

Centre for Competition and Consumer Policy
(CCCP), RegNet, Australian National University

**ACCC Enforcement and Compliance
Project: Working Paper on ACCC
Compliance Education & Liaison
Strategies**

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EXECUTIVE SUMMARY

The Centre for Competition and Consumer Policy's (CCCP) Australian Competition and Consumer Commission (ACCC) Enforcement and Compliance Project uses qualitative and quantitative research methods to evaluate the impact of ACCC enforcement strategies on compliance with the Trade Practices Act. This Report provides a preliminary analysis of the qualitative interview data collected to date that pertains specifically to the ACCC's compliance liaison and education activities, including its work in relation to codes of conduct. The main conclusion from this data is that much of the ACCC's most effective 'compliance' activity (ie in education, liaison and codes) has been facilitated by strong enforcement activity of various types. Indeed, some of the ACCC's most innovative and successful enforcement activity has been successful, at least partially because it has motivated commitment to significant compliance education activities or voluntary codes¹. Thus, as predicted by the theory of responsive regulation, compliance and enforcement activities must be used together to support one another for regulation to have an impact on industry.

¹ See also the CCCP's submission on the ACCC discussion paper on voluntary codes, which is appended to this report.

1. THE ACCC ENFORCEMENT AND COMPLIANCE PROJECT

1.1 Summary of Project

Perhaps, the dominant theme of regulatory compliance research over the past two decades has been regulatory mix. How do regulators get the right mix of punishment and persuasion? Some have argued for a shift toward more cooperative compliance strategies (Bardach and Kagan 1982; Kagan 1991; Rees 1988), others for more deterrence (Pearce and Tombs, 1997). The 'pyramid' theory of responsive regulation (Ayres and Braithwaite 1992) presumes that cooperative compliance, will work most of the time with most firms, deterrence will be the strategy that is most likely to work when cooperative compliance fails, and incapacitation is the strategy most likely to work when deterrence fails. The basic idea is one of organising compliance strategies in a regulatory pyramid where more cooperative strategies are deployed at the base of the pyramid and progressively more punitive approaches are used as the regulator moves up the hierarchy of strategies. There is a presumption in favour of starting at the base of the pyramid and only escalating up the pyramid if the regulated firm refuses to respond in a spirit of cooperative compliance. The objective is that firms and individuals will comply even without enforcement action (below the bottom of the enforcement pyramid) through internalisation and institutionalisation of compliance norms, informal pressure and indirect regulation.

The aim of this project is to test the pyramid theory in the context of the Australian Competition and Consumer Commission's (ACCC's) competition and consumer law enforcement activities.

1.2 Methodology

Qualitative and quantitative research methods are being used to evaluate the impact of ACCC enforcement strategies on compliance with the Trade Practices Act. This research is taking place in three main stages.

Stage One: Interviews were conducted with (a) thirty-six ACCC staff (including some former senior officers and Commissioners) in different offices and (b) twenty-one trade practices lawyers and other advisers to gather examples of key cases of ACCC compliance and enforcement activity and general information on the nature of ACCC enforcement activity and its impact on compliance. An analysis of the frequency and outcomes of different types of ACCC enforcement activity was also made using ACCC Annual Reports and the data from interviews. (See Parker & Stepanenko 2003 for preliminary results from this stage of the Project.)

Stage Two: The researchers have chosen about fifteen ACCC enforcement matters for examining in more detail the specific types of enforcement activity used in each case and the response of the business and industry involved to different enforcement approaches. (The CCCP will soon be producing a report based on analysis of this data relating to ACCC enforcement strategies in relation to s45 Trade Practices Act, anti-competitive collusive conduct: Ainsworth, Parker and Stepanenko 2004). These cases represent a cross-section of different types of compliance/enforcement activity, different industries and different types of conduct. A further twenty-five focused interviews with people in the businesses or industries affected by ACCC enforcement action in these chosen cases were conducted. The fifty-seven interviews with ACCC staff and trade practices lawyers and compliance advisers also contained much relevant data on these cases. The interviews were supplemented by data obtained via contemporaneous newspaper reports and other documentary sources including ACCC and court documents where they were available.

Stage Three: A quantitative survey of businesses that have been the target of ACCC enforcement activity and a control group is currently being conducted to test hypotheses about the impact of different enforcement strategies on compliance. The first results from this survey will be available in [late](#) 2004.

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Confidentiality, Anonymity and Other Ethical Issues: An interview protocol has been approved by the Australian National University's human research ethics committee for Stage One and Two interviews. It involves a guarantee of anonymity for all participants and all cases mentioned unless the participant consents or the material is already on the public record. Under the project's ethics protocol, the list of cases selected for further study must also be kept confidential from all participants in the research (ACCC and non-ACCC) to the extent possible, unless and until consent is received from those involved to name the case. The ACCC has partially funded this research by generously providing funding for the work of the Centre for Competition and Consumer Policy at the Australian National University. The ACCC has also supported and cooperated with this research project and the researchers have regularly consulted with staff at the ACCC about the conduct of the research. However, this research is being conducted independently of the ACCC. The researchers have committed to never pass any opinion from an ACCC staff member about any company, lawyer, industry association, etc to that company, lawyer or industry association (or to anyone else) and never to pass any opinion from a company, lawyer or industry association about the ACCC to the ACCC (or anyone else) in a way that identifies the company, lawyer or industry association. In order to ensure this commitment is kept, under no circumstances will the ACCC be able to find out who has been

interviewed or surveyed (apart from the exception above where permission is given).

1.3 Purpose of this Report

The purpose of this Report is to present a preliminary analysis of the data collected in Stages One and Two of the ACCC Enforcement and Compliance Project that pertains specifically to the ACCC's compliance liaison and education (including codes of conduct) activities. It is intended that the data reported here will be used in a number of subsequent publications that will draw conclusions about the significance of the data in terms of theories of enforcement and compliance. This Report presents the data with minimal commentary or conclusions. Comments and suggestions about this research are welcome. The Centre for Competition and Consumer Policy (CCCP) expects that further data on this topic and testing of the tentative conclusions drawn here will be published when the results of the Stage Three quantitative survey of business experience of the ACCC are available.

Further information about the methodology of this Project is detailed in the *Compliance and Enforcement Project: Preliminary Research Report* available from the CCCP (Parker & Stepanenko 2003).²

2. THE ACCC ENFORCEMENT AND COMPLIANCE PYRAMID

2.1 The Pyramid Theory of Responsive Regulation

The pyramid theory of responsive regulation presumes that cooperative compliance (which Braithwaite (2002) now prefers to call restorative justice), will work most of the time with most firms to achieve compliance with the law, deterrence will be the strategy that is most likely to work to achieve compliance when restorative justice fails and incapacitation is the strategy most likely to work when deterrence fails. So the theory gives us the presumptive ordering of strategies in Figure 2.1. (In corporate regulation, incapacitation generally does not mean imprisonment, but more often an injunction, license suspension, licence withdrawal, suspension of trading, seizure of assets, or putting in a state-imposed management team.) It is assumed that all three types of strategies will often fail. But it is argued that there are important ways that the pyramid enables the weaknesses of one

²Note some further interviews have been conducted since the Preliminary Report was prepared.

strategy to be covered by the strengths of another. For example, the naïveté of believing that ruthless firms will be socially responsible is covered by the cynicism of the deterrence model assumption that firms will do what is profitable however irresponsible. The weakness of the deterrence model — that it can be pointless to punish managers who are too incompetent to manage their way out of the problem — might be covered by incapacitative remedies that remove these managers.

The left-hand side of Figure 2.1 tells us something very general about the types of contexts where the three approaches will work. But Ayres and Braithwaite (1992) argue that all of us as individuals and all firms have their moments when they act in a socially responsible way (the base of the pyramid), when they are rational maximizers of value (the middle) and when they are incompetent or irrational (the peak). Even the most ruthless capitalists, who believe that greed is good, are seen by Ayres and Braithwaite as having a socially responsible self. All actors have multiple selves. The trick of smart regulation is to persuade the ruthless actor to put their socially responsible self forward when the regulatory stakes are high. When this can be done, regulation can move down the pyramid; when resistance becomes more determined, enforcement must move up the pyramid. The model is a dynamic one. It suggests that regulators must be constantly moving up and down the pyramid in strategic ways.

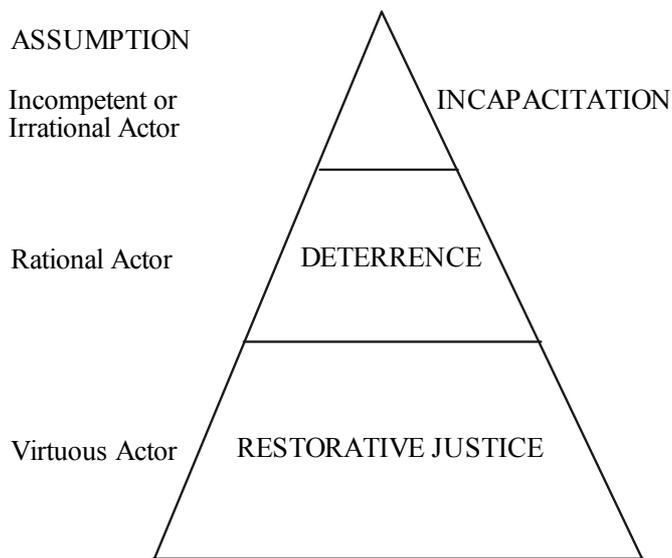


Figure 2.1: A Regulatory Pyramid

This approach to regulatory compliance and enforcement can be applied to individual firms in response to individual breaches (or allegations of breach). However, it can also apply at an industry level.

2.2 ACCC Compliance Activity and the Regulatory Pyramid

The compliance activities of the ACCC are coordinated at a national level through the ACCC's Compliance Division. The Division has three aspects, namely:

- The Regional offices of the ACCC (Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Townsville & Darwin). These offices undertake investigations of alleged breaches and enforcement responses including enforceable undertakings or court proceedings (and sometimes administrative undertakings);
- The Enforcement and Coordination branch (based in Canberra), which coordinates the work of the Regional offices and conducts its own investigations and enforcement work; and
- The Compliance Strategies branch, which is primarily responsible for compliance education and liaison activities as well as the ACCC's Infocentre which receives and refers about 53,000 complaints of alleged breaches annually. The ACCC's compliance education and liaison activities are extensive and primarily aim to highlight the rights and obligations of the various stakeholders in relation to the Trade Practices Act. The Compliance Branch's activities include:
 - the Small Business and Rural and Regional outreach programs;
 - consumer liaison activities including the Consumer Consultative Committee (Chaired by the Deputy ACCC Chair, Louise Sylvan);
 - other consultative committees including the Small Business Advisory Group and the Consultative Committee (coordinated by the ACCC's executive);
 - numerous speeches and attendances at meetings, conferences and other fora;
 - the development, maintenance and update of numerous publications on Trade Practices Act compliance issues (hardcopy and via the ACCC's website) including its "Competing Fairly Forums";
 - involvement in developing or reviewing industry codes of conduct³;

³ The ACCC has recently published a discussion paper proposing that it may get involved more formally in working with industry to develop and endorse voluntary industry codes of conduct that meet standards it will set (ACCC 2003).

- monitoring compliance with corporate compliance programs required by court order or pursuant to an undertaking ordered; and
- monitoring adherence to mandatory product safety standards.

The ‘compliance’ and ‘enforcement’ activities of the ACCC cannot (and should not) be divided in practice. Both are intertwined in the regulatory pyramid. In fact it is misleading to differentiate between the compliance and enforcement activities of a regulator like the ACCC. It is more meaningful to say that the object of *all* of the ACCC’s activities, both its so-called ‘enforcement’ and ‘compliance’ activities should primarily be to promote and enforce compliance with the Trade Practices Act. It has a number of tools available to help achieve firm compliance with the law. Those at the lower rungs of the pyramid, such as education, liaison and voluntary codes are sometimes named ‘compliance activities’. Those at the higher rungs are more formal and adversarial enforcement activities including litigation. But compliance is the goal of all the ACCC’s action including enforcement litigation. Table 2.2 sets out the types of enforcement (and compliance) activity used by the ACCC from highest to lowest levels of the pyramid. Table 2.3 links the various remedies or outcomes that the ACCC has achieved through its activities to the type of enforcement activity used. (Both tables are based on information from the responses to interviews with ACCC staff and ACCC Annual Reports 1997-2003.)

Table 2.1: Typology of ACCC Compliance Activity

<i>COMPLIANCE PYRAMID</i>	<i>ACCC COMPLIANCE ACTIVITY</i>	<i>COMMENTS</i>
CRIMINAL PROCEEDINGS	Criminal action fully litigated	<i>Only available for unfair practices and product safety and information breaches.</i>
	Criminal action – plea of guilty	
	Contempt proceedings	<i>To enforce court order as below.</i>
CIVIL PROCEEDING	Intervention in private action.	<i>May include appeal. May include enforcement of enforceable undertaking or escalation of enforcement activity after failure to comply</i>
	Enforcement action – fully litigated	
(CONTESTED PROCEEDINGS)	Enforcement action - litigated on penalties or remedies and agreed on facts	<i>May include appeal. May include enforcement of enforceable undertaking or escalation of enforcement activity after failure to comply</i>
	Representative action	

	Intervention in private action	<i>with administrative resolution or failure to cooperate after letter/inquiry.</i>
SETTLEMENT OF CIVIL PROCEEDING (UNCONTESTED PROCEEDINGS)	Civil action settled by way of agreed penalties and other consent orders.	<i>Settlement may be achieved through: Court-ordered mediation; Face to face negotiation; or Letters only. Any settlement may include exercise of leniency in penalties and other remedies.</i>
	Civil action settled by consent orders only, no financial penalties	
	Civil action settled by enforceable undertaking and consent orders and/or agreed penalties	
	Civil action settled by complete immunity agreement for cooperation with ACCC.	
<i>INSTITUTION OF PROCEEDINGS</i>		
ENFORCEABLE UNDERTAKING	Enforceable undertaking - no proceedings instituted.	
ADMINISTRATIVE RESOLUTION	Administrative resolution including agreement not to take action provided some rectification is made.	<i>Not usually made public although there may be a media release in unusual circumstances</i>
	Withdrawal of allegations	
INVESTIGATION	Investigation with use of s155	
	Letter threatening institution of proceedings if cooperation does not occur.	
	Investigation and no further action.	
INQUIRY	Inquiry or outline of concerns and complaints and no further action	
	Inquiry to administrators of a voluntary/mandatory code where complaints are made about a code.	
EDUCATIONAL AND PREVENTIVE COMPLIANCE ACTIVITY	Involvement in drafting a new voluntary/mandatory code of conduct for an industry.	
	Educational and liaison activity to business or consumers eg Small Business, Rural and Regional program, 'Best and Fairest' compliance training program on website, providing seminars, booklets or guidelines or responding to inquiries for advice about compliance	

	Public Compliance Commitments	<i>A preventive initiative used in GST campaign.</i>
MONITORING AND COMPLAINTS	Monitoring indicates potential breach but no further enforcement action is taken.	
	Complaint received and some advice offered on the spot on how the complainants might deal with the matter themselves (eg return goods and demand refund) or who they might go to for further help or advice.	<i>Call Centre receives 1100-1600 complaints per week. Product safety team regularly surveys business compliance with mandatory product safety standards.</i>
UNDETECTED BREACHES	Complaint received and no further action taken.	
	Misconduct not detected or reported.	

Table 2.2: Typology of Remedies or Outcomes Available from Different ACCC Enforcement Activities

TYPE OF ENFORCEMENT ACTIVITY	REMEDY OR OUTCOME
CRIMINAL PROCEEDINGS *Only available in limited situations	<i>Imprisonment (currently only available for contempt of court)</i> <i>Financial penalties</i>
CIVIL PROCEEDINGS	<i>Financial penalties</i> <i>Injunctions to cease unlawful conduct: Including injunction to cease and desist action in another court.</i> <i>Declarations that conduct is unlawful</i> <i>Compensation (in representative proceedings) including international refund order.</i> <i>Corrective advertising</i> <i>Adverse publicity order</i> <i>Community service order</i> <i>Probation order (to implement compliance program or training)</i> <i>Order to implement compliance program or attend compliance training.</i> <i>Enforcement of an enforceable undertaking</i> <i>Recognition of Australian court order in another jurisdiction</i> <i>Interlocutory orders:</i> <i>Interlocutory injunction to cease and desist conduct</i> <i>Mareva injunction (freezing assets)</i>
SETTLEMENT OF CIVIL PROCEEDING	<i>Consent orders for all of outcomes for civil proceedings above.</i> <i>Leniency by ACCC in return for cooperation.</i>
ENFORCEABLE UNDERTAKING	<i>Commitment to cease the alleged misconduct.</i> <i>Compensation, reimbursement or redress to affected parties.</i> <i>Other corrective action eg corrective advertising.</i> <i>Implementation and review of a compliance program.</i> <i>Community service obligations (such as funding or implementing an industry or consumer compliance education program).</i> <i>Undertakings by individual directors effectively guaranteeing payment of penalties by their companies.</i>
ADMINISTRATIVE RESOLUTION	<i>Compensation, reimbursement or redress to affected parties.</i> <i>Other corrective action eg corrective advertising.</i> <i>Implementation and review of a compliance program.</i> <i>Community service obligations.</i> <i>Immunity from action in return for cooperation.</i>
INVESTIGATION	<i>Section 155 inspection of documents.</i> <i>Section 155 interview.</i>
INQUIRY	<i>Same as for administrative resolution.</i>
EDUCATIONAL AND PREVENTIVE COMPLIANCE ACTIVITY	<i>Development or revision of code of conduct.</i> <i>Other educational or preventive outcomes eg guidelines, booklets, seminars etc</i> <i>Advice on how to comply</i>

2.3 The Dynamic Relationship Between ‘Compliance’ and ‘Enforcement’ Activity

It is important to emphasise that the pyramid theory of regulation is a dynamic one. The model does not assume that firms or industries are (or should be) dealt with at one level of the pyramid by one enforcement or compliance strategy only. Rather, the model assumes that firms (or industries) are regulated responsively (and therefore effectively) by different strategies at different times depending on their response to different levels of regulatory intervention. Thus, a regulator should not be content with compliance education (at the lower rung of the pyramid) where businesses are failing to comply with the law. The regulator should move up the pyramid. But, similarly, a regulator should not be content with punishment to deter or incapacitate a non-compliant business. The regulator should also attempt to build on enforcement activity at the higher levels of the pyramid to strengthen the effectiveness of compliance education activities and codes at the lower levels.

According to the pyramid theory of responsive regulation, therefore, *enforcement activity is effective when it leads to improved possibilities for compliance*, and *compliance activities are generally only effective when they are backed up, and indeed facilitated by, tough enforcement action*.

The interviews with ACCC staff, with trade practices lawyers and advisers, and with industry people provided plenty of evidence to back these statements up. Without a doubt, the ACCC’s most effective compliance activities have been facilitated by strong enforcement activity of various types. This has included important innovations in enforcement activity that feed forward the impact of a particular enforcement action into ongoing compliance education and/or code of conduct initiatives. Figure 4.1 in the Conclusion of this Report further illustrates this feed forward mechanism.

3. ANALYSIS OF INTERVIEW DATA ON ACCC COMPLIANCE ACTIVITIES

3.1 ACCC Compliance Education Activities and Publications: Trade Practices Lawyer and Adviser, and Business and Industry Interviews

One of the five questions that the twenty-one trade practices lawyers and advisers answered asked generally about the type of compliance advice they gave their clients. This question included the following sub-question:

Are there any ACCC cases, publications or educational activities in relation to compliance that you and your clients have found useful? If so, which ones?

Not all interviewees provided a response to this question. Those that did were generally positive, but not necessarily very specific or detailed in their response:

ACCC publications - I can't think of any on compliance, but the little booklets on s155 and s87B and things like that are very helpful. (03-002)

Some brochures are useful and some guidelines are useful from lawyers' point of view. (03-004)

I think the ACCC website is pretty good. I don't really know about other publications. (03-007)

ACCC educational activities: The Merger Guidelines are terrific. The Advertising Guidelines are good work by the ACCC. The Leniency Policy is a very difficult issue but so far they have done a great job and we are working through that. (03-008)

We find that publications issued by the ACCC such as the "*Merger Guidelines*", advertising and promotions publications such as "*Advertising and Selling*" are helpful. (03-014)

The ACCC do a great job on education and publications. They also do have to have an education phase before they have a prosecution phase. (03-017)

ACCC does a good job on education etc – very good publications. The majority of their people are happy to do talks. They are good on their s28 obligations. They certainly do it better than other regulators. The majority are very good at giving off the record chats. That is to be appreciated. [Name of a particular state Regional Director] has done wonders for the PR of ACCC in [name of the relevant state] on a practical level. [He/she] has a willingness to be an advisor and an educator as well as a regulator. [He/she] has the balance right. (03-018)

The ACCC does generate useful material. Their web-site is crap and you can tell them that. (03-019) [Note: The ACCC has developed a new web-site since that comment.]

The interviews with businesses that had been the subject of ACCC enforcement activities and related industry associations also revealed some

position opinions about the usefulness of ACCC compliance education activities:

The ACCC's 'Competing Fairly' forums that they are putting on in the bush are really helping. It is good the way they use real examples and make it concrete. (05-004)

Negative comments about ACCC publications and compliance education activities included the following:

ACCC publications – occasionally contain statements that are misleading on the law. It is important to have guidelines that set out what view the regulator takes of the law and sometimes they are essential reading (eg merger guidelines). But they often contain statements that are misleading or inaccurate on the law (eg third line forcing guidelines). Some are better than others. (03-001)

ACCC educational material is too tainted by Fels' prejudices on the law to be effective. (13-001)

There was also some comment on the role of the ACCC in providing information and material on compliance programs. In some cases where the ACCC requires a business to implement a compliance program via an enforceable undertaking or court order, the business, particularly if it is a small business, may want the ACCC to provide the compliance program:

When the ACCC does win a case, the ACCC always wants a compliance program. There was one case I did against a little player. The ACCC wanted a compliance program and this player didn't have one, so they wanted the ACCC to give them one. But the ACCC doesn't have a pro forma compliance program because they say they want the firm to do it for themselves, and I can understand that. But it took ages to settle because they wanted the ACCC to give them a compliance program, and then they went to Standards Australia and that standard is incomprehensible. (03-007)

The idea that a compliance program is simply a product that the ACCC could 'provide' or a business 'acquire' goes against the reality that effective compliance must be about everyday management of compliance issues arising within each particular business and growing a compliance culture (see Parker 2002). A compliance program is not just a manual and a video or computer based training program that can be given to a business. Nevertheless, there is clearly some demand for the ACCC to provide guidance and material to businesses, especially smaller businesses that are less able to afford private compliance advisers, in implementing effective

compliance programs. Indeed, since the ACCC promotes compliance programs and often requires them as a condition of settlement of a matter, it could plausibly be argued that the ACCC has a responsibility to provide help as to what an effective and appropriate compliance program involves. The ACCC website provides some basic guidance on compliance programs and what they involve at www.accc.gov.au/content/index.phtml/itemId/54418. This web page also links to the ACCC's 'Best and Fairest Compliance Manual', a simple, text-based trade practices training program. The Best and Fairest program was rarely mentioned in interviews. It was never mentioned by business and industry interviewees and only mentioned once or twice by lawyer and adviser interviewees:

We have provided a client with the Best and Fairest module. It looked good in the report [audit report for s87B enforceable undertaking]. We are not sure whether it ever got used. (03-004)

Generic compliance tools are usually ineffective in our view. (03-014)

Finally, it is important to remember the lack of understanding of the details of business's legal obligations under the Trade Practices Act and the role of the ACCC among all but the largest businesses with inhouse legal and compliance advice. For example, consider the following comments by the manager with compliance responsibilities at one medium-sized Australia-wide business chain that had been the subject of ACCC enforcement action in the previous few years:

Once we were audited by the ACCC, we put in place a compliance training program. So we just try to keep aware of the ACCC rulings... In our industry the general level of compliance awareness and commitment is fairly low and that is for two reasons. There is still a fair bit of flouting the rules by larger [businesses in our industry]. Then there is a lot of ignorance in very small [businesses] – one man bands who haven't had cause to get up to date with the rulings. For example I heard recently that there was a case that concerned [the type of misconduct for which this business had got in trouble]. But I haven't heard from the ACCC or any other industry body about that case. I don't know whether the ACCC should be providing updates to help us comply. It seems to be incumbent upon us to find all the information we need in order to be in compliance and pay for a lawyer to tell us what it means. (09-003)

This manager clearly saw his own business as ahead of the compliance game relative to the rest of their industry, due to their recent brush with the

ACCC. Yet his own understanding of the role of the ACCC (the reference to ACCC ‘rulings’ instead of enforcement actions in court, or perhaps guidelines), and the obvious lack of wherewithal to be able/committed to dedicating resources to understanding compliance (the negative reference to paying a lawyer) indicate that this business probably still has a long way to go in understanding its compliance obligations. Yet, as the logic of this interviewee’s comments suggest, typically small and medium sized businesses only acquire compliance awareness and skills when it is provided to them by their industry associations, partnerships with larger businesses, and even concerted initiatives by regulators. Enforcement action alone, as in this case, does not necessarily give smaller organisations and their managers the wherewithal to understand compliance issues.

On the other hand, there are also businesses who need little educational help from the ACCC, or at least believe they need little help. For example, one business interviewee (a specialist legal and compliance person from a very large business) commented:

ACCC publications? No, not really – we don’t use them. They just did this [name of brochure about a certain consumer topic relevant to the interviewee’s industry]. That is like telling us how to suck eggs. A company like us, it is our business to know how to [do what the brochure addresses] and it is very complex. The brochure is way too simplistic. That would be true of any business in our industry. They are all sophisticated. It may be useful for customers to read to see what they should be looking for. (10-002) [The brochure was in fact aimed at industry not consumers.]

Overall, the comments on ACCC’s general compliance education activities did not indicate that they had a strong impact on their own. There were much stronger indications of impact and effectiveness where compliance education activities were linked in some way to enforcement action. The next section considers the evidence on this.

3.2 Linkage Between Compliance and Enforcement Activity: ACCC, Lawyer and Adviser, and Industry and Business Interviews

As predicted by the pyramid theory of responsive regulation, the evidence from the interviews suggests that cooperative compliance strategies (such as

compliance liaison/education and voluntary industry codes) have more impact where they are linked to enforcement activity.⁴

Compliance Education Effect of Publicity of ACCC Enforcement Activity

Generally, interviewees also commented on the approach of the ACCC in generating publicity about enforcement activity and the effect this had on 'educating' business on trade practices compliance issues. The material in the interviews on publicity is more fully set out in the *Compliance and Enforcement Project: Preliminary Research Report* (Parker & Stepanenko 2003, 43-44). However, the following comment gives a flavour of the significance of publicity for enforcement action for compliance education:

No doubt Fels' use of media and high profile has raised the whole awareness of the Trade Practices Act in corporate Australia. Ten years ago it was not on the agenda, but Fels has put it on the agenda with able assistance of ACCC staff. (03-003)

The anecdotal evidence is also strong that ACCC publicity educates consumers about trade practices compliance. Several interviewees commented that the Infocentre always received more calls after former Chairman, Alan Fels, had been on television speaking about a particular issue such as petrol or beer prices:

It is a kind of rule - Alan Fels gets on TV and the phones ring. Even the New South Wales Office of Fair Trading gets more calls. (01-021)

Compliance Education Initiatives as an Innovative Enforcement Remedy

In interviews ACCC staff were asked what innovations in compliance or enforcement strategy had made the most significant difference to the impact and effectiveness of the ACCC as a regulator. A number of ACCC staff commented on remedies or undertakings that resulted in offending businesses taking responsibility for a trade practices compliance education initiative:

[In a particular case] once the company found out what happened and that the misconduct had occurred, they took the person responsible for the breach off duty and got him to spend

⁴ It should be noted that the design of this research was focused mostly on uncovering information about the compliance impact of ACCC "matters", and that most interviewees interpreted this to mean potential enforcement matters, rather than purely educational or voluntary activities. Nevertheless, interviewees were asked open questions about factors that motivated compliance or led to significant improvements in compliance outcomes, and therefore they were free to raise either enforcement or compliance strategies. The Stage Three survey may provide some more reliable evidence as to the impact of ACCC compliance education activities.

his time helping the ACCC in its investigation. He had to record a video about the effect his mistake had had on his life. The video was to be shown to everyone within the company. I think that if it were possible to make the video public it would be incredibly useful as a deterrence measure for other people considering the misconduct. (01-026)

[In a certain case] the labels said [the product] was ‘grown in Australia’ when it was actually grown in Thailand. It was a clear-cut administrative resolution and we decided to weave in some broader industry knowledge, so they were not just fixing the packaging. They had to fund two series of seminars for their industry on labelling issues. (01-012)

Remedies have definitely moved on since I started in 1994. Back then you’d always do the same remedies ie refund and corrective advertising or penalty. Then the ACCC was able to get more creative like an industry program. For example I worked on a case concerning labelling [of a certain pet food product]. The [pet] food was labelled as [a particular food] but actually used the same ingredients as all the other pet food of that type with only a tiny percentage of [that food]. My manager at the time was quite innovative and said let’s make [the offending business] feel good by becoming industry leaders because they kept pointing out that everyone was doing what they were doing. So we got them to print and fund most of a new industry guideline on labelling and ingredients, and the rest of the industry funded the rest. And a little pamphlet explaining it all was put up in the supermarket aisles where you buy pet food... That matter started out very simple but expanded as we went along because of the remedies. (01-012)

[Interviewee named a particular case.] This fellow had set up a 1902 [premium toll - \$4.95 per minute] phone number targeted at disadvantaged people and offering them loans. In fact he was just holding people on the line in order to make money from the phone calls with no intention of actually giving them a loan. The Commission got more money than we expected from him in the action via a consent order... So we thought that something constructive we could do with the money was to get them to give it to the Telephones Information Standards Council (TISC) for consumer education and complaint handling. TISC is a body (its name has now changed) that administers a code for the use of 1902 numbers. They have used that money very constructively to make themselves far more prominent through

a new website, ads and issuing press releases. [This was done by a court order.] (01-017)

A number of ACCC interviews saw these types of remedies as part of a strategy of using “community service orders”, a remedy that was added to the Trade Practices Act in 2001 (s86C). The ACCC had already been using “community service orders” in enforceable undertakings and administrative resolutions before 2001, but now the court can also order community service orders.

I really like some of the non-pecuniary outcomes we have been getting both at the litigation and administrative resolution [ie enforceable undertaking] levels. I think litigation is often necessary – we have no choice. But it’s got to be horses for courses in terms of the outcomes you go for. We often want a market-based outcome. You don’t want to just shut down a business. You need to get the best outcome for the market or for the issue at hand. Of course there may be a specific problem where a company or an individual is a thief and you just need to deal with that. But where the conduct is market-based conduct [ie everyone is doing it] then it is great to get an outcome like funding for market-based compliance training or an industry bulletin. It doesn’t always have to be a financial penalty. For example in the [name of a financial institution] enforceable undertaking, they paid for a pamphlet on home mortgages which was a good outcome for consumers. (Of course I don’t know how many consumers actually read the thing). (01-031)

A second interviewee (01-030) also mentioned the same enforceable undertaking as an example of the ACCC’s first use of a community service order. This interviewee commented that “We’re seeking fairly innovative orders and the idea is that they will educate consumers so they introduce some sovereignty back to the consumers.”

Interviewees also mentioned a number of other cases where funding or preparation of consumer rights or business compliance initiatives were included in consent orders or enforceable undertakings.

Compliance Education Initiatives as a Response to ACCC Enforcement Activity

In many cases compliance liaison/education initiatives were part of *business responses* to ACCC enforcement matters without being a formal part of the remedy. In other cases, they were part of the *ACCC follow-up* to enforcement activity or to the fact that there were a lot of complaints in a particular area.

The interviews with people from businesses or industries that had been the subject of ACCC enforcement activity produced a number of examples of

compliance education initiatives developed in response to that ACCC enforcement. For example, an interviewee (05-002) from the advertising industry gave a detailed explanation of the way in which the ACCC's action in joining advertisers to cases against their clients for misleading and deceptive advertising resulted in a major commitment by the industry association to trade practices compliance education of its members (and some of their clients). In fact, the ACCC enforcement led directly to the implementation of the industry-wide compliance training program because the person who is leading the training program lost their job at an advertising agency because of the downturn in business caused by ACCC enforcement action. This person decided to go and work for the industry association, rather than finding another ordinary advertising job, in order to educate other advertising agencies to avoid getting into trouble with the ACCC.

In another case an industry association had originally been investigated by the ACCC as a possible party to illegal behaviour. It was cleared, but a number of its member firms and individuals were found to have breached the Trade Practices Act. As a result, the industry association thought that,

the logical thing was to think about our future role. Should we do more about compliance than what we already do? How can we prevent this conduct from occurring again among our members? We developed an online training program on the Trade Practices Act focusing on the questions that are important to us. It cost \$25 000 to get the program converted into an online form. The next thing we did was to arrange a cheque for the membership of the Australian Compliance Institute. Compliance for us has always been very technical about product standards. We never thought about compliance with other laws. We started talking about what we could do to clear up our idea of compliance. Now we have about five people involved with the Australian Compliance Institute (staff and members) ... The whole experience was very traumatic and shook us to the core... And we tried to take reasonable steps to ensure we would not be so passive anymore. When we developed the training, we looked at all our companies and identified any that had a run-in with the TPA. So we used case studies from these experiences... [Interviewer: What was the ACCC role in this?] They did talks to the industry, meetings, and launch of the training program software. This was very constructive. The ACCC has a terrible reputation. People live in fear and loathing of it. People won't talk to the ACCC about problems on an informal basis. So we try to address that by bringing the ACCC to seminars. We try to

show that they are human... when you actually meet ACCC people, they are very helpful. (05-001)

ACCC interviewees (01-004, 01-022) also gave some examples of the ACCC becoming involved in successful compliance education initiatives instigated by business as a more indirect response to enforcement action. For example, the Federation of Australian Radio Broadcasters approached the ACCC to get involved in industry training on trade practices obligations with respect to advertising in the radio industry. The reason for their initiative was a combination of awareness of enforcement actions and potential enforcement actions concerning their industry, including the “cash for comments” inquiry that had recently occurred, and some ACCC misleading and deceptive advertising cases concerning radio advertising (but where the radio stations had not actually been joined to any action). The new CEO of the Federation has also previously been legal counsel at a large business which had had significant dealings with the ACCC through enforcement actions, so she was keen to work cooperatively with the ACCC to prevent problems occurring.

It is not always the business or industry involved that initiates compliance education activity in response to ACCC enforcement activity. Often it is the ACCC itself that responds to its own enforcement action by initiating compliance education via publications, the development of guidelines or business outreach. One example that was widely considered to be quite successful was the ACCC’s pricing guideline targeted at the travel and tourism industry. This guideline was developed in conjunction with enforcement action against Qantas and Virgin that resulted in enforceable undertakings whereby both airlines agreed to advertise prices inclusive of taxes and charges. The ACCC followed on from this by publishing a guideline on inclusive pricing that it widely promoted to the travel and tourism industry.⁵

A number of ACCC interviewees cited cases where ACCC enforcement action had led the ACCC to engage in various educational activities, often the promulgation of guidelines and publications (either in cooperation with the businesses involved or on their own), which then led to other businesses voluntarily contacting the ACCC to ensure their own preventive compliance with the Trade Practices Act.

⁵ Available at <www.accc.gov.au/transport_prices_oversight/allincl_pr_travel.html>. Following the recent Federal Court decisions in *ACCC v Dell Computer* [2002] FCAFC 434 (20 December 2002) and *ACCC v Signature Security Group* [2003] FCA 3 (13 January 2003), the ACCC is revising the guideline in consultation with industry.

Almost all of the successful compliance education initiatives mentioned by ACCC or industry interviewees could be attributed to a response to ACCC enforcement activity either one that was formally required as part of the remedy ordered by the court or agreed by the business, or voluntarily adopted by the business. There was only one instance mentioned in the interviews of a compliance education initiative that was thought to be successful without any ACCC enforcement action:

I am on the competition and compliance working party of [a state-based association of rural and local councils] – most rural and local councils are members. It meets monthly and a few years back there was a lot of work to be done. After the 1995 Hilmer reforms, there was no doubt that Trade Practices Act provisions applied to local government because of the Competition Code. There was a need for public education so we put together a booklet and CD-ROM (Q & A) on the Trade Practices Act and local government... That had a big impact and I'm still very involved in monthly meetings and they are always talking to me about potential problems. Great success – there have been no cases concerning local government in [the relevant state] since the 1995 Hilmer reforms. (01-006)

While no ACCC enforcement activity was required here, the ACCC interviewee went on to explain all the pressures the rural and local councils were under to make sure they complied with competition policy. Hence, this may be an unusual case where ACCC enforcement activity was not required as other coercive forces (from state and federal government) were sufficiently effective in attracting attention and priority to the need to comply. For most businesses and industries, court proceedings or other ACCC enforcement action might be the best way of attracting attention to the need for trade practices compliance.

Voluntary Industry Codes and ACCC Enforcement Activity

The Compliance Strategies branch of the ACCC also liaises with industry and consumer associations on voluntary industry codes. (There is also one mandatory industry code, the Franchising Code, which the ACCC has the power to enforce.) The ACCC has generally not endorsed voluntary codes to date. However, the ACCC is now considering the possibility of introducing guidelines for formally endorsing voluntary codes (see ACCC 2003).⁶

⁶ The UK Office of Fair Trading has also introduced a similar scheme (see Office of Fair Trading 2004).

The ACCC currently has the power to ‘authorise’⁷ codes of conduct where aspects of the code may contravene the anti-competitive conduct provisions of the Trade Practices Act. While authorisation is only obtained after a consideration of the net public benefit in respect of the provisions concerned, such authorisation only extends so far as conferring immunity from prosecution for the provisions the subject of the authorisation application. It does not otherwise ‘endorse’ or sanctify the code as a best practice model. In reality however, applying the public benefit test may often act as a functional equivalent of endorsement.

One ACCC interviewee who had worked in this area described the ACCC’s work on codes as “a vehicle for achieving outcomes without going to litigation. It is the carrot side of things.” Sometimes the ACCC does get involved with codes as an alternative to enforcement via litigation. If there is a code in place that has worked well in the past, yet the ACCC begins to receive a lot of complaints about conduct that should be governed by the code, it might go to the code administrators first to review the code and its implementation, rather than taking enforcement action. Similarly, in emerging areas of difficulty, the ACCC might be able to work with some businesses or an industry association to develop a code that is aimed at nipping non-compliance in the bud. For example, with the introduction of digital television to Australia, there was concern by the ACCC and by industry leaders about the potential for false and misleading conduct in relation to the use of the word ‘digital’. Therefore, according to one interviewee (05-001), the industry association together with the ACCC developed a Code of Conduct that essentially proscribed the use of the word ‘digital’ except in well-defined circumstances. The interviewee commented that the industry association did this partly because there had been some complaints about advertising of ‘digital’ TVs and because the industry perceived the market for digital TVs as quite fragile and susceptible to collapse if consumers lacked confidence in the honesty of marketing in the area. The resulting code probably requires compliance beyond the law and in that sense potentially gives consumers greater protection than the law would provide. (On the other hand, since the code is voluntary, consumers’ ability to enforce these rights will not be strong.)

However, this is not the whole story. The relevant industry association and its members had also been previously involved in serious ACCC enforcement action on a completely different matter. In the aftermath of that case, the industry association believed “it became logical for us to look for all possible solutions to avoid future misconduct. We need to re-build trust with the ACCC. The experience of the [name of case] has made us

⁷ Pursuant to its powers under Part VII of the Act, the ACCC can, in respect of conduct which may otherwise contravene the Act, grant immunity from prosecution. See the ACCC’s guide (insert title of Adjudications publication...)

acutely aware of the need to examine the trade practices implications of any new technology. Our motivation is that it can be useful to work with ACCC in working out what vague terms like ‘false and misleading’ can mean in particular contexts.” (05-001) This, then, is not only a story of a code being used instead of enforcement litigation, it is also an example of ACCC enforcement activity via litigation building the compliance culture in industry that creates the capacity for effective ACCC cooperative compliance activity later on to prevent an entirely different problem in a way that actually goes beyond legal compliance – a good example of the pyramid regulation theory hypothesis of the inevitable linkages between enforcement and compliance activity.

A number of interviewees gave examples of situations where various voluntary industry codes were developed or reviewed as part of the aftermath of ACCC enforcement action. Where this works effectively, tough ACCC enforcement action in one case motivates improved cooperative compliance which prevents or resolves later breaches before they become serious enough to warrant further ACCC enforcement action. Where the ACCC starts receiving more complaints about the relevant type of conduct again, or new variations of misconduct emerge, it might talk to the code administrators first about improving the code and/or its implementation, and then take further enforcement action if problems continue. Hence, consistent with the theory of responsive regulation, the ACCC and industry might cycle through a variety of stages where tough regulatory enforcement action elicits business compliance, which in turn elicits a more cooperative regulatory approach, before new problems of business non-compliance surface, leading to tough regulatory enforcement action, and so on. An ACCC interviewee (01-004) cited the case of a particular industry and its code where this cycle had revolved around several times in the last ten or fifteen years. Recently, the ACCC has taken a number of enforcement actions in the relevant industry and is concurrently trying to make the relevant code more effective. This involved negotiations about changing the terms of the code and a timetable for the business in the industry to come into compliance with those changes – a timetable that involved a promise that the ACCC would not take enforcement action against them in the meantime for breaches of the Trade Practices Act. From one point of view a case like this can be seen as a failure because, despite enforcement action and an actively implemented code, the ACCC’s believes there is still significant and widespread non-compliance in the industry. On the other hand, the ACCC’s strategy of using a combination of enforcement action and code negotiations to try to motivate better compliance and achieve widespread industry change appears to be fundamentally right. Nevertheless, in order to be successful this strategy involves a careful combination of :

- constant vigilance by the ACCC as to levels of complaints and compliance in the industry,
- good communication with the main stakeholders in the code,
- ongoing willingness to take enforcement action and,
- most importantly, a very contextually sensitive approach to the politics of negotiation and enforcement and when to use which.

Other more straightforward cases of ACCC enforcement action leading to codes that had important impacts in preventing future non-compliance were also cited by interviewees. For example, one ACCC interviewee referred to a case involving misleading and deceptive conduct in relation to the supply of weight loss products:

The main outcome of that action is the voluntary code of practice for the weight loss industry. The code was written and funded mainly by the more reputable companies of the industry that decided to get rid of the more dodgy ones. The big companies did not like the effect that the smaller ones were having in their market. The Dieticians Association of Australia was also involved. The Commission did not have a role writing the Code but it certainly did get a chance to review it and make recommendations. The recommendations were followed. There had been moves afoot to create the Code, but the involvement of the ACCC accelerated it... There have been no significant ACCC enforcement cases in that industry since the Code. (01-023)

A good example of the way in which both a voluntary industry code and compliance education activity can occur as an integral part of the outcomes of ACCC enforcement activity was the telecommunications ‘slamming’ case in 2000. ‘Slamming’ refers to deceptive door-to-door sales tactics and telemarketing methods that result in customers’ services being illegally (ie without legitimate authorisation) transferred from one service provider to another. Two telecommunications companies (and associated marketing companies) who were both trying to break into the newly competitive local telephony market were both investigated and ultimately offered enforceable undertakings to the Commission. The extent of slamming conduct identified in the case also had the capacity to significantly damage consumer confidence, and hence competition, in the recently competitive local telephony market. As a result, the Australian Communications Industry Forum (ACIF) set up a working party that drafted a new customer transfer

code addressing the issues raised in the ACCC investigation.⁸ ACIF is an industry-based self-regulatory body, and also includes consumer and government stakeholders on each of the various committees that sets standards. The enforceable undertakings required the telecommunications companies (who were members of ACIF) to join up to the new code as soon it was formally agreed.⁹ The existence of the code also made it easier for the industry ombudsman to resolve new complaints and disputes relating to customer transfers. However, it should be noted that the ACIF process has also been criticised by consumer groups. See ACA 2003:23, Consumer Law Centre Victoria 2003:3) Finally, the telecommunications companies agreed to donate half a million dollars each to be used in a public education campaign about consumer rights in telecommunications — an example of an attempt to ‘harden targets’ against misconduct by sales agents. The marketing companies agreed to donate much smaller amounts. The money was eventually used by ACIF in consultation with the ACCC and relevant consumer groups for the ‘It’s your call’ public education campaign. This education campaign was designed to empower consumers to grasp the advantages of competition, and to counteract the publicity surrounding the slamming misconduct and ACCC enforcement action which may have dampened consumer confidence about swapping from the dominant market player to one of its competitors.

On the other hand, at least two industry interviewees criticised the ACCC for not being cooperative in ‘approving’ (that is, endorsing) one particular code or guideline that industry had initiated to ensure compliance with the Trade Practices Act in an area where the ACCC had recently taken enforcement action. The interviews did not elicit the ACCC’s reasons for their lack of cooperation. It may be that ACCC staff thought the guideline suggested by industry was inadequate to ensure compliance with the law — the interviews with industry people suggested that there may have been some potential for conflict with the ACCC about how far the guideline should go. One interviewee commented that “Our concern is that in some of these things the ACCC tends to overshoot” (05-003). Alternatively, there may simply have been a breakdown in communication as to what level of involvement was expected from the ACCC. In the absence of a formal code

⁸ ACIF, *Industry Code: Customer Transfer*, ACIF C546: October 2001. ACIF had already identified these issues as a problem and had commissioned a research report on the topic: Communications Law Centre, *Research Project Report: Consumer Experiences with Selling Practices* (Sydney: ACIF, 1999).

⁹ However the ACCC should be careful about requiring a business that has breached the law simply to sign on to such a code. ACIF and other code administration bodies like it want businesses to sign onto their codes only when they have worked through their processes and made sure they comply. Requiring offending businesses to sign on to voluntary codes without adequate internal reform and monitoring could encourage lip service to the codes rather than genuine compliance.

endorsement policy and process at the ACCC, such misunderstandings are likely to be common. Nevertheless, the criticisms in this area illustrate the fact that even where there are genuine attempts at cooperative compliance strategies, there is also considerable potential for misunderstanding and conflict. This underlines once again the special negotiation and political skills required by ACCC staff in this context. It also shows that it will never be sufficient to rely on cooperative compliance strategies alone. Sometimes it will be necessary for the ACCC to take an enforcement stance on some issues, that can then be tested in court if necessary.

It is also possible that business might choose to implement and sign up to voluntary codes because doing so will give them some positive rewards. This is the basis for the UK Office of Fair Trading's (OFT) approved codes scheme. This scheme gives OFT approval to codes that meet certain very stringent criteria (including substantial evidence that the code is working well) (see OFT 2004). Once a code is approved, then the code administration body (code sponsor) and participating businesses can display an OFT approved code logo on their marketing and promotional literature. The logo will also be marketed by the OFT which has a dedicated budget for spending money to build brand recognition for the logo. It is yet to be seen how well this new scheme works to motivate business to commit to consumer codes that can be proven to be effective (a number of codes have started on the approval process, but none have yet achieved approved status). It should be noted that this scheme, with its high standards and clear criteria, was introduced to replace a previous OFT system for sponsoring codes which was found to be ineffective at ensuring the quality of codes and consumer and business awareness of good codes. At the very least, it seems likely that a tangible, well-defined incentive, like a well branded logo, is necessary to motivate business to commit to a code of the quality that the OFT. The ACCC experience suggests that enforcement action is also necessary to motivate commitment to a code.

4. CONCLUSION

Logically it seems reasonable to assume that compliance education and liaison activities (including codes) would lead to less breaches. Because compliance strategies are intended to have a widespread, preventive effect on observance of the law, it can be quite difficult to evaluate their impact and effectiveness (see Sparrow 2000:118-122). A thorough evaluation of the impact of the ACCC's compliance education activities, including its publications, would require a significant investment in focused market research looking at the target groups of various publications and educational initiatives, and would need to control for other factors that might impact on compliance. Similarly, in order to come to detailed conclusions about the effectiveness of the various voluntary industry codes with which the ACCC

has been involved, researchers would need to examine each code in detail, interviewing all the relevant stakeholders and a sample of relevant businesses and consumers (where relevant) and controlling for other factors.

Nevertheless, a number of firm conclusions can be drawn from the data collected for the ACCC Enforcement and Compliance Project:

- Business and lawyer interviewees rarely spontaneously mentioned general ACCC publications and education activities as a particular motivation or aid to compliance. Although when asked specifically, many interviewees said they found some publications quite helpful. (More reliable information on the general usefulness of ACCC educational activity to business should be generated by the Stage Three survey of businesses. The survey data may also allow us to analyse the impact of the use of publications on compliance.)
- Business and lawyer interviewees, as well as ACCC interviewees, did cite many examples of effective compliance education activities (some initiated by business and some initiated by the ACCC) that were related in one way or another to ACCC enforcement action. Indeed, *almost all positive mentions of compliance education activities, including publications and guidelines, were activities initiated in response to ACCC enforcement actions or as part of the remedies ordered through ACCC enforcement action.*
- *In almost all cases of voluntary codes that were mentioned in the interviews, one of the reasons for industry to be committed to the code, or for the ACCC to get involved in the code was breaches of the law that had led to ACCC enforcement action.* Even in the case of a purely preventive code (where there had been no enforcement action yet), one of the reasons the relevant industry association was so proactive in developing the code was its experience of recent ACCC enforcement action on a different matter in the industry.
- Effective compliance strategies, especially voluntary codes, are not set in place then forgotten. Where they work effectively they are likely to generate ongoing queries and will also require ongoing monitoring and evaluation. For example, the publication of guidelines on a particular issue, if effective, is likely to mean that businesses will contact the ACCC about preventive compliance or as soon as a potential problem arises in order to resolve it quickly. Similarly, a voluntary code will create a mechanism for complaints to be made about breaches of the code to business signatories, to the code administrators and ultimately to the ACCC. At the same time, *the ACCC will have a responsibility to monitor whether codes and guidelines and other compliance strategies continue to work effectively, to resolve problems that arise and to take enforcement action if and when serious, widespread or recurrent non-compliance re-emerges.*

Hence, successful compliance strategies should almost always be linked to enforcement strategies in a cycle of responsive regulation. The commitment and motivation to implement compliance strategies on the part of industry and the ACCC will often come from enforcement action in the past. Continuing relevance and improvements in compliance strategies generally only occurs because of the ongoing possibility (and often actuality) of enforcement action in the future. Diagram 4.1 (overleaf) illustrates the relationship between compliance and enforcement activities in this cycle.

The dynamic linkage of compliance and enforcement tools to solve problems in some ACCC cases provide examples of ACCC success and innovation at their best. Occasionally, these cases show an ‘integrated compliance’ or ‘problem-solving’ approach to regulation. As Malcolm Sparrow explains, the integrated compliance or problem-solving approach to regulation,

organises the tools around the work, rather than vice versa. It identifies important risks and then it develops coordinated, multi-functional responses. Often it invents new tools, techniques, or solutions tailor made for the problem in hand. Almost every problem-solving success story reveals this: effective solutions to identified risks involve either artfully crafted, properly coordinated combinations of actions or the design of something new. Such solutions could never be created by moving resources between existing functions or programs and allowing them to operate in isolation. (Sparrow 2000: 201-202)

Successful regulation is not simply about getting the ‘right mix’ of compliance and enforcement. It is about the craft of linking them to design new solutions.

ACCC ENFORCEMENT ACTION
(in relation to particular non-compliance)



Voluntary Re-
sponse by busi-
ness involved

Voluntary response by
other members of rele-
vant industry or indus-
try body

Remedy ordered by
court or in enforceable
undertaking

Initiative by
ACCC



ACCC AND INDUSTRY COMPLIANCE STRATEGIES
Educational (ACCC guidelines, publications, pamphlets, videos, consumer
awareness campaign) Voluntary Codes



**Preventive compliance by
industry**

Queries and complaints
about potential non-compliance
quickly identified and corrected

ACCC Monitoring
Of appropriateness and ongo-
ing implementation of compli-
ance strategies



**SERIOUS OR RECURRENT
NON-COMPLIANCE**
Go back to top—ACCC enforcement action



REFERENCES

- Australian Consumers Association (ACA) 2003. Submission with regard to ACCC Discussion Paper Guidelines for Developing Effective Industry Codes. Available at www.accc.gov.au visited on 22 January 2004.
- ACCC. 2003. *Guidelines for Developing Effective Voluntary Industry Codes: Discussion Paper*, Canberra.
- Ainsworth, Paul, Christine Parker and Natalie Stepanenko. 2004. *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases*. Canberra: Centre for Competition and Consumer Policy, Australian National University. Soon to be available at www.cccp.anu.edu.au/projects/project1.html
- Ayres, Ian and John Braithwaite. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.
- Bardach, Eugene, and Robert A. Kagan. 1982. *Going by the Book: The Problem of Regulatory Unreasonableness*. Philadelphia: Temple University Press.
- Braithwaite, John 2002. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.
- Consumer Law Centre Victoria. 2003. *Submission with regard to ACCC Discussion Paper Guidelines for Developing Effective Industry Codes*. Available at www.accc.gov.au visited on 22 January 2004.
- Kagan, Robert A. 1991. "Adversarial Legalism and American Government." *Journal of Policy Analysis and Management* 10(3): 369-406.
- Office of Fair Trading. 2004. *Consumer Codes Approval Scheme: Core Criteria and Guidance*. London: OFT390 Available at www.offt.gov.uk/business/codes.
- Parker, Christine and Natalie Stepanenko. 2003. *Compliance and Enforcement Project: Preliminary Research Report*, Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University. Available at www.cccp.anu.edu.au/projects/project1.html
- Pearce, Frank and Steve Tombs. 1997. "Hazards, Law and Class: Contextualizing the Regulation of Corporate Crime." *Social and Legal Studies* 6; 79.
- Rees, Joseph V. 1988. *Reforming the Workplace*. Philadelphia: University of Pennsylvania Press.
- Sparrow, Malcolm K. 2000. *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, The Brookings Institution, Washington DC.

Submission on ACCC Proposed Guidelines for Developing Effective Voluntary Industry Codes

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24 October 2003

General Comments [Consultation Question 10: 'Are you in favour of the ACCC industry code endorsement strategy?']

The Discussion Paper and Proposed Guidelines for Developing Effective Voluntary Industry Codes are a useful contribution to the ongoing debate about improving voluntary codes. Doubtless in response to the Discussion Paper many industry groups will say that they would not implement the guidelines because they are too onerous in this way or that. It would be a mistake for the Commission to respond to such comment by watering down the guidelines. They should become a benchmark that industry seeks in future to reach and exceed. The fact that most of Australian industry will not play ball with them for the moment is not really a worry.

The Commission should set a clear and strong benchmark in the Guidelines, after strengthening and clarifying them in response to feedback from this consultation. Then it should commit to triennial evaluations of the quality of voluntary industry codes and their administration in Australia, measured against the benchmarks set in the Guidelines. It does not matter if the first report is headlined "95% of Australian Business Substandard in Terms of Code Compliance". That leaves plenty of scope for upwards movement in subsequent triennial reports. The entire philosophy of this program should be about continuous improvement. If it is continuous improvement, improvement from a low base will make the long run historical accomplishment all the more important. Over time, industries that get into very hot water with the Commission will turn to the Guidelines as their lead firms seek to demonstrate in submissions to courts that they are moving to do everything they can to prevent a recurrence of breaches of the Trade Practices Act.

It would be prudent for the Commission to explain that it will need to keep in place a credible enforcement capability for when Codes fail to work or fail to work satisfactorily, as they often will. If the responsive regulatory idea of the enforcement pyramid is right, voluntary forms of regulation, including co-regulation, will only work effectively when backed up by a capability for punitive enforcement. It is this background threat of renewed commitment

to tough enforcement that creates the context where there is a willingness to take Codes seriously.

Continuous Improvement in Industry Codes [Consultation Question 9: Are there any additional matters you consider should be included in the Guidelines?]

In general, the greatest limitation of the Discussion Paper is in its failure to address how the Commission will monitor continuous improvement in the system of voluntary industry codes. One concrete step that should be taken to make this easier for the Commission, and to make Codes more transparent to other stakeholders, is that the Guidelines should be revised to require code administrators to make public on a website their annual reports, complaints statistics and Code review reports by outside consultants, indeed all information about Code administration. Failure to have a website that makes publicly available all the information about Code administration should result in a failure to meet the transparency guideline.

The ACCC's strategy should be one of meta-regulation of continuous improvement in industry codes. This means that:

1. Codes should require firms to continuously improve in their compliance with the standards in the code and to measure that improvement (say in product safety).
2. Codes should also require corporate compliance *systems* to continuously improve in each firm. That is compliance systems are measuring continuous improvement in actual compliance (point 1 above) and in "beyond compliance" performance and are also obliged to accomplish continuous improvement in the internal compliance system itself.
3. Codes reviews (internal annual reviews but especially triennial external reviews) should report on whether continuous improvement has been achieved against objectives, especially measurable objectives, set in the code across all firms, and whether continuous improvement has been achieved in the quality of internal compliance systems operating across the industry.
4. Publicly reported ACCC triennial reviews of voluntary code performance across all industry sectors should report on where the greatest and least continuous improvements in Code compliance has been achieved. They should also report on which industries have achieved the greatest improvement in the quality of their industry-wide code administration.

If the ACCC does not make a serious investment in 4, it is implausible to expect that industry will make a serious investment in 1-3, and continuous

improvement will not occur at any level. This is because industry codes will not be held sufficiently accountable and therefore commitment is likely to recede rather than continuously improve.

5. After each triennial review of all codes, the ACCC should be responsible for reviewing the Guidelines and Code Essentials themselves to ensure continuous improvement of the whole voluntary codes strategy. This review should meet the same requirements as the code reviews eg stakeholder consultation etc.

If the ACCC does not show a commitment to review of its own policies and strategies and to continuous improvement, it will have no capacity to respond to the problems identified in the reviews of individual codes. If the ACCC does show such a capacity, it will lead by example. In particular the Guidelines and Code Essentials must meet their own requirements

Monitoring and Methodology for Code Reviews

Research by the Centre for Competition and Consumer Policy shows that enforceable undertakings are not working as well as they could be because of (1) inadequate follow through by the ACCC to ensure effective implementation of compliance systems etc promised in enforceable undertakings and (2) inadequate methodologies for the review of compliance system implementation and compliance with other undertakings by independent reviewers.¹⁰ This lesson should also be applied to the voluntary codes work.

The ACCC has been widely reported as saying that code endorsement will be “hard to get and easy to lose”. The integrity of the process of endorsement and review (and perhaps withdrawal of endorsement) depends on the rigour and integrity of the internal and third party reviews of codes and on the rigour with which ACCC staff read and question those review reports. The current discussion paper and guidelines make no mention of the ACCC infrastructure that will be devoted to this task, and little to the standards or methodology expected of the internal and third party reviews. This was the problem identified with the enforceable undertaking compliance reviews, that is that there was no specified ACCC unit responsible for reviewing the reports when they came in and no clearly stated (or even implicitly and widely understood) expectations about the methodology of review.

¹⁰ C. Parker, ‘Regulator required corporate compliance program audits’ forthcoming in *Law and Policy*.

We do not think Appendices 4 and 5 of the Proposed Guidelines give the right signal on what makes for continuous improvement nor of the appropriate methodologies for reviewing codes. While they are not guilty of being mere box-ticking reports, they fail to communicate the idea of continuous industry deliberation on how to achieve continuous improvement.

One good way to do this is for Codes to require each member company to engage in a conversation within the company on what is their weakest point in terms of Code compliance. Then they would be required to design a quality improvement study to monitor whether a set of reforms to cover this weak point are actually improving outcomes against the objectives set in the Code. A Code can require that such a quality improvement study be conducted annually or triennially. The point is to have a concrete strategy for requiring deliberation and follow-through on how to improve “beyond compliance”.

Appendices 4 and 5 also fail to communicate the need for stringent evidence as to the claims made about code achievements. The forms should indicate that evidence will be required of each claim. When the review reports are published, their methodology, including whatever evidence was collected, should also be published.

In relation to the evidence required for reports and reviews, it is interesting to note that the UK Office of Fair Trading has recently decided to move away from a strategy of being involved in drafting the detail of codes and then formally endorsing voluntary codes in favour of a new strategy. In the new strategy, the OFT will give more general guidance about the drafting of codes and then endorse publicly through a well-marketed logo “those codes for which there is robust evidence of practical success.” The OFT spells out that “Code sponsors will have to provide this evidence which will include mystery shopping, compliance audits and complaints data to show that the code is being effectively implemented by all who claim to adhere to it, and that consumer disputes are properly resolved.”¹¹ The OFT also provides that consumer satisfaction should be regularly assessed and that “this could be done by eg sending out forms periodically using a customer database”.¹²

This issue of there being robust enough evidence of code compliance and success in addressing consumer concerns is absolutely crucial to the

¹¹ Office of Fair Trading, *The OFT's New Approach to Consumer Codes of Practice: A Consultation Paper*, February 2001 para. 2.6. See also Office of Fair Trading, *Core Criteria for Consumer Codes of Practice*, May 2002, p16.

¹² Office of Fair Trading, *Core Criteria for Consumer Codes of Practice*, May 2002, p17.

reputation of the ACCC. The ACCC should be very careful not to find itself in a position where it has formally endorsed a code that consumers cannot (or cannot any longer) rely upon to accomplish the objectives of competition and consumer protection. The ACCC will need to take a very active and vigilant approach to ensuring there is real life evidence of the success of codes, not just formal compliance. This is likely to require a significant investment on the part of the ACCC in its own staff infrastructure and also commitment to continuous improvement by the ACCC itself in its voluntary consumer codes policy.

Sanctions and Rewards

Deliberative governance of quality requires more than sanctions for failure to accomplish above the floor set in the Code. Awards are also needed when companies are led by the quality of their internal conversation to take the industry up through a ceiling.

Consultation Question 6: Is that which is required for a code to reach Stage 1 clear, and what is required to progress through to Stage 2?

There is no explanation of the significance of Stages One and Two or of the two different lists of indicators in relation to the code essentials. This is not very clear at all.

Further Specific Comments

The various requirements of ‘independence’ throughout the code essentially needs to be carefully defined: for example for Code administration committee chairpersons and also for those conducting independent reviews.

Code essential 11.2 on p14: Whose staff are referred to here?

Code essential 15.2 on p15: it is not clear what these ‘audits’ are. Presumably they should be independent audits or reviews of compliance with the code by signatories. These should be made by public.

Code essential 16.3: The results of the reviews should be made generally available to the public and particularly to stakeholders.

Code essential 9.1: The sanctions should include the possibility of more creative ‘community service’ type obligations.

Page 24, third dot point: The benefits of an endorsed code are said to include ‘avoidance of potential prosecution’. Is the ACCC saying that code membership may be taken into account in an ACCC decision about whether to prosecute or just that code compliance may prevent an actual breach occurring?

Page, 27, section headed ‘Retaining the ACCC Endorsement’: The annual report and the independent audit and the methodology used to conduct it should not only be available to the ACCC but also to the public. As discussed above, the Guidelines should set out guidelines and processes for continuous improvement of codes and also for continuous improvement of the Guidelines themselves on the basis of the annual (and especially triennial reports and audits). There should also be set out some reference to the ACCC’s process for monitoring the reports.