterrence', above n 7; Simpson, above n 7, 136, 149; John T. Scholz and Neil Pinney, 'Duty, Fear and Tax Compliance' (1995) 39 *American Journal of Political Science* 490 (finding that citizens reporting greater commitment to obey tax laws will systematically over-estimate the expected penalty for noncompliance).

⁵⁰ Toni Makkai and John Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and Case for Empiricism' (1993) 15 *Law & Policy* 271, 284 (finding that regulatees that disengage from the regulatory process will estimate compliance costs as very low because they think they will do nothing or very little to ensure compliance); Thornton et al, above n 7, 280 (interpreting their data as possibly supporting a model in which 'Good apples do not calculate and calibrate the costs of non-compliance; they *assume* that those costs are potentially disastrous.').

⁵¹ Emma Dawnay and Hetan Shah, *Behavioural Economics: Seven Principles for Policy-Makers* (2005); Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993) 101-132; James G. March and Herbert A. Simon, *Organizations* (1958); Herbert A. Simon, 'A Behavioral Model or Rational Choice' (1952) 59 *Quarterly Journal of Economics* 99; Sally Simpson, *Corporate Crime*, above n 7, 91-92.

attention.⁵² As Mendeloff and Gray conclude from their empirical research, ‘managers cannot optimise with respect to all aspects of their operations and tend to focus their attention on what appears to be most important at the time... an inspection that finds serious problems at a workplace may surprise management and lead them to pay more attention to safety issues.’⁵³

Similarly, in her investigation of health and safety programs in UK companies, Genn finds that it is ‘when there is a potential for a catastrophe of either an economic or political nature’ that they are more likely to have an occupational health and safety system in place.⁵⁴ They are also more likely to have implemented a system addressing that particular high profile hazard or short term possibility of disaster than they are to have a system addressing longer term health issues: Managers seem more likely to perceive and act on high profile risks of disaster.

It is their *subjective* estimation of factors such as the risk of being caught and sanctioned that must be more relevant in influencing compliance behaviour.⁵⁵ Therefore many

⁵² See Andrew Hopkins, *Making Safety Work* (1995) 88–95; David McCaffrey and David Hart, *Wall Street Polices Itself: How Securities Firms Manage the Legal Hazards of Competitive Pressures* (1998) 87 (finding that Wall Street firms will make heavier investments in compliance than they otherwise would, in the wake of a regulatory incident); John Scholz and Wayne Gray, ‘OSHA Enforcement and Workplace Injuries: A Behavioural Approach to Risk Assessment’ (1990) 3 *Journal of Risk and Uncertainty* 283 (‘concluding that imposing penalties results in improved safety because penalties focus managerial attention on risks that may otherwise have been overlooked’).

⁵³ John Mendeloff and Wayne P. Gray ‘Inside the Black Box: How Do OSHA Inspections Lead to Reductions in Workplace Industries?’ (2005) 27 *Law & Policy*, 219, 220.

⁵⁴ Hazel Genn, ‘Business Responses to the Regulation of Health and Safety in England’ (1993) 15 *Law & Policy* 219, 223.

⁵⁵ Braithwaite and Makkai, ‘Testing a Model of Corporate Deterrence’, above n 4, 7-8 (summarising the criminological literature on perceptual deterrence and noting that the evidence finds little support for the impact of perceived severity of punishment on compliance but some impact of perceived certainty of sanction and also perceived informal sanctions on compliance); Makkai and Braithwaite, ‘The Limits of Economic Analysis’ above n 50 (finding that perceptions of costs of compliance for nursing homes have some influence on compliance, and that perceptions of expected costs of compliance and the actual costs vary significantly); Simpson, above n 7, 28, 40-2 (summarising the literature on perceptual deterrence in relation to corporate compliance also finding little impact of perceptual deterrence overall). For suggestions that the related concept of awareness does influence compliance, see Dimento, above n 5, 228-30; Paul

researchers argue that it is more important to examine the ‘perceptual’ rather than ‘objective’ deterrence of sanctions since it is these perceptions that are likely to make a difference to business compliance behaviour.⁵⁶

This Paper: Understanding and Explaining Perceptions of the Costs and Gains of Compliance and Non-Compliance

The third and fourth parts of this paper report systematic, quantitative data on the way Australian businesses think about the costs and gains of compliance and non-compliance. We have described this in terms of ‘extended’ and ‘perceptual’ deterrence above. But the language of ‘deterrence’ may not be the most helpful way to crystallise the phenomenon that we are seeking to understand and explain. In policy circles at least, ‘deterrence’ is generally used narrowly to refer to the objective (‘mere’) deterrence of formal sanctions. Once we ‘extend’ deterrence beyond formal enforcement action to say that business perceptions of reality are likely to be more influential than the objective reality of sanction size and certainty in explaining behaviour, our focus has shifted from ‘deterrence’ to ‘compliance’. ‘Deterrence’ is the term used to describe an *enforcement strategy* that a regulator — whether a state enforcement agency or any other party seeking to influence someone’s conduct — uses in an effort to activate business calculative motivations to comply. For example, penalties for breach seek to ‘deter’ non-compliance by making the costs of non-compliance higher than its gains. But, if we are interested in understanding how businesses respond to those penalties — whether they actually *comply* with the law — we need to have a broader understanding of businesses’ *calculative thinking about compliance and non-compliance*. It is this calculative thinking that should be the real focus of our enquiry, not deterrence as such.

Robinson and John Darley, ‘Does Criminal Law Deter?’ (2004) 24 *Oxford Journal of Legal Studies* 173, 175-178; Søren Winter and Peter May, ‘Information, Interests, and Environmental Regulation’ (2002) 4 *Journal of Comparative Policy Analysis: Research and Practice* 115. Cf Henk Elffers, Peter van der Heijden and Merlijn Hezemans, ‘Explaining Regulatory Non-compliance: A Survey Study of Rule Transgression for Two Dutch Instrumental Laws, Applying the Randomized Response Method’ (2003) 19 *Journal of Quantitative Criminology* 409 (finding no effect of knowledge of and clarity of rules on compliance).

⁵⁶ See for example Tittle, *Sanctions and Social Deviance*, above n 39, 323 (arguing that ‘the author is convinced that it is now essential for researchers to try to explicate the perceptual process, treating actual sanctions as one of many possible influences on sanction perceptions.’)

The mere deterrence view assumes that the things that explain business compliance emanate mainly from the law and the regulator—such as the size of the penalty, and the resources of the regulator to monitor, investigate and prosecute breaches. A broader focus on calculative thinking, rather than mere deterrence, forces us to recognise that there are a range of factors other than the objective size and certainty of formal legal sanctions that will affect business perceptions of the benefits and risks of non-compliance and compliance, and business calculations about how to gauge the relative weight of those risks and benefits.⁵⁷ Getting businesses to calculate that it is in their interests to comply with the law is not just about increasing penalties or prosecution resources — and then expecting to see a concomitant increase in compliance. Businesses engage in a more complicated process of perception and internal consideration of a range of costs and gains of compliance and non-compliance that must be understood and explained. The third part of this paper provides empirical evidence about the way Australian businesses in fact think about the costs and gains of compliance and non-compliance with the TPA, and the fourth part seeks to identify some of the factors that create variation in business perceptions of these costs and gains of compliance and non-compliance.

2. METHODOLOGY

These data are part of a larger study of business experience of enforcement and compliance in relation to Australia's national competition and consumer protection legislation, the *TPA*, and the ACCC's enforcement of the *TPA*. The *TPA* applies to all Australian businesses and prohibits certain anti-competitive conduct (eg price-fixing, abuse of market power), unfair trading practices (especially misleading and deceptive advertising), non-compliance with legislated product safety standards, and unconscionable conduct in business dealings.

The first part of the research involved qualitative interviews with 39 current and former staff of the ACCC, 24 leading specialist trade practices lawyers, 7 compliance advisers, and 30 business people from businesses or industries that had faced ACCC enforcement

⁵⁷ See for example Jeff T. Casey and John T. Scholz, 'Beyond Deterrence: Behavioral Decision Theory and Tax Compliance' (1991) 25 *Law and Society Review* 821; Bridget Hutter, "'Ways of Seeing: Understandings of Risk in Organizational Settings' in Bridget Hutter and Michael Power (eds) *Organizational Encounters with Risk* (2005) 67, 72-8.

action.⁵⁸ The purpose of the qualitative research was to establish the nature and range of the ACCC's enforcement activities, to collect evidence as to the impact of ACCC enforcement activity on business compliance, and to explore the ways in which businesses reacted to ACCC enforcement activity. ACCC staff were chosen for interview on the basis of their seniority and experience with leading investigations in important cases. Lawyers and compliance advisors were chosen for interview on the basis that they were specialist trade practices lawyers who had represented clients in many significant enforcement actions and were considered leaders in their field. The business people interviewed were people who had experienced enforcement action in some of the cases identified as particularly significant by the interviews with ACCC staff. Quotations in the text of this article, unless otherwise attributed, are from these (anonymous) interviews. A great variety of ACCC policy documents and reports of enforcement activity were also read.

The second part of the research was the collection of quantitative data – the responses by 999 of Australia's largest businesses across all industries to a self-completion survey questionnaire. The questionnaire was to be filled in by the most senior person in the organisation responsible for trade practices compliance, with a focus on contacting first the compliance manager, then the in-house counsel, the company secretary, the chief financial officer and, finally, the chief executive officer, in that order, as the people most likely to be able to fill out the questionnaire on behalf of the business. Forty-two percent of those who filled out a questionnaire were chief executive officers, company secretaries or chief financial officers, and a further twenty percent general counsel or compliance managers.⁵⁹ The survey achieved a response rate of 43%,⁶⁰ which compares well with

⁵⁸ For further information about the methodology for this part of the research and a preliminary analysis of this data see Parker and Stepanenko, *Preliminary Research Report*, above n 12.

⁵⁹ For further information about this part of the project and its methodology, see Vibeke Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (Legal Studies Research Paper No 150, Faculty of Law, The University of Melbourne, 2005).

⁶⁰ In fact this under-estimates the actual response rate - we cut 4.3% of the responses actually received from the study because we discovered that the respondents were too small (less than 100 employees) to fit into our sample of large businesses. If we, quite reasonably, assume that similarly 4.3% of the entire list of companies surveyed (including non-respondents) were 'too small', then we would have a response rate of 45%.

average response rates for similar questionnaire research of businesses.⁶¹ The profile of our respondents compares well with the profile of the whole list of the largest Australian businesses in terms of size and industry, suggesting that our data are likely to be representative of large Australian businesses.⁶²

As the survey responses came in over a period of some months between the end of 2004 and middle of 2005, we also checked whether there was any systematic difference in the responses that came in earlier and later (particularly before and after two widely publicised ACCC cartel investigations). We found no significant variation between responses at these different times – suggesting that the sample is a robust representation of business perceptions of the costs and gains of compliance over the relevant period.⁶³

All respondents to the survey and interviewees were guaranteed strict confidentiality and anonymity in order to ensure that they were free to answer our questions honestly. Most of our survey measures also consist of multiple items, which is also believed to increase their reliability.

⁶¹ Yehuda Baruch, 'Response Rate in Academic Studies - a Comparative Analysis' (1999) 52 *Human Relations* 421 reports that the average response rate for questionnaire research where the targets for filling out the questionnaire were top managers or someone acting as a representative of a business in articles published in high quality management journals in 1975, 1985 and 1995 was 35.5%. See also Michael Bednar and James Westphal, 'Surveying the Corporate Elite: Theoretical and Practical Guidance on Improving Response Rates and Response Quality in Top Management Survey Questionnaires' in David Ketchen and Donald Bergh (eds), *Research Methodology in Strategy and Management* (forthcoming), also available at <<http://ssrn.com/abstract=936714>> at 10 January 2007.

⁶² Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 59, 12-13.

⁶³ Further details of this test are reported in *ibid* 279-82 especially at 282.

Previous studies of deterrence have sometimes been criticised for drawing people's attention to the costs (and gains) of non-compliance when they might not have even thought in a calculating way about compliance in the first place. It has been suggested that this might create the phenomenon that the researcher is seeking to identify or explain.⁶⁴ Our questionnaire partially overcomes this problem by asking the person who is responsible for trade practices compliance in the organisation to fill it out on behalf of the organization – but to report to us how 'most managers in the organization' think about these things. This means that those whose thinking is actually being reported have not had their attention artificially drawn to the various costs and gains of compliance and non-compliance. The person who does fill out the survey is the person most likely to have already thought about these things. However this is not a perfect way of dealing with this problem since for the many respondents that did not have a dedicated compliance position, the person filling out the survey would have been essentially reporting on their own views.

The measures and questions in the survey relevant to this paper are described in more detail as the results are set out below.

We begin by looking at how our respondents perceived the extended costs and gains of non-compliance and compliance in the third part of the paper. It is these perceptions that presumably form the basis for any calculative decision-making about whether to comply or breach in fact. In the fourth part of the paper, we go on to test some of the factors that might influence these perceptions, and therefore have the capacity to influence business calculations about whether to comply or not.

3. HOW AUSTRALIAN BUSINESSES PERCEIVE THE COSTS AND GAINS OF TPA NON-COMPLIANCE AND COMPLIANCE

Introduction

We asked our survey respondents a number of questions about how senior management in their organisation perceived the costs and gains of both compliance and non-compliance with the TPA, including the perceived costs of sanctions associated with ACCC enforcement action if they were ever caught breaching the TPA (Table 1), the

⁶⁴ See Vaughan above n 4, 28. See also Makkai and Braithwaite, 'The Limits of Economic Analysis' above n 55.

likelihood and severity of ACCC enforcement (Table 2), how they perceived the costs of informal economic and social sanctions from various other parties if they were ever accused of non-compliance (Table 3), and, on the other hand, how they perceived the gains of non-compliance, if they had ever breached the TPA (Table 4), and, finally, how they perceived the costs and gains of compliance with the TPA (Table 5).⁶⁵

The measures and results are discussed in turn below. In each case, the tables shown here report the mean rating given by our respondents to each item measuring their perceptions on a scale from 1 to 5.

⁶⁵ Further details of these statistics including the number of responses and standard deviations for each individual rating for each item are available at Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 59, 225-231 (which is available on the internet or from the authors).

Table 1: Australian Business Perceptions of Costs of TPA Non-Compliance – Sanctions of ACCC Enforcement Action

Perceived Costs of Sanction	Means (& Standard Deviation)
<i>How much of a problem do you think senior management of your organisation would find the following costs if you were ever caught by the ACCC in breaching the Trade Practices Act?</i>	1-5: 'very small problem' to 'very large problem'
Very Serious Sanctions (n=967-973)	
Conviction in court and a fine of 10% of your turnover	4.92 (0.32)
Criminal conviction and the senior manager goes to prison	4.85 (0.44)
Conviction in court and a fine of \$1 million	4.84 (0.46)
An enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of \$1 million	4.82 (0.49)
A private law suit where the ACCC takes a representative action on behalf of victims	4.69 (0.60)
Announcement of an investigation of your organisation at a televised press conference by the Chairman of the ACCC	4.51 (0.79)
Serious Sanctions (n=969-973)	
Conviction in court and a fine of \$ 100 000	4.48 (0.70)
An enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of \$ 100 000	4.45 (0.73)
Publication of advertising that corrected former advertising or informed about our breach	4.06 (0.93)
Loss of morale in our organisation	4.02 (0.91)

Costs of Non-Compliance — Sanctions of ACCC Enforcement Action (Table 1)

We asked respondents to rate ‘how much of a problem’ managers in their organisation would see various formal sanctions available—or potentially available in the future—under the TPA, if their organisation was ever caught breaching the TPA (Table 1). We also asked how much of a problem they would see two broader consequences of ACCC investigation and sanctions – ‘announcement of an investigation of your organisation at a televised press conference by the Chairman of the ACCC’ and ‘loss of morale in our organisation’.⁶⁶

Overall our respondents assess all of these potential costs of non-compliance as very high, with very little variation among individual respondents’ ratings of the various items. Almost all items garner ratings as a ‘large’ or ‘very large’ problem from 90% or more of the respondents.⁶⁷ Nevertheless some sanctions are seen as even more serious than the others – shown in the distinction in Table 1 between ‘serious’ and ‘very serious’ sanctions.

The two formal sanctions that can be confidently stated to be rated as the absolutely worst options by our respondents are a penalty of 10% of turnover, and criminal conviction with the possibility of a senior manager going to prison.⁶⁸ Of these two, the fine of 10% of turnover is even seen as a little worse than a senior manager going to

⁶⁶ These were both things that our qualitative interviews had indicated were likely to be an important aspect of businesses’ fear of ACCC enforcement action, although they themselves are not part of the formal sanction for breaching the TPA. In that sense they represent part of the ‘extended’ informal deterrence that formal ACCC enforcement action might bring with it.

⁶⁷ The exceptions were ‘publication of advertising that corrected former advertising or informed about our breach’ and ‘loss of morale in our organisation’ with 80% and 79%, respectively, ratings as a ‘large’ or ‘very large’ problem.

⁶⁸ Note that the fine of 10% of turnover was only added to the TPA as a penalty for anti-competitive conduct after the questionnaire was designed and administered. The possibility of criminal conviction is still only a proposed addition to the TPA, as a penalty for serious cartel conduct, at the time of writing: see text accompanying notes 19 to 20 above. A maximum of 5 years jail is proposed – but no particular number of years was mentioned in the questionnaire. Unfortunately, at the time that the questionnaire was prepared, the Dawson Review had not yet recommended the inclusion of penalties of three times the value of the illegal benefit, a penalty that was subsequently included in the TPA – so an item about that way of calculating the penalty was not included in the questionnaire.

jail!⁶⁹ We do, however, need to be cautious about this slightly surprising finding for two reasons.

First, our questions asked the person responsible for compliance to report on what ‘most managers’ would fear. It may be that the person filling out the survey thought that most managers would not feel that it would not be themselves personally facing jail – and that the deterrence of jail would be a much more powerful deterrent force on the actual individual senior manager who would be facing the prospect of going to jail. On the other hand humans seem to have an infinite capacity for denial,⁷⁰ and organisations are the perfect context for people to blame others, or ‘the system’ for their wrongdoing.⁷¹ In that context our findings might reflect the worrying fact that in an organisational context the fear of jail may never attach sufficiently to any one person to deter breaches of the law.

Second, our question only asked respondents to consider and rate how much of a problem each sanction would be individually on a scale of 1 to 5. We did not explicitly ask respondents to compare and rank the different sanctions. We should therefore be cautious in drawing conclusions about how respondents would rank the different sanctions if they were asked to do so. It may be that jail would in fact be seen as much *more* problematic than a fine in most people’s minds even though both are seen as ‘very serious’.

Nevertheless the very clear result that the previously available sanctions of fines of \$1 million, implementation of a compliance system combined with consumer compensation of \$1 million, and ACCC representative action seeking compensation on behalf of consumers are all ranked as very serious along with the newly available (or soon to be available) fines of 10% of turnover and imprisonment does raise questions as to whether there is likely to be any quantum leap in general ‘deterrence’ with either the harsher new penalties that have been available from 2007, or the introduction of criminalisation.

⁶⁹ This is true both in terms of mean scores and also the absolute number of respondents rating this as a ‘very large’ problem: 93% rate ten percent of turnover to be a ‘very large problem (with 6% rating it a ‘large’ problem) while 87% rate ‘criminal conviction and the senior manager goes to prison’ as a ‘very large’ problem (and 12% a ‘large’ problem).

⁷⁰ See Stanley Cohen, *States of Denial* (2001).

⁷¹ See Christopher Kutz, *Complicity: Law and Ethics for a Collective Age* (2000); Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 51.

This tallies with the observation in other empirical research on deterrence that there is no linear relationship between the severity of penalties available and the fear or perceived costs of those penalties among those at whom regulation is targeted – greater penalties do not automatically mean greater deterrence in equal measure.⁷² Any sanction above a certain threshold — and with a certain likelihood of being applied in the case of non-compliance — may be seen as equally disastrous or fearful to many business people. This was certainly the view of some of the specialist trade practices lawyers we interviewed before administering the survey. They thought that the 1993 increase in penalties and enforcement activity, particularly in relation to cartels, had already made such a substantial difference to business perceptions of deterrence that criminalisation and jail sentences would add only a little to the deterrent power of the TPA:

...You couldn't say that the introduction of criminal sanctions wouldn't have an impact, but it may not be a very substantial one on top of the changes that have already occurred.⁷³

Criminal sanctions won't make a big difference – perhaps a little bit of a difference... What was helpful to compliance started seriously under Fels. Concrete was their first big success. It changed the landscape in compliance. Now I think that landscape is well entrenched. I understand that the ACCC is frustrated that despite all the action there is still unlawful conduct. I think that because of all of this frustration they are pushing for criminal sanctions. There is the death penalty for murder yet people still commit murder. It is human nature. Companies getting fined do not have much impact anymore, I agree. However, if they stopped getting fined it

⁷² Simpson, above n 7, 30; Tittle above n 39, 322-3. See also Braithwaite and Makkai, 'Testing a Model of Corporate Deterrence', above n 4, 31-32; Makkai and Braithwaite, 'Dialectics of Corporate Deterrence', above n 7, 358, 366-7 (note that in this paper Braithwaite and Makkai did not find evidence of this tipping point effect, although they certainly find that the relationship between deterrence and compliance is non-linear, and that an element of deterrent capability is important for securing compliance); and Toni Makkai and John Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and a Case for Empiricism' (1993) 15 *Law & Policy* 271 (finding a non-linear relationship between expected costs of compliance and actual compliance).

⁷³ Interview of an anonymous lawyer, by Christine Parker, Sydney, 1 April 2003.

would become a big deal again. Particular cases don't have a big impact now. They are just a reinforcing mechanism.⁷⁴

This suggests that once the threshold is reached at which the perceived likelihood and costs of enforcement action become large (or certain) enough for deterrence to become a relevant motivation for business to comply with the TPA, any greater penalties or likelihood of being caught will produce only marginal gains in deterrence. Indeed some regulatory scholars have argued that there is also a point at which greater penalties might produce a counter-reaction of disengagement or resistance because they are seen as too heavy-handed, or as threatening the very viability of the business organisation.⁷⁵

The possibility of ACCC representative action (on behalf of consumers who have been harmed by a breach of the TPA) was seen as one of the more serious sanctions available under the TPA. Presumably this is at least partly because the potential amount of compensation awarded could be very large. Indeed ACCC representative action, or a private lawsuit, is likely to be the most serious sanction ever actually applied for breaches of the *consumer protection* aspects of the TPA, given that there are no civil penalties available and criminal penalties are rarely pursued.

This also points to the potential impact of 'coat-tails' actions on business calculations about the costs and gains of compliance. Coat-tails actions are where customers (or competitors) who have been damaged by breaches of the TPA sue the offender for compensation after the breach has been established by ACCC enforcement action (something that we did not ask about in our survey). Private actions are heavily used in relation to breach of the misleading and deceptive conduct provisions of the TPA –

⁷⁴ Interview of an anonymous lawyer, by Christine Parker and Natalie Stepanenko, Melbourne, 10 December 2002. Another lawyer interviewee commented that the impact of introduction of criminal sanctions would be 'absolutely zero' because of the culture change already brought about by the existing sanctions under the TPA: Interview with anonymous lawyer, by Christine Parker, Melbourne, 7 April 2003.

⁷⁵ John C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386-459, 389-393 (on the 'deterrence trap' that the deterrent power of fines against corporations is limited by the wealth of the corporation); Makkai and Braithwaite, 'Dialectics of Corporate Deterrence', above n 7, 364. Here, however, we measure only our respondents' perceptions of deterrence, not the actual impact of these sanctions (or proposed sanctions) on behaviour. So we cannot say for sure how these different sanctions actually affect behaviour.

indeed it may be the most commonly pleaded cause of action in Australia. But coat-tails actions have not been widely used in Australia. This is partly because the ACCC usually settles its enforcement proceedings without the facts of the offence having been proved in court. Thus any party seeking to claim damages after an ACCC enforcement action, must usually still prove its whole case. Our findings suggest that if ACCC representative actions were allowed under the TPA and private coat-tails actions occurred more frequently, these could each have a substantial deterrent impact.

The ranking of ‘announcement of investigation of your organisation at a televised press conference’ in the set of sanctions that are seen as more serious by our respondents confirms material from our qualitative interviews, and also anecdotal reporting about business opinion of the ACCC, that sees the publicity associated with TPA enforcement action as a very significant factor in business thinking about the costs of non-compliance.⁷⁶ However, the publicity associated with ACCC enforcements is not necessarily seen as being any *more* serious than financial penalties, contrary to what some of our interviewees had suggested.⁷⁷

⁷⁶ Some see televised announcement of an investigation – a more informal sanction - as an inappropriate use of the ACCC’s powers as a government prosecuting agency: Karen Yeung, ‘Does the Australian Competition and Consumer Commission Engage in “Trial by Media”?’ (2005) 27 *Law & Policy* 549.

⁷⁷ See Parker and Stepanenko, *Preliminary Research Report*, above n 12, 43-46; Karen Yeung, ‘Government by publicity Management: Sunlight or Spin?’ (2005) *Public Law* 360, 372-376 (explaining how publicity should work to improve deterrence). See also Makkai and Braithwaite ‘The Dialectics of Corporate Deterrence’ above n 7, 360, finding no effect for expectations of scandal in the media in nursing home regulation compliance. But publicity still might be a better motivator of compliance than penalties because it incorporates moralising as well as deterrent elements: see John Braithwaite, *Crime, Shame and Reintegration* (1989).

Table 2: Australian Business Perceptions of Costs of TPA Non-Compliance – Likelihood and Severity of ACCC Enforcement Action

Perception of Likelihood & Severity of ACCC Enforcement Action (n=990-993)	Means (& Standard Deviation) 1-5 'strongly disagree' to 'strongly agree'.
If we were caught by the ACCC in breach of the <i>TPA</i> the prospects of ACCC enforcement against the organisation are slight (reversed)	3.77 (0.91)
The ACCC has a wide range of effective sanctions against non-complying organisations	3.65 (0.90)
The ACCC is generally keeping a close eye on our industry	3.23 (1.07)
The level of sanctions imposed for trade practices breaches is generally very high ⁷⁸	3.35 (0.98)
If we breach the <i>TPA</i> the chances of the ACCC catching us are large ⁷⁹	3.35 (1.01)
A breach of the <i>TPA</i> does not have to be severe before the ACCC bothers to do anything about it ⁸⁰	3.18 (1.02)
It is easy for the ACCC to find out when organisations breach the law ⁸¹	2.82 (1.03)
The investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating	2.89 (0.80)
In the light of the size and complexity of their task the ACCC has appropriate resources ⁸²	2.67 (1.01)

⁷⁸ In the questionnaire this question was actually asked in reverse: 'The level of sanctions imposed for trade practices breaches is generally very low.' The responses have been reversed as reported in the table.

⁷⁹ In the questionnaire this question was actually asked in reverse: 'If we breach the *TPA* the chances of the ACCC catching us are slight.' The responses have been reversed as reported in the table.

⁸⁰ In the questionnaire this question was actually asked in reverse: 'A breach of the *TPA* has to be severe before the ACCC bothers to do anything about it.' The responses have been reversed as reported in the table.

⁸¹ In the questionnaire this question was actually asked in reverse: 'It is hard for the ACCC to find out when organisations breach the law.' The responses have been reversed as reported in the table.

⁸² In the questionnaire this question was actually asked in reverse: 'In the light of the size and complexity of their task the ACCC has few resources.' The responses have been reversed as reported in the table.

Costs of Non-Compliance — Likelihood and Severity of ACCC Enforcement Action (Table 2)

Sanction certainty is generally considered to be even more important than sanction severity for making deterrence work.⁸³ Yet the probability of detection and successful enforcement action against business offenders in most areas of business regulation is probably not very high, since enforcement agencies' resources and capacity are low compared with their task.⁸⁴ If business people do not perceive severe ACCC enforcement to be very likely, then the potential of even very high penalties would not be a very effective deterrent. Our survey included a number of questions asking respondents how their organisations perceive the resources and capacity of the ACCC to find out about non-compliance and take enforcement action, the possibility of investigation, the threshold for prosecution, and the level of sanctions actually in use (as opposed to those available in the legislation). The questions and mean responses received are shown in Table 2.

There is a lot of variation in the responses to these questions, making it hard to generalise about our respondents' views. Overall most respondents perceive the likelihood of being caught, and facing successful ACCC enforcement action, if they breach the *TPA*, as higher rather than lower, but not overwhelmingly high. The highest scores for individual items in this group relate to the likelihood that the ACCC will take enforcement action once they actually find out about a breach,⁸⁵ and the fact that the ACCC has a wide range of effective sanctions available to it.⁸⁶ On the other hand, the mean scores for three of the items were below the midpoint on the scale (ie below 3 on the scale from 1 to 5). These items related to whether the ACCC can find out when organisations breach the law, the resources available to the ACCC in relation to the size

⁸³ Braithwaite and Makkai, 'Testing a Model of Corporate Deterrence' above n 4, 8 (summarising the literature).

⁸⁴ Brent Fisse, 'Sentencing Options Against Corporations' (1990) 1 *Criminal Law Forum* 211, 215-6; Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (2002) 118.

⁸⁵ The majority (73%) disagreed or strongly disagreed that 'If we were caught by the ACCC in breach of the *TPA* the prospects of ACCC enforcement against the organisation are slight'. It might of course be argued that it would be preferable for deterrence to have much closer to 100% of businesses disagreeing or strongly disagreeing with the statements quoted above.

⁸⁶ The majority (61%) of businesses agreed that 'the ACCC has a wide range of effective sanctions against non-complying organisations'.

and complexity of their task, and the competence of the investigative staff of the ACCC compared with the competence of the staff of the organisations they regulate. The other items had more mediocre scores with a small majority in each case seeing the ACCC as more, rather than less, likely to catch breaches, take enforcement action and have high penalties imposed.⁸⁷ +

Although our respondents' perceptions of the likelihood of ACCC enforcement action in the event of breach of the TPA are not overwhelmingly high, this may still reflect a higher estimation of the possibility of detection and enforcement action than is in fact reality. In relation to anti-competitive conduct, there is research that suggests that 'as few as one in six or seven cartels are detected and prosecuted'.⁸⁸ We might expect a higher percentage of detection of consumer protection breaches since consumer protection abuses are more likely to become known to consumers themselves. (Cartels are among the most difficult to detect business offences since they must be kept secret by their nature.) But, on the other hand, the ACCC receives thousands of consumer complaints every year about business conduct and only investigates and prosecutes a tiny proportion of these, suggesting a very low chance of actually being prosecuted for consumer protection breaches despite a higher chance of being detected in breach.

It is also relevant that the ACCC must prosecute most contraventions of the TPA in court and has no power to impose penalties of its own. The ACCC has generally settled most enforcement actions, but where it does take matters to court, this process usually takes a number of years. Even where the matter is settled, the investigation and settlement negotiations, usually take several months. This means that not only have the costs of non-compliance with the TPA historically been relatively low, but they have also been slow in coming – a factor that discounts the deterrent power of enforcement, according to classical deterrence theory.

⁸⁷ 55% of respondents disagreed that the chances of the ACCC catching them if they breached the TPA were slight.

⁸⁸ OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 19, 27; See also Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003), 256.

Table 3: Australian Business Perceptions of Costs of Non-Compliance – Informal Economic and Social Sanctions of Third Parties

Costs of Informal Economic and Social Sanctions of Third Parties	Means (& Standard Deviation)
<i>If your organisation were accused of breaches of the TPA one day in the future, how much would your organisation worry about...</i>	1-4 'Worry very little' to 'Worry very much'
Economic losses in relation to the following groups of people: (n=924-964)	
Your customers	4.18 (0.99)
Your shareholders	4.08 (1.06)
Your employees	3.87 (1.04)
The media	3.52 (1.27)
Your business partners	3.50 (1.12)
Consumer groups/NGOs	3.13 (1.29)
Informal business networks	2.99 (1.17)
Other organisations in your industry	2.90 (1.23)
Your suppliers	2.82 (1.28)
Your industry association	2.73 (1.31)
Losing the respect and esteem of the following groups of people? (n=939-973)	
Your customers	4.41 (0.87)
Your shareholders	4.22 (1.02)
Your employees	4.13 (0.97)
Your business partners	3.83 (1.02)
The media	3.66 (1.22)
Consumer groups/NGOs	3.51 (1.20)
Other organisations in your industry	3.28 (1.24)
Your industry association	3.27 (1.24)
Your suppliers	3.26 (1.23)
Informal business networks	3.21 (1.19)
Lawyers/compliance professionals ⁸⁹	3.14 (1.26)

⁸⁹ Note that some extra third parties have been included in this set of measures (ie lawyers/compliance professionals, politicians, relatives) because they have no direct capacity to make economic losses for the respondents, but loss of their respect and esteem might still be important.

Politicians	3.13 (1.30)
Relatives	3.03 (1.27)

Costs of Non-Compliance — Informal Social and Economic Sanctions of Third Parties (Table 3)

Many researchers have suggested that, given the fact that official government enforcement agencies will never have the resources and capacity to discover and take enforcement action against every breach, various third parties should be ‘enrolled’ to monitor and enforce compliance.⁹⁰ Indeed in the case of a largely ‘reactive’ regulator⁹¹ like the ACCC, third parties can be quite influential on business compliance with the TPA through their complaints to the regulator. Moreover, since the ACCC does not investigate or take enforcement action in relation to most complaints, the only direct experience of ‘enforcement’ that many non-compliant businesses are likely to experience is the actions of third parties.

Our questionnaire asked respondents to rate the extent to which their organisation would worry about economic and social losses in relation to various ‘third parties’ beyond the ACCC if they were ‘accused of breaches of the TPA one day in the future’.⁹² Table 2 (below) sets out the responses.

It is clear that our respondents see social losses in relation to third parties as no less severe than economic losses,⁹³ and that they would worry about both quite a lot in the event of non-compliance. In relation to economic losses, our respondents worry most by far about customers (83% worry ‘a lot’ or ‘very much’) and then shareholders (80% worry ‘a lot’ or ‘very much’). The next highest was only 39% worrying ‘a lot’ or ‘very much’ about economic losses from employees. In relation to social losses, our respondents worry most about losing ‘the respect and esteem’ of customers (91% worry

⁹⁰ See Julia Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ *Public Law* (2003) 62

⁹¹ Robert A. Kagan, ‘Regulatory Enforcement’ in D. Rosenbloom and R. Schwartz (eds), *Handbook of Regulation and Administrative Law* (1994) 383, 387.

⁹² We report on and analyse the responses to this part of the questionnaire in more detail in Vibeke Nielsen and Christine Parker, ‘Testing the Promise of the “New Governance”: Do Non-State Actors Wield Any Influence over Business Compliance with Regulatory Objectives?’ on file with the authors.

⁹³ This may be partly because losses of respect and esteem can lead onto financial losses as well.

‘a lot’ or ‘very much’) and shareholders (84% worry ‘a lot’ or ‘very much’). But the vast majority (83%) would also worry ‘a lot’ or ‘very much’ about losing the respect and esteem of employees, and 73% would worry ‘a lot’ or ‘very much’ about business partners.

This suggests that certain third parties—particularly customers, shareholders, employees and business partners—can potentially wield a powerful deterrent threat in relation to compliance with the TPA. But third parties need to actually monitor compliance and react to non-compliance when they find it for this threat to be realised, something that they are not always motivated or equipped to do. In the next subsection we therefore look at our respondents’ perceptions that certain third parties are actually monitoring their compliance with the TPA.

Table 4: Australian Business Perceptions of Risk of Being Caught in Non-Compliance by Third Parties

<p>Perceived Risk of Being Caught in Non-Compliance by Third Parties (n = 881-884)</p>	<p>Means (& Standard Deviation) 1 to 5: 'Strongly disagree' to 'Strongly agree'</p>
<p>Our customers are aware of the TPA and keep a close eye on our compliance</p>	<p>3.59 (1.00)</p>
<p>Our suppliers are keeping a close eye on our trade practices</p>	<p>3.52 (0.96)</p>
<p>Our business partners focus a lot on the TPA and keep an eye on our compliance</p>	<p>3.47 (0.95)</p>

Costs of Non-Compliance — Risk of Being Caught by Third Parties (Table 4)

We asked respondents about their perception of whether their consumers, suppliers and business partners were monitoring their compliance with the TPA. In response only around half (48%) agree or strongly agree that their customers are keeping a close eye on their compliance, 37% agree or strongly agree that their businesses partners are doing so, and one third (33%) agree or strongly agree that their suppliers are keeping a close eye on their trade practices. Table 4 shows the mean responses.

Despite the potential for various third parties to wield a powerful deterrent threat (as suggested in the previous subsection), therefore, businesses do not perceive consumers, suppliers and business partners as actually very likely to detect a breach. Businesses' worries about third party losses in the event of non-compliance are very unlikely to make much difference to their behaviour if they do not think third parties are actually watching them. However we did not ask specifically about their perception as to whether the two groups that businesses worried about most (shareholders and employees) monitor their TPA compliance.

Table 5: Australian Business Perceptions of Gains of Not Complying with the TPA (Those Australian Businesses Who Admit to Having Breached the TPA in the Past Only)

<p style="text-align: center;">Gains of Breach (for those who have admitted breach only: n = 54-87)</p>	<p style="text-align: center;">Means (& Standard Deviation)</p>
<p><i>This question is only to be answered if your organisation has ever breached the Trade Practices Act – no matter whether you have been caught by the ACCC or not... How large were or would the gains from breaching the Trade Practices Act have been? If you believe that the mentioned kind of gain was, or would have been, very small, mark 1. If you believe that the gain was/would have been very large, mark 5, or mark a number in between. If the mentioned kind of gain was not relevant to the actual breaches please mark “not relevant”.</i></p>	<p>1-5: ‘very small’ to ‘very large’.⁹⁴</p>
<p>Gain of market share</p>	<p>2.40 (1.32)</p>
<p>Saved competition costs</p>	<p>2.32 (1.30)</p>
<p>Saved time and money that would otherwise have been spent on unproductive paperwork</p>	<p>2.24 (1.37)</p>
<p>Saved costs on lawyers and/or compliance professionals</p>	<p>2.23 (1.29)</p>
<p>Instant one shot economic gain</p>	<p>2.08 (1.31)</p>
<p>Prevention of a slow down in our investments in the market</p>	<p>2.07 (1.22)</p>
<p>Saved investment costs (in e.g. new machinery because of demands in relation to product safety)</p>	<p>1.98 (1.27)</p>
<p>Saved production costs</p>	<p>1.76 (1.03)</p>

Gains of Non-Compliance (Table 5)

We have seen that Australian businesses do rate many of the costs of non-compliance, particularly the costs of formal legal sanctions, as quite high. But it may be that the gains of non-compliance with the TPA outweigh its costs, particularly where the potential commercial gains are large, or where the business is desperate enough and sees non-compliance as necessary in order to stay in business at all.

It did not make sense to ask all our respondents to hypothesise about the gains of any potential non-compliance with the TPA in the future, since the likely gains will very much

⁹⁴ There was also a 6th option of marking ‘not relevant’. Those who have marked ‘not relevant’ have been disregarded in these statistics.

depend on what kind of breach is committed in what circumstances.⁹⁵ Instead we asked those respondents who had ‘ever breached the TPA’ (whether they had been caught or not) to estimate the level of the various potential gains of that breach. One hundred and six of our respondents answered this question (thereby indicating that they had breached the TPA at some stage in the past⁹⁶). Our measures of our respondents’ perceptions of the gains from their breaches of the TPA, and the results, are shown in Table 5.

Overall our respondents saw the gains of their non-compliance as very low. Indeed most of the respondents saw most of the gains mentioned in the question as irrelevant. The one type of gain that the most respondents rated as ‘large’ or ‘very large’ was ‘gain of market share’. Two thirds saw this gain as relevant to their breach of the TPA and, of those who saw it as relevant to their breach, 23% saw the gain as ‘large’ or ‘very large’. The next two most relevant gains according to our respondents were ‘instant one shot economic gain’ and ‘saved costs on lawyers and/or compliance professionals’. Just under half of our respondents saw each of these gains as relevant to their breach, with 12% and 14% respectively seeing the gain as large or very large. Well under half of the respondents reported that each of the other potential gains listed in the question (shown in Table 5) was relevant to their breach.

We also asked respondents how large on average they would ‘estimate to be the expected value of the breaches of the TPA committed by your organisation in the last six years (whether the breaches were a success or not)’. Of the 143 respondents who answered this question, only 6% saw the breaches as amounting to a ‘substantial’ or ‘very substantial improvement of our income’. The majority (55.6%) saw the breaches as a ‘tiny’ or ‘very tiny improvement of our income’.

⁹⁵ Perhaps this is why as Simpson, above n 7, notes at p32, ‘few studies of deterrence actually measure the potential gains of crime – and most of these employ objective deterrence research designs.’

⁹⁶ Given the anonymity and confidentiality of the survey in general and the very non-specific nature of this question, we believe that this is likely to be a reasonably reliable representation of those respondents who actually knew that they had breached. See Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 59, 12-19, 30-64 for further discussion of reliability of our respondents in answering questions in the survey about their compliance and contact with the ACCC.

We also asked them to answer yes or no to the question: 'Without the breaches we would have gone out of business'. We asked this question because Australian businesses have sometimes argued that breaches of the anti-competitive conduct provisions of the TPA have been a matter of necessity to stay in business, rather than a matter of greed for the potential gains of non-compliance. Of the 131 who answered this question, only 1 respondent answered yes.

Overall then the responses to our questionnaire suggest that most Australian businesses that breach the TPA do not experience the type of gains from those breaches that we might have expected to motivate them to breach. Why then do they breach? It is possible that the respondents perceive other gains of non-compliance as more important than the ones we asked about in the questionnaire and that these other gains motivate breach. Alternatively they might expect the gains to be higher in prospect than they prove to be (we only ask respondents about gains from past breaches). Or, even though the gains of non-compliance appear to be very modest, these businesses may still have perceived those gains to be high enough to outweigh the risk of sanctions for non-compliance. Finally, it is important to remember that there are of course other reasons for breach of the law other than calculations about the costs and benefits of breach, including incompetent management and individual employees breaching the law to advance their own position in the firm.

Table 6: Australian Business Perceptions of Costs and Gains of TPA Compliance

Costs of Complying (n = 961-977)	Means (& Standard Deviation)
<i>How large do you believe that each of the following types of compliance costs with the Trade Practices Act is to your organisation?</i> (1-5: 'very small' to 'very large'
Expenses on lawyers and/or compliance professionals whenever we have plans or ideas that are relevant to the TPA	2.53 (1.21)
Costs of compliance systems and training	2.26 (1.12)
Administrative costs: Time and money spent on paper-work in relation to the TPA	2.17 (1.03)
The costs of a lost opportunity e.g. not being able to take over another company	2.14 (1.13)
Production costs e.g. more expensive ways of production	2.02 (1.01)
Gains of Complying (n = 957-970)	
<i>Do most managers in your organisation think there is a business case for complying with the Trade Practices Act? That is, how large is the gain to the organisation from compliance with the Trade Practices Act?'</i>	1-6: 'No gain' to 'very large'
Absence of problems with the ACCC	4.06 (1.53)
A better image	3.94 (1.44)
A higher level of organisational learning as we respond to different kinds of mistakes in the organisations	3.40 (1.45)
A better way of handling consumer complaints	3.37 (1.50)
Better tools for monitoring our organisation	3.22 (1.47)
A better knowledge of our organisation	3.20 (1.44)
A higher level of product development and therefore a better product	3.09 (1.52)
More up-to-date investments in research and new technology	2.92 (1.47)

Costs and Gains of Compliance (Table 6)

Finally, respondents were asked to rate the costs and gains of compliance for their organisations. This was done on a scale from very small to very large, rather than on a monetary scale because, on the basis of our qualitative interviews and previous research on compliance, we believe it would not have been meaningful to ask respondents to put

a dollar figure on each of the costs and gains of compliance. It is hard enough to put a dollar figure on something like the costs of a lost opportunity, or time spent on paperwork. But it is even harder to expect our respondents to put a dollar figure on a 'higher level of organisational learning'. Our non-monetised scale is also better suited to measuring relative perceptions among organisations of different size and wealth than a monetised scale.

Overall the businesses see both the costs and gains of compliance as fairly low, with mean scores for perceptions of the costs of compliance a little lower than the means for gains of compliance.⁹⁷

The cost of compliance that was rated highest by the greatest numbers of respondents was 'expenses on lawyers and/or compliance professionals whenever we have plans or ideas that are relevant to the TPA' with 29% of the businesses rating this as a 'large' or 'very large' cost of compliance. The next highest was 'costs of compliance systems or training' with 18% of respondents seeing these as a 'large' or 'very large' expense of compliance. But overall more than half of our respondents see each of the costs of compliance as small or very small.

The mean scores for the items measuring gains of compliance cluster around the neutral mid-point of the scale. But these averages mask the fact that businesses' responses to these questions were fairly well spread over the whole scale for each item, including in each case a few respondents who perceive the gains as very high, and some who perceive them as very low. It is therefore difficult to talk about any overall tendency in Australian businesses' perceptions of the gains of compliance. The gains rated as highest overall are 'absence of problems with the ACCC', with a bare majority of 51% rating this as a 'large' or 'very large' gain of compliance, and, 'a better image' with 47% rating this gain to be 'large' or 'very large'. The next highest perceived gains are 'a higher level of organisational learning as we respond to different kinds of mistakes in the organisation' and 'a better way of handling customer complaints', with just under a third of respondents rating each of these gains as 'large' or 'very large'.

⁹⁷ Taking into account that the costs measures are reported on a scale from 1-5 while the measures for gains are on a scale from 1-6. Note that since the scales start at 1, not 0, the mid-points of the scales are 3 and 3.5 respectively.

4. WHY DO BUSINESSES PERCEIVE THE COSTS AND GAINS OF COMPLIANCE AND NON-COMPLIANCE THE WAY THEY DO?

Introduction — Research Strategy and Measures

From a policy perspective it is certainly useful to understand how businesses perceive the costs and gains of compliance in order to predict how calculative thinking might affect compliance behaviour. But it is equally important to explain why different firms have different perceptions of the costs and gains of compliance and non-compliance, if policy-makers want to know how best to change business calculations to increase compliance behaviour. Our analysis above of the significance of extended and perceptual ‘deterrence’ suggests that how the management of firms ‘see’ the world and calculate the risks and gains of compliance and non-compliance will be influenced by a range of factors beyond the size of formal sanctions available and visibility of official enforcement action.⁹⁸ These factors will include internal factors such as the size, resources and management style of the firm, and external factors such as the firms’ market position, and the people and agencies who have been most influential in forming a firm’s awareness of the TPA.

In this part of the paper, therefore, we test the extent to which each of a range of factors explains variation in how our respondents calculate costs and gains related to compliance and non-compliance using five regression analyses (shown in Table 7 below).⁹⁹ These five regressions test variation in each of five aggregate measures of businesses perceptions of costs and gains of compliance and non-compliance created from the variables described in the previous section of the paper. The five measures are:

- Businesses’ perceived aggregated costs of compliance;

⁹⁸ See above n 57 and accompanying text.

⁹⁹ We use regression analysis to do this, a powerful statistic technique for isolating and testing the relative influence of a range of potentially explanatory variables on the phenomenon that is to be explained. Originally, we had also sought to explain variation in respondents’ perceptions of gains of non-compliance, but this seemed to require a completely different model to the perceived costs and gain of compliance and costs of non-compliance. Therefore we have not included it in our final version. Using the same independent variables as shown in Table 7, resulted in a model that was insignificant with an R² of only 0.04.

- Businesses' perceived aggregated gains of compliance;¹⁰⁰
- Fear of serious sanctions—taking into account perceived risk of complaints and likelihood and seriousness of ACCC enforcement action;
- Fear of very serious sanctions—taking into account perceived risk of complaints and likelihood and seriousness of ACCC enforcement action; and
- Fear of third party economic and social losses—taking into account perceived risk of complaints and likelihood and seriousness of ACCC enforcement action.¹⁰¹

Deterrence theory hypothesises that how much people actually fear non-compliance is a function of their perceptions of the risk of being caught combined with their perception of the seriousness of the potential sanctions to be applied if they are caught. Therefore the three measures of respondents' fear of the various costs of non-compliance are weighted variables that take into account respondents' perceptions of the risk of being caught in non-compliance by customers, business partners or suppliers, their perception

¹⁰⁰ The measures of perceived costs and gains of compliance were created by adding together the various items shown in Table 6, and using the mean score for each respondent in our analyses. Relevant statistics for the whole measures are shown in Table A1 in the Appendix. Putting each of these sets of measures together into one index was supported by factor analysis as indicated by the Cronbach's Alpha scores for each of the indices shown in Table A1. Cronbach's Alpha measures how reliably a set of items (for example, questions in a survey) measures a single uni-dimensional latent variable. An index with a Cronbach's Alpha score of 0.70 or higher is considered a strong index.

¹⁰¹ The measures of serious sanctions, very serious sanctions and third party economic and social losses are based on the individual items in Tables 1 and 3. However as there was very little variance in some of the items relating to very serious sanctions and likelihood and seriousness of ACCC enforcement action, those items have not been included in the measure. The items from Table 1 not included in the measure of very serious sanctions are: 'Conviction in court and a fine of 10% of your turnover'; 'Criminal conviction and the senior manager goes to prison'; 'Conviction in court and a fine of \$1 million'; 'An enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of \$1 million'. The item from Table 1 not included in the measure of likelihood and seriousness of ACCC enforcement action is: 'The ACCC has a wide range of effective sanctions against non-complying organisations'.

of the likelihood and seriousness of ACCC enforcement action and also how much they fear the different sanctions that might be applied in the event of breach.¹⁰²

We test the relative influence of a range of explanatory variables on each of these five measures relating to factors hypothesised as likely to affect businesses' calculative thinking about compliance.

First, we test to what extent the fact that a business has experienced an ACCC investigation in the last six years,¹⁰³ or has experienced criticism of itself or its industry's TPA compliance in the last six years¹⁰⁴ affects its calculations about compliance. We also test for the influence of a business having breached the TPA in the last six years (regardless of whether they were caught or not).¹⁰⁵

Deterrence theory generally assumes that businesses that have experienced investigation or third party criticism fear the costs of non-compliance more than those that had not. This is 'specific deterrence'.¹⁰⁶ On the other hand, if a business breached the TPA and

¹⁰² The details of each of these measures is shown in Table A1 in the Appendix.

¹⁰³ Based on asking respondents to self-report whether the ACCC had investigated the organisation in the last six years. Fourteen percent (141) of the respondents reported that they had been the subject of an ACCC investigation. This figure does not completely tally with official ACCC Annual Report records of those against whom the ACCC had taken enforcement action (see Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 59, 12-19, 30-64). We use the self-reported ACCC investigation measure for our analyses here rather than the official record of whether the organization had experienced ACCC enforcement matter, since it is more salient to consider those organisations that actually remember being investigated by the ACCC and because the self-reported investigation measure is likely to capture cases where a preliminary investigation took place but was settled or otherwise not pursued to an enforcement action recorded in the ACCC Annual Reports.

¹⁰⁴ The measure for this factor is shown in Table A4 in the Appendix. As so few organisations had actually experienced criticism from any of the parties in this list, we add all the potential sources of criticism together into an index measuring to what degree the respondent business, or its industry, has been criticised going from 'our organisation or others in our industry have never been criticised' to 'we have been criticised by all the different groups'. Just over half (54%) of the respondent businesses have never been criticised.

¹⁰⁵ This is based on the same question as discussed at above n 96 and accompanying text.

¹⁰⁶ Tittle, above n 39, 4. Deterrence theory also hypothesises that businesses that are aware of other businesses that have breached the law and been discovered and sanctioned will fear non-compliance. This is 'general deterrence'.

‘got away with it’ or faced criticism or enforcement action and found it was not so bad, then they might see the costs of non-compliance as lower. In looking at the costs and gains of compliance, we also test the influence of businesses perceptions of the risk of complaints from third parties and their opinion of the likelihood and severity of ACCC enforcement action,¹⁰⁷ since if they see the chances of being caught as small, then this is hypothesised to decrease their perception of the costs and gains of compliance.

Second, we examine how a number of factors internal to the business affect their perceptions of costs and gains related to compliance: the size of the business (measured by number of employees), how well-resourced in terms of knowledge and expertise in a range of areas relevant to TPA compliance the organisation rates itself to be,¹⁰⁸ and the degree to which the organisation rates its senior management as taking a long-term management approach.¹⁰⁹ Managers who concern themselves with longer term, more strategic issues might ‘see’ better both the potential long term gains of compliance, and the costs of non-compliance in the context of stakeholder concerns. Similarly, companies that have greater resources to understand the TPA and their strategic environment might also have a higher perception of the benefits of compliance, and the potential costs of breaching. We might also expect businesses that are larger and better resourced to perceive the costs of compliance as lower, since the administrative costs should be relatively lower for them. On the other hand we might expect them to perceive the costs of non-compliance as higher since it has been widely reported that larger businesses perceived themselves to be a greater target for ACCC enforcement action.¹¹⁰

Third, we tested whether our respondents’ market position made a difference to their thinking about the costs and gains of compliance.¹¹¹ We expect that the extent to which

¹⁰⁷ These variables are not included as explanatory variables in the models explaining variation in the three measures of fear of non-compliance because they were included in the measures of fear of non-compliance to be explained.

¹⁰⁸ The items used in this measure, and relevant statistical details for the whole measure are shown in Table A2 in the Appendix.

¹⁰⁹ The questions used for these last two measures, and relevant statistical details are shown in Table A3 in the Appendix.

¹¹⁰ See Christine Parker and Vibeke Lehmann Nielsen, ‘What Do Australian Businesses Think of the ACCC and Does it Matter?’ (2007) 35(2) *Federal Law Review* 187.

¹¹¹ The measure for market position was a single item asking respondents to rate on a scale from 1-5 whether they agreed that ‘our customers can easily switch to substitute products or services.’

firms fear different sanctions, particularly informal social and economic losses in relation to customers, will depend on their market position and how vulnerable to competition they are. Those with greater brand presence, more contact with consumers and more substitutable products are also likely to be more sensitive to risk.¹¹² Originally we also tested for whether the respondent's industry influenced their thinking about the costs and gains of compliance. However we found that this was of no significance and therefore left it out of the final version in the interests of simplicity.¹¹³

¹¹² David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005) pp??; other references??

¹¹³ Statistics on file with the authors. We also tested the influence of another single item 'The competition is much tougher in this industry than in most' and found that it too was not significant probably because it measures more or less the same thing as our measure of market position.

Finally, we hypothesise that businesses will have different perceptions of the costs and gains of compliance and non-compliance depending on who has been most influential in forming their awareness of TPA compliance issues. The literature on both deterrence and risk perception suggest that by whom and in what way the potential risks are communicated can make a big difference to how people perceive, and act on, those risks.¹¹⁴ To test this we used a measure of the extent to which our respondents rated the ACCC, compliance professionals, the media, the organisation's industry association and consumer groups as having formed their organisation's awareness of the TPA.¹¹⁵ This is not a measure of how much they worry about these different actors' views of their compliance and non-compliance (as with our previous measure of worries about social and economic losses from third parties). Nor is it a measure of whether they are aware of the TPA at all. It is a measure of who or what formed that awareness, to the extent that the firm is aware of TPA compliance. We expect that actors that influence organisations' awareness of the TPA more will also influence their perceptions of how they 'see' the risks and benefits of compliance and non-compliance.

Results

The results of our tests of the relative influence of each of the explanatory variables on perceptions of the costs of compliance, gains of compliance and three measures of the costs of non-compliance are shown in Table 7. The bolded entries on the Table are those where there was a significant association between the two variables, controlling for all the other variables. The number of asterisks indicates how confident we can be about the strength of the significance.

The adjusted R^2 shown near the bottom of each column indicates the total explanatory power of all the factors shown. The adjusted R^2 for explaining costs of compliance is quite good for this type of social science research at 32%. The R^2 for how the model

¹¹⁴ See for example Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93 *The American Economic Review* 1449 at 1458-1460 (on 'framing effects'); Tittle, above n 39, 11-12.

¹¹⁵ The exact questions used and relevant statistical details are shown in Table A5 in the Appendix. Each of these measures is actually an index made up for a number of specific questions we asked respondents about what actors and activities formed their awareness of the TPA 'over the years'.

explains gains of compliance is not as good, with the other R^2 s fair.

Table 7: Explaining Variation in How Australian Businesses Perceive the Costs and Gains of TPA Compliance, and Costs of TPA Non-Compliance¹¹⁶

	Costs of Compliance	Gains of Compliance	Costs of Non-Compliance ¹¹⁷		
			Fear of Serious Sanctions	Fear of Very Serious Sanctions	Fear of Third Party Economic & Social Losses
Size	.06 (1.91)	-.01 (0.25)	.07* (2.27)	.10*** (2.99)	.07* (2.18)
Well-resourced¹¹⁸	.07* (2.18)	.06 (1.68)	.08* (2.28)	.08* (2.23)	.09* (2.73)
Long-term management¹¹⁹	.03 (1.00)	.09* (2.57)	.12*** (3.53)	.12*** (3.65)	.11*** (3.39)
ACCC investigation (in the past)¹²⁰	.05 (1.48)	.02 (0.55)	.10*** (2.92)	.07* (2.25)	.05 (1.41)
Breached TPA¹²¹	.07* (2.18)	.08* (2.25)	-.03 (0.81)	-.01 (0.39)	-.04 (1.29)
Market position¹²²	.09*** (3.04)	.01 (0.19)	.12*** (3.98)	.12*** (3.87)	.11*** (3.48)
Awareness formed by:					
ACCC	.13*** (3.58)	.16*** (3.94)	.12*** (3.22)	.13*** (3.26)	.17*** (4.30)
Compliance professionals	.28*** (7.82)	.01 (0.32)	.17*** (4.67)	.18*** (4.96)	.16*** (4.16)
Media	-.01 (0.28)	.06 (1.82)	.04 (1.16)	.04 (1.13)	.03 (0.79)

¹¹⁶ Note: *** = $p < 0.005$; ** = $p < 0.01$; * = $p < 0.05$ (two-tailed). Cell entries are standardized regression coefficients with the absolute value of t-statistics in parentheses.

¹¹⁷ Note that each of these measures is actually a weighted variable also including items measuring the perception of risk of complaints and likelihood and seriousness of ACCC enforcement, as explained in the text above.

¹¹⁸ See n 108 above and accompanying text for explanation of this measure.

¹¹⁹ See n 109 above and accompanying text for explanation of this measure.

¹²⁰ 0=no, 1= yes.

¹²¹ 0=no, 1= yes.

¹²² See n 109 above and accompanying text for explanation of this measure.

Industry association	.04 (1.26)	0.6 (1.76)	.10*** (2.97)	.08* (2.34)	.11*** (3.48)
Consumer groups	.08* (2.51)	.15*** (4.06)	.04 (1.17)	.04 (1.05)	.07* (2.09)
3rd party criticism (in the past)	.05 (1.74)	.06 (1.63)	.08** (2.54)	.11*** (3.36)	.05 (1.57)
Risk of being caught by 3rd parties	.09*** (2.93)	.08* (2.37)	-	-	-
Likelihood & seriousness of ACCC Enf'ment	.06 (1.89)	.06 (1.60)	-	-	-
Model statistics:					
N =	856	851	853	853	856
Adjusted R²	0.32	0.19	0.22	0.24	0.22
F-value of full model	29.62***	14.93***	21.46***	23.05***	21.60***

Influence of Experience of Breach, Investigation and Third Party Criticism

Those respondents who report that they have breached the TPA at some time in the last six years see both the costs and also the gains of compliance as higher than those who have not. But there is no significant difference in their view as to the costs of non-compliance – although the tendency is towards seeing the costs of non-compliance as lower (the numbers here are negative). If this were so, it would fit with previous research which suggests that people who breach the law often learn from their experience that the consequences are not as bad as they feared they might be.¹²³

Since we have separate measures of being investigated by the ACCC for an alleged breach and being criticised by third parties for non-compliance, our data allow us to

¹²³ Grasmick and Bursik, above n 37, 843 (noting that it is well established in the literature that illegal behaviour in the past tends to reduce the level of perceived risk in the present). Note that since we have not asked before and after questions here, we cannot test whether the experience of breach caused businesses to downwardly revise their estimation of the costs of non-compliance, or whether they had this lower perception of costs of non-compliance anyway (which could have led them to breach in the first place).

separate out the influence of these events on thinking about the costs and gains of compliance and non-compliance. We find that those firms that have experienced an ACCC investigation in the past and those firms that have experienced third party criticism of their or their industry's compliance both fear sanctions more than those who have not had an investigation or third party criticism. This clearly supports the assumption of deterrence theory that official enforcement action against an organisation will affect that organisation's calculations about compliance for the future ('specific deterrence'). It also suggests that to the extent that a range of third parties monitor and criticise non-compliance this too will support the deterrent power of official enforcement activity.

Surprisingly, however, neither those who have had an ACCC investigation nor those who have experienced third party criticism of non-compliance fear broader informal third party economic and social sanctions any more than those who have not. The 'extended' deterrent power of third parties does not seem to be increased by the experience of official investigation or third party criticism. This could be because those who experience ACCC investigation and enforcement or third party criticism, do not in fact find that this leads on to broader informal third party sanctions.¹²⁴

Businesses that have experienced ACCC investigation and third party criticism of non-compliance do not perceive the costs and gains of compliance (as opposed to non-compliance) significantly differently to businesses who have not. However, the greater the perception of the risk of being caught in non-compliance by third parties, the higher respondents perceive both the costs and gains of compliance to be. This seems to bear out the finding of the risk perception and behavioural economics literature that the fear of an unknown future phenomenon is bigger and more effective than the memory of

¹²⁴ Note for example the messages of support from the Prime Minister and other senior political and business leaders for Richard Pratt after he admitted that he knew that his company was engaged in cartel conduct: see David Crowe, Andrew Burrell and Duncan Hughes, 'PM Back-Pedals on Cartel Penalties' (Wed 10 October 2007) *The Australian Financial Review* (Sydney) 1 and 10; Malcolm Maiden, 'Australian Corporate Culture Yet to Appreciate Damage Cartels Cause' (Saturday 13 October 2007) *The Age* (Melbourne) Business Day 1. See also praise for Richard Pratt from the Prime Minister when the ACCC first announced its investigation of Richard Pratt's company: Jewel Topsfield and Marc Moncrief, 'Prison terms for price fixers' (24 December 2005) *The Age* (Melbourne) online. See also Nielsen and Parker, 'To What Extent Do Third Parties Influence Business Compliance?' above n 44.

having actually experienced the same thing.¹²⁵ It is also consistent with a persistent finding in deterrence research that those who have actually experienced sanctions for non-compliance often fear non-compliance less as they have learned that it does not matter that much (there is no need to worry).¹²⁶ Different perceptions of the likelihood and severity of ACCC enforcement make no significant difference.

Influence of Internal Factors: Size, Resources and Management Approach

Larger organisations fear non-compliance more than do smaller organizations—perhaps because they see themselves as a more conspicuous target for complaints and enforcement action. But size makes no difference to perceptions of the costs and gains of compliance, although we might have expected smaller organisations to find doing things such as implementing compliance systems to ensure compliance relatively more costly than larger organisations. Presumably either smaller organisations do things to ensure compliance that cost less than larger organizations, or, more pessimistically, both large and small organisations do so little that it makes no difference to their relative assessments of the costs.

As predicted, organisations that rate themselves as better resourced in terms of legal and economic knowledge, technical knowledge relevant to compliance, and research and development fear the costs of non-compliance more than others. Those that rate themselves as taking a longer term management approach also fear non-compliance more than the others. This indicates how much of calculating thinking about compliance is likely to be influenced by the way firms choose to organise and manage themselves. Those that take a longer term approach to management strategy and those who have the resources to develop organisational knowledge about the risks and requirements of TPA compliance are more worried about the potential for non-compliance faced by their organisations. They might also, of course, be better equipped to address and avoid those risks. Indeed we would expect that larger, better resourced organisations and those with a longer term management view will be more motivated by calculative motivations to comply better with the law because they will have a greater perception of the risks of non-compliance that can be expected to justify a ‘business case’ for compliance.

¹²⁵ See for example, Casey and Scholz, ‘Beyond Deterrence’ above n 57, 835 (citing research that individuals generally avoid ambiguity).

¹²⁶ Grasmick and Bursik above n 37 843.

We do not however find that better-resourced organisations and those with a longer term management approach see any greater *gain* from compliance than those who do not have their resources and management approach. This could mean that the benefits of compliance are equally apparent to all—but the risks of non-compliance become more worrying the more management understands about them, and the more long term view of the organisation they take. More pessimistically, our findings can be interpreted to mean that the ‘business case’ for TPA compliance is seen solely in negative terms—avoiding the costs of non-compliance—even among those firms we might expect to have the greatest imagination for seeing positive strategic advantages in excelling in TPA compliance. This suggests much room for improvement for regulators and others in building positive calculative motivations for compliance among business managers.

Influence of Market Position

Those firms that are in a weaker market position see the costs of non-compliance, but also the costs of compliance, as higher. The finding that the weaker the firm’s market position, the more they fear the costs of non-compliance is easy to explain: The weaker the market position, the less ability to absorb costs and the shock of sanctions in the event of breach. Moreover, the more competitive the marketplace in which they operate, the more likely it is that any breach will be found out by consumers or other businesses in that industry who might impose sanctions of their own, or complain to the ACCC and raise the risk of official enforcement action.

Presumably those in a weaker market position also see the costs of compliance as greater for similar reasons: they feel there is less margin to spend on extra non-essential costs such as ensuring compliance.

These findings mean we cannot assume that just because being in a more competitive market leads businesses to fear non-compliance more, that this will actually motivate them to comply more. It is true that they fear the consequences of non-compliance, but since they also see compliance as more costly than other businesses, they may choose to run the risk of non-compliance, or put their head in the sand at the impossible conundrum they face of not being able to afford to spend time and money on ensuring compliance but also not being able to afford the risk of non-compliance.

Influence of Source of Awareness

Very clearly, the more it is the ACCC that has formed an organisation's awareness of TPA compliance, then the more they fear the costs of non-compliance, and the higher they perceive both the costs and gains of compliance to be. The measure of the ACCC forming firms' awareness of the TPA included items asking about the influence of ACCC investigations of other businesses as well as ACCC publications and educational activities (see Table A5 in the Appendix). Looking at the absolute numbers (Table A5), we find that few firms in fact rated the ACCC as having a big influence on their awareness of the TPA. But, the more firms did rate the ACCC as influencing on their awareness, the more they saw the costs and gains of compliance and non-compliance as greater too. To the extent that firms do pay attention to the ACCC, it has a powerful effect on their calculations about compliance. The catch is that most firms do not seem to pay very much attention at all to these messages from the ACCC.

It is also striking that the more respondents rated compliance professionals (including lawyers, compliance people within the firm and compliance consultants – see Table A5) as having formed their awareness of the TPA, the more they fear the costs of non-compliance, and, very clearly, the more costly they perceive compliance itself to be. It seems that the respondent firms pay compliance professionals (including lawyers) a lot to make them worry more about non-compliance! Lawyers and compliance professionals we interviewed indeed saw it as their job to make sure that business managers worried sufficiently about non-compliance to make sure they behaved compliantly. They would probably be disappointed, however, that their work does not result in managers coming to see more not only the costs of non-compliance but also the benefits of compliance. Those firms where awareness was formed more by compliance professionals do not see the benefits of compliance as any greater. However those where awareness was formed by the ACCC and consumer groups do see the gains of compliance as greater.

Industry associations too, have an impact on businesses estimations of the costs of non-compliance, to the extent that they influence organisations' awareness of the TPA. This is probably because those industry associations that have worked on educating their members about the TPA are generally those where industry members have faced severe ACCC enforcement action. The ACCC has adopted an explicit strategy of taking the opportunity to work with industry associations in those industries to publicise the enforcement action and educate others about their TPA compliance obligations. TPA

compliance awareness building by industry associations is therefore likely to emphasise the availability and likelihood of official sanctions in the specific circumstances of that industry.¹²⁷

To the extent that consumer groups form firms' awareness of the TPA, they influence firms to see the costs and the gains of compliance as higher, but have no effect on fear of non-compliance.

Our tests reveal no significant association between awareness of the TPA being formed by the media and heightened perceptions of the costs of non-compliance. This is very surprising. The explanation is probably that because almost all our firms rated the media very highly for forming their TPA awareness, there is not enough variation in our measure of awareness being formed by the media to explain different calculations of the costs and gains of compliance and non-compliance. This does not mean that the media is not an important influence on the way businesses calculate the costs and gains of compliance and non-compliance. Media attention to TPA compliance issues creates the environment in which all firms operate, and probably influences all firms' perceptions of costs and gains of compliance in similar ways.

CONCLUSION

Summary of Findings

We find that overall Australian businesses rate the *costs of TPA non-compliance* as quite high, especially the formal sanctions available from ACCC enforcement action. But they also worry a lot about both informal economic and social losses, especially in relation to customers, shareholders, and employees. Those who have breached the TPA report, on the other hand, that the *gains of TPA non-compliance* are fairly low—at least on the dimensions that our survey asked about. Our respondents also see both the costs and gains of TPA compliance as quite low.

We also find that a range of factors have an important influence on *how much businesses fear non-compliance*. The extent to which ACCC activities, lawyers and compliance professionals, and industry associations have formed an organisation's awareness of the

¹²⁷ See also Winter and May 'The Role of Third Parties' above n 44 finding agricultural consultants to farmers supplied through an industry associations as very important in influencing compliance commitment and behaviour.

TPA are each important predictors of how much they fear non-compliance, along with the organisation's size, resources, whether they take a long-term management approach, and their market position. Having experienced ACCC investigation or third party criticism of compliance in the past is also important for how much businesses fear formal enforcement activity for non-compliance, but not for fears of social and economic losses.

Variation in *how businesses perceive the costs of compliance* is explained by their market position, how well-resourced they are, how great they perceive the risk of third parties finding about non-compliance, and the extent to which the ACCC and compliance professionals have formed their organisation's awareness of the TPA. Those who have breached the TPA in the past also see the costs of compliance as higher.

Different *perceptions of the gains of compliance* are more difficult to explain. Those respondents with longer-term management approaches, greater resources and more influence of compliance professionals on their awareness of the TPA might all have been expected to understand and act on the positive business case for compliance in terms of things like better reputation and organisational learning. But there is no evidence of this in our findings. However, those who have breached the TPA in the past see the gains of compliance as higher, as do those whose awareness is formed more by the ACCC and by consumer groups, and those who have a greater perception of the risk of being caught in non-compliance by third parties. There must be other factors that explain which firms perceive the gains of compliance as greater that we have not included in our model.¹²⁸ But those that are significant all suggest that an appreciation of the gains of compliance are not endogenous—it does not come with good management, but rather from the experience of engagement, criticism and investigation by the ACCC and other third parties.

Implications for Understanding Deterrence and Business Calculations About Compliance

One of the leading empirical researchers of deterrence and business regulation has argued that the simple model of deterrence incorrectly relies on four simplifying assumptions:

¹²⁸ Note the low R² for this regression.

(1) corporations are fully informed utility maximizers; (2) legal statutes unambiguously define misbehaviour; (3) legal punishment provides the primary incentive for corporate compliance, and; (4) enforcement agents optimally detect and punish misbehaviour given available resources.¹²⁹

Our research does not address the second and fourth of these assumptions, but our data certainly confirm that the first and third of these assumptions are oversimplifications.

Our findings show that there is considerable variation in different firms' knowledge and information about the risks of non-compliance (as reflected in our measures of resources of the firm and long-term management approach) leading to variation in different firms' fear of non-compliance. Moreover, to the extent that different actors form firms' awareness of the TPA, this too affects their calculations of the risks and benefits of compliance and non-compliance.

Information about legal punishment is refracted through the organisation and its level of resources, the short or long-sightedness of its managers, and the perspectives of those external to it from whom it obtains information about compliance. Each firm's calculations about how to maximise its own utility is likely to be slightly different depending on which resources, actors (within and without the firm), and management style 'interpret' information about the costs and gains of compliance and non-compliance to the firm. This all means that it is not solely in the power of an enforcement agency, like the ACCC, the law-makers who set the penalties, and the courts who determine penalties in individual cases to determine the deterrent power of legal punishment. The ACCC has long recognised this in its efforts at leveraged deterrence set out above.

This does not mean that important information that fully informed, utility maximisers would take into account in making optimally rational calculated decisions about compliance is not consistently important for the firms in our sample. We find that the firm's market position, past experience of ACCC investigation and past experience of third party criticism are all significantly factored into thinking about the costs of non-compliance (as deterrence theory would expect of fully informed utility maximisers). But the range of other factors that are significant, confirm that researchers and policy-makers need to have a sophisticated model of firm decision-making and thinking in order to understand calculating thinking about compliance and to predict its likely impact on behaviour.

¹²⁹ John Scholz, above n 39, 254.

Nor can a realistic model of business calculative thinking about compliance assume that ‘legal punishment provides *the* primary incentive for corporate compliance’ (emphasis added). We find a great *potential* for businesses’ worries about the reactions of a range of third parties, beyond regulators, to have an influence on their compliance behaviour—although we also find that our respondents did not in fact think that certain third parties were very likely to find out about their non-compliance. There is every indication that a range of third parties *could* create a range of highly significant incentives for compliance (or non-compliance) given the opportunity, motivation and resources to do so. Moreover, we find that to the extent that various third parties do find out about business non-compliance and criticise business for it, this heightens business fear of legal punishment. Similarly, where consumer groups, industry associations and compliance professionals form firms’ awareness of the TPA, this too heightens their perception of various costs and gains of compliance and non-compliance. At the very least, there is an important interaction here between legal punishment and third party impacts that should be included in models of how deterrence might work.

Increasing the Deterrent Power of the TPA: Criminalisation and Jail Terms

It has been suggested that part of the trick of effective regulation (to promote compliance) is ‘for regulators to project an image of invincibility to industries that may be more powerful than themselves’.¹³⁰ Our results suggest that although the ACCC may not have quite achieved an image of ‘invincibility’, it may well have achieved a perception of tough, swift and sure enforcement action. Nevertheless there are still proposals to further increase the deterrent power of the TPA, most notably the proposal to criminalise serious cartel conduct and introduce jail terms for individuals involved in breaches.¹³¹

Assuming that increasing the deterrent power of the TPA is an important reason for the proposed criminalisation of cartel conduct, both our findings and the literature on deterrence reviewed here cast doubt on whether the simple availability of jail terms will automatically lead to a significant increase in deterrence for cartel conduct. A sophisticated understanding of business calculations about the costs and gains of compliance and non-compliance cautions against seeing the mere introduction of the possibility of jail terms as a formal legal sanction as sufficient to change business thinking

¹³⁰ Ayres and Braithwaite, above n 5, 44-45.

¹³¹ See above n 20 and accompanying text.

and business behaviour. For example, since the ACCC has rarely used the criminal penalties currently available to it for breach of consumer protection provisions – even under the relatively activist Chairmanship of Allan Fels – and there are many practical problems with the ACCC being able to prosecute criminal cases,¹³² business people might think that even if a crime of serious cartel conduct is created, it will only be rarely used.¹³³ This aspect of the deterrent power of criminalisation is, however, at least partly within the power of the ACCC to address. What requires more creativity is how the criminalisation of cartels, and the other sanctions available under the TPA, are interpreted and translated into action by internal and external stakeholders for each firm.

There is no support in our data for the proposition that business people will see jail penalties as substantially more serious than the penalties already available – although this may reflect the way we asked the questions rather than how business people will in fact respond to criminalisation and jail penalties for cartel conduct. It is, however, clear from our data that there are already a range of penalties in the TPA that respondents see as very serious, and that can act as powerful deterrents where business people are

¹³² According to ACCC staff, it is rare for the ACCC to take criminal proceedings because the level of proof required is so much higher, the case takes longer, there is a perception that the Director of Public Prosecution is unlikely to prioritise the type of case the ACCC is likely to bring (eg. misleading conduct) and, there is also a perception that the courts themselves see the ACCC taking criminal action as an inappropriate waste of their time. The most significant practical problem is that under current protocols, the ACCC cannot run a criminal prosecution itself, but must refer it to the Director of Public Prosecutions. It was recognised as part of the Dawson Review that there would need to be some system for streamlining this referral and decision-making process if there was to be a credible threat of criminal enforcement: Dawson Review, above n 2, 157. One option would be to give the ACCC its own criminal prosecution arm, but this is not being contemplated. But see Hon Peter Costello MP, Treasurer of the Commonwealth of Australia, ‘Additional Funding for the ACCC: Criminal Cartel Enforcement’, Press Release No. 33 of 2006, 9 May 2006 (announcing greater funding for each of the ACCC, the DPP and Federal Court to enable the investigation, prosecution and hearing of criminal cartel conduct cases).

¹³³ Moreover the ACCC does not currently have a reputation for getting civil penalties at the *maximum* available in anti-competitive conduct cases, although the penalties are increasing. So businesses may not even see it as very likely that the ACCC will successfully seek tough penalties, such as fines of 10% of turnover and jail penalties, in the future in criminal or civil prosecutions.

sufficiently aware of those sanctions, and also believe that the ACCC and third parties are likely to detect and take action against breaches.

For example, having to pay large amounts of compensation to consumers is much feared, suggesting that if strengthening the power of the ACCC to deter is the objective, then expansion of the ACCC's ability to obtain compensation for consumers in enforcement actions and representative actions¹³⁴ is just as important as introducing jail for serious cartel conduct. Moreover, the imbalance between the penalties available for breach of the consumer protection compared with the anti-competitive conduct aspects of the TPA is a more gaping hole in the TPA than is the lack of jail penalties for cartel conduct.¹³⁵ Our data show that the type of fines that are available as civil penalties for breach of the anti-competitive conduct provisions are feared by business. Yet these powerful deterrents are not available for breach of the consumer protection provisions of the TPA.¹³⁶ It seems obvious that the same sort of penalties that are currently available for breach of the competition provisions should also be available for breach of the consumer protection provisions.

This is not to say that there are not pressing reasons to criminalise serious cartel conduct other than increasing deterrence. For example, criminalisation may be necessary as a matter of justice to treat like offences alike (comparing cartel conduct with theft and fraud, which are both crimes), to reflect the moral standards of the community, or in order to increase compliance by providing a strong moral message to business people about the unacceptability of this conduct and hence activating their moral commitment to comply (rather than calculative motivations to comply).¹³⁷ We should be cautious

¹³⁴ The ACCC's ability to take representative and class actions on behalf of consumers seeking compensation for harm caused by breaches of the TPA is severely limited by the procedural requirements of the court. The ACCC and various consumer groups have asked for the ACCC to have the power to seek civil penalties for breaches of the consumer protection provisions of the TPA: See above n 27 and accompanying text.

¹³⁵ See Stephen Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127 (for a similar argument in the US context).

¹³⁶ It is true that criminal penalties are available for consumer protection breaches, but they are so rarely used that it seems unlikely that they have much power to affect business calculations about the costs and gains of compliance.

¹³⁷ Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2007) *Centre for Competition Policy Working Paper 07-12*, University of East Anglia, Norwich

about criminalising cartel conduct primarily in order to get the deterrent impact of jail sentences, without considering first whether certain breaches of the TPA are morally serious or socially harmful enough to warrant criminalisation in the first place.¹³⁸ Putting the possibility of imprisonment for serious cartel conduct into the TPA without considering whether and how the ACCC will actually be able to enforce the provisions, and how internal and external stakeholders in firms will factor it into the firms behaviour could easily mean that those provisions become a purely symbolic statement that are rarely used.

(setting out these arguments and reporting public opinion in relation to each of them). See also the references at above n 20.

¹³⁸ This ‘putting the cart before the horse’ is at the core of Brent Fisse’s arguments against the former Coalition Government’s current proposals for creation of a new criminal offence of hard core cartel conduct: above n 20 (policy-makers have not yet conceptualised clearly enough about what it is about cartel conduct that should be criminalised before accepting the recommendation to introduce an offence based on dishonesty). On this point see also Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels’ above n 20.

APPENDIX: ADDITIONAL STATISTICAL INFORMATION

Table A1: Statistical Details of Aggregate Measures of Costs of Compliance, Gains of Compliance and Fear of Costs of Non-Compliance

MEASURE AND ITEMS INCLUDED IN MEASURE (Means shown in brackets where relevant.)	STATISTICS FOR WHOLE MEASURE
Costs of Compliance	
Individual items as shown in Table 6. (Scale from 1-5 'very small' to 'very large'.)	Mean = 2.23 St'd Dev'n = 0.91 Cronbach's Alpha = 0.88 n = 977
Gains of Compliance	
Individual items as shown in Table 6. (Scale from 1-6 'No gain' to 'very large'.)	Mean = 3.40 St'd Dev'n = 1.26 Cronbach's Alpha = 0.95 n = 970
Fear of Costs of Non-compliance	
<i>Serious Sanctions</i>	
Individual items as shown in Table 1. (Scale from 1-5 – 'very small problem' to 'very large problem'.)	Mean = 4.25 St'd Dev'n = 0.65 Cronbach's Alpha = 0.80 n = 973
<i>Very Serious Sanctions</i>	
Announcement of an investigation of your organisation at a televised press conference by the Chairman of the ACCC (4.51) A private law suit where the ACCC takes a representative action on behalf of victims (4.69) (Scale from 1-5 – 'very small problem' to 'very large problem'.)	Mean = 4.60 St'd Dev'n = 0.57 Cronbach's Alpha = 0.47 n = 965
<i>Third Party Economic & Social Losses</i> ¹³⁹	
Individual items as shown in Table 3. (Scale from 1-5 'Worry very little' to 'Worry very much'.)	Mean = 3.46 Std Dev'n = 0.79 Cronbach's Alpha = 0.88 n = 973
<i>Likelihood & Severity of ACCC Enforcement Action</i>	

¹³⁹ The question and items used for this measure are described in greater detail below at Table 3 and the accompanying text.

<p>In the light of the size and complexity of their task the ACCC has few resources (reversed) (2.67)</p> <p>It is hard for the ACCC to find out when organisations breach the law (reversed) (2.82)</p> <p>The investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating (2.89)</p> <p>A breach of the <i>TPA</i> has to be severe before the ACCC bothers to do anything about it (reversed) (3.18)</p> <p>The ACCC is generally keeping a close eye on our industry (3.23)</p> <p>If we breach the <i>TPA</i> the chances of the ACCC catching us are slight (reversed) (3.35)</p> <p>The level of sanctions imposed for trade practices breaches is generally very low (reversed) (3.35)</p> <p>If we were caught by the ACCC in breach of the <i>TPA</i> the prospects of ACCC enforcement against the organisation are slight (reversed) (3.77)</p> <p>(Scale from 1-5 'strongly disagree' to 'strongly agree')</p>	<p>Mean = 3.16</p> <p>St'd Dev'n = 0.67</p> <p>Cronbach's Alpha = 0.81¹⁴⁰</p> <p>n = 985</p>
<p><i>Perceived Risk of Being Caught in Non-Compliance by Third Parties</i></p>	
<p>Individual items as shown in Table 2.</p> <p>(Scale from 1 to 5 'strongly disagree' to 'strongly agree')</p>	<p>Mean = 3.19</p> <p>Std Dev'n = 0.86</p> <p>Cronbach's Alpha = 0.85</p> <p>n = 927</p>

Table A2: Measure of How Well-Resourced is the Respondent

Question: How "well-resourced" – either by contracting out by using in-house expertise – do you think your organisation is in the following respects? (n = 961, 968 and 980)	Mean Responses (Standard Deviation) 1-5 ('Very badly resourced' to 'Very well resourced') ¹⁴¹	Whole Measure
Research and development	3.20 (1.11)	Mean = 3.54 Std Dev'n = 0.75
Legal knowledge	3.66 (0.96)	
Economic knowledge	3.69 (0.86)	

¹⁴⁰ The Cronbach's Alpha would be 0.80 if we left out 'The investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating'.

¹⁴¹ 3 = 'Neither well nor badly resourced'

Technical knowledge relevant to compliance	3.60 (0.97)	Cronbach Alpha = 0.78 n = 970
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Table A3: Measures of Managerial Oversight, Long-Term Management Approach and Market Position

Measures and Items Included in Each Measure	Mean Responses for Each Question (and Standard Deviation) (Scale from 1-5 'Strongly disagree' to 'Strongly agree')	Whole Measure
Measure of Long-Term Management Approach		
Our managers give a lot of priority to long term strategic planning (n = 972)	3.63 (0.92)	Mean = 3.14 Std Dev'n = 0.78 Cronbach Alpha = 0.74 n = 999
Our managers spend most of their time on day-to-day problem solving and short term planning ¹⁴² (n=969)	3.24 (0.93)	
Our management is more interested in being nimble than in long range plans ¹⁴³ (n=999)	2.88 (0.922)	
Market Position		
Our customers can easily switch to substitute products or services (n=964)	3.65 (1.2)	NA

¹⁴² This item was reversed for the calculation of the whole measure (as shown in the third column). The unreversed mean and standard deviation are shown in the second column.

¹⁴³ This item was reversed for the calculation of the whole measure (as shown in the third column). The unreversed mean and standard deviation are shown in the second column.

Table A4: Measure of Level of Criticism by Third Parties

<i>Below you will find a number of different groups of people who may have criticised your organisation or others in your industry for their perceived failure to comply with the TPA. For each of these, please state whether they have expressed such a criticism within the past six years.</i>	Respondents Reporting Criticism % (n=999)
The ACCC	25%
Customers	26%
Competitors	17%
Media	12%
Australian Securities and Investments Commission (ASIC)	12%
Consumer groups/NGOs	11%
Employees	10%
Lawyers/compliance professionals	10%
Politicians	9%
Suppliers	8%
Industry association	8%
Business partners	6%
Shareholders	5%
Relatives of management	2%
Informal business networks	2%

Table A5: Measures of Who Formed Organisation's Awareness of the TPA

Measures and Items Included in Each Measure (mean for each item shown in brackets)	Statistics for Whole Measures
<i>To what degree have the following persons, organisations, and activities formed your organisation's awareness of the Trade Practices Act over the years? (Scale from 1 to 5: "Not at all" to "To a very large degree")</i>	
Media	
Media stories about breaches of TPA (3.11) Media articles about ACCC and their work in general (3.02) Media articles about rights/obligations under TPA (2.91)	Mean = 3.01 Std Dev'n = 0.84 Cronbach Alpha = 0.90 n = 985
Industry association	
Our industry association (2.57)	NA
Compliance professionals	
Our lawyers (3.00) Another champion inside our organisation (2.27) Compliance training programmes provided by consultancy firms (2.02)	Mean = 2.43 Std Dev'n = 0.97 Cronbach Alpha = 0.65 n = 983
Consumer groups	
Consumer groups (2.24)	NA
The ACCC	
ACCC investigations against our suppliers and/or buyers (1.93) ACCC investigations against other organisations in our industry (2.25) Compliance training programs made by the ACCC (e.g. Best and Fairest training program) (1.60) Seminars/events where ACCC staff members or Commissioners talked about the TPA (1.70) ACCC formed or chaired consultative committees (1.33) The ACCC information call-centre (1.32) ACCC publications (1.88) The ACCC web-site (1.89)	Mean = 1.71 Std Dev'n = 0.64 Cronbach Alpha = 0.84 n = 984