

WHAT DO AUSTRALIAN BUSINESSES REALLY THINK OF THE ACCC, AND DOES IT MATTER?

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INTRODUCTION

There is no doubt that the Australian Competition and Consumer Commission ('ACCC') has provoked very strong opinions among big business in Australia. This criticism reached its height in 2002 and 2003, at the end of Professor Allan Fels' period as Chairman of the Commission.¹ At this time, the Chief Executive Officers of a number of Australia's biggest companies regularly and publicly criticised the ACCC, and Professor Fels himself, for being 'unfair, unjust and immoral', and having no 'line of accountability at all'.² The ACCC's behaviour was criticised for being 'a corruption

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1 The business complaints resulted in the federal government commissioning an extensive independent review of the *Trade Practices Act 1974* (Cth) ('TPA') and the way it had been administered by the ACCC: Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('Dawson Review'). It also may have led to the federal government offering Professor Fels a shorter second term as Chair of the ACCC: see Fred Brenchley, *Allan Fels: A Portrait of Power* (2003) 214–15. Professor Fels himself, however, commented that, given the amount of business lobbying against him, he was surprised that he had lasted as long as he did: 'Allan Fels Surprised He Lasted So Long at the ACCC', *Australian Associated Press Financial News Wire* (Sydney), 29 June 2003.

2 Quotations from Dick Warburton, Chairman of Caltex, and Roger Corbett, CEO of Woolworths, respectively: reported in Ross Gittins, 'Perhaps This is Why Big Business is Ganging Up on Allan Fels', *The Age* (Melbourne), 10 July 2002, 13. See also Brenchley, above n 1, 22, 143, 211–36 for further instances of private and public business lobbying of government against Professor Fels and the ACCC. For allegations by business leaders that

of administration of the *Trade Practices Act*, 'false and misleading behaviour on the part of the cop', and for using publicity 'in a way that damages companies before they are proven guilty'.³ One chief executive said that 'Fels' use of the media ... smacks of the Gestapo.⁴ Another called Fels a 'smiling assassin' who had inflicted 'irreparable harm to the Australian economy'.⁵ Professor Fels was described as 'a maverick autocrat whose overzealous application of merger law retards companies' ability to grow big enough at home to compete in a globalised marketplace';⁶ and big business argued that the ACCC needed to give Australian businesses much more freedom to merge with one another in order to achieve 'scale' so that they could export overseas, and Australia could avoid the fate of becoming a 'branch economy'.⁷

On the other hand, according to Professor Fels himself, big business will always criticise an effective regulator: 'There is always deep resentment when we prosecute or block mergers or cut prices, no matter how strong the justification'.⁸ According to him, the ACCC was merely bringing competition and consumer law enforcement strategies 'into line with North American standards', and debate should be less about 'the restrictions that should exist to protect business against an allegedly zealous regulator' and more about 'the greater danger that there are few safeguards for business or the public against a tame regulator'.⁹ Indeed, at previous times in its history, the ACCC's

the ACCC used 'its position of strength to "bully" business into complying with its directives without necessarily sticking to the formal legal process', see House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Competing Interests: Is There Balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000* (2001) 41.

³ David Murray, CEO of the Commonwealth Bank, and Geoff Dixon, CEO of Qantas, reported in Gittins, above n 2.

⁴ Damon Kitney and Katharine Murphy, 'Big Business Steps Up Attack on ACCC', *The Australian Financial Review* (Sydney), 13 May 2002, 1, quoting a 'leading Australian chief executive, who declined to be named'.

⁵ Gerry Harvey, CEO of the Harvey Norman chain of retailers, quoted in Christian Catalano, 'Gloves Off as Retailer Hits Out', *The Age* (Melbourne), 30 June 2003, 2. Harvey went on to say: 'I think he is egotistical, I think he is a megalomaniac ... I think that he is the most powerful man in Australia ... In the years to come he will be judged, and others that are intimidated at the moment will speak out and say what they really think.'

See also Richard Gluyas, 'A Last Mauling for Retiring Watchdog Fels', *The Australian* (Sydney), 30 June 2003, 29.

⁶ Cameron Stewart, 'Making Markets Add Up', *The Weekend Australian* (Sydney), 8-9 June 2002, 21.

⁷ Brenchley, above n 1, 220. See criticisms of the ACCC's approach to mergers at 220-9; Trade Practices Act Review Committee, above n 1, 43-71; Toni O'Loughlin, 'Process Slow But Not Too Tough', *The Australian Financial Review* (Sydney), 17 April 2003, 5. Cf Alan Dignam, 'The Role of Competition in Determining Corporate Governance Outcomes: Lessons from Australia's Corporate Governance System' (2005) 68 *Modern Law Review* 765.

⁸ Professor Fels in Malcolm Maiden, 'The Bell Tolls for Fels at ACCC Kennel', *Business and Money, The Age* (Melbourne), 21 June 2003, 1. Elsewhere Professor Fels was reported as having commented about Gerry Harvey's criticisms of him (quoted above): 'Professor Fels said Mr Harvey had been "totally uncooperative" during every step of the ACCC's proceedings against his company, and had dragged the inquiry to exhaustive lengths': Catalano, above n 5.

⁹ Allan Fels, 'ACCC Needs Support From the Top', *The Australian Financial Review* (Sydney), 30 June 2003, 55. Professor Fels was also quoted as saying: 'Some business people are

predecessor, the Trade Practices Commission, was more frequently, and justifiably, criticised for being too lame than too game.¹⁰

After Professor Fels' retirement in the middle of 2003, big business was looking forward to a 'less aggressive and more conciliatory' ACCC under the Chairmanship of Graeme Samuel.¹¹ The Australian Chamber of Commerce and Industry welcomed the announcement of the appointment of Mr Samuel as someone who had 'a deep understanding not just of how business works, but also of the kind of institutional environment which businesses need if they are to operate successfully'.¹² A year after Mr Samuel's appointment, *The Australian Financial Review* was citing reports that the ACCC had 'gone soft'.¹³ Mr Samuel himself said that 'the ACCC had backed away from litigation as the main means of enforcing the law' and that 'education and publicity programs were a much more effective way of protecting consumers from the anti-competitive behaviour of major companies'.¹⁴ By 2006, the *Business Review Weekly* reported that there had been a 58 per cent decrease in the number of court cases brought by the ACCC over the previous four years.¹⁵

This paper reports systematic, representative quantitative evidence collected from mid-2004 to mid-2005 on how large Australian businesses perceive the ACCC as a regulator. Is it seen as wielding a credible deterrent threat? Is the Commission seen as fair, flexible and accommodating, or rigid and stigmatising? Is it seen as strategically sophisticated? And why would it matter?

throwing a trial-by-media slogan at practices that are quite normal in the field of law enforcement': Kitney and Murphy, above n 4.

10 See, eg, Robert Baxt, 'Thinking About Regulatory Mix – Companies and Securities, Tax and Trade Practices' in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (1993) 117, 118; Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) 91; Stuart Simpson, 'Keeping Business Honest: Trade Practices Commission Runs Lame', *The National Times* (Sydney), 17–23 October 1982, 41; V G Venturini, *Malpractice: The Administration of the Murphy Trade Practices Act* (1980).

11 Miranda McLachlan, 'Section 46 to be Samuel's Big Test', *The Australian Financial Review* (Sydney), 4 July 2003, 15. See also 'Use it Properly', *The Newcastle Herald* (Newcastle), 2 July 2003, 8. One of our survey respondents commented in their answer to an open-ended question at the end of the survey (see below n 60):

With the appointment of a new head of the ACCC, I believe businesses are reassured that the approach of the ACCC is more reasonable and less media hungry or keen to grab headlines. A more considered and conciliatory approach seems to be evident which in turn encourages openness by business.

This sentiment was repeated in several other comments.

12 Laura Tingle and Mark Skulley, 'ACCC Posting Signals Policy Shake-Up', *The Australian Financial Review* (Sydney), 11 October 2002, 10.

13 Toni O'Loughlin, 'Competition Regulator Has Lost its Hard Edge: Dossier', *The Australian Financial Review* (Sydney), 4 June 2004, 29.

14 But he also pointed out that the ACCC was investigating up to 40 cartels, among other things: Toni O'Loughlin, 'ACCC Boss Backs Away from Litigation', *The Australian Financial Review* (Sydney), 4 June 2004, 1. See also Graeme Samuel, 'Heal Thyself: Voluntary Compliance is Much Better than Prosecution', *BRW* (Melbourne), 9 October 2003, 50.

15 Adele Ferguson and Kristen Le Mesurier, 'The Red-Tape Stranglers', *BRW* (Melbourne), 7 September 2006, 42, 44. Chair Graeme Samuel was reported as saying that 'he is litigating less but with "sharper" force': at 44.

The business criticisms of the ACCC cited above are mostly based on the assumption that it is important a regulatory enforcement agency act, and be seen to be acting, according to certain constitutional values.¹⁶ Business perceptions of the ACCC, however, are also important for another more instrumental reason — regulatees' opinions of a regulator are an important influence on whether those businesses comply with the law or not. Our concern in this paper is to examine business opinion of the ACCC from this second 'compliance-oriented' approach. We report empirical data on large Australian businesses' opinions of the ACCC, with a view to how these opinions are likely to affect compliance with the legislation the ACCC administers, the *TPA*.¹⁷

In the *first* part of this paper we briefly review competing theories as to what motivates businesses to comply or not comply with the law. Our focus is on what each type of theory predicts about how regulatees' opinions of regulators will influence compliance and non-compliance. We also briefly set out the methodology used to collect the empirical data reported here, including our qualitative interviews with trade practices lawyers and businesses that have experienced ACCC enforcement, and our survey of 999 large Australian businesses about their compliance with the *TPA* and opinions of the ACCC conducted in 2004 to 2005. The views and criticisms of the ACCC reported in the newspapers are not representative. They may well be the minority views of a vocal few. Our survey provides a more representative indication of large Australian businesses' views of the ACCC.

In the *second* part of the paper, we report our survey results, showing that our respondents' opinions of the ACCC group into six dimensions — their assessment of the ACCC's procedural and substantive justice, their perceptions of the likelihood and severity of ACCC enforcement action, the ACCC's level of strategic sophistication, how undogmatic it is, how accommodating it is, and whether it is biased in the way it targets large and small businesses for enforcement action. We discuss why opinions differ according to these six dimensions on the basis of theory and our own empirical evidence, and how we might expect these business opinions of the ACCC to make a difference to their level of compliance.

In the *third* part, we examine the extent to which our survey respondents' opinions of the ACCC are based on actual experience or not. This gives us a better idea of whether their opinions relate to the way in which the ACCC actually behaves in making decisions about investigations and prosecutions, or are merely a matter of perception. We also consider the extent to which our respondents' opinions of the ACCC are, or are not, out of kilter with their opinions of the other main national business regulators in Australia, the Australian Securities and Investments Commission ('ASIC'), Australian Tax Office ('ATO') and Australian Prudential Regulatory Authority ('APRA'). This helps us understand whether Australian businesses' opinions of the ACCC are based on factors unique to the ACCC and its regulatory style, or whether they are common to all business regulators.

In the *fourth* part, we begin to test our theoretical assumptions about the relationship between businesses' opinions of a regulatory enforcement agency and

¹⁶ For example, their behaviour should be authorised by law, certain and stable, accountable and transparent, procedurally fair, and proportionate, consistent and rational: Karen Yeung, *Securing Compliance: A Principled Approach* (2004) 36–43.

¹⁷ As we shall see, businesses' normative assessments of the ACCC are also relevant to this compliance-oriented approach.

their level of compliance. We do this by examining how variation in business opinions of the ACCC influences their attitudes towards compliance with the *TPA*.

Overall we find that business opinions of the ACCC as reported in our 2004–05 survey are not as negative as those reported in the press in 2002–03. Indeed our respondents are reasonably positive about the ACCC's level of strategic sophistication, how accommodating it is, and also its procedural and substantive justice. They estimate the likelihood and severity of enforcement action as high, but not very high. Our respondents' opinions of the ACCC are also very similar to their opinions of the other three national business regulators, suggesting that they do not see the ACCC's behaviour and style as out of kilter with other regulators.

Our respondents, however, have a particularly negative view of the ACCC for being dogmatic. This is especially true of those who have actually interacted with the ACCC – a finding that suggests this negative view is based on evidence of their actual experience with the ACCC in the past. A high opinion of the ACCC in terms of its strategic sophistication, how accommodating it is, its procedural and substantive justice, the likelihood and severity of enforcement action, and whether the ACCC is biased in targeting, are all related to more positive attitudes towards *TPA* compliance by our respondents. But there is no relationship between respondents' view of the dogmatism of the ACCC and their attitude toward compliance, a finding that underlines the ambiguity of criticisms of the ACCC's dogmatism. On the one hand, dogmatism might provoke resentment and resistance in business but, on the other hand, a degree of dogmatism might be an essential element of effective enforcement action. We discuss these issues further below.

1 Theory and evidence: explaining compliance and business opinions of the ACCC

The significance of business perceptions of regulators for explaining compliance: three theories

Although there are a range of theories that seek to explain what makes people, including business organisations, comply or not comply with the law,¹⁸ almost all

¹⁸ See Søren Winter and Peter May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675 for a helpful typology of 'normative', 'social' and 'calculative' motivations as explanations for compliance. Our summary of the literature in the text is based on this typology. Like Winter and May, most researchers of regulatory compliance now find that motivations for compliance are plural with different types of explanations being true in different circumstances and interacting in complex ways: 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* 109; Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1998); Jon Sutinen and Karen Kuperan, 'A Socio-Economic Theory of Regulatory Compliance' (1999) 26 *International Journal of Social Economics* 174. Certain 'extended' deterrence theories also end up taking into account most of these plural factors within the umbrella of deterrence theory: see 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; Harold G Grasmick and Robert J Bursik Jr, 'Conscience,

agree that people's opinions of regulatory enforcement agencies can be a very strong influence on their level of compliance.

First, deterrence theory sees people's compliance or non-compliance as based on their *calculated decisions* about whether it is in their interest to comply with the law or not – whether the gains of compliance outweigh its costs.¹⁹ In considering the gains of complying with the law, one important factor is the risk of being caught and sanctioned for non-compliance by the relevant regulatory enforcement agency. Much empirical and theoretical work on deterrence, however, has shown that people do not necessarily rationally assess the objective likelihood and severity of being caught.²⁰ Therefore, 'objective deterrence' is not very good at explaining compliance. It is people's subjective estimation of their risk of being caught and sanctioned – 'perceptual deterrence' – that influences their level of compliance with the relevant law.²¹ Regulatees' subjective awareness and assessment of a regulator's capacity to take severe enforcement action will capture their attention and influence their calculation as to the relative costs and gains of compliance and non-compliance.²²

A second group of theories sees people's compliance or non-compliance as a response to their belief that they ought to comply with the law or not – their *normative commitment* to compliance with the law. Normative motivation to comply can be based on people's belief that a law is just in the sense that obeying the law leads to an outcome that fits with their moral or ideological values – they comply with rules because they see those rules and the way they are administered and enforced as *substantively just*.²³ An impressive body of empirical research has established that

Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law and Society Review* 837.

¹⁹ See Sally Simpson, *Corporate Crime, Law and Social Control* (2002) 22–44 for a thorough review of the literature and empirical evidence on deterrence. See also Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; John Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspectives of Deterrence Theory' (1997) 60 *Law and Contemporary Problems* 253; Winter and May, 'Motivation for Compliance with Environmental Regulations', above n 18, 676–7.

²⁰ Simpson, above n 19, 41 concludes from her survey of the literature testing the power of perceptual deterrence to explain crime by corporations that 'most corporate decision makers, even though they share many characteristics thought to maximize deterrent effects, are unaffected by formal punishment risks and outcomes.' For other empirical evidence of failure of deterrence see John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law and Society Review* 7; John Braithwaite and Toni Makkai, '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 and Policy* 262.

²¹ Simpson, above n 19, 28, 40–2.

²² On the importance of awareness for compliance, see Søren Winter and Peter May, 'Information, Interests, and Environmental Regulation' (2002) 4 *Journal of Comparative Policy Analysis: Research and Practice* 115. See also Dimento, above n 18; cf Elffers, van der Heijden and Hezemans, above n 18 (finding no effect of knowledge of and clarity of rules on compliance).

²³ Winter and May, 'Motivation for Compliance with Environmental Regulations', above n 18, 677–8. See also Tom R Tyler and John M Darley, 'Building a Law-Abiding Society: Taking

people are also likely to obey a law where they see that law, and its enforcement, as 'legitimate', and that they judge legitimacy by whether the relevant legal authorities are *procedurally just*. According to this theory, people's assessment of procedural justice is a more important influence on their compliance than whether compliance with the law leads to outcomes that are in their self-interest or not, or accord with their own personal sense of substantive justice or not.²⁴ People comply because they recognise the legitimate authority of the law and of the regulatory agencies that administer the law, rather than evaluating the substance of the law. Tyler shows that people psychologically evaluate the procedural fairness of regulatory authorities according to four criteria: opportunities for participation; the quality of decision-making (neutrality); the quality of interpersonal treatment (including acknowledgement and respect for rights, treatment with dignity and interpersonal respect, and politeness); and trust in the motives of authorities (evidence that the representative of the authority cares about the needs, concerns and well-being of the people they are making decisions about).²⁵ Their opinions of regulators along these four dimensions will influence their level of compliance, according to procedural justice theory.

Normative commitment theories see compliance as a result of internalised moral judgments by people about the substance and procedures of the law and legal authorities. A *third* set of explanations for compliance with the law suggest that people can be influenced to comply by their desire 'to earn the approval and respect of significant people with whom they interact'²⁶ – even if they personally are not normatively committed to compliance.²⁷ Business peers, and perhaps employee, consumer and other stakeholder groups, can exercise this sort of *social influence* on businesses to comply or not comply with regulation. Interactions between regulators and regulated businesses might also 'foster a set of expectations that comprise one

Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law' (2000) 28 *Hofstra Law Review* 707; Sutinen and Kuperan, 'A Socio-Economic Theory of Regulatory Compliance', above n 18, 182; K Kuperan and Jon G Sutinen, 'Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries' (1998) 32 *Law and Society Review* 309 (significance of moral development).

²⁴ See Tom Tyler, *Why People Obey the Law* (2nd ed, 2006) especially 269–76 for a succinct summary of the theory and empirical evidence supporting it; Tyler himself and co-authors have adduced much empirical evidence supporting procedural justice theory at least in relation to individual regulatees: see Tom R Tyler, 'Trust and Law Abidingness: A Proactive Model of Social Regulation' (2001) 81 *Boston University Law Review* 361. See also Kristina Murphy, 'Procedural Justice and Tax Compliance' (2003) 38 *Australian Journal of Social Issues* 379; Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behavior* 187.

²⁵ Tyler, *Why People Obey the Law*, above n 24, 276.

²⁶ Winter and May, 'Motivation for Compliance with Environmental Regulations', above n 18, 678. For empirical studies supporting the significance of social influence on compliance, see Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (2003); Joseph Rees, 'Development of Communitarian Regulation in the Chemical Industry' (1997) 19 *Law and Policy* 477.

²⁷ As Winter and May ('Motivation for Compliance with Environmental Regulations', above n 18, 678) point out, social influence 'may over time have a socializing effect on regulated parties leading to normative commitment'. This is also a central claim of institutional theories: see, eg, Andrew Hoffman, *From Heresy to Dogma: An Institutional History of Corporate Environmentalism* (1997); W Richard Scott, *Institutions and Organizations* (1995).

basis for social motivation.²⁸ Thus we would expect that the degree to which regulatees perceive a regulator as open, available, accommodating and trusting would help explain whether or not regulatees in turn can be persuaded by the regulator to be open and flexible in complying with the regulator's interpretation of the law. Business perceptions of whether a regulator is open to appropriate negotiation of compliance will influence whether the business is open to social influence towards compliance from that regulator.²⁹

Here it is not the regulated person's opinion of the legitimate authority of the regulatory agency's actions that influences compliance (as in procedural justice theory). Rather it is the social relationship between regulator and regulatee that promotes compliance. This type of social influence is the mechanism by which persuasive styles of enforcement might work to induce compliance.³⁰ Social influence theories suggest that the more accommodating a regulator is perceived to be, the more successful they are likely to be at persuading businesses to comply voluntarily. On the other hand, when people feel that a regulator is (implicitly or explicitly) labelling them as dishonest or untrustworthy, they are more likely to question the legitimacy of the regulator and its enforcement activity. Indeed if a regulator, like the ACCC, treats offenders as bad, it may actually help destroy their consent to being regulated by enforcement action by that regulator.³¹

A more complicated account of the social psychological significance of the relationship between regulatee and regulator is the concept of 'motivational postures'. Motivational postures research shows that regulatees' beliefs, opinions and feelings about regulators are intertwined with their attitudes and interests in relation to compliance along the dimensions of cooperation (commitment and capitulation vis-à-vis resistance) and dismissiveness (disengagement and/or game-playing).³² The

²⁸ Winter and May, 'Motivation for Compliance with Environmental Regulation', above n 18, 678. Tyler's procedural justice theory also sees social influence between regulator and regulated as important since '[i]t has been shown that people care more strongly about procedural justice when their identities are linked to a social relationship with a group or person': Tyler, *Why People Obey the Law*, above n 24, 276.

²⁹ John Braithwaite has also argued, on the basis of empirical evidence, that 'the proffering of trust, praise, and the nurturing of pride in corporate social responsibilities' by the regulator might be part of an effective dialogic approach to regulation: John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 112.

³⁰ Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982) 123–51; Raymond J Burby and Robert G Paterson, 'Improving Compliance with State Environmental Regulations' (1993) 12 *Journal of Policy Analysis and Management* 753, 756, 766; Kathryn Harrison, 'Is Cooperation the Answer? Canadian Environmental Enforcement in Comparative Context' (1995) 14 *Journal of Policy Analysis and Management* 221, 222–3; Peter J May and Søren Winter, 'Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy' (1999) 18 *Journal of Policy Analysis and Management* 625. Note that most of these empirical studies find that it is actually a mix of cooperation and deterrence that is effective.

³¹ Valerie Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 15.

³² Motivational postures theory comes from Valerie Braithwaite's analyses of survey data about regulatees' experiences of nursing home and tax regulation and compliance: 'Motivational postures are conglomerates of beliefs, attitudes, preferences, interests, and

perceived deterrent threat from a regulatory enforcement agency can stimulate a person to develop a motivational posture that puts social distance between themselves and the regulator — such as disengagement, resistance or game-playing — as a coping mechanism. Procedural justice on the part of the regulator can improve the relationship. Similarly, if the regulatee morally accepts the demands of the regulator, then this is likely to lead them to an attitude of cooperation with the regulator.³³ While a motivational posture of resistance, game-playing or disengagement (as opposed to commitment or capitulation) does not necessarily lead to disobedience,³⁴ it can do so, and indicates that 'at the most fundamental level, regulation rests on the art of managing relationships'.³⁵

Resentment and anger may be present, but ... there is also likely to be goodwill and acceptance of the rules of game, if they can be brought into the discussion and resolution of the problem. The challenge for [enforcement agents] is to play a two-handed game: To deal with wrongdoing today, while nurturing consent for tomorrow.³⁶

The dominant policy-oriented theory of regulatory enforcement strategy, responsive regulation, responds to the plurality and complexity of the motivations and contextual factors that influence compliant and non-compliant behaviour by saying that regulators should also use multiple enforcement strategies in contextually sensitive ways. It sees the capacity for regulators to persuade regulatees to voluntarily comply in a social interaction as the baseline for a pyramid of enforcement strategies that can be escalated to deterrence where necessary. Deterrence or punishment are most effective where they are held in reserve 'threatening in the background but never threatened in the foreground', and used only in the most egregious cases at the tip of the pyramid.³⁷ Responsive regulation theory also requires that the deployment of different regulatory strategies and enforcement tools be done in a way that is, and is

feelings that together communicate the degree to which an individual accepts the agenda of the regulator, in principle, and endorses the way in which the regulator functions and carries out duties on a daily basis': Valerie Braithwaite, Kristina Murphy and Monica Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29 *Law and Policy* 137, 138. See also Valerie Braithwaite, John Braithwaite, Diane Gibson and Toni Makkai, 'Regulatory Styles, Motivational Postures and Nursing Home Compliance' (1994) 16 *Law and Policy* 363; Valerie Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995) 17 *Law and Policy* 225; Valerie Braithwaite, 'Tensions Between the Citizen Taxpaying Role and Compliance Practices' (Working Paper No 13, Centre for Tax System Integrity, Australian National University, 2001); Braithwaite, 'Dancing with Tax Authorities', above n 31. Note that motivational postures theory has so far been developed primarily in relation to individuals. While we would expect similar phenomenon to apply to firms, the social psychological dynamics are likely to be more difficult to measure in organisations.

33 Braithwaite, Murphy and Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation', above n 32.

34 Braithwaite, 'Dancing with Tax Authorities', above n 31, 33.

35 Braithwaite, 'Tensions Between the Citizen Taxpaying Role and Compliance Practices', above n 32, 9.

36 Braithwaite, 'Dancing with Tax Authorities', above n 31, 35. See also Winter and May, 'Motivation for Compliance with Environmental Regulations', above n 18, 679 for a description of the complex mix of formalism and flexibility, coercion and negotiation that they hypothesise would best promote compliance.

37 Braithwaite, *Restorative Justice and Responsive Regulation*, above n 29, 35. See also Ayres and Braithwaite, above n 18.

seen to be, procedurally and substantively fair, in order to build up trust and moral commitment to compliance.

Taking into account all three major sets of theories of compliance, responsive regulation suggests that a regulatory enforcement agency is only likely to be effective at promoting compliance where it is able to project quite a sophisticated set of messages about itself and its behaviour to regulatees: It 'must have an image of invincibility at the same time as it has an image of mercy and forgiveness'.³⁸ It needs to be both procedurally and substantively just at the same time that it is accommodating and flexible, yet also capable, and publicly known to be capable, of tough and effective enforcement action when a breach occurs.³⁹

How does the ACCC match up to this challenge? In the following subsection we describe the way that we collected data to answer this question before going on to present and discuss the interpretation of our data in the remainder of the paper.

Methodology for this study

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 action.⁴⁰ 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 advisers were chosen for interview on the basis that they were specialist trade practices lawyers who had represented clients in

³⁸ Braithwaite, *Restorative Justice and Responsive Regulation*, above n 29, 119.

³⁹ Note that Braithwaite does not explicitly typify theories of compliance according to the three categories we have used. This is our interpretation of the attraction of responsive regulation theory. This paper is concerned with assessing how businesses perceive the ACCC in terms of all three of the sets of theories described above. We do not go on in this paper to assess whether it meets the specific requirements of a responsive regulator as set out by Braithwaite.

⁴⁰ For further information about the methodology for this part of the research and a general preliminary analysis of this data, see Christine Parker and Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (2003). See also Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209; Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Review* 591; Michelle Sharpe and Christine Parker, 'A Bang or a Whimper? The Impact of ACCC Unconscionable Conduct Enforcement' (2007) *Trade Practices Law Journal* (forthcoming).

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.⁴¹ The survey achieved a response rate of 43 per cent,⁴² which compares well with average response rates for similar questionnaire research of businesses.⁴³ 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.⁴⁴ 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 views of the ACCC over the relevant period.⁴⁵ Both 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. The measures and questions in the survey relevant to this paper are described in more detail in the second part of the paper below.

⁴¹ 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 20 percent general counsel or compliance managers. 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* (2005).

⁴² In fact this underestimates the actual response rate — we cut 4.3 per cent 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 per cent of the entire list of companies surveyed (including non-respondents) were 'too small', then we would have a response rate of 45 per cent.

⁴³ 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 per cent. 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* (2007) (forthcoming).

⁴⁴ Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 12–13.

⁴⁵ Further details of this test are reported in *ibid* 279–82.

2 Opinions of the ACCC

Our questionnaire asked businesses to respond to a number of different statements about the ACCC, indicating to what degree they agreed with each statement. These questions were later grouped into six separate indices (as shown in Table 1), each one measuring a different dimension of respondents' opinions about the ACCC.⁴⁶

⁴⁶ The six indices have been arranged in order with the one that garnered the highest level of agreement from our respondents first, and so on, down to the sixth. The items within each index have been arranged from the ones that fit best in each index to the one that is least important to the index. The mean rating for each individual item is shown in brackets. The division into the six separate indices is supported by a factor analysis. The Cronbach's Alphas for each of the six indices are shown in Table 1. Cronbach's Alpha measures how reliably a set of items (for example, questions in a survey) measures a single unidimensional latent variable. An index with a Cronbach's Alpha score of 0.70 or higher is considered a strong index, but it is difficult to get a high score when the index contains few variables. The Cronbach's Alphas for 'accommodating behaviour', 'not biased in targeting', and 'undogmatic behaviour' shown in Table 1 are rather low: the main reason for this is that these indices contain only two to four variables each. In the case of 'undogmatic behaviour' (which has four items), it may also be that the items do not fit together as well as the items in some of the other measures.

Table 1: Opinions about the ACCC

Measures of Opinions About ACCC	Items Included in Each Measure (Mean for Each Item on Scale from 1-5)	Statistics for Each Whole Measure	Significant Difference by Size? ⁴⁷
Strategic Sophistication	Sophisticated in its understanding of how business works today (3.22) Beneficial for the Australian economy (3.6) One of the most effective regulators in Australia (3.5) Focuses on the most important problems (3.21) Cares more about the productivity of Australian organisations than about publicity (2.9)	Mean = 3.27 Std. dev. = 0.65 Cronbach's Alpha ⁴⁸ = 0.75	No (0.061)
Accommodating Behaviour	Offers organisations assistance to help them understand and meet their obligations under the TPA (3.17) Willing to agree to remedies suggested by organisations that have breached the TPA (3.09) If an organisation cooperates with the ACCC they are treated more leniently (3.48)	Mean = 3.25 Std. dev. = 0.57 Cronbach's Alpha ⁴⁹ = 0.50	No (0.043)

⁴⁷ Tested by calculating the Pearson's Product Moment Correlation Coefficient ('Pearson Correlation') between size and each of the six dimensions of opinion. The Pearson Correlation is a measure of strength of the linear correlation between two variables with 0.00 representing no correlation and 1.00 representing perfect correlation. In this Table and all other places in this paper showing Pearson Correlations: ** = sig. 0.01; * = sig. 0.05 (two-tailed); and statistics shown without asterisk are not significant. We also tested for significant difference by industry but found no significant difference, as explained in the text.

⁴⁸ According to the factor analyses, 'wide range of effective sanctions', 'politically difficult to ride roughshod over my organisation' and 'the ACCC is generally keeping a close eye on our industry' were together a separate factor. But by adding them to 'Likelihood and Severity of ACCC Enforcement Action', we only lowered the Cronbach's Alpha score for that item from 0.82 to 0.77, which still indicates a strong index.

⁴⁹ The Cronbach's Alpha would be slightly better if we left out '[i]f an organisation cooperates with the ACCC they are treated more leniently'.

Measures of Opinions About ACCC	Items Included in Each Measure (Mean for Each Item on Scale from 1-5)	Statistics for Each Whole Measure	Significant Difference by Size? ⁴⁷
Likelihood & Severity of ACCC Enforcement Action	<p>If we breach the <i>TPA</i>, the chances of the ACCC catching us are slight (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>It is hard for the ACCC to find out when organisations breach the law (reversed) (2.82)</p> <p>In light of the size and complexity of their task, the ACCC has few resources (reversed) (2.67)</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 level of sanctions imposed for trade practices breaches is generally very low (reversed) (3.35)</p> <p>The ACCC has a wide range of effective sanctions against non-complying organisations (3.65)</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>The ACCC is generally keeping a close eye on our industry (3.23)</p>	<p>Mean = 3.21 Std. dev. = 0.64</p> <p>Cronbach's Alpha⁵⁰ = 0.77</p>	<p>Yes — larger organisations have a higher estimation of the likelihood and severity of enforcement action (0.233**)</p>

⁵⁰ The Cronbach's Alpha would be 0.80 if we left out '[t]he investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating'.

Measures of Opinions About ACCC	Items Included in Each Measure (Mean for Each Item on Scale from 1-5)	Statistics for Each Whole Measure	Significant Difference by Size? ⁴⁷
Procedural & Substantive Justice	Fair (2.5) Just (3.36) Accountable (3.04) Treats Australian organisations as trustworthy (3.1) Reasonable (reversed) (3.24) Willing to listen to companies/organisation's point of view (reversed) (3.25) Most organisations get what they deserve when dealing with the ACCC (reversed) (3.10) Decisions made by the ACCC are based on facts (reversed) (3.30) The procedures of the ACCC are transparent (reversed) (2.92)	Mean = 3.20 Std. dev. = 0.66 Cronbach's Alpha ⁵¹ = 0.89	No (-0.021)
Not Biased in Targeting	[The ACCC] Catches mostly big organisations (3.07) The ACCC prioritises enforcement action in such a way that they often let small organisations go (reversed) (2.79)	Mean = 2.97 Std. dev. = 0.83 Cronbach's Alpha ⁵² = 0.50	No (-0.011)
Undogmatic Behaviour	Does not fight back if an organisation is non-cooperative (2.19) The ACCC is open-minded and willing to change its mind about organisations (2.91) Not keen on taking organisations to court (2.84) Does not stigmatise organisations that breach the law (2.56)	Mean = 2.62 Std. dev. = 0.54 Cronbach's Alpha ⁵³ = 0.57	Yes – larger organisations see the ACCC as less undogmatic (-0.123)

⁵¹ Although the factor analysis and Cronbach's Alpha supports putting the elements in this index together, it should be noted that in theoretical terms this index contains a number of sub-dimensions that are discussed below.

⁵² The questionnaire included a third related question, '[The ACCC] [c]atches only small organisations'. However, there is no significant negative or positive correlation between this item and the item '[The ACCC] [c]atches mostly big organisations'. The Pearson Correlation is -0.015. The item about small organisations has not been included as it correlates significantly with size (whereas the item about large organisations did not). This suggests there is some bias in the way respondents answered that particular item. There is a significant negative correlation between the two items that have been included in the index (Pearson Correlation = -0.333), and neither of them correlates significantly with size.

⁵³ Not able to get better by deleting a variable.

We might expect that business opinions of the ACCC would vary by size and industry. Newspaper reports particularly suggested that it was very big business that was most negative of the ACCC: they felt they were on the ACCC's 'radar' as potential targets for enforcement activity because their size meant they would attract publicity.⁵⁴ Larger businesses were also more likely to be affected by the ACCC's relatively conservative approach to merger policy. We might also expect that opinion of the ACCC would vary by industry because of different levels of enforcement in different industries, cultures of resistance in particular industries, and the fact that some industries were regulated by the *TPA* later than others.⁵⁵

There was no significant difference between the mean scores for each dimension of opinion by *industry*.⁵⁶ The *size* of the respondent did, however, make a significant difference to respondents' opinions about the likelihood and severity of ACCC enforcement action and also their opinion of how undogmatic the ACCC is (see last column of Table 1). Larger organisations had a higher estimation of the likelihood and severity of ACCC enforcement action, and a lower opinion of how undogmatic the ACCC is. We discuss the possible interpretation of these differences below. Size made no significant difference to the other dimensions of opinion.

Although our statistical analysis showed that the six dimensions of opinion in Table 1 were each separate and distinct, we also tested for correlations between these six sets of opinions. The results are shown in Table 2 and discussed further below. The asterisks indicate a significant correlation.⁵⁷

⁵⁴ See discussion of opinion of 'Biased in Targeting' below.

⁵⁵ For constitutional reasons, the *TPA* was only extended to cover certain sectors of the economy well after its first introduction: see Russell V Miller, *Miller's Annotated Trade Practices Act: Australian Competition and Consumer Law* (27th ed, 2006) 41–3 (extension of the *TPA* to cover business activities of states and territories), 125–7 (extension of the *TPA* to cover individuals/unincorporated entities).

⁵⁶ Statistics in Appendix 1 below. Mean scores for each industry grouping were calculated, and then tested for significant differences using one-way Analysis of Variance ('ANOVA') testing. One-way ANOVA is a powerful statistical technique for comparing variance between different groups within a population in order to determine whether another factor explains some of that variance.

⁵⁷ Tested by calculating the Pearson Correlation between each of the six dimensions of opinion. See above n 47 for explanation of Pearson Correlation and meaning of asterisks.

Table 2: Correlation Between Different Opinions of the ACCC

	Procedural & Substantive Justice	Likelihood & Severity of Enforcement Action	Strategic Sophistication	Undogmatic	Accommodating	Biased in Targeting
Procedural & Substantive Justice	1 (n=961)					
Likelihood & Severity of Enforcement Action	-0.40 (n=951)	1 (n=986)				
Strategic Sophistication	0.552** (n=960)	0.060 (n=959)	1 (n=969)			
Undogmatic	0.267** (n=910)	-0.173** (n=902)	0.186** (n=910)	1 (n=910)		
Accommodating	0.462** (n=907)	0.038 (n=899)	0.306** (n=907)	0.046 (n=907)	1 (n=907)	
Not Biased in Targeting	0.093** (n=941)	0.264** (n=951)	0.119** (n=946)	0.127** (n=908)	0.009 (n=906)	1 (n=959)

Strategic sophistication

Of the six sets of opinions measured, respondents were most positive about the ACCC's level of strategic sophistication. The strategic sophistication index measured whether business saw the ACCC as effective overall in seeking to accomplish the objectives of the *TPA*: does it prioritise its resources and activity properly to improve the Australian economy, or is it more concerned about things like its own level of publicity? Does it have a sophisticated enough understanding of how business works to do a good job? Does it address the most important problems, or does it get distracted by irrelevant issues?

Where businesses perceive a regulator to be strategically sophisticated, this is likely to contribute to those businesses' normative motivations to comply with the law. If people see a regulator failing to address important problems, then they will have no faith in the substantive justice of regulatory outcomes, and have less reason to comply with the law themselves. They might also see the regulator as acting in a procedurally unfair way to the extent that they see a regulator focusing on unimportant issues, such as its own profile and publicity. Opinions about the strategic sophistication of the ACCC did indeed correlate with respondents' social and normative assessments of the ACCC – its procedural and substantive justice, how undogmatic it is, how accommodating it is and its lack of bias.

We might also expect regulatees' perceptions of a regulatory enforcement agency's strategic sophistication to be an important aspect of whether they see that enforcement agency as wielding a credible deterrent threat. Our results, however, show that

business estimations of the strategic sophistication of the ACCC are quite unrelated to their opinion of the likelihood and severity of ACCC enforcement action, our main measure of opinions of the deterrent threat of the ACCC. Our factor analysis (Table 1) showed they are separate factors and that there is no correlation between the two factors (Table 2). Seeing the ACCC as more strategically sophisticated does not lead business to calculate the risk of ACCC enforcement action as greater.

Given the nature and high profile of some of the criticisms of the ACCC in 2002–03, cited in the introduction to this paper, it might be considered surprising that the ACCC rates as positively as it does on strategic sophistication. Many big business complaints about the ACCC during that period could be interpreted as suggesting that the ACCC lacked strategic sophistication. For example, the ACCC is criticised by business for failing to understand how Australian business works, and, particularly, for using merger law to hold back the Australian economy. Yet, our respondents (surveyed in 2004–05) gave their highest rates of agreement, out of all the items measured in Table 1, to the statements that the ACCC is 'beneficial for the Australian economy' (57 per cent agreed and 8 per cent disagreed) and 'one of the most effective regulators in Australia' (50 per cent agreed and 9 per cent disagreed).⁵⁸ These do not vary by size or industry. It seems that the critics of the strategic sophistication of the ACCC who received so much publicity in 2002–03 were not representative of general business opinion of the ACCC, not even the opinion of the very biggest businesses.

By contrast, our respondents are quite negative about one aspect of the ACCC's strategic sophistication: only 28 per cent of respondents believe that the ACCC 'cares more about the productivity of Australian organisations than about publicity', while 35 per cent think the opposite. (The remaining 37 per cent are neutral.) This fits better with publicly reported criticism of the ACCC's proactive approach to publicity, which was particularly notable during the Chairmanship of Professor Allan Fels.. Our qualitative interviews reveal that many lawyers and business people who have had direct experience of ACCC enforcement action believed that the ACCC 'often use[s] a sledgehammer to crack a nut' and might sometimes 'bring cases just to attract publicity'.⁵⁹ At least some respondents to our survey told us that they still think of the ACCC as a place where there is 'little real world understanding of what is going on in various industries', and '[s]calps come first, second and all the way to last'.⁶⁰ If these very negative opinions were representative of general business views of the ACCC, we might expect the ACCC's rating on caring more about productivity than publicity to be even lower than it is. It may be that by 2004–05 when our survey was conducted, business felt that with the departure of Professor Fels the ACCC was changing its attitude towards publicity, and therefore did not rate the ACCC as poorly as they might otherwise have done.

⁵⁸ The remaining proportion of the respondents in each case chose the neutral option of 3 on a scale from 1 to 5.

⁵⁹ Christine Parker, Interview with anonymous lawyer (Perth, 25 February 2003). See also Parker and Stepanenko, above n 40, 57–9; Parker, 'The "Compliance" Trap', above n 40, 606–8.

⁶⁰ One (anonymous) respondent's response to an open-ended question in the survey. An open-ended question at the end of our questionnaire asked '[i]f your organisation has any comments about the ACCC which you would like to add, please write them below.' All of the responses to this question are reported in Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 268–78.

Accommodating behaviour

Our respondents' opinions of how accommodating is the ACCC are concerned with how they assess the willingness of the ACCC to help them comply with the law, and whether they see the ACCC as willing to tailor sanctions for any breaches to suit each company's attitude and circumstances. Accommodating behaviour on the part of a regulatory enforcement agency is often seen as an important aspect of a regulatory style that uses social influence with businesses to facilitate and persuade them to voluntarily comply.⁶¹ In our qualitative interviews, many lawyers who were experienced in acting for clients against the ACCC report cases where they felt that the ACCC had not been sufficiently accommodating: a number of lawyers interviewed cite cases where they believed that the ACCC had barely cooperated at all with alleged offenders in trying to reach a settlement. Rather, it is said that the ACCC preferred to institute proceedings immediately if the alleged offender did not accede to all the ACCC's demands. In relation to one ACCC investigation the lawyer tells us that they had repeatedly phoned the ACCC asking for information, but the ACCC refused to meet with them for six to eight months. When the Commission did agree to a meeting, '[t]hey came prepared with the draft statement of claim ... and said either roll over or we'll institute proceedings. So it was adversarial from the start and handled through the media from the start.'⁶² Another lawyer criticises the ACCC for insisting on an admission that a certain client had engaged in misleading and deceptive advertising as well as various remedies for the alleged misconduct. Even though the company withdrew the product from sale and offered to implement compliance initiatives, the ACCC continued proceedings since the business refused to formally admit liability.⁶³ Another lawyer comments that '[w]e never had a case where a company has got any credit from the ACCC for a compliance program ... All you get is ACCC people criticising the compliance program and they are very simplistic criticisms ...'⁶⁴

The survey results, however, show that on average large Australian businesses are more positive than negative about how accommodating the behaviour of the ACCC is with a mean rating of 3.25 on a scale from 1 to 5. One of our survey respondents gives a very good example of how the ACCC's accommodating behaviour positively influenced their compliance with the TPA:

Following our incident [in specified year] we have not had any serious incidents concerning the TPA. We share a very positive and constructive relationship with the

⁶¹ See Braithwaite, *Restorative Justice and Responsive Regulation*, above n 29, 30–4; Bridget M Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11 *Law and Policy* 153; Robert A Kagan, 'Regulatory Enforcement' in David H Rosenbloom and Richard D Schwartz (eds), *Handbook of Regulation and Administrative Law* (1994) 383, 387–90; Peter J May and Raymond J Burby, 'Making Sense Out of Regulatory Enforcement' (1998) 20 *Law and Policy* 157; Peter J May and Robert S Wood, 'At the Regulatory Front Lines: Inspectors' Enforcement Styles and Regulatory Compliance' (2003) 13 *Journal of Public Administration Research and Theory* 117; John T Scholz, 'Managing Regulatory Enforcement in the United States' in David H Rosenbloom and Richard D Schwartz (eds), *Handbook of Regulation and Administrative Law* (1994) 423, 441–6.

⁶² Christine Parker, Interview with anonymous lawyer (Sydney, 1 April 2003).

⁶³ Christine Parker, Interview with anonymous lawyer (Melbourne, 13 September 2003). For further examples of these criticisms from the qualitative interviews, see Parker and Stepanenko, above n 40, 53–7. See also n 85 and n 86 below and accompanying text.

⁶⁴ Parker, Interview with anonymous lawyer, above n 62.

ACCC. We have found them knowledgeable and willing to listen to our position. With the few inquiries [from the ACCC] that we have had since the early 1990s, we have not received any adverse comment or been subject to further action. We believe that while it was a breach that brought our company to the ACCC's attention, since 1990 we have shown the Commission that we are a compliant company and that we are a good corporate citizen. We have found that the ACCC works with us to resolve issues.⁶⁵

Some of the qualitative interviews indicate that lawyers and their clients interpreted unaccommodating behaviour by the ACCC as unfair. Among the survey respondents, we find that the items measuring opinions about procedural and substantive justice of the ACCC (shown in Table 1) are quite distinct from the items measuring opinions about how accommodating the ACCC is. But the two sets of items do correlate with one another (Table 2). Businesses' perceptions of the ACCC as accommodating and as procedurally and substantively just are therefore separate, but related. This finding fits the predictions of John Braithwaite's responsive regulation theory that where regulators try more persuasive enforcement methods before moving to more punitive mechanisms, regulatees will see the use of coercive control as more legitimate and fair.⁶⁶

Likelihood and severity of ACCC enforcement action

The likelihood and severity of ACCC enforcement action measure includes a range of factors that are generally theorised to affect people's perception of the level of deterrence exercised by a regulatory agency. It includes items measuring the perceived 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 in use.⁶⁷

Most respondents perceive the likelihood and severity of ACCC enforcement action as fairly high, if they breach the *TPA*. However, the items that relate more to the ACCC as an institution, and less to what it actually does in enforcement, garner lower responses: most respondents see the resources and capacity of the ACCC as fairly low.⁶⁸

Despite the fact that the sanctions that were available under the *TPA* at the time of the survey were widely seen as inadequate by commentators and policy-makers,⁶⁹ the

⁶⁵ Anonymous response to an open-ended question at the end of our survey. See above n 60.

⁶⁶ Braithwaite, *Restorative Justice and Responsive Regulation*, above n 29, 33.

⁶⁷ More formal economic-style modelling of deterrence usually *multiplies* businesses' (perception of the) chance of being caught by the chance of being prosecuted and found guilty and by the severity of the sanction if prosecuted. We have chosen instead to *add* these items into an index. We see all these items (as well as others that were included in our questionnaire and are not reported here) as potentially involving different dimensions of the business perception of deterrence and therefore find the multiplicative model described above as too simplistic to deal with the range of elements that might effect deterrence.

⁶⁸ There were lower responses for the items asking the businesses for the extent to which they agreed that 'it is hard for the ACCC to find out when organisations breach the law' and 'in light of the size and complexity of their task the ACCC has few resources'.

⁶⁹ The sanctions available under the *TPA* were up to \$10 million for corporations and \$25 000 for individuals. But the sanctions actually in use were much lower: David Round, John Siegfried and Anna Baillie, 'Collusive Markets in Australia: An Assessment of the Economic Characteristics and Judicial Penalties' (1996) 24 *Australian Business Law Review* 292, 298. The penalties levied in three cartel cases are demonstrated to be inadequate

majority (61 per cent) of businesses agree that 'the ACCC has a wide range of effective sanctions against non-complying organisations'. Similarly, despite the fact that the ACCC is an essentially reactive regulator engaging in very little monitoring of compliance activity, 55 per cent of respondents disagree that the chances of the ACCC catching them if they breach the *TPA* are slight. The majority (73 per cent) also disagree or strongly disagree that '[i]f we were caught by the ACCC in breach of the *TPA* the prospects of ACCC enforcement against the organisation are slight'.⁷⁰

The qualitative interviews suggest that many larger businesses and their lawyers still saw the very large increase in penalties that had occurred in 1993 as a significant factor in their estimation of the deterrent effect of the ACCC. As one lawyer interviewed comments, '[p]eople still raise an eyebrow when we remind them of \$10 million penalties'.⁷¹

It may be that the respondents to our survey perceive the threat of being caught, and the severity of the consequences as greater than they really are. In one area, cartel offences, the Organisation for Economic Cooperation and Development ('OECD') estimates that as few as one in six or seven cartels are detected and prosecuted. More generous estimates put it at one in three.⁷² Other breaches of the *TPA*, such as misleading and deceptive advertising, are more public than cartels and therefore may be much more likely to be discovered. 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. Regardless of the real likelihood and severity of enforcement action, it is regulatees' perception of the likelihood and severity of prosecution and criticism that will motivate their actions, according to deterrence theory. It may be sufficient for a regulator to project an 'image of invincibility', even if it is rarely put to the test, in order to improve business compliance.⁷³

according to deterrence theory in Parker, 'The "Compliance" Trap', above n 40, 597. For criticism of the deterrence impact of the previous sanctions and recommendations for new higher sanctions, see Trade Practices Act Review Committee, above n 1, 161–5 for. As of 1 January 2007, the penalties available are up to three times the benefit received by a corporation because of their breach, or 10 per cent of annual turnover if the benefit cannot be determined, and \$500 000 for individuals: *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth). The Federal Government has also committed to introduce criminal sanctions for breaches of the price-fixing provisions to increase the deterrent threat even further: Peter Costello, 'Criminal Penalties for Serious Cartel Behavior' (Press Release No 4, 2 February 2005) <<http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>> at 14 January 2007. See also Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 *Deakin Law Review* 141.

⁷⁰ Again of course it might be argued that it would be preferable for deterrence to have much closer to 100 per cent of businesses disagreeing or strongly disagreeing with the statements quoted above.

⁷¹ Christine Parker, Interview with anonymous lawyer (Sydney, 3 April 2003). See Parker and Stepanenko, above n 40, 43–6 for further evidence from the qualitative interviews of the deterrent impact of the ACCC.

⁷² Organisation for Economic Cooperation and Development, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) 27.

⁷³ See Braithwaite, *Restorative Justice and Responsive Regulation*, above n 29, 119–22.

The survey results show that, the larger the business, the more likely and severe the assessed threat of ACCC regulatory enforcement (see Table 1). This might reflect the fact that large businesses feel that they are more likely to be targeted for enforcement action by the ACCC.⁷⁴ In the few years before our survey there had been a widespread perception among business lawyers and large business that the ACCC targets cases involving larger businesses, partly because these cases are likely to attract more publicity.⁷⁵ Certainly the ACCC has had a policy of prioritising cases where there is a significant public detriment, there appears to be substantial damage to competition, or successful enforcement would have a significant deterrent or educational effect.⁷⁶ This policy may well mean that the ACCC is often more likely to target larger businesses for enforcement, and large businesses' perception that they are more vulnerable to enforcement may reflect reality.

Procedural and substantive justice

The procedural and substantive justice index measures how the respondents assess the ACCC's treatment of individual businesses in its investigations, enforcement action and other regulatory decision-making. Most of the items in this index deal with the *procedural* justice shown by the ACCC in these dealings.⁷⁷ The fourth item, 'most organisations get what they deserve when dealing with the ACCC', is clearly to do with *substantive* justice and the second last item, 'just', could cover either or both procedural and substantive justice.

Business assessments of a regulator's procedural and substantive justice will contribute to normative reasons for complying with the law. Tom Tyler, the leading proponent of procedural justice theory as an explanation for compliance, makes a clear distinction between procedural and substantive justice as distinct (but often mutually reinforcing) in people's perceptions, and in their influence on compliance.⁷⁸ Procedural and substantive justice certainly are conceptually and theoretically distinct. However we have included both procedural and substantive justice in one measure because they are so intertwined in businesses' responses to our survey that there is no statistical indication for separating them, and every reason to include them in one holistic justice measure.⁷⁹

⁷⁴ See discussion under heading '[n]ot biased in targeting' below.

⁷⁵ See above n 59 and accompanying text.

⁷⁶ ACCC, *Summary of the Trade Practices Act 1974* (2001) 10.

⁷⁷ See above n 24, and accompanying text on the meaning of 'procedural justice' in this context.

⁷⁸ In Tyler and Darley, above n 23, 723–4, 736, a distinction is made between the extent to which people voluntarily defer to law because it accords with people's sense of morality and the extent to which they voluntarily defer because legal authorities are seen as legitimate (based on assessment of the authority's procedural fairness). Tyler finds that the two reinforce each other, but are not the same thing; at 725–6. Tyler, *Why People Obey the Law*, above n 24, distinguishes between people's assessments of the distributive (substantive) justice and procedural justice of authorities' decision-making – finding procedural justice to be more significant in building legitimacy and therefore compliance.

⁷⁹ The Cronbach's Alpha for the whole index of procedural and substantive justice would drop from 0.886 to 0.881 if we excluded 'most organisations get what they deserve' from the measure. The Cronbach's Alpha would drop from 0.886 to 0.865 if we excluded 'just' from the measure. Furthermore, 'most organisations get what they deserve' and 'just' are equally

But while our statistical analyses do not give us any strong indication that our respondents assess the ACCC's procedural justice differently from its substantive justice, it is very clear that their assessments of the ACCC's procedural and substantive justice are completely unrelated to their opinions of the ACCC's deterrent power. Indeed all our other measures of respondents' opinions of the ACCC, apart from respondents' perception of the likelihood and severity of ACCC enforcement action, do correlate to procedural and substantive justice, making the distinction between respondents' opinions of the ACCC's level of deterrence and the ACCC's procedural and substantive justice all the more stark. As Tyler argues, there does seem to be a complete contrast between these two types of thinking in relation to business perceptions of the ACCC.

The businesses have a fairly neutral opinion about the ACCC's level of procedural and substantive justice, with many rating the ACCC at the neutral mid-point of the scale from 1 to 5 in relation to the items in this index. The most agreed with statements in the index are that the ACCC is 'fair' (50 per cent agree and 14 per cent disagree), 'just' (42 per cent agree and 12 per cent disagree), and that 'decisions made by the ACCC are based on facts' (42 per cent agree and 17 per cent disagree). For none of these does the ACCC receive a ringing endorsement. The least agreed with statements are that 'most organisations get what they deserve when dealing with the ACCC' (23 per cent agree and 14 per cent disagree) and that 'the procedures of the ACCC are transparent' (24 per cent agree and 26 per cent disagree). The statement that least respondents agree with (23 per cent), and that most respondents actively disagree with (31 per cent), is that the ACCC 'treats Australian organisations as trustworthy', a factor considered very important in previous scholarly research and writing on procedural justice.⁸⁰

The lack of a very positive rating for the ACCC on procedural and substantive justice is not very surprising, given the fact that much business criticism of the ACCC has focused on the ACCC's fairness, especially in relation to its use of publicity, but also in relation to the process it uses for providing its opinion on whether prospective mergers would breach the *TPA* or not.⁸¹ The ACCC under Alan Fels was criticised for using the media to announce investigations before proceedings were instituted, publicising the commencement of proceedings in court before matters were concluded,

as highly correlated with each of the other variables as the other variables are correlated to each other.

⁸⁰ See the contributions to Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (1998); Murphy, 'The Role of Trust in Nurturing Compliance', above n 24. Note that the remaining proportion of respondents in relation to each of the statistics quoted were neutral about the relevant statement.

⁸¹ See above n 7. But it should be noted that if not all businesses are very positive about the ACCC's level of procedural and substantive justice, their assessment of the ACCC in this area is not actively negative. Nevertheless the open-ended question at the end of our survey (see above n 60) did receive some positive responses about the fairness of the ACCC. For example: 'We have only had one experience with the ACCC and have found them fair not only to the consumer but to our business. Their judgments were based on facts and they seemed to keep an open mind on all the circumstances surrounding the complaint.'

and making statements that lacked 'balance and objectivity'.⁸² These were seen as a 'denial of natural justice' with people 'labelled as guilty before they have a chance to respond'.⁸³ The lawyers interviewed for the qualitative part of the study also indicate that they felt that businesses often received higher sanctions from ACCC enforcement action than they deserved, partly because breaches of the *TPA* were, according to the lawyers, 'inadvertent' and not 'contumelious', partly because of the adverse publicity that went with ACCC enforcement action, and partly because the ACCC usually required businesses to put in place expensive compliance systems as a response to their breach.⁸⁴

In our qualitative interviews, lawyers also criticise the ACCC for being 'unreasonable' and therefore 'unfair' in its approach to enforcement by refusing to settle matters without the alleged offender admitting that they had breached the law in the ways alleged by the ACCC; demanding 'over the top' conditions in settlement agreements; inappropriately issuing court proceedings when the alleged offender and their lawyer believed a cooperative resolution without court action should be possible; and a generally uncooperative or demanding manner in discussing the resolution of enforcement action with alleged offenders.⁸⁵ These are all behaviours that could be described as unaccommodating, but were also interpreted by interviewees as unfair.⁸⁶ Not surprisingly then there is a significant positive correlation between respondents' opinions of how accommodating the ACCC is and how procedurally and substantively just it is (Table 2).⁸⁷

⁸² Trade Practices Act Review Committee, above n 1, 182. The Dawson Review also commented that the 'ACCC's use of the media was one of the issues most frequently raised with the Committee', with the complaint made that the ACCC's use of publicity amounted to a 'trial by media' that denied natural justice: at 182. For further examples of criticisms of the ACCC's allegedly unfair use of publicity from our qualitative interviews and in relation to specific cases, see above n 59 and accompanying text.

⁸³ Quotation from Dick Warburton, a high profile company director, then Chairman of Caltex and David Jones, reported in Kitney and Murphy, above n 4. See also Jill Margo, 'Dick: The Brick Thrower', *The Australian Financial Review* (Sydney), 8 June 2002, 24. The Australian Chamber of Commerce and Industry ('ACCI') has also complained that 'business goodwill is being undermined merely on the basis of suspicions held by the regulator': Lyndon Rowe (Acting Chief Executive of the ACCI), 'Business United Against Stronger ACCC', *The Australian Financial Review* (Sydney), 14 May 2002, 71.

⁸⁴ Summary of comments made in the following interviews: Parker, Interview with anonymous lawyer, above n 59; Christine Parker, Interview with anonymous lawyer (Melbourne, 29 August 2002).

⁸⁵ For example, one business claimed that the ACCC 'did not allow it time to put its side of the story...'. Their solicitor was reported saying that '[t]he ACCC was not prepared to listen to what we had to say. It was as if our client was guilty until proven innocent': Jason Clout, 'ACCC Acted Unfairly, Franchisor Alleges', *The Australian Financial Review* (Sydney), 13 July 1999, 40.

⁸⁶ Note that respondents' assessments of how reasonable the ACCC is was an item in the procedural and substantive justice measure (see Table 1). We have already seen that respondents' views of how accommodating the behaviour of the ACCC is and the ACCC's procedural and substantive justice are positively and significantly correlated (see Table 2): see above n 66 and accompanying text.

⁸⁷ See above n 66 and accompanying text.

Not biased in targeting

The 'biased in targeting' index relates to the extent to which the ACCC is perceived to be biased against big organisations for enforcement action. This is likely to be seen by business as a particular aspect of the fairness shown by the regulator and thus contribute to normative reasons for compliance and non-compliance. There was some suggestion in our qualitative interviews and in publicly reported criticism of the ACCC that the ACCC might target large organisations for enforcement action in order to collect high profile 'scalps' that will garner significant publicity for the ACCC. As one lawyer interviewed commented:

[XX client] has a view that they are a target for the ACCC because of their size. There is a view that the ACCC would like to get a conviction against certain big companies like [XX, YY, ZZ] – that there are some prize scalps the ACCC would like to get.⁸⁸

On the other hand, it has also been suggested that the ACCC targets smaller organisations that are not as able to defend themselves in order to get easy scores.

The mean score for this measure was around the middle of the scale (at 3.03 on a scale of 1 to 5). Respondents' ratings of whether the ACCC is not biased in targeting do not correlate with size.⁸⁹ There is no indication that either larger or smaller businesses feel more that there is a bias in targeting – despite the fact that, as we have already seen, larger businesses estimate the likelihood and severity of ACCC enforcement action as greater than smaller businesses.

It is no surprise that perceptions of the ACCC's lack of bias in targeting correlate significantly and positively with all of the other five dimensions of opinion (except opinions about the degree to which the ACCC is accommodating) (see Table 2).⁹⁰ If the ACCC is seen as being more biased in targeting large organisations, they are likely to be acting with less procedural and substantive justice and in a more dogmatic, less flexible way.

The significant correlation between perceptions of the ACCC lacking bias in targeting and the likelihood and severity of enforcement action means that the more the businesses see the ACCC as biased in targeting the lower they rate their own risk of being caught and facing serious enforcement action for breaches. This is logical in the sense that, to the extent that respondents believe that everybody is equally likely to be caught by the ACCC (rather than the ACCC just targeting big business), the higher they should estimate their own risk of being caught. A similar logic would apply to the significant correlation between seeing the ACCC as lacking bias in targeting and seeing the ACCC as strategically sophisticated – the more strategically sophisticated the ACCC in the eyes of business, the less likely they are to see it as prioritising enforcement action simply by a bias on the basis of size of the alleged offender. Sophistication involves more complex decision-making criteria about enforcement action.

⁸⁸ Parker, Interview with anonymous lawyer, above n 62. See also above n 59 and accompanying text, and above n 76 and accompanying text.

⁸⁹ See Table 1 above.

⁹⁰ There is no logical connection between being biased in targeting on the basis of size and being accommodating, so the lack of any significant correlation here is not surprising.

Undogmatic

The survey respondents are most negative about how undogmatic the ACCC is. Their average rating for this set of opinions is below the mid-point on the scale (at 2.62 on a scale of 1 to 5).⁹¹ Like the procedural and substantive justice measure and the accommodation measure, the undogmatic measure is concerned with the way the ACCC treats individual organisations. But with the undogmatic measure the focus is not so much on respondents' normative assessment of the procedural and substantive justice of the ACCC, but rather on their perception of the way the ACCC relates to business. The focus is on the flexibility or intractability of the ACCC's opinion of, and enforcement strategy in relation to, businesses. Therefore, as with perceptions of accommodating behaviour by the ACCC, perceptions of the ACCC's lack of dogmatism would primarily contribute to the social influence of the ACCC in motivating compliance. Do businesses believe that once the ACCC forms a bad opinion of an organisation and its compliance with the law, that the ACCC is willing to change its mind and revise its opinion? Or do businesses believe that the ACCC will stigmatise their organisation, treating them as bad because of what they have done, perhaps even using publicity to shame the business? Once the ACCC has made an initial assessment that a business has committed an offence, does it see taking that business to court as the only possible course of action, or are they willing to listen to the business consider other possibilities? Will the ACCC retaliate stubbornly and single-mindedly if they perceive an organisation as failing to cooperate with them, or will they reconsider whether their own opinion of the business and its conduct is correct where a business decides not to cooperate?⁹²

The relatively negative opinion of the ACCC on this index shows that some of the criticisms of the ACCC made by business leaders in 2002–2003 and quoted in the

⁹¹ This is true for each individual item in the measure also, as shown in Table 1. A disproportionate number of respondents fall on the negative side of the index rating how undogmatic the ACCC is, but meanwhile a fairly large group is also clustered around the middle of the index.

⁹² Two of the items on this measure — '[d]oes not fight back if an organisation is non-cooperative' and '[n]ot keen on taking organisations to court' — are ambiguous as to whether they are measures of lack of dogmatism or simply measures of whether the ACCC is perceived as likely to take serious enforcement action (perhaps reflected in the lower Cronbach's Alpha of 0.57 for this measure). We have interpreted those two items as relating, at least partially, to businesses' perceptions of the flexibility that the ACCC demonstrates in the way it chooses to enforce the law in individual cases. These questions were placed on the questionnaire with the positive version on the left hand side and the negative version (shown in Table 1) on the right hand side. In the context of the ACCC and the way it has been criticised in the media (as reflected in our qualitative interviews and the quotations cited in the text above), to the extent that businesses agree that the ACCC is 'keen on taking organisations to court' or 'fights back if an organisation is non-cooperative' we interpret our respondents to be saying that the ACCC has an inflexible, stubborn approach to enforcement strategy in individual cases. Placing these two items in the measure of 'undogmatic behaviour' was supported by our statistical analysis as shown in Table 1 (see also accompanying explanation). Taking these two items out of the measure of undogmatic behaviour did not change the correlations reported in Table 2. Individually the two items do correlate significantly and negatively with opinions on likelihood and severity of ACCC enforcement action (as does the whole measure of undogmatic behaviour as shown in Table 2).

introduction to this paper were widely shared by respondents to the survey. These opinions are also reflected in some of the responses to the open-ended question about the ACCC in the survey and in our qualitative interviews with lawyers about their clients' experiences of the ACCC:

The ACCC would have made the Nazis in WW2 Germany look like sissies from where we sat in our brief altercation with them. They were heartless and in many ways brainless in the way they spent public monies to bastardise our small company. In the end they admitted that they didn't really want to "get us". They wanted to get at our client who is a well known national company that Fels wanted to get his teeth into.⁹³

The company is being stigmatised by ACCC as an entity with monopoly power ... so everything we do is scrutinised closely. It makes them check and double check everything with lawyers ... Things that are efficient and good for the company will never happen because the ACCC will never let them through.⁹⁴

[The ACCC] don't take the commercial advice. They don't weigh up the costs of taking action. They just run the case ... with the ACCC, you know that if they say they are going to litigate something, they will. A commercial litigant might cave in and settle when it gets near court and the costs start going up ...⁹⁵

We might expect that respondents' opinions about how undogmatic and how accommodating is the ACCC would fit together. We would expect that a regulatory agency with more flexible, less dogmatic opinions about businesses and about what enforcement strategy to pursue in each case would also be more accommodating in helping businesses comply, and in tailoring sanctions to suit business. But our statistical analysis makes it clear that these are two quite separate dimensions of opinion of the ACCC (as shown in Table 1). There is no correlation between the two indices (neither positive nor negative — see Table 2). Just because a respondent sees the ACCC as accommodating does not mean that they will see it as undogmatic. Opinions of how accommodating is the ACCC, on our measure, relate to how willing the ACCC is to facilitate compliance by regulatees that are cooperative.⁹⁶ Our measure of the dogmatism of the ACCC, however, relates to the rigidity and legalism of the ACCC's enforcement reaction to those who it sees as breaching the law and not cooperating with it.⁹⁷

As we might expect, the more respondents view the ACCC as dogmatic, the more highly they also estimate the likelihood and severity of ACCC enforcement action (see Table 2): being dogmatic suggests that the ACCC takes an uncompromising approach to enforcement action. On the other hand, the more the respondents see the ACCC as undogmatic, the more highly they rate the ACCC on procedural and substantive justice and on strategic sophistication. This suggests that, paradoxically, dogmatic behaviour by a regulator might be an advantage in projecting an image of invincibility to increase deterrence, but a disadvantage when a regulator is trying to build up

⁹³ Response to the open-ended question at the end of the survey. See above n 60.

⁹⁴ Christine Parker, Interview with anonymous lawyer (Melbourne, 12 December 2002).

⁹⁵ Christine Parker, Interview with anonymous lawyer (Melbourne, 24 August 2002).

⁹⁶ Similar to May and Wood's dimension of 'facilitation' in regulatory enforcement style ('the willingness of inspectors to help regulatees and be forgiving'): May and Wood, above n 61, 119.

⁹⁷ More consistent with May and Wood's concept of 'formalism' ('the rigidity with which the rules are interpreted and applied'): *ibid.* See also the comments on how we interpret the items in this scale at above n 92.

normative commitment to the law by demonstrating that it acts in a procedurally and substantively just and strategically sophisticated way.

This demonstrates how difficult it would be for a regulator to behave in a way that appeals to all three of the different types of motivations for compliance at the same time (as proposed by responsive regulation). A regulator might take a tough and uncompromising stance on rule-breaking in order to make a credible deterrent threat and direct regulatee's attention to the moral seriousness of breaches of the rules. But this can quickly be interpreted by regulatees as overly coercive and overbearing. Appealing to calculative motivations by being tough can therefore backfire and break down normative and social commitments to compliance.⁹⁸

This puts an agency like the ACCC in a tricky position in deciding how flexibly to behave. The ACCC has had particular trouble in drawing the balance satisfactorily in relation to the use of publicity. On the one hand publicity that communicates the moral seriousness of breaches of the *TPA* and the severe penalties that are available is a useful way to draw business attention to the deterrent and punitive threat of ACCC enforcement action and the need to take compliance seriously. On the other hand such publicity can stigmatise the offenders named and make the ACCC appear harsh and unfair. Similarly, it has been very difficult for the ACCC to get the balance right in deciding when to settle cases and when to take them to court for authoritative determination.⁹⁹ On the one hand, if it settles matters it can be criticised for taking the law into its own hands and failing to give the courts the opportunity to develop the law through precedent so that the application and interpretation of the law will be clearer for all. On the other hand, when it does not settle matters, it is criticised for lack of flexibility and for using individual businesses for 'test cases'.¹⁰⁰ A regulator is seen as unfair and unsophisticated when it insists on seeing breaches as morally serious matters that must be dealt with publicly, rather than being willing to privately negotiate settlements. But on the other hand it is not taken seriously, and may be viewed as insufficiently transparent and accountable where it deals with most matters informally.

⁹⁸ Winter and May, 'Motivation for Compliance with Environmental Regulations', above n 18, 679. A series of empirical studies in various areas of regulation have shown that when regulators are perceived as unreasonable or unresponsive to those who they regulate, this can break down the good will and motivation of those that were already willing to comply: John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985); Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982); Toni Makkai and John Braithwaite, 'Reintegrative Shaming and Regulatory Compliance' (1994) 32 *Criminology* 361; Murphy, 'Procedural Justice', above n 24.

⁹⁹ The ACCC's practice of refusing to settle matters, without the offender agreeing to court declarations (by consent) that they have breached the law (or more rarely the offender making admissions that they breached the law in an enforceable undertaking) was particularly contentious for some of the interviewees: 'The Commission is obsessive about getting declarations of guilt. In Part IV matters the clients would deny all and offer undertakings and the Commission would still demand a confession ...' (Parker, Interview with anonymous lawyer, above n 71).

¹⁰⁰ Parker has previously discussed these difficulties in more detail in 'The "Compliance" Trap', above n 40.

3. Are business opinions of the ACCC based on experience of the ACCC?

We would expect business interaction with the ACCC to have a significant influence on a business' opinion of the ACCC. Those who have actually interacted with a regulator have the opportunity to develop a more accurate perception of its fairness, strategic sophistication and how undogmatic it is. But, on the other hand, we might also expect a business' opinion of a regulator that it has interacted with to be coloured by the outcome of that interaction — whether it was good or bad for the business. In this section we first consider how interaction with the ACCC, and the outcome of that interaction, affects our survey respondents' opinion of the ACCC. To what extent do their opinions of the ACCC appear to be based on the way the ACCC behaved and to what extent on the substantive outcome, and whether they were happy with it? We go on to compare our respondents' opinions of the ACCC with their opinions of the other three main national business regulators, ASIC, APRA and the ATO.

Does interaction with the ACCC influence businesses' opinion of the ACCC?

Table 3 shows the difference between respondent's opinions of the ACCC according to whether they have had an interaction with the ACCC or not.¹⁰¹ The asterisks in the final column show whether the difference of opinion between those who had and had not interacted with the ACCC is significant or not. The more asterisks the more confident we can be that there is a significant difference.¹⁰²

¹⁰¹ Measured by asking: 'Has your organisation ever — as far back as you have knowledge — had any interaction with the ACCC? By "interaction" we mean both investigations (whether the case was dropped or not), and different kinds of formal or informal discussions about eg applications for authorisation, notification or proposed merger, as a potential consumer, making a complaint or in the context of enforcement activities.' 70 per cent have had no interaction with the ACCC. For those who have had an interaction with the ACCC the most common interactions concerned either being the subject of an investigation or complaint (15 per cent of the total respondents) or mergers and acquisitions, notifications and authorisations (10 per cent of the total sample). For further details see Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 13–15.

¹⁰² Independent Samples T-test for Equality of Means ('T-test'). The T-test compares the mean scores of two groups in relation to a given variable. Here and in Table 3 *** = $p < .001$ (two-tailed sig.); ' ' = not significant.

Table 3: Mean Score for Each Set of Opinions by Whether Respondent had Interacted with the ACCC or Not

<i>Opinion about ACCC in Relation to:</i>	<i>Had Not Interacted with ACCC</i>	<i>Had Interacted with ACCC</i>	<i>Significant Difference</i>
Procedural & Substantive Justice	3.29	2.99	***
Likelihood & Severity of ACCC Enforcement Action	3.08	3.51	***
Strategic Sophistication	3.30	3.21	—
Undogmatic	2.67	2.51	***
Accommodating	3.23	3.27	—
Not Biased in Targeting	3.07	2.93	—

There are significant differences of opinion in relation to three of the sets of opinions. Those who have interacted with the ACCC have a *lower* view of the ACCC's *procedural and substantive justice* and *how undogmatic it is* than those who have not. But they have a *higher* view of the *likelihood and severity of enforcement action*.

It is not surprising that businesses might have a stronger perception of the *likelihood and severity of ACCC enforcement action* if they have actually interacted with the ACCC. The reason for their interaction with the ACCC in the past may well be that the ACCC had complaints about them or investigated and prosecuted a breach. After such an interaction, a business may feel that that they will remain on the ACCC's radar so that any future breaches will likely be discovered and sanctioned by the ACCC. They might even feel they would receive harsher treatment next time. Even if a business is in fact no more likely to be caught or treated harshly than before, the mere fact of having interacted with the ACCC might well have increased the perception of deterrence by bringing the possibility of ACCC action to the forefront of managers' minds. This is consistent with deterrence theory which predicts that a person or firm that has been caught and punished in the past will be deterred from future wrongdoing in proportion with their experience of enforcement in the past ('specific deterrence').¹⁰³

Our results in relation to business opinions about the *procedural and substantive justice* of the ACCC and how *undogmatic* it is are more ambiguous. In both cases, those businesses that had interacted with the ACCC have more negative opinions of the ACCC. There are at least three possible explanations for this difference of opinion. First, the businesses' experience of interaction with the ACCC may have made this group more negative because they gained more knowledge about the way the ACCC actually works — that is, the more negative opinion is based on fact. Or, second, the more negative opinion is because they did not like what the ACCC did in their

¹⁰³ However even if estimation of likelihood and severity of ACCC enforcement is increased via interaction with the ACCC, this does not necessarily mean that respondents' overall calculus of costs and gains of compliance vis-à-vis non-compliance would be tipped more in favour of compliance by interaction with the ACCC. It may be that other costs of non-compliance are seen as lesser as result of interaction with ACCC. See Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 140–2.

particular case — their more negative opinion of the ACCC is biased by their reaction to the outcome of their interaction with the ACCC. Third, these respondents may have always held a more negative attitude towards the ACCC before their interaction with the ACCC, an attitude that might perhaps have contributed to them breaching the law or being investigated by the ACCC and therefore led to them having an interaction with the ACCC in the first place.

It is also worth noting that many of the ACCC interactions reported by respondents related to approaches to the ACCC to request the authorisation of mergers or other potentially anti-competitive conduct.¹⁰⁴ This is an area where the ACCC has been heavily criticised at times for lack of transparency and accountability, for uncertainty in the way it applies the law, and for a commercially unrealistic application of the law.¹⁰⁵ Therefore we tested whether there was a significant difference in opinion of the ACCC between those who had interacted with the ACCC in relation to matters concerning mergers and acquisitions and those whose interaction concerned other matters. The results are shown in Table 4.

Table 4: Mean Score of Opinion about ACCC by Whether Interaction Concerned Mergers and Acquisitions or Not

	Interaction not about Mergers and Acquisitions	Interaction about Mergers and Acquisitions	Significant Difference ¹⁰⁶
Procedural and Substantive Justice	3.29	3.02	***
Likelihood & Severity of Enforcement Action	3.08	3.52	***
Strategic Sophistication	3.30	3.21	—
Undogmatic	2.67	2.52	—
Accommodating	3.23	3.33	—
Not Biased in Targeting	2.93	3.00	—

As Table 4 shows, those whose interaction with the ACCC concerned mergers and acquisitions are more likely to see the ACCC as less procedurally and substantively just and to perceive the likelihood and severity of enforcement action as greater. The lower view of procedural and substantive justice is in line with criticisms that the ACCC exercises great power over whether mergers and acquisitions go ahead through an informal merger clearance process that lacks accountability and transparency. The Dawson Review recommended some adjustments to this process, but also noted 'that the weaknesses of the system are inherent in its informality,' although the Review went on to state that its informality was a strength worth preserving.¹⁰⁷ It is not surprising

¹⁰⁴ See above n 101.

¹⁰⁵ See Trade Practices Act Review Committee, above n 1, 49.

¹⁰⁶ Tested using T-tests. See above n 102 for an explanation of the T-test and the meaning of the asterisks.

¹⁰⁷ Trade Practices Act Review Committee, above n 1, 60-1.

that the likelihood and severity of enforcement action should be seen as high – since businesses almost always seek ACCC clearance for mergers beforehand, the ACCC will know about mergers that go ahead despite informal authorisation having been denied (or not sought) and will therefore be much more likely to take action than in relation to other breaches of the *TPA* that may not even come to its attention.

Do opinions about the ACCC change after interaction with the ACCC?

In order to investigate which explanation for differences in opinion between those who have and have not interacted with the ACCC is most likely to be true, the questionnaire asked those businesses that had interacted with the ACCC (but not necessarily had an ACCC investigation) to rate to what degree they agreed with the statements about the ACCC's procedural and substantive justice, strategic sophistication, how undogmatic and how accommodating the ACCC is *before* their interaction with the ACCC.¹⁰⁸ By subtracting respondents' opinions when filling out the questionnaire from their opinions before the interaction,¹⁰⁹ we obtain a measure of whether or not interaction with the ACCC has changed these businesses' opinions about the ACCC for the better or the worse (shown in Table 5).

Table 5: Difference in Opinions about ACCC Before and After Interaction with the ACCC (N = 266)

Opinion about ACCC in Relation to:	More Positive after Interaction	Has Not Changed after Interaction	More Negative after Interaction
Procedural and Substantive Justice	42.8 %	19.7 %	37.5 %
Strategic Sophistication	47.7 %	28.6 %	23.7 %
Undogmatic	34.4 %	30.9 %	34.7 %
Accommodating	39.3 %	40.1 %	20.6 %

A difficulty with drawing conclusions from these data is that we do not know about the earlier opinions of those who have *not* interacted with the ACCC, and whether they too have changed. That is, we do not know to what degree there might have been a general shift in opinion about the ACCC. Therefore we cannot be sure whether or not the differences in opinion are linked to having interacted with the ACCC or not.¹¹⁰

¹⁰⁸ The questions asked on the questionnaire only allow us to compare opinions before and after interaction with the ACCC in relation to opinions about procedural and substantive justice, strategic sophistication, and how undogmatic and how accommodating the ACCC is. Therefore we can only discuss changes in these four sets of opinions. We are not able to examine more closely whether businesses change their opinion about the likelihood and severity of ACCC enforcement action and the ACCC being biased in targeting as a direct result of their interaction with the ACCC.

¹⁰⁹ Note the responses discussed in the subsections above all related to the time at which the questionnaire was actually filled out; that is *after* any interaction the respondent had had with the ACCC.

¹¹⁰ Another difficulty is that we have measured opinion of the ACCC before interaction with the ACCC retrospectively (that is after the interaction had already occurred). It would have been more reliable to ask the respondents what their opinion of the ACCC was at two

However, one thing is clear. Interaction with the ACCC does not necessarily make business opinion about the ACCC on these four dimensions more negative than it was before. Table 5 shows that for those businesses that did have an interaction with the ACCC, most have a more positive opinion of the ACCC's *strategic sophistication* and how *accommodating* is the ACCC afterwards. A bare majority see the ACCC as more *procedurally and substantively just* after interaction. About equal numbers change their opinion for the better and for the worse in relation to how *undogmatic* the ACCC is after interaction with the ACCC.

Does the outcome of an interaction with the ACCC bias opinions of the ACCC?

The reason that some businesses change their opinion of the ACCC for the better or worse after interaction with the ACCC might relate to whether they are pleased or displeased with the outcome of that interaction. Table 6 shows the proportions of respondents that had an interaction with the ACCC and were pleased, displeased or neither with the outcome of that interaction. Table 7 shows the mean score of how pleased respondents are with the outcome of their interaction with the ACCC by whether their opinions in relation to each of the four dimensions had changed for the better, worse or not changed after the interaction with the ACCC.

Table 6: How Pleased Management of Respondent Organisations are with Outcome of Most Significant Interaction with ACCC (N = 303)

Very Displeased	Displeased	Neither	Pleased	Very Pleased
13%	16%	23%	34%	14%

points in time — both before and after the interaction. However since our survey occurred at only one point in time, this was impossible. Therefore our results in this section should be treated with caution. Nevertheless the fact that the respondents did answer the two questions about their opinion of the ACCC before and after interaction differently give us some confidence that we have reliably measured their change in opinion.

Table 7: Mean Scores of How Pleased Respondents are with Outcome of ACCC Interaction by whether Change in Opinion is Positive, Negative or No Change

Opinion about ACCC in Relation to:	How Pleased are Respondents with the Outcome of Interaction with the ACCC			Significant Difference as to How Pleased Respondents are ¹¹¹
	More Positive after Interaction	No Change after Interaction	More Negative after Interaction	
Procedural and Substantive Justice	3.40	3.39	2.79	***
Strategic Sophistication	3.31	3.37	2.62	***
Undogmatic	3.30	3.31	2.90	—
Accommodating	3.29	3.12	2.98	—

There is a positive correlation between how pleased respondents are with the outcome of their interaction with the ACCC, and how their opinion about the ACCC had changed before and after the interaction in relation to opinions of the ACCC's strategic sophistication and procedural and substantive justice (see Table 7). This suggests that, to the extent that opinions of the ACCC's *procedural and substantive justice* and *strategic sophistication* are based on direct experience, they are influenced by how pleased the respondent was with the outcome of the interaction with the ACCC in their own particular case, and are not necessarily based on an objective view of the ACCC's processes and strategy.¹¹²

However this is not true of respondents' opinions of how undogmatic and how accommodating the ACCC is. As we saw above, about equal numbers changed their mind for the better and the worse about how undogmatic the ACCC is after interaction with the ACCC. The finding in Table 7 suggests that this is based on knowledge of the ACCC gained from their actual experience of ACCC interaction, not just whether they were pleased with the outcome of the ACCC interaction or not. A higher proportion saw the ACCC as more *accommodating* after interaction with the ACCC. The results suggest that this too must be related to their actual experience of the ACCC, as the change is not significantly related to how pleased they are with the outcome of the interaction. Thus it appears that during interactions with our respondents, the ACCC behaved in ways that were more accommodating than the respondents previously believed the ACCC to be. In some cases it behaved in ways that were more dogmatic, and in others less dogmatic, than our respondents would have expected. This finding underlines our comment above that being accommodating and being undogmatic are two separate things. The ACCC is apparently more able to be consistently

¹¹¹ Calculated using One-Way ANOVA. See explanation at above n 56. *** = $p < .001$ (two-tailed sig.); — = not significant.

¹¹² On the other hand it is possible that they took into account these more procedural factors in deciding how pleased they were with the outcome in their own case. A better test might have been if we had asked to what extent the substantive outcome accorded with their self-interest.

accommodating than to be undogmatic in its interactions with business (but even so only 39 per cent saw the ACCC as *more* accommodating after the interaction).

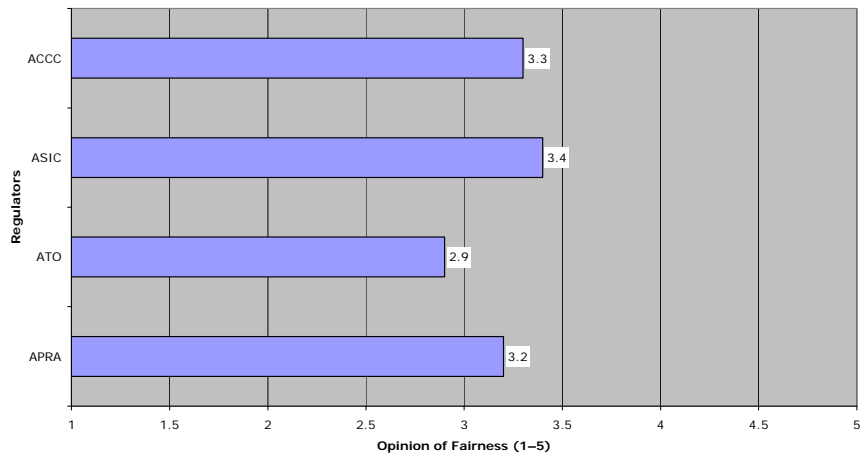
Are business opinions about the ACCC similar to business opinions about other regulators?

It would be overly optimistic to expect that businesses would ever have a very high opinion of any agency that is charged with the task of investigating, prosecuting and sanctioning them for misconduct. It is therefore helpful to compare businesses' opinion of the ACCC with their opinion of the other main national business regulators in Australia.¹¹³ To the extent that businesses' opinion of the ACCC are different to their opinions of other regulators, it is more likely that their opinions about the ACCC are based on unique characteristics of the ACCC, rather than being based on the necessary activities of all business regulators or a generally resistant or dismissive stance towards regulation as an interference with their freedom.

The other main national level business regulators in Australia are ASIC, ATO and APRA. We asked the respondents to rate to what level they agreed with various different positive statements about each of these three national regulators and also the ACCC: that they were 'fair', 'cooperative', 'keen on offering assistance', 'trusting', 'reasonable', and 'understanding and sympathetic'. The results are shown in Figures 1 through 7.

¹¹³ A January 2006 government-commissioned review of regulation (the 'Regulation Taskforce') listed a number of 'allegations' that business submissions to the review had made about the operation of various regulators. These criticisms were similar to those expressed about the ACCC. But by this time the Regulation Taskforce commented that 'there was a particular focus on the financial and corporate regulators', APRA and ASIC. They went on to comment that '[s]imilarly, business strongly criticised the [ACCC] a few years ago for its approach to merger and other regulation, culminating in the Dawson Review, whereas it hardly rated a mention in this review': Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006) 158–9.

**Figure 1: Opinion of ACCC and Other National Regulators on Fairness
(n=897–946)**



**Figure 2: Opinion of ACCC and other National Regulators on Competence
(n=903–948)**

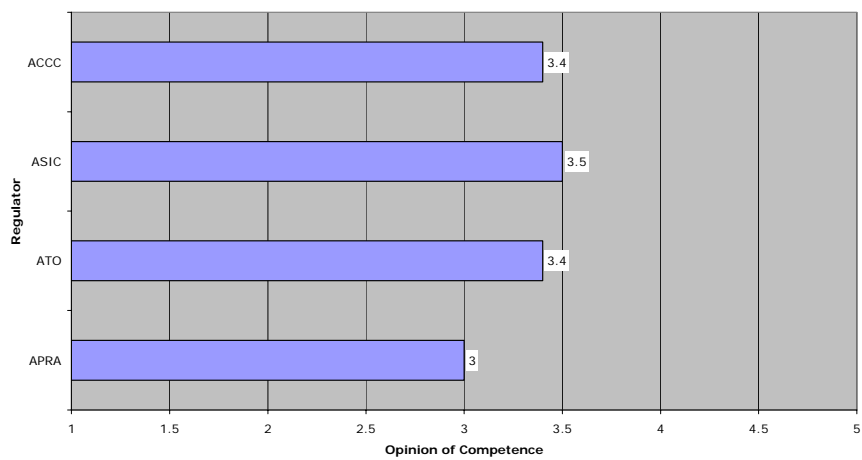


Figure 3: Opinion of ACCC and Other National Regulators on Cooperativeness (n=893–941)

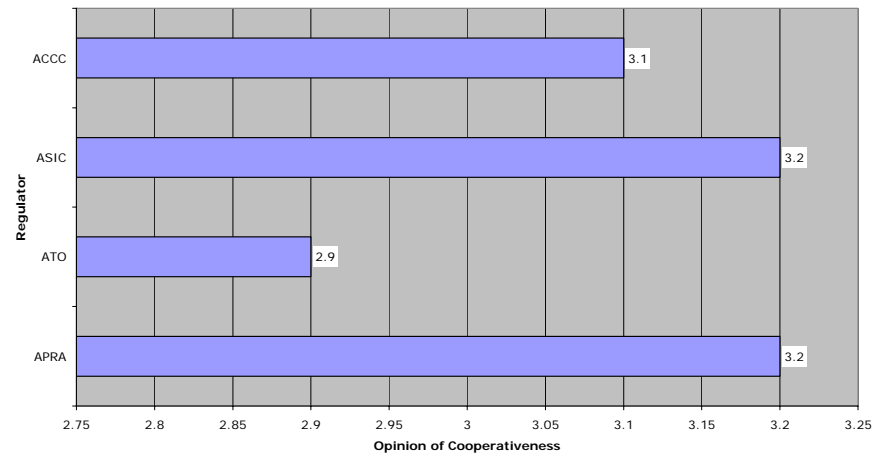


Figure 4: Opinion of ACCC and Other National Regulators on Whether Keen on Offering Assistance (n=890–938)

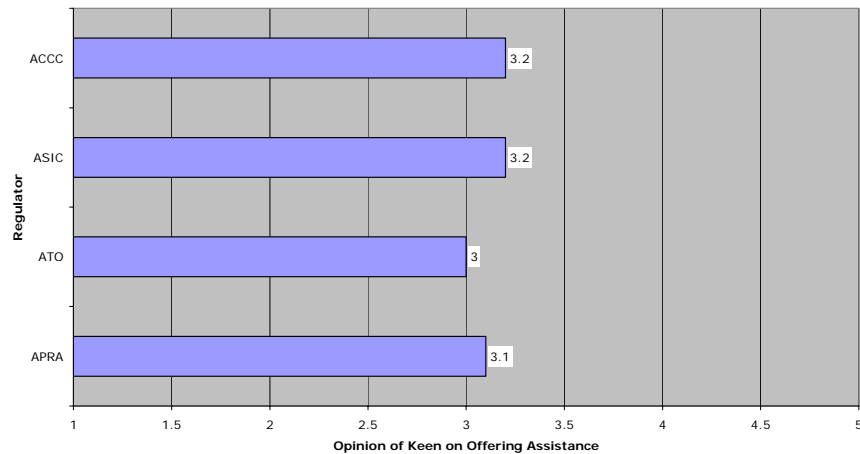


Figure 5: Opinion of ACCC and Other National Regulators on Being Trusting (n=890–934)

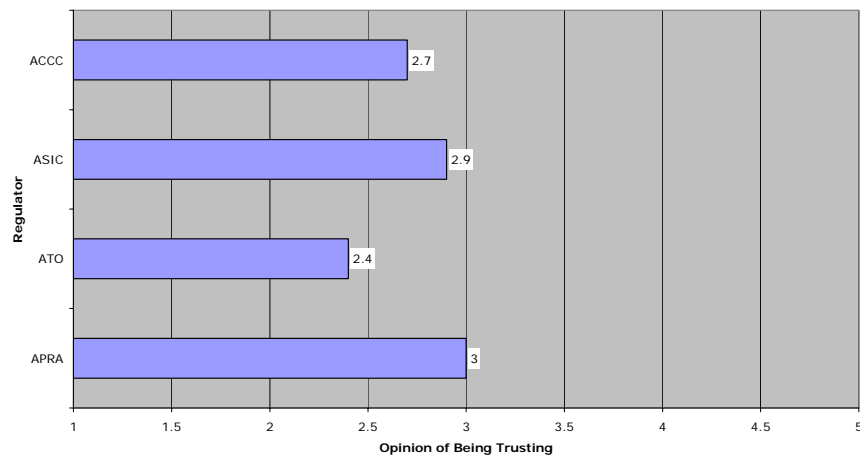


Figure 6: Opinion of ACCC and Other National Regulators on Reasonableness (n=889–937)

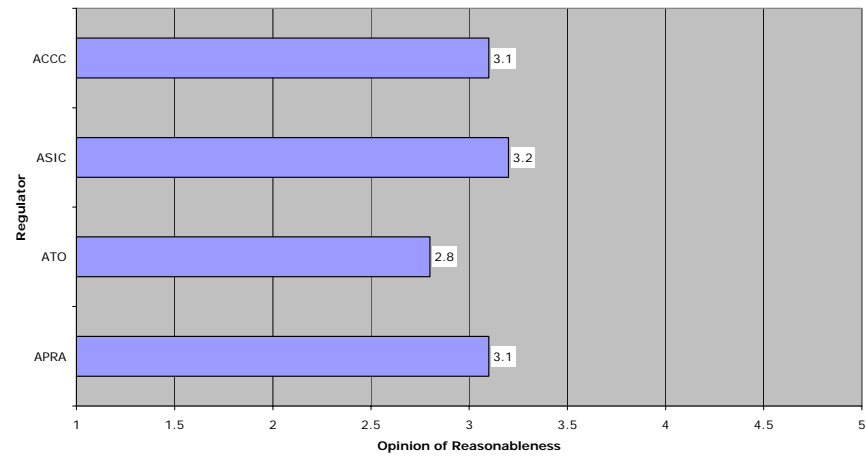


Figure 7: Opinion of ACCC and Other National Regulators on Being Understanding and Sympathetic (n=890–934)

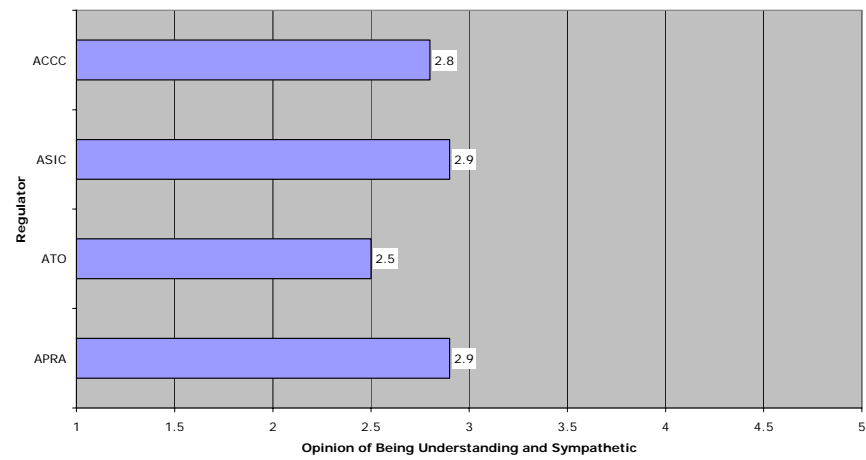
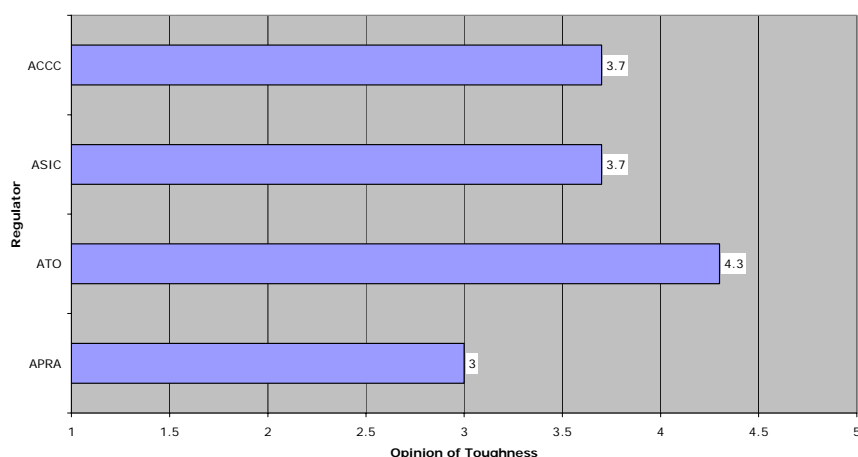


Figure 8: Opinion of ACCC and Other National Regulators on Toughness
(n=900–954)



The ACCC and APRA are the regulators that the respondent businesses rate most positively overall. The ATO was rated most negatively with the lowest mean rating for most statements. The respondent businesses' mean ratings of toughness (on a scale from 1 to 5) for each of the regulators are shown in Figure 8.¹¹⁴ All four are thought to be pretty tough but the ATO is thought to be toughest. This is not surprising given the ATO's record in recent years of enforcement and imprisonment of tax offenders.¹¹⁵ But overall the four regulators are seen as comparable by our respondents on all eight statements, with little variation in the respondent's opinions of the different regulators.¹¹⁶ This suggests that our respondents' opinions about the ACCC reflect their feelings about Australian business regulators in general (setting aside those who have actually had an interaction with the ACCC, as discussed above). They do not necessarily see the ACCC as behaving very differently to other regulators.

However, the dimensions of opinion measured in Figures 1 through 7 were not phrased in exactly the same way as the six dimensions of opinion discussed previously

¹¹⁴ We also checked whether there was any correlation between size of the organisation and their opinion of the toughness of each of the four regulators. Only in relation to the ACCC was there a significant correlation between size and opinion of toughness with a Pearson Correlation of 0.141 significant at the 0.01 level (two-tailed). The other Pearson Correlation statistics were ASIC (0.012), ATO (0.013) and APRA (0.037).

¹¹⁵ For the year to 30 June 2005, the ATO had 158 criminal convictions and 102 jailings from 164 prosecutions in relation to 336 fraud investigations: *Australian Taxation Office, Annual Report 2004-2005*, para. 2.4. See John Braithwaite, *Markets in Vice, Markets in Virtue* (2005), 178.

¹¹⁶ There was no significant difference as to opinion by industry. Nor was there any significant correlation between size and positive opinion of the ACCC, ATO and APRA. However, there was a significant negative correlation between size and opinion about ASIC. The bigger the business, the more negative is their opinion of ASIC. Statistics on file with the authors, and also reported in Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 156–60.

in relation to the ACCC alone.¹¹⁷ Therefore we cannot be sure that there might not have been differences between their view of the ACCC and other regulators if we had asked all the same questions about each of the other three regulators that we asked about the ACCC. In particular, opinions about the strategic sophistication and bias in targeting of the different regulators are not fully examined in the questions reported in Figures 1 through 7. Nor is the distinction between being undogmatic and being accommodating that was clear in our statistical analysis of opinions of the ACCC reflected in these questions about all four regulators, with dogmatism particularly poorly represented.

4. Are opinions about the ACCC related to attitudes towards compliance and motivations to comply?

The relationship between opinions of the ACCC and attitudes towards compliance

In the previous sections we have explored how Australian businesses view the ACCC. But do their views of the regulator affect their attitude to compliance and their actual compliance behaviour? Theories that seek to explain and predict compliance see business opinions of regulators as important because they contribute to people's attitude towards compliance, motivation to comply with the relevant law, and ultimately their actual compliance behaviour.

In this part of the paper we test whether our respondents' opinions of the ACCC do in fact relate to their attitudes towards *TPA* compliance, whether they are committed to compliance or dismissive or resistant to compliance with the *TPA*. Compliance theories hypothesise that regulatees' opinions of the ACCC should influence their attitudes towards compliance and that their attitudes towards compliance should go on to influence their actual compliance behaviour.¹¹⁸

We look at how our respondents' opinions of the ACCC relate to positive attitudes towards compliance with the *TPA* measured in four different ways, and negative

¹¹⁷ This was partly because the questionnaire was very long already and it was not possible to ask all the questions about each regulator that we asked about the ACCC. It is also because the indices for the six opinions for the ACCC were fine-tuned by statistical analysis after the results came in, and therefore well after the questionnaire had been designed.

¹¹⁸ Ideally, we would go on to test what influence opinions of the ACCC and different attitudes towards compliance each have on actual compliance behaviour by our respondents. However, it was impossible to find a reliable, meaningful and practical measure of compliance for this research. Official statistics are bound to be under-inclusive since the ACCC is a reactive regulator that does not monitor or inspect for compliance, and only takes enforcement action in a small fraction of the cases of potential breaches that come to its attention through complaints (let alone all the non-compliance that is never the subject of complaint). Yet self-reported measures of compliance are unreliable especially where one is seeking to measure compliance with a whole piece of legislation that contains prohibitions expressed in broad terms with clear purposes but uncertain applications to particular fact scenarios. For a description and evaluation of the various ways compliance could have been measured in this study, see Vibeke Nielsen and Christine Parker, 'Is It Possible to Measure Compliance?' (Legal Studies Research Paper No 192, Faculty of Law, The University of Melbourne, 2006).

attitudes towards compliance with the *TPA* measured in two ways.¹¹⁹ (The questions used and responses are shown in detail in Table A2 in the Appendix.)

The first positive measure, *TPA compliance values*, measures management's moral commitment to compliance with the *TPA*. The measure is a sum of eight questions (shown in Table A2) reflecting management's beliefs about the desirability of the *TPA* and its policies and feelings of moral obligation to comply with the *TPA*.¹²⁰

The second and third measures of attitude are first, agreement with goals of the *TPA* — consumer protection, fair trading & unconscionable conduct, and second, agreement with goals of the *TPA* — anti-competitive conduct. The object of the *TPA* is stated to be 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (*TPA* s 2). The *TPA* does this by prohibiting a number of different types of conduct that would offend consumer protection or fair trading values, would amount to unconscionable conduct in business, or are anti-competitive. In relation to each major prohibition in the *TPA*, the questionnaire asked respondents to rate how damaging or beneficial to Australian economic wellbeing they believed the type of trading practice prohibited to be. These items were split into the two separate measures. The first includes all the items asking about the consumer protection, fair trading and unconscionable conduct provisions of the *TPA*. The second concerns the provisions of the *TPA* dealing with anti-competitive conduct.¹²¹

The fourth measure of positive attitude is a single item measuring *obligation to obey the law* (also shown in Table A2). This item has been included as a measure of normative motivation to obey the law in general, as opposed to normative commitment to the *TPA* in particular. It was expected that there might be some dissent among business to the substantive values of competition and consumer policy represented in the *TPA*. The single item explicitly asks whether it is believed that people should obey the law 'even if it goes against what they think is right'.

We also included two measures of negative attitudes towards *TPA* compliance. Both are single items measuring respectively resistance towards the ACCC and game-playing (as shown in Table A2). Both of these are motivational postures identified by Valerie Braithwaite and her collaborators in their research on nursing home and tax compliance. Resistance towards the law is about the businesses feeling they should 'fight for their rights' and 'curb' ACCC power.¹²² 'Game-playing' is an attitude where

¹¹⁹ We have drawn on and adjusted Valerie Braithwaite and colleagues' measures of motivational postures for our measure of compliance attitudes: see above n 32 and accompanying text.

¹²⁰ This measure is similar to Valerie Braithwaite's motivational posture of 'commitment': see Braithwaite, 'Dancing with Tax Authorities', above n 31, 18, 20.

¹²¹ Factor analysis showed that the way the respondents answered the question clearly split into these aspects. The Cronbach's Alphas for these two indices are also good, as shown in Table A2.

¹²² Consistent with the motivational posture of 'resistance': Braithwaite, 'Dancing with Tax Authorities', above n 31, 18, 20. However, Braithwaite's measure of resistance also includes items that relate more to beliefs about the regulator such as we have included in Table 1 above.

'law is seen as something to be moulded to suit one's purposes rather than as something to be respected as defining the limits of acceptable activity.'¹²³

Do opinions of ACCC relate to attitudes towards TPA compliance?

Table 8 shows the results of Pearson tests of correlation between respondents' opinions of the ACCC across each of the six dimensions discussed above and their positive and negative attitudes toward TPA compliance.¹²⁴

Table 8: Correlations Between Opinions of ACCC and Attitudes Towards TPA Compliance

Opinion about ACCC in Relation to:	Compliance values	Agreement with Goals of TPA – Consumer Protection etc	Agreement with Goals of TPA – Anti-Competitive Conduct	Obligation to Obey Law	Resist ACCC	Game-Playing
Strategic Sophistication	0.326**	0.089**	0.137***	0.067*	-0.171**	-0.044
Accommodating	0.211**	0.037	0.099**	0.023	-0.035	-0.034
Likelihood & Severity of ACCC Enforcement Action	0.222**	0.057	0.060	0.108**	0.036	-0.201**
Procedural & Substantive Justice	0.281**	0.136**	0.121**	0.034	-0.158**	-0.047
Not Biased in Targeting	0.078*	0.030	0.065*	0.065*	-0.050	-0.064*
Undogmatic	-0.050	0.056	0.028	0.017	-0.063	0.012

Table 8 shows that the more the respondents see the ACCC as *strategically sophisticated*, the more normative commitment to comply they have, across all four measures of positive attitudes towards TPA compliance. Moreover, the more respondents see the ACCC as strategically sophisticated, the less likely they are to have an attitude of resistance towards the ACCC. In order to be viewed as strategically sophisticated, a regulator has to act in such a way that it convinces those watching that it understands business, understands how to translate the legitimate policy goals of regulation into effective enforcement strategies, and is pursuing matters of substance. To the extent that the ACCC has succeeded in convincing businesses that it knows what it is doing in this sense, our results suggest that this should help build up business support for compliance with the TPA.

¹²³ Ibid 19 following Doreen McBarnet, 'When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 229.

¹²⁴ See above n 47 for explanation of Pearson Correlation and meaning of asterisks.

Similarly, the more our respondents saw the ACCC as acting in a *procedurally and substantively just* way, the more they also report their organisations to be normatively committed to *TPA* compliance values, and in agreement with both sets of goals of the *TPA* (competition and consumer protection), and the less likely they are to have an attitude of resistance towards the ACCC. This is consistent with theories that see regulatees' views of the procedural justice and legitimacy of authorities as important in building up normative commitment to comply, and greater compliance in practice.¹²⁵ As one lawyer interviewed commented:

Lawyers have an important role in defending the client's interest and also explaining to the client the legal realities ... That becomes difficult when the Commission develops the reputation for doing things beyond propriety. Clients become resentful but miss the main compliance objective. They do what the ACCC wants but only because they bloody have to. It is not healthy. [Interviewer: what difference does it make in the long term?] You would want people to recognise that compliance is ultimately good business. If they comply with the *TPA* because it has to be done because otherwise they will be trodden over it is unhealthy. There is not a strong link to principles-based compliance. That manifests in all kinds of human behaviour, people are much more difficult to deal with. They are more likely to deny things ... Perhaps at the end of the day the organisation won't be as compliant as it could have been ... They might be more prepared to cut the thin line.¹²⁶

One aspect of our findings however does not align with the predictions of procedural justice theory — there is no significant correlation between perceptions of the procedural and substantive justice of the ACCC and the feeling of having an obligation to obey the law in general. This might be because all our respondents gave a high rating to the obligation to obey the law in general.

Likelihood and severity of ACCC enforcement action is most likely to influence compliance behaviour by making regulatees calculate the costs of non-compliance as greater.¹²⁷ However, we do not look at the relationship between perceptions of the ACCC and calculations of the costs and benefits of compliance with the *TPA* in this paper. On the other hand, compliance theory also suggests that the greater the regulatee's assessment of the likelihood and severity of enforcement action, the more likely this is to backfire into promoting resistance or a game-playing, adversarial attitude towards the law among regulatees.¹²⁸ Contrary to this prediction, we found evidence here of a significant negative correlation between the likelihood and severity of enforcement action and a game-playing attitude — the more our respondents see ACCC enforcement action as likely and severe, the less likely they were to take a game-playing attitude. It may be that, as Valerie Braithwaite and colleagues have suggested, when a regulator exercises strong coercive power, 'fear of retribution means

¹²⁵ See sources cited above n 24.

¹²⁶ Christine Parker, Interview with anonymous lawyer (Sydney, 4 April 2003).

¹²⁷ We do not look at the relationship between perceptions of the ACCC and calculations of the costs and benefits of compliance with the *TPA* in this paper. However our survey did collect data on businesses' perceptions of a range of costs and benefits of compliance and non-compliance with the *TPA*, which we intend to report in a later paper. See Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 41, 119–43.

¹²⁸ See above n 98 and accompanying text.

that they [the regulator] can no longer be dismissed as irrelevant or as a nonsense institution.¹²⁹

There was no significant correlation between our respondents' opinion of the likelihood and severity of enforcement action and an attitude of resistance to the ACCC. Moreover, there was a positive significant correlation between businesses' perception of the likelihood and severity of ACCC enforcement action and their normative commitment to *TPA* compliance values and general obligation to obey the law (but no correlation with agreement with the goals of the *TPA*). This suggests that there is a place for severe enforcement action in building up normative commitment to compliance with the *TPA* – not just in changing calculations about the costs and benefits of compliance (deterrence). Critics of a purely persuasive, accommodative approach to building up voluntary compliance by regulators have argued that the regular use of strong sanctions communicates an important moral message about the value of compliance with business regulation, and that without the use of severe, even criminal, sanctions for breach, business will never become fully committed to compliance because they will not see compliance with business regulation as a morally serious matter.¹³⁰ Our statistical results lend some support to this argument. Our qualitative interviews too suggested that businesses' reaction to 'over'-enforcement by the ACCC was likely to be 'capitulation'¹³¹ to the ACCC's interpretation of the law, or perhaps 'over-compliance', rather than resistance and non-compliance:

Now people are more *TPA* skittish. They have a Trade Practices compliance program and know what they are doing. But they have an abundance of caution. They tend to come and ask you things that they know.¹³²

Certainly, a lot of companies I would deal with will stay on the side of caution because they are afraid of the ACCC.¹³³

The ACCC is quite aggressive in its enforcement and therefore they are effective. It gets people's attention.¹³⁴

¹²⁹ Braithwaite, Murphy and Reinhart, 'Taxation Threat', above n 32, 150. Braithwaite and colleagues had also found in a study of taxpayers' motivational postures that 'higher perceived deterrence was associated with lower dismissiveness [a measure combining disengagement and game-playing]': at 150.

¹³⁰ That is, they will not see the polity and community taking business regulation in a morally serious way: see Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002) 416–18; Parker, 'The "Compliance" Trap', above n 40; Laureen Snider, 'The Regulatory Dance: Understanding Reform Processes in Corporate Crime' (1991) 19 *International Journal of the Sociology of Law* 209; Frank Pearce and Stephen Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (1998).

¹³¹ To use the term that Valerie Braithwaite gives to one of her respondents' possible motivational postures. She defines 'capitulation' as 'acceptance of the tax office as the legitimate authority and the feeling that the tax office is a benign power as long as one acts properly and defers to its authority': see Braithwaite, 'Dancing with Taxation Authorities', above n 31, 18.

¹³² Parker, Interview with anonymous lawyer, above n 71.

¹³³ Parker, Interview with anonymous lawyer, above n 126. This lawyer suggests that clients may simply be spending more money on advice about compliance before taking action in the market and this may be a completely appropriate and desirable response to the potential for ACCC enforcement that enhances compliance.

¹³⁴ Parker, Interview with anonymous lawyer, above n 62.

Consistent with social influence theories of compliance, the more respondents saw the ACCC as *accommodating*, the more likely they were to be committed to *TPA* compliance values and in agreement with the anti-competitive conduct goals of the *TPA*. An accommodating attitude on the part of the ACCC may therefore indeed provide opportunities to build up commitment to the value of compliance.

Consistent with the findings on procedural and substantive justice, to the extent respondents viewed the ACCC as *biased in targeting*, there was less normative commitment to compliance (on all the measures except agreement with the consumer protection goals of the *TPA*). There was also more likely to be a game-playing attitude towards *TPA* compliance suggesting that respondents were less likely to take the ACCC seriously if they thought the ACCC was biased in its targeting.

It will be remembered that respondents overall had the most negative view of the ACCC in relation to the ACCC's *dogmatism*. Respondents' views on dogmatism were, however, not related to any positive or negative attitudes towards compliance. This finding underlines the ambiguity of dogmatic action by a regulator. We would expect perceptions of dogmatism to have contradictory effects on our respondents' attitudes towards compliance depending on the precise context (see discussion above), an expectation that is consistent with the lack of any significant correlations in Table 8.

5 Conclusion

Business complaints about a regulator like the ACCC can result in legislative and administrative reform,¹³⁵ media attention and public critique. It can also lead to less public consequences such as the failure to re-appoint particular Commissioners or failure to promote particular staff members as the result of behind the scenes lobbying.¹³⁶ It is therefore important to be evidence-based about such criticisms – how widely are critical views held? Are they based on fact, or are they just an expression of resentment about being regulated? Our survey gives a more representative picture of business opinion of the ACCC than media reporting and big business lobbying.

We find that on the whole Australian businesses are not as extremely negative about the ACCC as media reports, especially during 2002–03, might have suggested they are. Indeed, the majority of our respondents are moderately positive about the ACCC's level of strategic sophistication and how accommodating the ACCC is. Generally they see the ACCC as an effective regulator that focuses on important problems and is beneficial to the Australian economy. The weakest element of the ACCC's strategic sophistication, according to our respondents, is whether the ACCC cares more about publicity than the productivity of Australian business. Yet it could also be argued that the ACCC's proactive use of publicity is an important element of a sophisticated strategy to improve compliance with the law. We also find that business views of how accommodating the ACCC is are likely to change for the better, rather

¹³⁵ The Dawson Review of the *TPA* was prompted by both big business and small business complaints about the ACCC: Trade Practices Act Review Committee, above n 1.

¹³⁶ Deputy Commissioner Allan Asher, a Labor government appointment, was not re-appointed by the conservative Coalition government, presumably because of the unpopularity of his vigorous enforcement methods. When the former Chair, Professor Allan Fels, announced his imminent retirement, at least one prominent CEO made it clear he was glad to see him go: see above n 5.

than worse, after having direct experience of interaction with the ACCC, a change that we find is probably based on the actual behaviour of the ACCC (not just respondents' feelings about the outcome of the case).

Australian businesses are fairly neutral about the ACCC's procedural and substantive justice and whether it is biased in the way it targets enforcement action towards large vis-à-vis small business. Certainly the ACCC could have rated much more highly in these areas – suggesting that widely reported criticisms of the ACCC in this area do have some support. But at the same time, some of the media reports referred to in the introduction to this paper implied that the ACCC would have been rated a lot more negatively than they were on these dimensions.

Businesses are most negative about the ACCC's dogmatism: they are neutral or negative about whether the ACCC is stigmatising and lacking open-mindedness in its approach to business. Many see the ACCC as having an inflexible preference for taking organisations to court. We also saw that, on most of our measures of opinion, businesses are slightly more likely to change their opinion for the better after the direct experience of interaction with the ACCC. With dogmatism, however, equal numbers are more negative as more positive after interaction with the ACCC, a change of opinion that seems to be based on the actual behaviour of the ACCC (rather than being a perception influenced by the final outcome of the case).

We also find that Australian businesses estimate the likelihood and severity of ACCC enforcement action as reasonably likely and severe, but not extremely high, suggesting that they see the ACCC as wielding an effective deterrent threat, but not as overly tough.

Comparing respondents' opinions of the ACCC with their opinions of the three other main Australian business regulators – ASIC, APRA and the ATO – we found that respondents hold very similar views of all four regulators, except that they see the ATO as tougher than the other regulators. This suggests that the criticisms and challenges the ACCC faces in relation to business perceptions are likely to be similar to those faced by the other regulators. We have not, however, compared opinions of the four regulators on the very specific issues, such as the use of publicity, where the opinion of the ACCC seems to be particularly negative. Moreover, just because opinions of the ACCC are in line with opinions of the other regulators does not necessarily mean that the ACCC operates in an appropriate way. It may be that all four regulators make the same mistakes. For example, the only major, comparative academic study of Australian regulators (published in 1986) found that Australian regulators were uniformly 'of manners gentle', not punitive.¹³⁷ It is quite possible that all Australian regulators share the fault of being too tame, rather than too game, and that our findings might change if we compared business perceptions of the toughness of the ACCC with perceptions of toughness of business regulators in other countries, such as the US, where criminal sanctions are available for the type of breaches that the ACCC deals with.

Previous theoretical and empirical research on regulatory compliance tells us that regulatees' opinion of, relationship with, and experience of, enforcement by regulators will likely have a large influence – for good or for ill – on their motivation to comply, and their actual compliance behaviour. Therefore in the last part of the paper we tested

¹³⁷ Grabosky and Braithwaite, *Of Manners Gentle*, above n 10.

the relationship between our respondents' opinions of the ACCC and their attitudes towards compliance. We find evidence that five of the six sets of opinions of the ACCC examined in this paper — all except dogmatism — have a positive impact on attitudes towards compliance (see Table 8). This suggests that there is some truth in all of the three main theories about compliance introduced in the first part of the paper. To that extent, the prescription of responsive regulation, currently the dominant policy-oriented approach to regulatory enforcement, is correct in its insight that regulators like the ACCC are likely to be most effective if they can strategically utilise multiple regulatory strategies and communicate multiple messages about themselves with different regulatees in different circumstances, and even at the same time with the same regulatees. For example, if the ACCC can communicate that they are accommodating, yet capable of tough enforcement action, and that they act strategically but also with procedural and substantive justice, this is likely to build up commitment to compliance. The difficulty with this policy prescription, as we have seen, is that it is very difficult to accomplish in practice.

Tom Tyler's procedural justice theory emphasises that authorities' procedural fairness can be sufficient to shore up belief in the legitimacy of the law and normative commitment to compliance. Our findings suggest that businesses take into account matters of both procedure and substance in the way they assess the ACCC, and which assessments matter for compliance. Regulatees' assessments of matters of procedural and substantive justice in a regulator's behaviour are strongly related. Moreover, we find that regulatees' assessments of strategic sophistication — an opinion about how well the ACCC's procedures and strategies contributed to good substantive policies — are also significantly related to normative commitments to compliance. The focus of procedural justice theory is on separating out the impact of assessments of enforcement agencies' procedural justice on compliance.¹³⁸ Our findings about the ACCC suggest that we need to weave examination of perceptions of substance and procedure together in understanding how opinions of regulators affect compliance. For example, it is likely that Australian businesses' assessments of whether the ACCC behaves in a procedurally 'unreasonable', 'aggressive', 'unfair' or 'uncooperative' way are influenced by how businesses perceive the substantive goals of the ACCC. The more they see competition and consumer policy as morally important, the more likely they are to see tough, public, enforcement action as reasonable and fair. The more they disagree with the priorities of the *TPA* and the ACCC's interpretation of the *TPA*, the more likely they are to label any attempts by the ACCC to enforce the law as unfair.¹³⁹ Motivational postures theory and responsive regulation theory both attempt to weave together matters of procedure and substance in ways that are more consistent with our findings.¹⁴⁰

¹³⁸ Tom Tyler's research and writing on procedural justice certainly acknowledges that people's views about the morality or substantive justice of regulation, as well as its procedural justice, can affect their views of the legitimacy of regulation: see, eg, Tyler and Darley, above n 23. Indeed one of Tyler's strongest and clearest arguments is that it is both of these normative assessments of regulation that are likely to be a more democratic and robust basis for compliance than the calculative and fear-based motivations on which deterrence relies: Tyler, *Why People Obey the Law*, above n 24.

¹³⁹ See Parker, 'The "Compliance" Trap', above n 40.

¹⁴⁰ On the other hand, in doing so, of course, they sometimes lack clarity and predictability.

The exception to our finding of correlations between opinions of the regulator and attitude towards compliance is that opinions about the dogmatism of the ACCC did not relate to attitudes towards compliance at all. We interpret this as support for the proposition that an element of formalism and legalism is appropriate to promote compliance, but it will vary for each circumstance — a regulator cannot be dogmatic about being either dogmatic or undogmatic.¹⁴¹

It is important to remember, however, that our findings about the relationship between opinions of the ACCC and *TPA* compliance are preliminary — in this paper we have not tested to what extent opinions of the ACCC go on to influence actual compliance behaviour. The positive and negative attitudes towards compliance that we examined tell us about respondents' motivations to comply and we expect — but do not know — that these will go on to influence compliance behaviour. Nor have we used sophisticated multivariate analysis to rule out other explanations for the relationships we find. Finally, since our survey was conducted at one point in time, we cannot be sure about the causal relationships between opinions of the ACCC and attitudes towards *TPA* compliance. It could be that a more positive attitude towards *TPA* compliance sometimes leads to a more positive attitude towards the ACCC, rather than the other way around.

¹⁴¹ It is also possible that our more ambiguous findings in relation to dogmatism arise from difficulties in the way we have measured dogmatism (as reflected in the low Cronbach's Alpha for this measure). See the discussion at n 92 above. Moreover, this cross-sectional study of broad opinion of the ACCC does not provide a thorough test of the specific claims of responsive regulation in relation to how a regulator should utilise a pyramid of enforcement strategies in a particular enforcement matter.

Table A2: Measures of Attitudes towards TPA Compliance

Questions Included in Each Measure of Attitude towards <i>TPA</i> Compliance	Means (1-5: 'Strongly Disagree' to 'Strongly Agree'.)	Whole Measure
Normative Commitment to <i>TPA</i> Compliance [' <i>TPA</i> Compliance Values'] ¹⁴²		
Our organisation feels a moral obligation to observe the <i>TPA</i>	4.15	n = 984-92 Mean = 3.85 Cronbach's Alpha = 0.77 Std. dev. = 0.45
Most managers in this organisation would feel ashamed if the organisation was caught breaching the <i>TPA</i>	4.07	
Most managers in this organisation would in general feel ashamed if the organisation committed a breach of the <i>TPA</i>	4.04	
Many senior managers in this organisation have serious doubts about aspects of the <i>TPA</i> (reversed)	3.22	
The <i>TPA</i> interferes far too much in private enterprise (reversed)	3.42	
It is appropriate to breach the <i>TPA</i> if the purpose is to protect Australian products from foreign competitors (reversed)	3.87	
It is appropriate to breach the <i>TPA</i> if the purpose is to save Australian jobs (reversed)	3.89	
It is appropriate to breach the <i>TPA</i> if others are contravening the law (reversed)	4.09	
Agreement with Goals of the <i>TPA</i> – Consumer Protection, Fair Trading & Unconscionable Conduct ¹⁴³		
Making untrue claims or giving wrong information about products or services	4.26	n = 988-94 Cronbach's Alpha = 0.94 Mean = 4.14 Std. dev. = 0.83
Creating a misleading impression about products or services	4.15	
Supplying products that do not meet mandatory product safety or labelling standards	4.35	
Making inaccurate statements about the country of origin of products	3.98	

¹⁴² For each item respondents were asked to '[m]ark the number closest to the opinion held by most managers in your organisation'.

¹⁴³ The actual question asked was: 'The *Trade Practices Act* is the main Australian government law that sets out rules and standards on competition and consumer protection for all Australian business and trading activity (for profit and not for profit). The following trading practices are each regulated by the *TPA*. To what extent do you believe that each is damaging or beneficial to Australian economic well-being?'

Questions Included in Each Measure of Attitude towards TPA Compliance	Means (1-5: 'Strongly Disagree' to 'Strongly Agree'.)	Whole Measure
Using a strong bargaining position to put harsh conditions in an agreement with a consumer or business that is in a weaker bargaining position	3.92	
Taking advantage of someone's vulnerable circumstances (eg poor English skills, illness, youth or age) to sell them a product	4.16	
Agreement with Goals of the TPA – Anti-Competitive Conduct		
Agreements between competitors to raise prices	4.25	n = 989-91 Cronbach's Alpha = 0.92 Mean = 3.94 Std. dev. = 0.81
Competitors agreeing to share a market	3.91	
Using a dominant position in the market to eliminate or damage competitors	4.02	
Group boycotts: Trading with someone only on condition that they limit their competitive activities (eg by not trading with a competitor)	4.00	
Mergers or acquisitions of organisations that substantially lessen the amount of competition in the market place	3.87	
Supplying goods or services only on condition that the buyer agrees to purchase goods or services from another organisation as well	3.83	
Supplying goods only on condition that their price not to be discounted by retailers	3.67	
Obligation to Obey the Law		
People should obey the law even if it goes against what they think is right (n = 988)	3.69	Std. dev. = 0.84
Resistance towards the ACCC		
Most managers in this organisation believe that we should stand up to the ACCC when we can (n = 988)	2.75	Std. deviation: 0.90
Game-Playing		
A wise organisation uses the loopholes in the law (n = 989)	2.57	Std. deviation: 0.99

Table A3: Correlations between Different Attitudes towards TPA Compliance¹⁴⁴

	TPA Compliance Values	Resistance
TPA Compliance Values	1	
Resistance	-0.118**	1
Game-Playing	-0.347**	0.094**

¹⁴⁴ Pearson Correlations as explained in above n 47.