

THE FELS EFFECT

Responsive Regulation and the Impact of Business Opinions of the ACCC

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As chair of the Australian Competition and Consumer Commission, Professor Allan Fels blasted his way into popular consciousness by aggressively using the media to promote no-holds-barred enforcement against businesses that breached competition and consumer protection laws. Opinions were sharply divided on the desirability and effectiveness of Allan Fels' media approach during his chairmanship of the ACCC. This article argues that opinions of the 'Fels effect' were based on two opposed, mono-dimensional theories as to how a regulator should behave: one based on conflict and deterrence and the other on cooperation and voluntary compliance. Responsive regulation theory, however, suggests that regulators should be evaluated on multiple dimensions, including whether they are both tough and fair, strategic and sophisticated. This paper reports and analyses survey evidence as to how large businesses do in fact perceive the ACCC across multiple dimensions. We find that Australian businesses may be divided into three groups: those that see the ACCC as threatening; those that see the ACCC as unthreatening; and those that see the ACCC as a professional or responsive regulator. The article goes on to test what impact such differences in opinions have on businesses' compliance attitudes and compliance management behaviours. Seeing the ACCC as a deterrent threat has some influence on compliance management behaviour. However, when businesses see the ACCC as both strong and fair, this improves both compliance management behaviour and attitudes towards compliance. These findings support responsive regulation theory, but only a minority of businesses in fact saw the ACCC as a responsive regulator.

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Introduction

As chair of the Australian Competition and Consumer Commission ('ACCC') from 1995 to 2003, Professor Allan Fels blasted his way into popular consciousness by aggressively using the media to promote no-holds-barred enforcement against businesses that breached competition and consumer protection laws. By the time he retired, opinions were sharply divided on the desirability and effectiveness of his media approach.¹ Fels' personal relationship with the media, and the resulting media profile of the ACCC as an institution, was in many ways the defining aspect of his chairmanship. For Fels, it was a crucial element of a successful regulatory strategy to garner a reputation as an active and strong regulator for two reasons.² First, a successful regulator must enjoy public support for its efforts to protect the public interest so that it is protected from political attack and behind-the-scenes lobbying to weaken its law enforcement efforts. Second, a successful regulator must instil an element of fear in those it regulates, in order to deter misconduct.

Big-business criticism of Fels, however, suggested that the ACCC's use of the media had instead given it a reputation for being unfair and inflexible in the way it mercilessly publicised every enforcement action, no matter how cooperative the respondent business had been and how insignificant the misconduct in which the business felt it had engaged. Business people and their lawyers argued that this approach would ultimately undermine the effectiveness of the ACCC, since businesses that saw the ACCC as using the media and its enforcement powers illegitimately would be less inclined to cooperate with the ACCC. The ACCC's actions would also inevitably erode their sense of moral obligation to obey the law.³

This article first argues that these two different evaluations of the effectiveness of Fels' media strategy draw on two different – but equally valid – theories as to how a regulator should behave in general, and what perception they should seek to elicit from the businesses they regulate. Specifically, we argue that Fels' view draws on a conception of regulation as being inherently conflictual and based on deterrence. His big-business critics see regulation as being inherently educational and cooperative. Both theories can be rhetorically over-simplified into tropes that are misused for political purposes. We expect, however, that a regulator will be most effective at eliciting compliance where their behaviour (as well as their media image) prompts regulated businesses to make a quite complex, multidimensional evaluation of the regulator as tough and fair, strategic and sophisticated.

Asking business people to anonymously and confidentially report their opinions in a rigorous survey can be a helpful way to step outside political debate and measure businesses' evaluations of a regulator like the ACCC in a multi-dimensional way. The data collected can then also be used to test

¹ Brenchley (2003); Yeung (2005).

² See notes 11 to 15 and accompanying text.

³ See notes 21 to 27 and accompanying text.

what impact differences in business opinions have on their compliance attitudes and compliance management behaviours. The second part of this article therefore uses quantitative evidence collected from a mailout questionnaire to which 999 large Australian businesses responded between mid-2004 and mid-2005 (shortly after Fels' retirement). First, we briefly describe the methodology used to collect our data.⁴ Next we go on to identify a number of dimensions of business opinions of the ACCC. We then divide our respondents into three groups that hold these different dimensions of opinion together in different ways – including one group (albeit a minority) which saw the ACCC as both a strong, deterrent threat, but also as a fair and flexible regulator. The existence of this latter group demonstrates that regulators do not need to settle for the reductionist politics of being seen as either strong or fair: it is possible to garner a reputation with some businesses as being *both* strong and fair. This suggests that responsive regulation is possible, but difficult to achieve in practice.

The third part of the paper examines whether differences among businesses in their opinions of the ACCC on these issues in fact made any difference to their compliance management behaviours and attitudes towards compliance with the *Trade Practices Act 1974* (Cth) (*TPA*). We find some evidence that seeing the ACCC as a strong deterrent threat has some influence on compliance management behaviour. However, our evidence suggests that there is a more positive influence on both their compliance management behaviours and their attitudes towards compliance when businesses see the ACCC as both strong *and* fair – that is, as a professional or responsive regulator. This finding supports the predictions of responsive regulation theory. We also find, however, that other more fundamental organisational factors, such as organisational resources and management styles, are probably more important than business evaluations of the ACCC in explaining compliance.

Business Opinions of the ACCC: Fels and His Critics

The Fels Effect: Conflict and Deterrence Theory

The Trade Practices Commission (its successor organisation being the ACCC) was given a very challenging job at the time the *TPA* was passed. Anti-competitive practices – or ‘orderly marketing’ as they were euphemistically known – were normal business in Australia.⁵ For the first time, the *TPA* prohibited all sorts of anti-competitive conduct, as well as misleading and deceptive conduct and certain other unfair practices. Civil fines were available for breach of the anti-competitive conduct provisions. Criminal fines were theoretically available for breach of the consumer protection provisions, but very rarely used. It was only during the 1980s that

⁴ This article reports on one aspect of the analysis of a much larger survey. Full details of the survey and its methodology are available in Nielsen and Parker (2005). Other aspects of analysis of the survey are reported in Nielsen and Parker (2009) and Parker and Nielsen (2006, 2007, 2009).

⁵ Karmel and Brunt (1962), pp 94–95; Marr (1980), p 185; Pengilly (1974), pp 44–45.

the ACCC became active in enforcement litigation.⁶ In the early 1990s, the ACCC became a consciously aggressive and strategic regulator that used deterrence as a strategy.⁷ Since the 1990s, the ACCC has seen the ‘extended deterrence’ of not only formal legal sanctions, but also informal shame from media publicity, as well as the other costs associated with being prosecuted as very important ways to make sure that businesses see it as being in their self-interest to comply.⁸

The media approach of ACCC chair Allan Fels was part of that overall regulatory strategy. Indeed, as Fels’ (highly sympathetic) biographer Fred Brenchley highlights, Fels became ‘a brand name’. The ‘Fels’ brand ‘represented no-holds-barred enforcement of competition: a regulator with real bite’.⁹ Many (unkindly) labelled Fels a ‘media tart’ or, in the typically more convoluted language of former prime minister Paul Keating, a ‘media nymphomaniac’.¹⁰ By contrast, Brenchley summarises the media strategy of Fels more positively as:

Fels used what he came to call the ‘full five channel blast’ of media exposure to highlight issues ... His idea was to couple the strong enforcement powers of the ACCC with media exposure to make the regulator a force to be reckoned with. Media became a weapon in the war for a new culture of competition, in a society where decades of protectionism and insulation had bred laziness and monopoly among business, unions and the professions. Media coverage gave Fels’ ACCC the image of being a powerful player in the market. The competition regulator had long held many of the enforcement powers, but had been seen as a marginalized player. In a blaze of publicity Fels took on cartels, winning landmark cases. Publicity also became a means of shaming ...¹¹

Fels’ approach to the media drew on two justifications. First, a successful regulator must enjoy public support for its efforts to protect the public interest so that it is protected from political attack and behind-the-scenes lobbying to weaken the law and the regulator. Thus, Fels argued that part of the value of publicity of the ACCC was to spread ‘the culture of competition’, and hence ‘to counter criticism of the Commission and the Act made behind closed doors as part of attempt to weaken and water it down by big business lobbying’¹² Fels commented that:

Big business does not like the publicity the Commission has obtained. The publicity has built strong public and small business support for

⁶ Grabosky and Braithwaite (1986), pp 92–93; Round et al. (1996), p 298.

⁷ Brenchley (2003); Fels (2000); Spier and Gimwade (1997), pp 232–41.

⁸ Parker (2006).

⁹ Brenchley (2003), p 90.

¹⁰ On Fels as a ‘media tart’, see Brenchley (2003), p 247. On the Keating comment, see Brenchley (2003), p 3 and Dillon (2003).

¹¹ Brenchley (2003), p 192.

¹² Fels (2003), p 18.

the Act, the Commission and for competition, and has got in the way of vested interests who want the law to be softened, to be applied softly or who want exemptions.¹³

This assumes that there will always be a degree of conflict in effective regulatory enforcement, since the regulator will be challenging ‘vested interests’.

The second justification for Fels’ media strategy is that a successful regulator must instil an element of fear in those it regulates in order to deter misconduct. Deterrence theory sees businesses’ compliance, or non-compliance, as based on their calculated decisions about whether it is in their interest to comply with the law – whether the gains of compliance outweigh its costs.¹⁴ In considering the gains of complying with the *TPA*, one important factor that businesses would be expected to take into account is the risk of being caught and sanctioned for breach by the ACCC. The regulated businesses’ 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-compliance¹⁵ – hence the importance of a regulator having a prominent media profile.

This justification assumes that effective regulation always entails an element of conflict. Effective regulation necessitates change in business practices and therefore (potentially) generates conflict between business self-interest and the public interest as represented by the regulator.¹⁶ The necessity for regulatory enforcement is predicated on the assumption that some businesses will need to be forced to do the right thing – and that, for some businesses at least, compliance will only occur if they see enforcement action as likely and severe. Indeed, even those businesses that might be willing to comply of their own volition may worry that other businesses will only comply if there is strong enforcement. Some businesses’ compliance activity might additionally be conditioned on their perception of the ACCC as likely to take severe action against important instances of non-compliance by other businesses.¹⁷

As we show below, critics have seen the ACCC’s high profile in the media as unnecessary self-aggrandisement, and as creating the illusion of a simplistic conflict to generate media profile for the ACCC where conflict is not really necessary. Indeed, it can be tempting for regulators and policy-

¹³ Fels (2003), p 18.

¹⁴ For a thorough review of the literature and empirical evidence on deterrence, see Simpson (2002), pp 22–44. See also Robinson and Darley (2004); Scholz (1997).

¹⁵ On the importance of awareness for compliance, see Winter and May (2002). See also Parker and Nielsen (2009b).

¹⁶ See Parker (2006) for further analysis of this conflict in the context of the ACCC’s enforcement of anti-cartel laws.

¹⁷ Simpson and Rorie (forthcoming).

makers to over-simplistically conceive compliance and enforcement purely in terms of conflict and deterrence.¹⁸

There are, however, other motivations and factors relevant to compliance, apart from fear of a threatening regulator.¹⁹ The criticisms of the ACCC's profile in the media implicitly rely on these alternative theories of compliance.

Business Criticisms of ACCC Use of Media: Normative and Relational Theories of Compliance

Big business and their lawyers criticised Fels' ACCC, especially his media strategy, as being both unfair and inflexible.²⁰ First, the ACCC's use of the media under Fels was criticised as an unfair 'trial by media.'²¹ This criticism is neatly summarised by the ways in which Fels' successor, Graeme Samuel, announced that he would differentiate himself from Fels upon his appointment:

Samuel laid down the new law in his first day in office last week. His relations with the media will be unapologetically low key compared with his predecessor. 'You can assume I'll do exactly the same as Allan. But ... I will be very circumspect in dealing with issues that could affect people's reputations or rights ... There will be no trial by media ... I have a very keen understanding of the principles of natural justice – and people's rights. We have to be very careful during the allegation phase [of an investigation] that we don't, through the media, betray confidences or say things that impact upon the negotiations. Our position will be set out in all documents filed with court. It won't be reflected in a short media grab or interview. We will issue a carefully crafted media release, then essentially it's "no comment".'²²

Furthermore, the ACCC under Fels was criticised for using the media to announce investigations before proceedings had actually been instituted, publicising the commencement of proceedings in court before matters had been concluded, and making statements that lacked 'balance and

¹⁸ On the way in which cartel criminalisation was justified by the ACCC in Australia, see Beaton-Wells and Haines (2009).

¹⁹ For a helpful typology of 'normative', 'social' and 'calculative' motivations as explanations for compliance, see Winter and May (2001); see also Dimento (1989); Gunningham and Grabosky (1998).

²⁰ For summaries of the criticisms, see Parker and Nielsen (2007); Parker and Stepanenko (2003).

²¹ Dawson et al (2003), p 182; Yeung (2005). For examples of criticisms of the ACCC's allegedly unfair use of publicity in specific cases, see the discussion of the 'Simply No Knead' case in Parker and Sharpe (2006), pp 33–36; and Sharpe and Parker (2007), p 152; and the discussion of the oil 'raids' in Parker and Stepanenko (2003), pp 279–81.

²² Ham (2003).

objectivity'.²³ The Australian Chamber of Commerce and Industry complained that 'business goodwill [was] being undermined merely on the basis of suspicions held by the regulator'.²⁴

Second, the ACCC's projection of itself as a strong regulator and as an effective deterrent threat in the media has also been criticised as inflexible and unreasonable. Many specialist trade practices lawyers believed that the ACCC 'often use[d] a sledgehammer to crack a nut' and that it 'sometimes ... b[rought] cases just to attract publicity'.²⁵ At the time of our survey, at least some business respondents still thought of the ACCC as a place where there was 'little real world understanding of what is going on in various industries' and '[s]calps come first, second and all the way to last if you judge their public performance'.²⁶ One specialist trade practices lawyer questioned 'whether the ACCC has a principle based compliance method or a publicity based one', additionally commenting that '[t]here are a few examples where by doing this wrong they undermined 99% of cases where they do act appropriately'.²⁷ As another lawyer observed:

The ACCC's actions have positively deterred compliance in certain circumstances, for example where a court action is initiated against company X for committing a minor infringement, principally in order to send a message to other companies, or to generate self-serving publicity for the ACCC. Instead, company X might be given some leniency for having a compliance system.²⁸

A number of other interviewees also commented that the ACCC under Fels should have taken a more flexible, educational and cooperative approach to regulatory enforcement, rather than a conflictual, publicity-based approach:

In none of the cases that I have seen of individuals being targeted by the ACCC has there been contumelious disregard for the law. But the ACCC has hauled them through the coals with the publicity and

²³ Summary based on the Dawson Committee's summary of the criticisms of the ACCC's use of publicity made to it: Dawson et al (2003).

²⁴ Rowe (2002).

²⁵ Parker (2003), Interview with lawyer 03-012 (Perth, 25 February 2003). This was one of a number of interviews with business people who had had experience of ACCC investigations and specialist trade practices lawyers that the first author conducted in preparation for the survey reported below. For a full description of the methodology used for these interviews and a full summary of the themes and findings in these interviews, see Parker and Stepanenko (2003).

²⁶ One respondent wrote this in response to an open-ended question at the end of our questionnaire that asked 'If your organization has any comments about the ACCC which you would like to add, please write them below.'

²⁷ Parker (2003), Interview with lawyer 03-019 (Sydney, 4 April 2003).

²⁸ Parker (2003), Interview with lawyer 03-014 (Sydney, 1 April 2003).

everything. I think where there's just a personal stuff-up, the ACCC should take an educative approach.²⁹

You should be able to go to them and have a dialogue rather than have them just go 'splat' and institute proceedings. They lull you into a false sense of security and then they slam you. The ACCC get themselves whipped up into a frenzy about something. So they can't talk to you about it [and come to a sensible settlement].³⁰

These criticisms of the ACCC and its use of the media rely on the assumption that businesses generally want to comply with legitimate laws, and that they will cooperate with a reasonable regulator that seeks to educate them about compliance. The assumption is that compliance is based on a voluntary commitment to obeying the law, a normative evaluation of the regulator as acting fairly and appropriately, and the sense that people will want to comply because they want to earn the approval and respect of others in the community (including regulators), and not merely because they fear negative sanctions. On this view, a regulator that behaves illegitimately in an unreasonable, unfair or untrusting way towards business may break down goodwill, cooperation and commitment to compliance, and strong deterrence may well be perceived as illegitimate.

This echoes the findings of a number of regulatory theorists and empirical researchers that democracies generally work on the basis of voluntary compliance. Tyler's procedural justice theory is the leading theory that explains people's compliance with the law by reference to their normative and relational evaluations of the regulator. Tyler broadly conceives people's evaluation of the procedural justice of regulatory authorities as including their evaluation of opportunities for participation, quality of decision-making (neutrality), quality of interpersonal treatment and trust in the motives of authority.³¹ He sees people's evaluations of both regulators' procedural justice and their substantive justice as relevant to their evaluations of the legitimacy of regulators.³² His findings show that people are more likely to comply with a regulator that they see as legitimate as a matter of procedural justice, even where compliance with the law leads to outcomes that are not in their self-interest, or do not accord with their own personal sense of substantive justice. By contrast, where people see regulators as not procedurally just, this can break down willingness to

²⁹ Parker (2003), Interview with lawyer 03-012 (Perth, 25 February 2003).

³⁰ Parker (2003), Interview with lawyer 03-011 (Melbourne, 13 September 2003).

³¹ See especially Tyler (2006), pp 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 regulates: see also Tyler (2001); Murphy (2003); Murphy (2004).

³² On substantive justice, see Winter and May (2001), pp 677–8; see also Tyler and Darley (2000).

comply.³³ Tyler's theories have been applied mainly to individuals – and are very strongly supported by empirical evidence. We apply them to business firms here.

Another set of explanations for compliance with the law also suggests that people can be influenced to comply by their desire 'to earn the approval and respect of significant people with whom they interact'³⁴ – even if they are not normatively committed to compliance themselves. 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 basis for social motivation'.³⁵ Thus we would expect that the degree to which businesses that are regulated perceive a regulator as open, available, accommodating and trusting would help explain whether or not those businesses 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.³⁶

Certainly, there is very strong evidence to support the significance of normative and relational evaluations of a regulator for the effectiveness of regulation. However, such arguments can also be abused and misused. MacCoun has argued that procedural justice effects are so robust that they raise the spectre of 'false consciousness' – that is, the concern 'that authorities can use the appearance of fair procedure (dignity, respect, voice) as an inexpensive way to coopt citizens and distract them from outcomes that by normative criteria might be considered substantively unfair or biased'.³⁷ On the other hand, criticism of the ACCC by powerful big businesses suggests a flipside to the 'false consciousness' argument – that procedural justice criticisms of a regulator like the ACCC may be cynically deployed by big business to seek to emasculate a powerful and substantively effective regulator. That is, allegations of lack of procedural fairness may be used by some powerful players to try to stop a regulator that might otherwise force them into making substantive changes that they do not like, as Fels

³³ See n 31.

³⁴ Winter and May (2001), p 678. For empirical studies supporting the significance of social influence on compliance, see Gunningham et al (2003); Rees (1997).

³⁵ See Winter and May (2001), p 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 (2006), p 276.

³⁶ Bardach and Kagan (1982), pp 123–51; Braithwaite (2002), p 112; Burby and Paterson (1993), pp 756, 766; Harrison (1995), pp 222–23; May and Winter (1999). Note that most of these empirical studies find that it is actually a mix of cooperation and deterrence that is effective.

³⁷ MacCoun (2005), p 189. See also Tyler's response in Tyler and McGraw (1986).

himself pointed out on the basis of his own experience.³⁸ Yet the businesses also wish to be seen as compliant companies.³⁹ Large businesses' fairly simplistic statements of their negative evaluations of the procedural justice performance of regulators might therefore serve a rhetorical purpose in seeking to curb the power of regulators.

This suggests that we should look more carefully at the multidimensional nature of a regulator's relations to business. On the one hand, it may well be desirable for business to see a regulator as fair and reasonable in process, but it is equally important that they see the regulator as strong and effective in substance.

Responsive Regulation: Multidimensional Evaluations of Regulators by Businesses

Taking into account both major sets of theories of compliance discussed above, Ayres and Braithwaite's responsive regulation theory suggests that regulators should use multiple enforcement strategies in contextually sensitive ways. This theory sees the capacity for regulators to persuade regulated businesses 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 considered as 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.⁴⁰

Responsive regulation theory further 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 those who it regulates.⁴¹ It 'must have an image of invincibility at the same time as it has an image of mercy and forgiveness'.⁴² The regulatory agency needs to be both procedurally and substantively just, while being simultaneously accommodating and flexible, perceived as capable and publicly known to be capable, of tough and effective enforcement action when a breach occurs. Therefore, we expect that regulators need to try to make sure that businesses (and the public) hold together a quite complex set of potentially contradictory opinions and expectations about the way that the regulators do their job. Below we examine the combinations of opinions of the ACCC held by different businesses. It is the combination – the handling of tension between the different dimensions of opinions – rather than the separate dimensions in and

³⁸ Fels (2000).

³⁹ Thus 'big business' will prefer to influence the social construction of compliance to suit their own interests rather than to advocate resistance and non-compliance. See Edelman et al (1999); McBarnet, in Cain and Harrington (1994), pp 73–84.

⁴⁰ Braithwaite (2002), p 35; see also Ayres and Braithwaite (1992).

⁴¹ Ayres and Braithwaite (1992).

⁴² Braithwaite (2002), p 119.

of themselves, that is likely to be of most practical importance for regulators. We go on to examine the impact of these combinations of opinions of the ACCC on compliance attitudes and behaviours.

Survey Evidence of Business Opinions of the ACCC

Methodology and Data

Our data come from a quantitative mailout questionnaire of business experience of enforcement and compliance in relation to the ACCC and the TPA.⁴³ The largest 2,321 Australian businesses trading in 2004 and readily contactable were identified (through a publicly available commercial list, the Dun and Bradstreet list), with special efforts made to include all those large businesses that had been the target of ACCC enforcement activity in the previous seven years, as identified by ACCC Annual Reports.⁴⁴

The businesses were surveyed with a mailed self-completion questionnaire, and repeated telephone follow-up yielding 999 responses – a response rate of 43%.⁴⁵ Nevertheless, 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, and we have not been able to identify any systematic bias in our sample.⁴⁶

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. Forty-two per cent of those who filled out a questionnaire were chief executive officers, company secretaries or chief financial officers, and a further 20 per cent general counsel or compliance managers. In large business organisations, it is always problematic to ask one person to report on behalf of the whole firm, as we have done here. However, the high rank and position of those who actually filled out the

⁴³ The results discussed in this paper represent only one part of the survey. Full details of the methodology of the survey are available in Nielsen and Parker (2005). See also the references at n 4 above.

⁴⁴ A total of 273 of the 2,321 businesses surveyed were identified in this way.

⁴⁵ This under-estimates the actual response rate because we cut 4.3 per cent of the responses actually received from the study because those respondents were too small (fewer than 100 employees) for 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. For a full report of the survey, including the sample and methodology, see Nielsen and Parker (2005), p 287. Our response rate compares well with the 35.5 per cent average response rates for similar questionnaire research of top management of business. Baruch (1999) reports that the average for this type of questionnaire in articles published in high-quality management journals is 35.5 per cent.

⁴⁶ The full figures and tables demonstrating this are available in Nielsen and Parker (2005), pp 12–13.

questionnaire for each organisation suggests that we have succeeded in finding the person in the organisation best informed about trade practices compliance attitudes and activities to respond on behalf of the organisation for the purposes of this preliminary test of our theoretical specifications.

Each of our measures is based on our respondents' self-reported answers to closed questions in our surveys.⁴⁷ The wording of each question was based on our earlier qualitative and documentary research on the nature of ACCC enforcement activities and their impact on business compliance,⁴⁸ as well as theoretical considerations and previous studies. The particular measures are described below as relevant. The full text of all relevant questions is shown in the tables in the Technical Appendix.

Dimensions of Business Opinions of the ACCC

In a previous analysis of our survey data set, we identified five dimensions of opinions of the ACCC among Australian business. We also related these survey results to concepts that various theories of regulatory compliance conceived as important for improving compliance.⁴⁹ The five dimensions of opinions of the ACCC that were identified among the respondents are:

- the likelihood and severity of ACCC enforcement action
- the strategic sophistication of the ACCC
- the procedural and substantive justice of the ACCC
- the extent to which the ACCC engages in accommodating behaviour, and,
- the degree to which the ACCC engages in undogmatic behaviour.

⁴⁷ Self-report measures are particularly useful where the object of interest is a perception or attitude (such as the measures of opinion of the ACCC and attitudes to compliance used here). Self-reports can also be useful in relation to matters that only the respondents themselves are likely to know about (such as the measures of compliance management behaviour used here). A problem with self-report measures is that respondents might show social desirability or other biases that make it difficult for them to answer questions truthfully. Like other researchers, we sought to overcome this set of potential reliability problems by making (and following through on) strict guarantees of confidentiality and anonymity in our handling of the data, in order to ensure that respondents felt they could securely answer questions honestly. Moreover, to the extent possible, we framed our questions as specifically as possible so that it should be relatively easy for the person filling out the questionnaire to objectively determine whether the answer should be yes or no, thereby eliminating as far as possible the element of subjectivity that makes it easier to respond in a socially desirable or conforming manner. Most of our survey measures consisted of multiple items, which is also believed to increase the reliability of data. Nevertheless, our results should be interpreted bearing in mind that they rely on self-reports only, and therefore, may reflect limited knowledge and the way respondents feel they should think and behave.

⁴⁸ Parker and Stepanenko (2003).

⁴⁹ These were identified using exploratory factor analysis. Full details of the items used for each of these measures are available in Table A1 in the Technical Appendix, together with other statistical information about each measure. Further explanation of these measures can be found in Parker and Nielsen (2007).

The first dimension of opinion relates to how the deterrence of the ACCC is evaluated by the businesses it regulates. 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 identify and investigate non-compliance and take enforcement action, the possibility of investigation, the threshold for prosecution and the level of sanctions in use.

The second dimension of opinions of the ACCC, *strategic sophistication* of the ACCC, can relate to both business respondents' evaluations of the deterrent threat of the ACCC and also their normative and relational evaluations of the ACCC. It measures whether business see 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 as failing to address important problems, then it is more likely that such businesses will have less faith in the substantive justice of regulatory outcomes, and consequently have less reason to comply with the law. 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. We might also expect regulatees' perceptions of a regulatory enforcement agency's strategic sophistication to be an important aspect of whether they consider that enforcement agency to be wielding a credible deterrent threat.

The remaining three dimensions of opinion relate to how the fairness and flexibility of the ACCC is evaluated by the business respondents to the survey. We would expect these factors to be associated with their normative and relational motivations for compliance.

The *procedural and substantive justice* of the ACCC relates to how the respondents assess the ACCC's treatment of individual businesses in its investigations, enforcement actions and other regulatory decision-making. Most of the items in this index deal with the *procedural justice* shown by the ACCC in these dealings.⁵⁰ Business assessments of a regulator's procedural and substantive justice will contribute to normative reasons for complying with the law.

The extent to which the ACCC engages in *accommodating behaviour* relates to how businesses assess the willingness of the ACCC to help them

⁵⁰ See n 31 and accompanying text on the meaning of 'procedural justice' in this context. One item, 'most organisations get what they deserve when dealing with the ACCC', is clearly to do with *substantive justice* and another item, 'just', could cover either or both procedural and substantive justice.

comply with the law, and whether they see the ACCC as willing to tailor sanctions for any breaches to suit each company's attitudes 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.

Like the procedural and substantive justice measure and the accommodation measure, the *undogmatic behaviour* measure is concerned with the way the ACCC treats individual organisations. The distinction here is that the focus is not so much on the respondents' normative assessment of the procedural and substantive justice of the ACCC, but rather on their perceptions of the way the ACCC relates to business. The focus is thus on the flexibility, or intractability, of the ACCC's opinion of and enforcement strategy in relation to businesses. As with perceptions of accommodating behaviour by the ACCC, perceptions of the ACCC's lack of dogmatism would primarily contribute to normative and social motivations for compliance. The relevant focus questions here include: 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 is it willing to listen to the business consider other possibilities or options? Will the ACCC retaliate stubbornly and single-mindedly if it perceives an organisation is failing to cooperate with it, or will it reconsider whether its own opinion of the business and its conduct is correct where a business decides not to cooperate?

Our business respondents' mean ratings of the ACCC on each of these dimensions of opinion are shown in Figure 1 (in the bar that relates to 'all businesses'), with full details also shown in Table 1 in the Technical Appendix.

Except with regard to the measure of perceptions of undogmatic behaviour by the ACCC, business opinions of the ACCC on each of these dimensions are fairly positive across the whole group of businesses. Indeed, these results reinforce our previous argument that such opinions of the businesses surveyed are more positive than one might have expected given the negative business opinions highlighted in the media at the time of our survey.⁵¹ We also found previously that such opinions largely parallel business opinions of other prominent business regulators, such as the Australian Securities Investment Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Australian Taxation Office (ATO).⁵² We also previously showed that business opinions of the ACCC

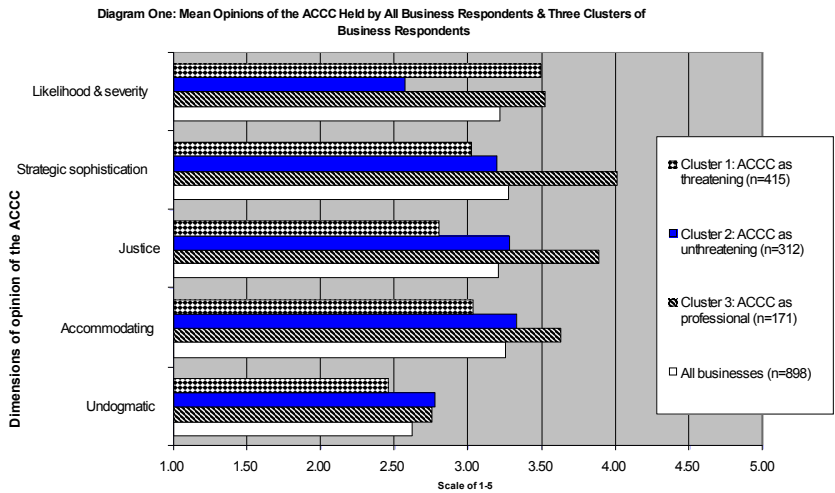
⁵¹ Parker and Nielsen (2007).

⁵² Parker and Nielsen (2007).

have, after direct interaction and experience with the ACCC, mostly changed for the better, rather than for the worse.⁵³

In the following sections of this article, we extend our previous analysis to demonstrate how these dimensions of opinion relate to each other in combinations of opinions of the ACCC. We subsequently examine whether certain combinations of opinions about the ACCC influence businesses' attitudes towards compliance and compliance management behaviours in positive or negative ways, and which individual dimensions of opinion might be most important in changing this dynamic.

Figure 1: Mean opinions of the ACCC held by all business respondents



and three clusters of business respondents

Combinations of Opinions About the ACCC

As argued above, we expect that it is the way in which business respondents hold combinations of opinions about the ACCC that is likely to be of most significance to the ACCC's effectiveness as a regulator. Therefore, we use the statistical technique of cluster analysis to identify three groups of businesses with different constellations of opinions of the ACCC. Cluster analysis is an exploratory data analysis tool that aims to sort different objects into groups in a way that ensures the degree of association between two objects is maximal if they belong to the same group and minimal otherwise.⁵⁴

⁵³ Parker and Nielsen (2007).

⁵⁴ Cluster analysis allows us to see which respondents are most alike on a range of predefined variables (in this case, our measures of opinions of the ACCC), and therefore, form a cluster or segment. Cluster analysis is often used in market research to identify different segments of customers. One by one, the statistical procedures calculate the

Our cluster analysis of respondents' opinions of the ACCC identifies three groups with different combinations of opinion of the ACCC, as shown in Figure 1. (Full statistical details of the three clusters are also shown in Table A2 in the Technical Appendix.) We label the three groups according to the way they see the ACCC: as threatening (Cluster 1), unthreatening (Cluster 2) or professional (Cluster 3).

The first cluster accounts for nearly half (46 per cent) of our respondents. This group perceives the deterrence of the ACCC as relatively high, but evaluates the ACCC quite negatively on normative and relational dimensions. This group therefore sees the ACCC as quite threatening, with little flexibility and reasonableness to temper the threat. Previous research and theory on regulatory compliance would therefore predict that, on the one hand, this group might engage in greater compliance behaviour because of fear of sanctions. On the other hand, it might also have a more adversarial attitude towards the ACCC in comparison to the attitudes of other groups, and perhaps even less of a sense of inherent duty to comply because of a lack of trust in the reasonableness and legitimacy of the regulator's conduct.

The second group (which constitutes 35 per cent of our sample), by contrast, evaluates the ACCC as relatively high on fairness and willingness to be accommodating, and lower on deterrence. These respondents therefore see the ACCC as less threatening. Their evaluation of the strategic sophistication of the ACCC is also relatively low, like those in the first group. We might expect this group to be less worried about regulatory enforcement and therefore less active in compliance management behaviour as a result. On the other hand, its sense of the fairness and reasonableness of the ACCC might build up a more positive sense of duty to comply, when compared with the first group.

The third, and smallest, group (19 per cent of our respondents) is perhaps the most interesting. This group rates the ACCC highly on four of the five dimensions – the exception being the dogmatism of the ACCC, which all three groups score as low. The third group sees the ACCC as very professional – perhaps as a 'responsive regulator' – and able to meld together in its approach, deterrence, fairness, ability to accommodate individual businesses and strategic sophistication. In theory, this is the sort of view that the ACCC should be aiming for – both to deter non-compliance and also to nurture compliance and elicit support for the legitimacy of the regulator. We expect to see this group showing good compliance management behaviour, commitment to compliance and cooperation with the ACCC – a perfect relationship!

distance between each respondent to each of the other respondents that already form a cluster (the first respondent forms the first cluster, and then the distance of the second is calculated) on the different predefined variables. When the distance is too big, a new cluster is formed. The analysis could, in theory, end up with only one cluster (if all the companies were extremely alike) or 999 individual clusters (if they were extremely unlike). Cf May and Winter (2000).

Impact of Opinions of the ACCC on Compliance Management Behaviours and Attitudes Towards Compliance

Research Strategy: Testing the Impact of Business Opinions of the ACCC

The question remains: What difference, if any, does it make what dimensions of opinion or combination of dimensions of opinions respondents hold about the ACCC to their attitudes towards compliance and their compliance management behaviour? We test this using the statistical technique of logistic regression in two ways:

- First, we test whether each respondent's *combination* of opinions makes a difference to their attitudes towards compliance and compliance management behaviours. To do this, we test the effect of being in one or other of the three clusters.⁵⁵ The results are shown in Table 1, which is discussed further below.
- Second, we test which of the various *individual* dimensions of opinion make the most difference, and therefore which it could be most important to change first. The results are shown in Table 2, which is discussed further below.

We want to know whether these various opinions of the ACCC make a difference to attitudes to compliance and/or compliance management behaviour. Our measures of compliance attitudes and compliance management behaviour of the businesses are based on previous analyses of the same data.⁵⁶

We use three distinct compliance attitudes as dependent variables:

- 1 *Duty to obey the law* measures businesses' sense of obligation to obey the law 'even if it goes against what they think is right', and their sense of shame if their organization breached the law.
- 2 *Game-playing* is an attitude where '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'.⁵⁷
- 3 *Resistance* measures business sense that they should 'fight for their rights' and 'curb' ACCC power.⁵⁸

Attitudes to regulation and regulator are a separate dimension from actual behaviour, so a negative posture does not necessarily lead to non-

⁵⁵ To do this, we create a dummy variable relating to the three clusters identified and use these three clusters as independent variables in linear regression to identify whether the different clusters make a difference to compliance attitudes and behaviours.

⁵⁶ The items measuring each attitudes and other statistical information about each of the measures are shown in Table A3 in the Technical Appendix. For further discussion of these measures in our previous work, see Parker and Nielsen (2006); Parker and Nielsen (2009a, 2009b).

⁵⁷ Braithwaite (2009), p 38, following McBarnet, in Braithwaite (2003), p 229.

⁵⁸ Based on the motivational posture of 'resistance' conceptualised by Braithwaite (2009), p 38.

compliance. We therefore look at the impact of opinions of the ACCC on both attitudes towards compliance and also compliance-management behaviour. We measure business respondents' compliance-management behaviour by asking a series of specific statements about what measures management actually undertakes in order to make sure businesses comply with the *TPA* in everyday decision-making and functioning. We label this measure 'compliance management in practice'.⁵⁹

Finally, since we are using multiple linear regression to test the impact of opinions of the ACCC on compliance attitudes and compliance-management behaviour, we are also able to control a number of other variables that might provide more fundamental explanations of differences in compliance-management attitudes and behaviour, including:⁶⁰

- whether the respondent organisation has had any experience of interaction with the ACCC in the previous six years;⁶¹
- size;
- organisational resources;
- level of managerial oversight and planning.⁶²

In each case, we conduct the regression analyses in two steps – with and without the control variables – so that we can see what difference the controls make. The results of the two sets of regressions are shown in Tables 1 and 2.

⁵⁹ This measure is set out in Table A4 in the Technical Appendix. For further discussion of this measure and its relation to both formal compliance systems and actual compliance, see Parker and Nielsen (2009).

⁶⁰ The details of each of the last two measures are provided in the Technical Appendix, Table A5. For further discussion of these measures, see Parker and Nielsen (2006); Parker and Nielsen (2009a). We do not look at industry, because we know from previous analyses that industry does not co-vary with opinion of the ACCC.

⁶¹ This includes situations where businesses have been investigated by the ACCC and also situations where they have interacted with the ACCC in relation to proposed mergers and acquisitions. Note that, as the median length of years that a person had spent working in the organisation was six years (with a mean of nine years), those individuals filling out the questionnaire should generally have had enough knowledge to recall whether there had been an interaction with the ACCC in the previous six years (during their time in that particular organisation). It was necessary to go back six years in order to locate an adequate number of cases of companies having had ACCC interactions for statistical manipulation. We used a self-report measure, rather than official ACCC records, for the reason that it is more salient to measure those businesses that actually remembered having interacted with the ACCC and, furthermore, because of lack of access to ACCC records regarding with whom the organisation had previously interacted.

⁶² In previous analyses of our respondents' compliance behaviour, we found the level of management oversight and planning to be very important: see Parker and Nielsen (2006); Parker and Nielsen (2009a).

Finding 1: Impact of Combinations of Opinion of the ACCC

First, we consider the impact of respondents' combination of opinions of the ACCC – that is, which cluster they are in. Because we split the respondents into three clusters, we have to use one group as the reference group against which we compare the other two groups for the purposes of the statistical analyses shown in Table 1. We use Cluster 1, the group that sees the ACCC as threatening, as our reference group. Therefore Table 1 shows how the other two groups compare with this group.

The group that sees the ACCC as unthreatening (Cluster 2) is significantly lower on compliance management in practice than the group that sees the ACCC as threatening (Cluster 1). The group that sees the ACCC as professional (Cluster 3), however, does not vary significantly from Cluster 1 on its level of compliance management in practice. The effect for Cluster 2 is lower once we take the control variables into account, and is therefore partly explained by differences in resources, size, interaction with ACCC and management approach. It is likely that those who see the ACCC as unthreatening also have lower resources, less managerial oversight and planning, and less interactions with the ACCC, and these factors partly explain their lower compliance management in practice.

Also as expected, the group that sees the ACCC as highly professional (Cluster 3) is more positive than those who see the ACCC as threatening (Cluster 1) on all their attitudes towards compliance. The positive effects for Cluster 3 actually seem to become slightly stronger once we take the control variables into account! On the other hand, those who see the ACCC as unthreatening (Cluster 2) do not vary significantly from Cluster 1 on negative attitudes to compliance. Cluster 2 is significantly lower than the other two groups on duty to obey the law – although this effect disappears once we take the control variables into account.

Once we put the control variables into the model, we see that they are quite important in explaining variation in compliance attitudes and compliance management behaviours. Having had an interaction with the ACCC in the previous six years is important: those businesses generally have greater compliance management in practice, but also greater game-playing and resistance! Both greater size and greater managerial oversight and planning appear to lead to greater compliance management in practice, and also seem to be associated with a greater sense of duty to obey the law. Overall, therefore, those with greater resources have greater compliance management in practice, a greater sense of duty to comply and also more resistance. This latter result is somewhat surprising, but perhaps it can be explained by the fact that businesses with greater resources are more likely to have internal lawyers, and these can have contradictory effects – for or against resistance – depending on the ethical orientation of the lawyer and the business.⁶³

⁶³ Parker, Rosen et al. (2009).

Table 1: Impact of combinations of business opinions of the ACCC on compliance attitudes and compliance management in practice

Explanatory variables	1. Analysis without control variables				2. With control variables			
	Compliance management in practice	Duty to obey the law	Game-playing	Resistance	Compliance management in practice	Duty to obey the law	Game-playing	Resistance
Clusters of combinations of opinion of ACCC								
Cluster 1: Threatening (ref. category)	[3.75] (126.54)]	[3.97] (131.09)	[2.66] (70.79)	[2.78] (80.28)	[1.77] (15.21)	[3.27] (23.33)	[2.85] (16.24)	[2.18] (13.72)
Cluster 2: Unthreatening	-.27*** (7.72)	-.08* (2.19)	.03 (0.78)	-.06 (1.59)	-.16*** (5.20)	-.05 (1.04)	.10 (1.55)	.04 (0.70)
Cluster 3: Professional	.05 (1.37)	.12*** (3.47)	-.10*** (2.87)	-.14*** (4.03)	.03 (1.08)	.16*** (2.79)	-.14* (1.91)	-.22*** (3.41)
Control variables								
Interaction with ACCC	IR	IR	IR	IR	.14*** (4.60)	.03 (0.66)	.18*** (2.95)	.19*** (3.45)

<i>Size</i>	IR	IR	IR	IR	IR	IR	.07* (2.24)	.06*** (2.89)	-.02 (0.63)	.04 (1.70)
<i>Organizational resources</i>	IR	IR	IR	IR	IR	IR	.37*** (12.05)	.13*** (4.32)	.00 (0.11)	.11*** (3.12)
<i>Managerial oversight and planning</i>	IR	IR	IR	IR	IR	IR	.20*** (6.66)	.01 (0.36)	-.07 (1.72)	-.00 (0.10)
Model statistics:										
N	892	896	895	896	895	896	840	844	843	844
Adjusted R ²	0.08	0.03	0.01	0.02	0.01	0.02	0.36	0.06	0.02	0.05
F-value of full model	40.37***	12.67***	5.94***	8.14***	5.94***	8.14***	78.05***	10.63***	3.65***	8.51***

Note: *** = p < 0.005; ** = p < 0.01; * = p < 0.05 (two-tailed).

Cell entries are standardised regression coefficients with the absolute value of t-statistics in parentheses.

Table 2: Impact of individual dimensions of business opinions of the ACCC on compliance attitudes and compliance management in practice

Explanatory variables	1. Analysis without control variables					2. With control variables				
	Compliance management in practice	Duty to obey law	Game-playing	Resistance	Compliance management in practice	Duty to obey law	Game-playing	Resistance		
Individual dimensions of opinion of ACCC										
<i>Likelihood and severity of enforcement action</i>	.39*** (12.45)	.20*** (6.16)	-.08* (2.23)	.07* (1.96)	.23*** (7.42)	.15*** (4.20)	-.10** (2.58)	-.01 (0.13)		
<i>Strategic sophistication</i>	.04 (0.97)	.19*** (4.93)	.04 (1.06)	-.16*** (4.12)	.05 (1.50)	.22*** (5.46)	.04 (0.89)	-.17*** (4.13)		
<i>Procedural and substantive justice</i>	.03 (0.68)	.04 (1.03)	-.13*** (2.90)	-.14*** (3.11)	.02 (0.52)	.01 (0.16)	-.08 (1.71)	-.12** (2.57)		
<i>Accommodating behaviour</i>	.11*** (3.25)	.05 (1.37)	-.03 (0.69)	.10*** (2.63)	.08** (2.49)	.03 (0.94)	-.04 (1.03)	.09* (2.42)		
<i>Undogmatic behaviour</i>	-.09*** (2.67)	-.10*** (2.92)	-.03 (0.75)	.05 (1.55)	-.07** (2.52)	-.09*** (2.70)	-.02 (0.62)	.07* (2.04)		
Control variables										
<i>Interaction with ACCC</i>	-	-	-	-	.11*** (3.43)	-.01 (0.15)	.11*** (2.90)	.09** (2.53)		

<i>Size</i>	-	-	-	-	-	.04 (1.51)	.07 (1.89)	-.02 (0.62)	.07 (1.92)
<i>Organisational resources</i>	-	-	-	-	-	.34*** (11.31)	.14*** (3.92)	.02 (0.45)	.10*** (2.71)
<i>Managerial oversight and planning</i>	-	-	-	-	-	.18*** (6.10)	-.01 (0.21)	-.06 (1.63)	.01 (0.40)
Model statistics:									
N =	892	896	895	896	896	840	844	843	844
Adjusted R ²	0.18	0.10	0.00	0.05	0.05	0.39	0.13	0.02	0.08
F-value of full model	41.16***	21.61***	3.86***	10.60***	10.60***	59.78***	14.59***	2.89***	8.92***

Note: *** = p < 0.005; ** = p < 0.01; * = p < 0.05 (two-tailed).

Cell entries are standardized regression coefficients with the absolute value of t-statistics in parentheses.

Once we put the control variables into the model, we see that they are quite important in explaining variation in compliance attitudes and compliance management behaviours. Having had an interaction with the ACCC in the previous six years is important: those businesses generally have greater compliance management in practice, but also greater game-playing and resistance! Both greater size and greater managerial oversight and planning appear to lead to greater compliance management in practice, and also seem to be associated with a greater sense of duty to obey the law. Overall, therefore, those with greater resources have greater compliance management in practice, a greater sense of duty to comply and also more resistance. This latter result is somewhat surprising, but perhaps it can be explained by the fact that businesses with greater resources are more likely to have internal lawyers, and these can have contradictory effects – for or against resistance – depending on the ethical orientation of the lawyer and the business.⁶⁴

Many of the R squares (a measure of the total explanatory power of the model) for the models are low, indicating that these models do not generally have a good explanatory power. The R square for the full model for compliance management in practice, however, is good (at 36 per cent).

Overall, the findings in Table 1 support the hypothesis that to the extent that business hold a positive, multidimensional view of the ACCC as both tough and fair (that is, those who see the ACCC as ‘professional’), they are likely to exhibit both more positive attitudes towards compliance and also engage in greater compliance management behaviours. Compared with those who see the ACCC as threatening, the group that sees the ACCC as professional does not have significantly different levels of compliance management in practice, and does have more positive attitudes towards compliance. The group that sees the ACCC as fair and accommodating but non-threatening has significantly lower levels of compliance management in practice and no better attitudes towards compliance (indeed, perhaps even worse).

We next consider whether there are any individual dimensions of opinion that can make a difference.

Findings 2: Impact of Individual Dimensions of Business Opinions of the ACCC

Table 2 shows our test of the impact of each of the individual dimensions of opinion of the ACCC.

Greater perceived deterrence of the ACCC (*likelihood and severity of enforcement*) is associated with higher compliance management in practice, as we might expect. However, it also seems to have a positive effect on attitudes towards compliance, despite the prediction that it might break down positive commitment to comply. There is also some suggestion of a negative effect on resistance – that is, resistance might increase with greater

⁶⁴ Parker, Rosen et al. (2009).

perception of likelihood and severity of ACCC enforcement action, but this effect disappears when we take into consideration the control variables.

As predicted, a good opinion of the *strategic sophistication* of the ACCC is associated with a higher sense of duty to obey law high and lower resistance, but we do not find that it makes any difference to compliance management in practice. Similarly, as expected, the higher the respondents' opinion of the procedural and substantive justice of the ACCC, the less likely they are to have a game-playing or resistant attitude – although some of this effect disappears once the control variables are taken into account.

On the other hand, a good opinion of the degree of *accommodation* of the ACCC seems to make compliance management in practice higher, but also makes resistance higher. This latter result seems strange, as it is a concern for the ACCC if those firms that see the ACCC as most accommodating interpret this as an invitation to resist compliance with the law, even at the same time as they introduce a compliance system. Finally, there is an equally unsettling result in relation to effect of seeing the ACCC as *undogmatic*: the more undogmatic the respondents see the ACCC as being, the lower their compliance management in practice and the lower their sense of duty to obey law.

We find that the control variables mostly have the same effects as in the results of Table 2. Those businesses who have had interaction with ACCC have greater compliance management in practice, but also greater game-playing and resistance (as discussed above)! Those with greater managerial oversight and planning, as expected, have greater compliance management in practice. Those with greater resources also have greater compliance management, and a greater sense of duty to obey the law, but they also show greater resistance.

Most of the R squares for the models are a little higher than in Table 1, and are quite good for compliance management in practice and for duty to obey the law, both with and without the controls. The R squares are better because, of course, looking at individual dimensions of opinions, rather than combinations of opinions, puts more information into the statistical analysis. But this does not mean that the model in Table 2 gives us a 'better', or more useful, explanation of our explanatory variables than looking at combinations of opinion. The challenge is that businesses do not form opinions about single dimensions of a regulator's behaviour in isolation. That is, a business does not only think about the perceived deterrent threat of a regulator without also having an opinion of their fairness, flexibility, strategic sophistication, and so on. Businesses always evaluate a regulator along a number of dimensions of opinions at once. For this reason, we need to consider the findings in Table 2 about the effect of individual dimensions of behaviour in the light of the findings in Table 1 about the effect of combinations of opinions.

Looking only at the results in Table 2 about the effects of various individual dimensions of opinion, we might conclude that a regulator should ensure that it is seen as being capable of likely and severe enforcement action – since this is the dimension of opinion that gives the 'best' results

overall. Taking the more multidimensional approach in the model shown in Table 1, we find that it is wisest for a regulator to focus not just on the single dimension of being threatening, but on being seen as ‘professional,’ in order to build up both compliance management behaviour and normative commitment to compliance. It is certainly crucial that a regulator project a large deterrent threat – a regulator that is not threatening is useless in changing behaviour. However, in projecting a serious threat of enforcement, a regulator should also ensure that it is seen as using that threat in a sophisticated way that is both strategic and fair.

Conclusion

In a study of all the press releases issued by the ACCC in 2001, Yeung concluded that the ACCC’s media strategy had not necessarily held together the potentially contradictory dimensions of publicity for regulatory enforcement appropriately:

The Commission’s media strategy has a Janus-like quality. Viewed from the perspective of regulatory effectiveness, the Commission’s proactive media usage has contributed to its credibility as a powerful, proactive regulator, vigorously endeavoring to protect competition and the interests of consumers. But viewed from the perspective of constitutional principle, its pursuit of publicity may have a tendency to undermine its credibility as an even-handed law enforcement agency committed to ensuring that those at risk of violating the TPA are fairly treated.⁶⁵

While Yeung studied ACCC press releases objectively, our study considers the *subjective* perceptions of the ACCC actually formed in corporate minds a few years later. Our findings show that almost half of our respondents indeed see the ACCC primarily as threatening, as Yeung’s analysis might have predicted. However, there is another group of our respondents – more than one-third of the group – that sees the ACCC in a different way, as primarily just, accommodating and strategically sophisticated, and not as threatening.

It is most important to notice that we find a substantial minority of respondents – about one-fifth – hold a sophisticated, nuanced and generally positive view of the ACCC as posing a strong deterrent threat, but also being a just, flexible and strategic regulator. These respondents perceive the ACCC as ‘professional’. As we have shown, this attitude contributes positively to both their compliance management behaviour and normative commitment to compliance.

The existence of this third group, which sees the ACCC as professional, provides some hope that regulators do not have to choose between showing one or other of Janus’s two faces, to adopt Yeung’s metaphor. The ACCC does not have to slip into one or other of the two tropes of regulation as

⁶⁵ Yeung (2005), p 574.

purely conflict and deterrence, or cooperation and voluntary compliance, as we describe in the first part of this article. We find some possibility here for regulators like the ACCC to be seen as 'responsive regulators' who cooperate where possible and threaten where necessary, and choose between the two in a fair and strategic way.⁶⁶ In order to achieve this, it is certainly very important that a regulator be seen as wielding a strong threat along the single dimension of opinion of deterrence. Yet it is also important that the deterrent threat be matched by fairness, reasonableness and strategic sophistication.

However, our findings relate to business perceptions of just one regulator at one particular point in time. Our research only considers the effect of differing business perceptions of the same regulator. Further research is necessary to find out what regulators can actually do in order to be seen as responsive regulators by a larger proportion of those they regulate. Such research might involve comparing the impact of different regulators who behave in different ways towards the same (or similar) populations of regulated businesses. It may also involve undertaking a comparison of the business responses to different strategies of communication and enforcement by the same regulator at different points in time. Indeed, it is important to note that our analyses also suggest that in explaining good compliance management behaviour, it is generally just as important, if not more so, to examine various features of the regulated entities themselves, specifically their resources, management style and particular histories of interaction with the ACCC. A further topic for research is the possibility that regulators may need to communicate to firms with different levels of resources and management approaches in different ways, thereby tailoring their approach in order to be truly effective in their regulatory efforts.⁶⁷

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⁶⁶ See also Nielsen and Parker (2009b) on the difficulties of being seen to behave as a responsive regulator in specific enforcement interactions. For other empirical demonstrations of the difficulties for regulators to behave and be perceived to behave as responsive regulators, see also Mascini and Van Wijk (2009); Waller (2007).

⁶⁷ See, for example, Gunningham and Sinclair (2002).

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Technical Appendix

Table A1: Individual dimensions of respondents' opinions of the ACCC⁶⁸

<i>Measures of opinions about the ACCC</i>	<i>Items included in each measure (mean for each item on scale from 1–5)</i>	<i>Statistics for each whole measure</i>
Likelihood and 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</p> <p>Std. dev. = 0.64</p> <p>Cronbach's Alpha = 0.77</p>
Strategic sophistication	<p>Sophisticated in its understanding of how business works today (3.22)</p> <p>Beneficial for the Australian economy (3.6)</p> <p>One of the most effective regulators in Australia (3.5)</p> <p>Focuses on the most important problems (3.21)</p> <p>Cares more about the productivity of Australian organisations than about</p>	<p>Mean = 3.27</p> <p>Std. dev. = 0.65</p> <p>Cronbach's Alpha = 0.75</p>

⁶⁸ Further details of the statistical and theoretical considerations in developing this set of measures are available in Parker and Nielsen (2007).

<i>Measures of opinions about the ACCC</i>	<i>Items included in each measure (mean for each item on scale from 1–5)</i>	<i>Statistics for each whole measure</i>
Procedural and substantive justice	publicity (2.9) 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 = 0.89
Accommodating behaviour	Offers organisations assistance to help them understand and meet their obligations under the <i>TPA</i> (3.17) Willing to agree to remedies suggested by organisations that have breached the <i>TPA</i> (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 = 0.50
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 = 0.57

Table A2: Results of cluster analysis of respondents' opinion of ACCC

	Cluster 1: ACCC as threatening	Cluster 2: ACCC as unthreatening	Cluster 3: ACCC as professional	
Dimensions of opinion of ACCC (scale of 1–5)				Significant difference
Likelihood and severity of ACCC enforcement action	3.49 (0.49)	2.57 (0.50)	3.52 (0.45)	***
Strategic sophistication of the ACCC	3.02 (0.52)	3.19 (0.60)	4.01 (0.36)	***
Procedural and substantive justice of the ACCC	2.80 (0.48)	3.28 (0.50)	3.88 (0.38)	***
Degree of accommodating behavior of the ACCC	3.03 (0.55)	3.33 (0.54)	3.62 (0.46)	***
Degree of undogmatic behavior of the ACCC	2.45 (0.57)	2.77 (0.47)	2.75 (0.44)	***
Cluster Information				
Number of businesses (% of total)	415 (46%)	312 (35%)	171 (19%)	898 (100%)

Cell entries are the mean values of designated items for businesses comprising the designated cluster of compliance motivation calculated using K-means clustering for the items that comprise compliance motivation. Significant differences are calculated using One-Way ANOVA: Two-tailed sig. *** = $p < .005$ ** = $p < .01$ * = $p < .05$ (two-tailed)

Table A3: Measures of attitudes to compliance⁶⁹

	<i>Items included in each measure (mean for each item on scale from 1–5)</i>	<i>Statistics for each whole measure</i>
Duty to obey law for its own sake	People should obey the law even if it goes against what they think is right (3.69)	Mean = 3.95 Std. dev. = 0.64 Cronbach's Alpha = 0.85
	Our organisation feels a moral obligation to observe the <i>TPA</i>	
	Most managers in this organisation would in general feel ashamed if the organisation committed a breach of the <i>TPA</i>	
Avoiding or evading compliance (game- playing)	My organisation sometimes spends time and resources figuring out how to get what we want without directly breaching the <i>Trade Practices Act</i> (2.69)	Mean = 2.62 Std. dev. = 0.77 Cronbach's Alpha = 0.28
	A wise organisation uses the loopholes in the law (2.57)	
Resistance	Lack of senior management priority to keeping good relations with the ACCC (2.58)	Mean = 2.70 Std. dev. = 0.71 Cronbach's Alpha = 0.27
	Most managers in this organisation believe that we should stand up to the ACCC when we can (2.75)	

⁶⁹ Further details of the statistical and theoretical considerations in developing this set of measures are available in Parker, Rosen et al (2009); Nielsen and Parker (2009a).

Table A4: Measure of compliance management in practice

Questions	Mean response for each question (Scale from 1–5 Strongly disagree to strongly agree)	Whole measure
Thinking about the impact of the <i>Trade Practices Act</i> on your organisation at this point in time, please tell us on a scale from 1 to 5 to what extent you agree with each of the statements:		
In my organisation compliance advice is rarely ignored by the board (If you don't have a board, please skip this question). ⁷⁰	4.21	Cronbach's Alpha: 0.90 Mean: 3.62 n = 994 Min = 1.33 Max = 5.00 Std dev = 0.63
In our organisation the people responsible for compliance find it easy to get access to top management.	4.10	
In my organisation compliance problems are quickly communicated to those who can act on them.	3.99	
In my organisation compliance advice is rarely ignored by line managers. ⁷¹	3.86	
In my organisation systemic and recurring problems of non-compliance are always reported to those with sufficient authority to correct them.	3.77	
Compliance requirements of laws, regulations, codes and organisational standards are integrated into my organisation's day-to-day operating procedures.	3.69	
Managers in our organisation know what aspects of compliance they are responsible for.	3.61	
Compliance failures are always investigated to understand their cause.	3.58	
In our organisation everyone knows where the buck stops for compliance.	3.58	
In my organisation we review our compliance program on a regular basis.	3.39	
My organisation allocates adequate resources to enable the implementation of the compliance policy.	3.40	
My organisation is one of those organisations that try to have the best compliance of any organisation in the country. ⁷²	3.04	
My organisation invest a lot of time and money in compliance training;	2.94	

⁷⁰ In our questionnaire, this item was asked in reverse to that shown here: 'In my organisation compliance advice is often ignored by the board (If you don't have a board, please skip this question).' The mean response has also been reversed to reflect the wording shown in Table 4.

⁷¹ In our questionnaire, this item was asked in reverse to that shown here: 'In my organisation compliance advice is often ignored by line managers.' The mean response has also been reversed to reflect the wording shown in Table 4.

⁷² In our questionnaire, this item was asked in reverse to that shown here: 'My organisation is not one of those organisations that try to have the best compliance of any organisation in the country.' The mean response has also been reversed to reflect the wording shown in Table 4.

Table A5: Control variables – organisational resources and market position

	Mean responses 1–5 (standard deviation)	Whole measure
Organisational resources		
How 'well-resourced' – either by contracting out by using in-house expertise – do you think your organisation is in the following respects? (n = 961, 968 and 980) ('Very badly resourced' to 'Very well resourced')		
Research and development	3.20 (1.11)	Mean = 3.54 Cronbach's Alpha = 0.78 n = 970 Min. = 1 Max = 5 Std dev 0.75
Legal knowledge	3.66 (0.96)	
Economic knowledge	3.69 (0.86)	
Technical knowledge relevant to compliance	3.60 (0.97)	
Level of managerial oversight and planning		
Our managers give a lot of priority to long term strategic planning (n = 972)	3.63 (0.92)	Mean = 3.14 Std dev = 0.78 Cronbach's Alpha = 0.74 n = 999
Our managers spend most of their time on day-to-day problem solving and short term planning ⁷³ (n=969)	3.24 (0.93)	
Our management is more interested in being nimble than in long range plans ⁷⁴ (n=999)	2.88 (0.922)	

⁷³ This item was reversed for the calculation of the whole measure (as shown in the third column). The unreversed mean and standard deviation are shown in the second column.

⁷⁴ This item was reversed for the calculation of the whole measure (as shown in the third column). The unreversed mean and standard deviation are shown in the second column.