

THE ACCC ENFORCEMENT AND COMPLIANCE PROJECT: EXPLANATION OF PROJECT AND METHODOLOGY

Christine Parker* & Vibeke Lehmann Nielsen**

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The ACCC Enforcement and Compliance Study

Qualitative and quantitative research methods were used to evaluate the impact of Australian Competition and Consumer Commission (ACCC) enforcement strategies on business attitudes and behaviours in relation to compliance with the Trade Practices Act, and to test different theories about what factors motivate and explain business compliance attitudes and behaviours.

The *Trade Practices Act 1974* (Cth) (TPA) is Australia's national competition and consumer protection legislation. It applies to all Australian businesses and prohibits certain anti-competitive conduct (eg price-fixing, abuse of market power), unfair trading practices (especially misleading and deceptive advertising), non-compliance with legislated product safety standards, and unconscionable conduct in business dealings. It is enforced by the ACCC, an agency that receives thousands of complaints every year about potential breaches of the TPA. At the time of our survey the ACCC was receiving between 50 000 and 100 000 inquiry calls raising potential complaints each year. It takes enforcement action in relation to only a small proportion of those complaints. At the time of our survey the ACCC was completing public enforcement action of some kind in less than 100 cases per year on average, although there were likely a further number of hundreds of cases each year where the ACCC took some minor, private action – such as writing a letter or making a phonecall to the business concerned to resolve the issue complained about.

Our data collection took place in two main stages:

Stage One – Qualitative Interviews and Documentary Analysis: The first part of the research involved qualitative interviews with 39 current and former staff of the Australian Competition and Consumer Commission (ACCC), the regulator responsible for enforcing the TPA, 24 leading specialist trade practices lawyers, 7 compliance advisers, and 30 business people from businesses or industries that had faced ACCC enforcement action. It also included an analysis of the frequency and outcomes of different types of ACCC enforcement activity using ACCC Annual Reports and the data from interviews. The purpose of the qualitative research was to establish the nature and range of the ACCC's enforcement activities, to collect evidence as to the impact of ACCC enforcement activity on business compliance, and to explore the ways in which businesses reacted to ACCC enforcement activity.

* Law School, University of Melbourne, Australia. Email: c.parker@unimelb.edu.au

** Political Science, University of Aarhus, Denmark. Email: vln@ps.au.dk

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Stage Two – Survey of Businesses: A quantitative survey of all larger businesses (with more than 100 employees) in Australia designed to measure their perceptions of the TPA and ACCC and their own compliance management behaviours and to test hypotheses about the impact of different ACCC enforcement strategies on compliance behaviours. The survey garnered 999 responses – a response rate of 43%.

Stage One: Qualitative Interviews and Documentary Analysis

Documentary Analysis

A great variety of ACCC policy documents and reports of enforcement activity were read as context for the interviews.

In 2001-2002 we also compiled all the ACCC enforcement matters reported in ACCC Annual Reports for 1997 to 2002 to identify how many enforcement actions the ACCC had taken in relation to different types of alleged breaches and what outcomes and remedies results. This was double checked and updated in 2008.

Summary data from the earlier version of this analysis were published as:

- Christine Parker and Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (Canberra, Centre for Competition and Consumer Policy, Australian National University, 2003). Available at SSRN: <http://ssrn.com/abstract=906945>.

ACCC Staff

Qualitative interviews were conducted with 39 current and former ACCC staff in Melbourne, Sydney, Canberra, Brisbane and Perth using the interview schedule at Appendix One. ACCC staff were chosen for interview on the basis of their seniority and experience with leading investigations in important cases. In each of the ACCC's regional offices, Melbourne, Sydney, Brisbane and Perth, the Regional Director was interviewed first and asked to nominate three or four staff that they thought it would be most useful for us to interview. These staff were then contacted and interviewed. It was not possible to arrange interviews with only two staff that were suggested in this way. A few additional staff were also interviewed later in the process when it became evident from other interviews that they had particular experiences that would be valuable to add to the data collection. The Canberra staff interviewed were generally interviewed because of their specialised responsibilities.

The purpose of the interviews with ACCC staff was to identify and explore staff experiences of significant cases of the success or failure of ACCC enforcement activity. Therefore, the bulk of each interview was spent on detailed description by the staff member of two or three or four enforcement matters in which they had been involved, how those matters had proceeded and what the results and compliance impact had been. Staff were also asked to nominate enforcement strategy innovations that they thought had been especially successful and to explain why, and also the compliance issues that had been particularly recurrent or difficult in their experience. The answers to these questions provide a more general perspective on what makes ACCC enforcement activity succeed or fail in its compliance impact than the description of specific cases. The final question asked them to describe the ACCC's strategic priorities as they impacted on their own work. This last question was intended simply as a check that the rest of the interview had covered issues of strategic significance in their work, not just peripheral ones.

Lawyers and Compliance Advisors

Qualitative interviews were also conducted with 31 leading trade practices lawyers and trade practices compliance advisors in Sydney, Melbourne, Brisbane, Canberra and Perth. Lawyers and compliance advisors were chosen for interview on the basis that they were specialist trade practices lawyers who had represented clients in many significant enforcement actions and were considered leaders in their field. Interviewees were identified via recommendation by ACCC Regional Directors and other regional staff or because they were members of the Trade Practices Committee of the Law Council of Australia. The latter group is generally recognised as representing the best, most elite, and most influential trade practices lawyers in Australia. It was thought that this would represent the leading lawyers who practiced exclusively in trade practices law. The other

trade practices compliance advisors were identified by word of mouth and recommendation by other interviewees. Seven of the leading trade practices lawyers who we approached for interview either declined to be interviewed, did not reply, or we were unable to organise a time with them. The researchers also sought to do some interviews with lawyers from smaller or second tier firms. However, these lawyers either did not reply to requests for interview or we were unable to identify individual lawyers for interview (only firms). This means there is a bias in the lawyer interview data towards the experiences of leading lawyers who mostly represent leading, well resourced companies. However, since the largest companies were also the focus of our quantitative survey, this means that these interviews are a good complement to our quantitative data. When interpreting both the qualitative and quantitative data it is important to bear in mind that our focus is on larger companies and that different findings might have been made if the focus had been on very small businesses and sole traders.

Seven of the interviews that were conducted with lawyers and trade practice compliance advisers were concerned almost exclusively with the advisors' experiences with clients' enforceable undertakings. The other twenty interviews used the interview schedule at Appendix Two. These interviews matched the ACCC interviews in the issues to be discussed as much as possible. The bulk of each interview was therefore spent with the lawyer describing those cases in which they had been personally involved and that they thought had the most significant impact on compliance. The lawyers were also asked more generally about what factors they believed motivated their clients to comply with trade practices law, and to implement or revamp compliance programs. They were also asked about the type of compliance advice they generally provided to clients. Finally they were asked about any conduct by the ACCC that hampered compliance in their opinion.

The twenty interviews with lawyers or advisers that were conducted had a serendipitous strike rate in finding lawyers who worked on those cases that the ACCC staff identified as most significant. It seems likely that the original strategy of concentrating on elite trade practices lawyers for interview is most useful as these lawyers have a variety of clients and cases in trade practices matters. Other lawyers are likely to do less trade practices work and therefore have less experience to share.

Preliminary analyses of the interview data from ACCC staff and lawyers and compliance professionals were published in:

- Christine Parker and Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (Canberra, Centre for Competition and Consumer Policy, Australian National University, 2003). Available at SSRN: <http://ssrn.com/abstract=906945>.

Further Data Collection in Relation to Specific Cases

Further interviews and documentary research was done in relation to a number of cases and issues that had been identified as having a particularly significant impact on compliance with the TPA or attitudes towards the ACCC and the TPA on the basis of the interviews with ACCC staff. In relation to the cases that were identified as particularly significant interviews were conducted, where possible, with business people or inhouse lawyers in the business that had experienced enforcement action. 30 interviews in this category were conducted. Exhaustive newspaper and web searches for information about the cases and the individual business and industry responses to it were also conducted and used in analyses.

A number of working papers and journal articles have been published on the basis of our interviews and further work in relation to specific cases and issues focusing on:

- The ACCC's successful use of enforceable undertakings to get creative, efficient resolutions to potential enforcement actions, and problems with the original systems for monitoring and reviewing businesses' compliance with their enforceable undertakings:
 - Christine Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" *Modern Law Review*, 67(2), 2004, 209-246. Available at SSRN: <http://ssrn.com/abstract=522038>

Argues that enforceable undertakings represent a valuable ‘restorative justice’ alternative to traditional regulatory enforcement action, and that the use of restorative justice in business regulation can simultaneously address both fairness and bias concerns about settlements of potential regulatory enforcement. The way in which restorative justice in business regulation should be implemented and held accountable is discussed and ACCC use of enforceable undertakings critically assessed against that standard.

- Christine Parker, “Regulator-required Corporate Compliance Program Audits” *Law and Policy*, 25(3), 2003, 221-244.

Critically examines the ability of compliance program audits as used by the ACCC and ASIC to provide adequate assurance of compliance system performance. The primary value of compliance program audits in this context is as a management review that induces better compliance. The danger is that the review aspect of the audit will be captured by management concerns. This is evident in a tendency for the audit methodology to focus on management systems at the expense of forensic investigation of harm done (or likely to be done) to consumers and investors, and in a failure to seek out public opinion and input.

- The ACCC’s use of compliance education and liaison activities including working with industry self-regulatory codes of conduct:

- Christine Parker, John Braithwaite and Natalie Stepanenko, *ACCC Enforcement and Compliance Project: Report on ACCC Compliance Education and Liaison Strategies* (Canberra Centre for Competition and Consumer Policy, Australian National University, 2004). Available at <http://ccc.anu.edu.au/projects/compliancereportapril2004.pdf>

This Report provided 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 codes. 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.

- The ACCC’s success in cartel prosecutions in the late 1990s and early 2000s and issues for future enforcement:

- Christine Parker, Paul Ainsworth and Natalie Stepanenko, *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases* (Canberra Centre for Competition and Consumer Policy, Australian National University, 2004). Available at SSRN: <http://ssrn.com/abstract=583521>

The Report examines four case studies of significant ACCC cartel enforcement action in detail using empirical evidence from interviews with ACCC staff, lawyers and business people involved in each case, and documentary reports of the case and its impact. The four cases are the Freight, Concrete, Transformers and Queensland Fire Protection cases. Each case was chosen because of its significant impact on industry compliance and on the reputation and effectiveness of the Commission, according to preliminary interviews with ACCC staff. The analysis shows that each case did have significant impacts, but also weaknesses. The Report evaluates the strengths and weaknesses of each of the investigation and enforcement strategies used by the ACCC in the cartel cases. The Report concludes that despite failures in the impact of both the ACCC’s deterrent and moral messages, the data suggests that ACCC enforcement activity has significantly influenced a change in social norms in Australian business related to

cartel behaviours through a mix of enforcement techniques that have begun to extend a web of control over market behaviour.

- Christine Parker, “The ‘Compliance’ Trap: The Moral Message in Responsive Regulatory Enforcement” *Law & Society Review*, 40(3), 2006, 591-622.

Examines the impact of four apparently successful ACCC cartel enforcement cases and argues that the ACCC did well at increasing deterrence of cartel behaviour, but fell into a ‘compliance trap’ because of conflict between the ACCC and business as to what compliance with the Act should mean, and whether enforcement should assume that antitrust offences should attract moral opprobrium or not. The ‘compliance trap’ occurs where there is a lack of political support for the moral seriousness of the law a regulator must enforce, such as is the case with cartel enforcement in Australia.

- The ACCC’s lack of success in enforcing the unconscionable conduct provisions of the TPA:
 - Michelle Sharpe and Christine Parker, *The ACCC Enforcement and Compliance Project: Assessment of the Impact of ACCC Regulatory Enforcement Action in Unconscionable Conduct Cases* (Canberra, Centre for Competition and Consumer Policy, Australian National University, 2006). Available at SSRN: <http://ssrn.com/abstract=945276>
 - Michelle Sharpe and Christine Parker, “A Bang or a Whimper?: The Impact of ACCC Unconscionable Conduct Enforcement” *Trade Practices Law Journal*, 15(3), 2007, 139-162.

Evaluates the success of the Australian Competition and Consumer Commission (‘ACCC’) in enforcing the unconscionable conduct provisions of the *TPA* in a number of key cases between 1998 and 2005. We find that the ACCC has succeeded in raising awareness of the prohibition against unconscionable conduct. But it has also faced three major problems: First, its lack of success on the merits in unconscionable conduct cases means that it has made a limited contribution to developing the law on unconscionable conduct and sending out a clear message about what amounts to acceptable or unacceptable business conduct in this area. Secondly, the ACCC has been criticised for commencing cases too quickly, and for refusing to negotiate settlements or mediate cases in certain circumstances. Finally, the ACCC has been criticised for failing to produce publications that provide a clear guide as to what types of conduct are likely to be regarded by the ACCC to be unconscionable and deserving of enforcement action.

Conduct and Analysis of Interviews

The interviews were not taped as it was felt that might inhibit candor. Instead copious notes were taken during each interview and then typed up as soon as possible after the interview so as to preserve as much verbatim material as possible. Therefore the quotes from our interviews reported in our papers contain many paraphrases of what the interviewees actually said. They are direct quotes from the notes of the interviews rather than necessarily reflecting the exact words and grammar of the interviewees in all cases.

Confidentiality, Anonymity and Other Ethical Issues in Qualitative Interviews

An interview protocol was approved by the Australian National University's human research ethics committee for the interviews. It involved a guarantee of anonymity for all participants and all cases mentioned unless the participant consented or the material was already on the public record. Where interviewees must remain anonymous, code numbers for interviewees and the date and place of interviews are given in footnotes.

All interviewees were given a copy of the briefing sheet at Appendix Four before interview. This briefing sheet explains the confidentiality and anonymity arrangements for the data collection and analysis, and also the relationship between the ACCC and the researchers. The identity of all interviewees was anonymised through the use of code numbers. In most articles we have included the date and city of interview where we quote from an interview. No other information is provided about the interviewees. Some effort has been made in reporting interviews even to avoid gender references, as it was thought that in some cases indicating the gender of an interviewee might compromise their anonymity. All interviewees who are directly quoted in our papers have been given a chance to review the way in which they were quoted to check for accuracy, confidentiality and anonymity. Some minor changes were made to quotations as a result of this process.

The ACCC has partially funded this research by providing funding for the work of the Centre for Competition and Consumer Policy at the Australian National University. The ACCC also supported and cooperated with this research project and the researchers regularly consulted with staff at the ACCC about the conduct of the research. However, this research was conducted independently of the ACCC – and this was made clear to the ACCC and all interviewees and survey respondents. As part of their ethics protocol, the researchers 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).

Stage Two: Quantitative Survey

The largest 2321 Australian businesses trading in 2004 and readily contactable were identified through a publicly available commercial list, the Dun and Bradstreet list (where large = more than 100 employees). Special efforts were 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 (according to our documentary analysis). 273 of the 2321 businesses surveyed were identified in this way.

The questionnaire was to be filled in by the most senior person in the organization 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. The businesses were surveyed with a mailed self-completion questionnaire, and repeated telephone follow-up yielding 999 responses – a response rate of 43%.¹ Our response rate compares well with the 35.5% average response rates for similar questionnaire research of top management of business.² Forty-two percent of those who filled out a questionnaire were chief executive officers, company secretaries or chief financial officers, and a further

¹ This under-estimates the actual response rate because we cut 4.3% of the responses actually received from the study because those respondents were too small (less than 100 employees) for our sample of large businesses. If we, quite reasonably, assume that similarly 4.3% of the entire list of companies surveyed (including non-respondents) were “too small”, then we would have a response rate of 45%.

² Y. Baruch, ‘Response rate in academic studies – a comparative analysis’ (1999) 52 *Human Relations* 421 (reporting that average for that type of questionnaire in articles published in high quality management journals is 35.5%).

twenty percent general counsel or compliance managers.³ 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.

A fuller report of the way the survey was conducted and sample characteristics is available in our preliminary analysis of survey data:

- Vibeke Lehmann Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005). Available at SSRN: <http://ssrn.com/abstract=906945>.

The survey questionnaire is available at <http://cccp.anu.edu.au/projects/FinalQuestionnaire180304.pdf>

We have written and published a number of papers analyzing the survey results and will continue to do so.

Our findings include more practical policy-oriented conclusions about how businesses have responded to the Australian Competition and Consumer Commission's enforcement of Australia's Trade Practices Act:

- Christine Parker & Vibeke Nielsen 'Do Businesses Take Compliance Seriously? An Empirical Study of Implementation of Trade Practices Compliance Systems in Australia' (2006) *Melbourne University Law Review*, 30: 441-494. Also available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946850:

Examines the extent to which Australian businesses have implemented trade practices compliance systems - and found the results to be patchy and mostly low:

- Christine Parker & Vibeke Nielsen, 'What do Australian Businesses Think of the ACCC and Does it Matter?' (2007) *Federal Law Review*, 35, 187-239:

Examines businesses' perceptions of the deterrence, strategic sophistication and justice of the ACCC and how this influences their attitudes towards complying with the law. Overall we find that business opinions of the ACCC as reported in our 2004–05 survey are not as negative as those reported in the press in 2002–03. Indeed our respondents are reasonably positive about the ACCC's level of strategic sophistication, how accommodating it is, and also its procedural and substantive justice. Our respondents' opinions of the ACCC are also very similar to their opinions of the other three national business regulators. Our respondents, however, have a particularly negative view of the ACCC for being dogmatic. This is especially true of those who have actually interacted with the ACCC. A high opinion of the ACCC in terms of its strategic sophistication, how accommodating it is, its procedural and substantive justice, the likelihood and severity of enforcement action, and whether the ACCC is biased in targeting, are all related to more positive attitudes towards *TPA* compliance by our respondents. But there is no relationship between respondents' view of the dogmatism of the ACCC and their attitude toward compliance.

- Christine Parker & Vibeke Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance with the Trade Practices Act' (forthcoming) *Melbourne University Law Review*. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085054:

Tests the extent to which businesses fear the deterrence of the penalties available under the Trade Practices Act and ACCC enforcement, and what factors explain their different perceptions of deterrence. Overall Australian businesses rate the *costs of TPA non-compliance* as quite high, especially the formal sanctions available from ACCC enforcement action. But they also worry a lot about both informal economic and social losses, especially in relation to customers, shareholders, and employees. Those who have breached the *TPA* report, on the other hand, that the *gains of TPA non-compliance* are fairly low. The extent to which ACCC activities, lawyers and compliance professionals, and industry associations have formed an organisation's awareness of the *TPA* are each important predictors of how much they fear non-compliance, along with the organisation's size, resources, whether they take a long-term management approach, and their market position. Having experienced ACCC investigation or third party criticism of compliance in the past is also important for how much businesses fear formal

³ These figures are a correction to the original coding as reported in our preliminary report on the survey: Vibeke Lehmann Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005).

enforcement activity for non-compliance. Those who have breached the TPA in the past also see the costs of compliance as higher. Our findings show that legal punishment (including fines and potential jail sentences) do not necessarily provide *the* primary incentive for corporate compliance.

- Christine Parker and Vibeke Nielsen, 'Is Anyone Out There Listening?' (2009) *Trade Practices Law Journal*, forthcoming:

Tests the extent to which Australian businesses gain their awareness of TPA compliance issues from the ACCC, media, lawyers, compliance professionals, industry associations and consumer groups and find that they mostly listen to the media and their own lawyers. Those that listen more to the media have a greater sense of moral commitment to comply and those that listen more to their own lawyers have a greater sense of the risks of non-compliance:

We have also done empirical work testing more fundamental theories of why businesses do and do not respond compliantly to the law, and what difference various enforcement strategies and compliance behaviours make on the basis of our qualitative and quantitative data collection including:

- Christine Parker & Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (forthcoming) *Administration & Society*:

Tests whether formal compliance management systems influence the way compliance is managed in practice. We find that at least some elements of compliance systems can translate into good management of compliance in practice. But management commitment to compliance values, managerial oversight and planning, and organizational resources, are just as important.

- Vibeke Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance Management Behaviour?' (2008) *Journal of Law & Society*, 35, 309-340:

Examines the extent to which businesses' worries about, and perceptions of pressure from, various third parties influence their internal compliance management activities and moral commitment in relation to the TPA. We find that businesses worry a lot about the reactions of a range of third parties including customers, shareholders, employees and business partners to non-compliance. We find little evidence that these worries have much impact on what businesses actually do. Perceptions of risk of complaints do, however, have an impact on what businesses do.

- Christine Parker, Robert Eli Rosen and Vibeke Nielsen, 'The Two Faces of Lawyers: Legal Services and Business Compliance with Regulation' (forthcoming) *Georgetown Journal of Legal Ethics*:

Examines the influence that professional advice has on business compliance. We examine how frequently businesses use lawyers in making decisions with regulatory compliance dimensions, and whether businesses that use lawyers more also value compliance more, or instead whether they exhibit a resistant or game-playing approach to compliance. We find evidence that both are true. We also try to determine whether this is because lawyers with different ethics influence their clients to take different approaches to regulators and regulatory compliance, or whether it is the other way around – that businesses choose and instruct their lawyers according to their own underlying attitude towards compliance. We find evidence that clients generally pick lawyers who will represent the client's commitments to compliance, but that some lawyers also influence their clients to take a legalistic, game-playing approach to law.

- Vibeke Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement'. Presented at the *Law and Society Association Annual Meeting*, Montreal, May 2008:

Measures business perceptions of the reactions and counter reactions of the ACCC and business throughout the investigation and prosecution process to test whether perceived responsive regulation enforcement leads to better compliance attitudes and behaviours than non-responsiveness. We find some evidence of a positive impact of responsive regulation on attitudes towards compliance, but little evidence of impact on behaviour.

Measures of Business Compliance Attitudes and Behaviour in the Quantitative Survey⁴

One key intention of our survey was to be able to test to what extent various factors and motivations lead to greater or lesser compliance with the TPA by our business respondents. This requires us to be able to measure compliance in some way and then this measure as a dependent variable in our statistical analyses.

The survey and other information we collected in preparation for the survey included a number of different pieces of information that could be used for this purpose. In the end the measures that we have used as dependent variables for our analyses in our published papers to date were not in fact direct measures of compliance – but measures of our business respondents’ compliance management activities. We used these because we judged them to be the most reliable measures we had available, and also the most appropriate to our theoretical hypotheses. They can also be seen as ‘proxies’ for compliance in a sense – although the relationship between compliance management activities and actual compliance is not proven.⁵

In this section we briefly set out what the different possibilities were for measuring compliance, the advantages and disadvantages of each in relation to our data, and particularly how reliable they appear to be as compared with each other. These included (a) different measures based on different sources of information and (b) different ways of measuring compliance, including different proxies for compliance. The different sets of information possible for measuring our respondents’ compliance with the TPA are each set out below.

1. Whether the firm has been the subject of a successful ACCC enforcement action for a breach of the TPA as reported in the ACCC’s Annual Reports between mid-1997 and the date when the firm filled in the survey.

There are 100 respondents in this category. (Named ‘ACCCPing’ in the data file.)

Advantage:

- An apparently objective, external measure of compliance using officially recorded data.

Disadvantages:

- This measure is strictly speaking of limited use as a dependent variable in regressions and similar analyses since it measures compliance in the past (before the survey was filled out) and therefore does not clearly allow us to draw causal inferences from our analyses.
- This measure is likely to be grossly under-inclusive of actual incidents of non-compliance since the ACCC’s enforcement activity is primarily single case-based; it only investigates potential breaches when complaints are made to it, rather than engaging in systematic, proactive monitoring and inspection to seek out breaches; and only investigates a small minority of the complaints that are made to it.
- Paradoxically in some cases these records may be over-inclusive since in the majority of cases the ACCC ‘settles’ enforcement action with agreed sanctions rather than prosecuting businesses in court. Some of these businesses will later deny that they have actually breached the law, and no court case has actually settled the matter.

2. Whether the firm has self-reported in its response to the survey that it has breached the law at least once “ever”.

There are 125 respondents in this category. (Named ‘AdmitBreach’ in the data file. Dummy variable based on page 16 Question 21 which respondents were to answer ‘only if your organization has ever breached the TPA’.)

Advantage:

⁴ The material in this section updates and corrects the original discussion of these measures in Vibeke Lehmann Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005).

⁵ We discuss these relationships and the theoretical and empirical bases for them in depth in our paper from our data: Christine Parker and Vibeke Lehmann Nielsen “Corporate compliance systems: Could they make any difference?” Forthcoming in *Administration & Society*.

- The business respondent is more likely to know about incidents of non-compliance than anyone else, and the wording of the question and anonymity of the survey should have made it relatively easy to admit to having had a breach at some time in the past simply by answering the question.

Disadvantage:

- This measure is strictly speaking of limited use as a dependent variable in regressions and similar analyses since it measures compliance in the past (before the survey was filled out) and therefore does not clearly allow us to draw causal inferences from our analyses.
- No specific information is provided about the number, nature or timing of the breach/es.
- Might be under-inclusive since some respondents might not know of the breach(es)

3. Whether the firm has self-reported in its response to the survey that they have had an investigation of an alleged breach of the TPA by the ACCC within the last six years.

There are 141 respondents in this category.

Advantage:

- The business respondent is more likely to know about incidents of non-compliance than anyone else.
- A range of specific information about the investigation and alleged breach is available since there is also an open text section where the respondent fills in details about the investigation and alleged breach and a series of questions about how the investigation unfolded and what its outcome was.

Disadvantage:

- This measure is strictly speaking of limited use as a dependent variable in regressions and similar analyses since it measures compliance in the past (before the survey was filled out) and therefore does not clearly allow us to draw causal inferences from our analyses.
- Although strict anonymity and confidentiality provisions are in place for the whole survey, the more detailed questioning in this section of the questionnaire may have given respondents more cause for concern that their answers may not be able to be kept anonymous and may have provided more space for social desirability bias.
- Only provides information about breaches that the ACCC found out about, so it does not measure actual breaches but “investigated potential breaches”. Therefore as a measure of breaches it is under-inclusive.

4. Whether the firm has self-reported in its response to the survey that they have had an interaction (which includes both investigations and also formal and informal discussions) with the ACCC as far back as they know.

There are 296 respondents in this category.

Advantage:

- This more open wording of the question may have encouraged businesses to respond and report an ‘interaction’ with the ACCC even if they did not feel comfortable admitting to a potential breach of the Act.
- An open text section asked respondents to tell us what the interaction was about there we have some details about it.

Disadvantage:

- Same as for point 3 immediately above, plus we cannot be sure which interactions actually relate to breaches or not.

5. *The firm's self-evaluation of their 'overall culture of compliance' in each of 1998, 1999, 2000, 2001, 2002 and 2003.*

Based on a question asking respondents: 'How would you rate the overall culture of compliance in your organization with respect to the Trade Practices Act for each of the last six years? By a culture of compliance we mean attitudes and systems that support compliance with the Trade Practices Act. Please mark your evaluation for each year on the scale from 0-100. You should mark 0 if you believe that the culture of compliance with the Trade Practices Act is very low. You should mark 100 if you believe that the culture of compliance is very high.' (This was originally measured on a 0-100 scale for each of the 6 years, but changed into a five point scale so we do not overestimate the meaning of slight differences in where the respondents ticked the scale.)

Advantages:

- Can overcome direction of causation/timing issue because goes back in time to before survey time.
- It is simpler to answer than all alternatives
- Compared with the measure of 'actual compliance' below: People who do not have much objective insight about actual compliance can evaluate their organisation's 'culture of compliance' with subjective coherence. A respondent might not know enough to know if the company is actually breaking the law in a particular area. But the respondent may feel confident there is a culture of meticulous compliance on such things. The respondent can observe "attitudes and systems" in a way they cannot observe hardly any of the actual breaches that occur across a large organization. This means that using "culture of compliance" as a proxy for compliance measurement for kinds of non-compliance that are highly secretive might be a good option.

Disadvantages:

- The 0-100 scale is not anchored to anything: Does 50 mean the same for different respondents? It is a very subjective scale. But on the other hand people are used to such scales and have to a large degree the same sense of a scale. As long as researchers do not interpret minor differences as meaningful, such a scale can be very useful.
- The definition of compliance culture in the question includes reference to both 'attitudes' and 'systems' so that respondents could be thinking about a very broad range of different things in answering the question and we have no way of knowing what they were thinking.
- The broadness and subjectivity of the question leaves plenty of room for social desirability bias to affect the answers.

6. *The firm's self-evaluation of their 'actual level of compliance' in each of 1998, 1999, 2000, 2001, 2002 and 2003.*

Based on six measures from a question asking: 'Now we want you to estimate in the same the actual level of compliance of your organisation with the Trade Practices Act.' (This was originally measured on a 0-100 scale but changed into a five point scale so we do not overestimate the meaning of slight differences in where the respondents ticked the scale.)

Advantages:

- Goes back in time to before survey time so fewer problems with direction of causation/timing.
- Generally the respondents themselves are likely to know more about their own history of compliance with the law, than enforcement officials do.

Disadvantages:

- The 0-100 scale is not anchored to anything: 95 will sound like almost perfect compliance to one person, but to another breaking the law on 5% of business transactions might be interpreted as being a corporate Jessie James.
- Measuring compliance by asking the respondents to rank the regulatee's 'level of compliance' is a very subjective measure of compliance – it leaves a lot of interpretation to the respondent rather than the researcher.

- Although we might generally expect respondents to know more about their compliance history than official enforcement agents, it is also possible that respondents may have forgotten their own violations of the law, or even not be sufficiently aware of the law to know that they have breached it. Business organisations are more likely to lack this sort of ‘self-compliance-knowledge’ since no one individual within the organisation (or outside it) knows everything that happens within the business, and some business people may not even be sufficiently aware of the TPA to know if they have breached it or not. Breaches of the TPA are not visible, people cover them up, and it takes some detailed knowledge to know if say visible advertising which makes a claim about price reduction is false (and you still have to notice the false ad). So who really knows how much their organization complies?
- Respondents may incorporate their assessment of attitudes and intentions that respondents believe will lead to greater compliance (essentially indirect indicators of compliance) – into what appears to be a direct measure of compliance. This means that factors that we might prefer to use as independent variables are mixed up in the dependent variable. (The ‘culture of compliance’ has the same problem but at least it explicitly includes these attitudes and intentions so that it is clear that they are included in the dependent variable.)
- Respondents might show a social desirability bias that makes it difficult for them to admit to themselves or on the questionnaire that their organisation has breached the law or exhibits a low level of compliance commitment. Moreover, people are likely to want to keep secret the fact that they or their organisation have violated the law, particularly if it has not been officially discovered. They are therefore unlikely to be willing to create any documentary record admitting a breach (even an anonymous questionnaire).⁶

7. *The mean score of self-evaluated level of actual level of compliance within the six years (using the five point scale).*

8. *The mean score of self-evaluated level of culture of compliance within the six years (using the five point scale).*

- These have the same advantages and disadvantages as options 5 and 6.

9. *The accumulative score of changes over the six years in regard to self-reported level of culture of compliance (using the five point scale).*

10. *The accumulative score of changes over the six years in regard to self-reported level of actual compliance (using the five point scale).*

These have broadly the same advantages and disadvantages as options 5 and 6.

- However using the measures to focus on changes in compliance or culture of compliance over the 5 years has the advantage of overcoming the subjective variable interpretation of the absolute meaning of the scale. The direction of change is important rather than the accrual point on the scale.
- This way of thinking about measurement also implies a different way of thinking about leverage on the direction of causality question. That is to ask the question whether those with a strong compliance system this year have better compliance this year than they had 5 years ago.

⁶ Like other researchers, we have 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. This was to seek to ensure that respondents felt they could safely answer the question honestly. Similarly, we chose not to ask respondents to identify the particular breaches that their organisations had committed. Rather we asked them to report the overall level of compliance in each year, without having to admit to any specific incident of non-compliance. Our pre-testing of the survey, and feedback we received from the early efforts at follow-up with potential respondents shows that many respondents did feel very nervous about the possibility that their answers on the questionnaire might in some way be able to be used against them. We only got a good response rate once we had worked out how to communicate effectively to respondents the strictness of our confidentiality and anonymity protocols and that they were not being asked to admit to specific violations. We believe that those who did respond are likely to have done so honestly on the basis of their understanding of these guarantees.

11. *The firm's score on the index of compliance management in practice.*

A scale based on 13 items as shown in Table 1.

Advantages:

- A more anchored and specific measure of the aspect of 'compliance culture' that is concerned with habits of management. The items are based on the extensive qualitative fieldwork into the characteristics of best practice compliance management reported in the scholarly literature.⁷
- The questions are designed to be as specific as possible to avoid unnecessary subjectivity and social desirability bias in the responses.
- It does not mix up attitudes and values with habits of compliance management. So it is conceptually clear and values or attitudes, formal systems and habits of management can all be kept separate in analyses.

Disadvantages:

- At best only a proxy for compliance. Really this is an independent variable that we would hypothesise helps explain actual compliance. There have been insufficient tests in other studies for us to be confident that it really is a good proxy for compliance, and no other valid and reliable measure of actual compliance in our own study to test it.⁸
- Since the focus here is on more intangible habits of management, the questions necessarily allow for an element of subjectivity in response.

12. *The firm's score on four indices measuring implementation of compliance system elements.*

A scale based on 20 items as shown in Table 2.

Advantages:

- Questions require yes or no answers to a series of 20 very specific questions about whether respondents' organizations have implemented various procedures and controls expected to be part of a good compliance system based on previous empirical research.⁹ These questions were designed in such a way that it should be relatively easy for the person filling out the questionnaire to objectively determine whether the answer should be yes or no, eliminating as far as possible the element of subjectivity that makes it easier to respond in a socially desirable way.

Disadvantages

- At best only a proxy for compliance. Really this is an independent variable that we would hypothesise helps explain actual compliance. There have been insufficient tests in other studies for us to be confident that it really is a good proxy for compliance, and no other valid and reliable measure of actual compliance in our own study to test it.¹⁰

⁷ Most of the statements are based directly on the study of management of coal mine safety by John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, Albany, 1985) 75-118, and the description and summary of the qualitative literature on compliance management set out by Christine Parker, *The Open Corporation* (Cambridge University Press, Cambridge, 2002) 233-235.

⁸ We set out the other studies of which we are aware and further conceptualise the relationship between compliance management in practice and actual compliance in detail in our paper, Christine Parker & Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (forthcoming) *Administration & Society*.

⁹ Based on Christine Parker, *The Open Corporation* (Cambridge University Press, Cambridge, 2002) 197-244 and the literature cited there.

¹⁰ We set out the other studies of which we are aware and further conceptualise the relationship between compliance management in practice and actual compliance in detail in our paper, Christine Parker & Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (forthcoming) *Administration & Society*.

13. The firm's score on the index of compliance values.

Scale summing the eight questions shown in Table 3.

Advantages:

- It separates attitudes and values from compliance systems and habits of compliance management. So it is conceptually clear and values or attitudes, formal systems and habits of management can all be kept separate in analyses.

Disadvantages:

- At best only a proxy for compliance. Really this is an independent variable that we would hypothesise helps explain actual compliance. But using it as a proxy for compliance means that we cannot test the relationship, and there have been insufficient tests in other studies for us to be confident that it really is a good proxy for compliance.¹¹
- Since the focus here is on attitudes and values, the questions necessarily allow for an element of subjectivity in response.

TABLE 1: MEASURE OF COMPLIANCE MANAGEMENT IN PRACTICE

Items Included in Measure (Scale from 1-5 'Totally disagree' to 'Totally agree'.)	Mean Response (st. devn)	Whole Measure
In my organization compliance advice is rarely ignored by the board (If you don't have a board, please skip this question); ¹²	4.40 (0.98)	Cronbach Alpha: 0.90 Mean: 3.96 Std. dev. = 0.55 Min = 1.85 Max = 5.00
In our organization the people responsible for compliance find it easy to get access to top management;	4.29 (0.76)	
In my organization compliance problems are quickly communicated to those who can act on them;	4.18 (0.78)	
In my organization compliance advice is rarely ignored by line managers; ¹³	4.13 (0.77)	
In my organization systemic and recurring problems of non-compliance are always reported to those with sufficient authority to correct them;	4.06 (0.71)	
Compliance requirements of laws, regulations, codes and organizational standards are integrated into my organization's day to day operating procedures;	4.12 (0.80)	
Managers in our organization know what aspects of compliance they are responsible for;	3.92 (0.68)	
Compliance failures are always investigated to understand their cause;	4.11 (0.71)	
In our organization everyone knows where the buck stops for compliance;	4.02 (0.78)	
In my organization we review our compliance program on a regular basis;	3.79	

¹¹ We set out the other studies of which we are aware and further conceptualise the relationship between compliance management in practice and actual compliance in detail in our paper, Christine Parker & Vibeke Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (forthcoming) *Administration & Society*.

¹² In our questionnaire this item was asked in reverse to that shown here: 'In my organization 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 the table.

¹³ In our questionnaire this item was asked in reverse to that shown here: 'In my organization compliance advice is often ignored by line managers?'. The mean response has also been reversed to reflect the wording shown in the table.

	(0.91)	
My organization allocates adequate resources to enable the implementation of the compliance policy;	3.65 (0.95)	
My organization is one of those organizations that try to have the best compliance of any organization in the country; ¹⁴	3.18 (1.14)	
My organization invests a lot of time and money in compliance training.	3.71 (0.97)	

TABLE 2: MEASURE OF COMPLIANCE SYSTEMS: FOUR GROUPS OF (FORMAL) COMPLIANCE SYSTEM ELEMENTS¹⁵

	Elements Included in Each Group (Yes/No)	% Implementing Each Element
Complaints Handling	In my organisation there is a clearly defined system for handling complaints from customers/clients;	91
	In my organisation we keep records of complaints from customers, competitors and/or suppliers;	87
	In my organisation there is a clearly defined system for handling compliance failures identified by staff, competitors, suppliers or the ACCC;	53
	In my organisation we actively seek out consumer opinion about new advertising and/or new products;	40
	In my organisation we have a hotline for complaints about our compliance with the TPA.	13
Communication & Training	My organisation has a written compliance policy about trade practices compliance;	45
	In my organisation employees are now and then sent to a brush up course on how to comply with the TPA;	38
	Live training sessions are a part of our training of employees in trade practices compliance;	34
	In our organisation we use a compliance manual in trade practices compliance;	31
	My organisation has a dedicated compliance function taking care of trade practices compliance;	30
	Induction for new employees includes substantial training in trade practices compliance;	28
	At least half our employees have attended an employee seminar about the TPA during the last 5 years;	21
	In my organisation we use a computer based training program in trade practices compliance.	17
Management Accountability & Whistleblowing	My organisation has written policies to encourage and protect internal whistleblowers;	43
	In the last 5 years an external consultant has reviewed our compliance system;	35

¹⁴ In our questionnaire this item was asked in reverse to that shown here: 'My organization is not one of those organizations that try to have the best compliance of any organization in the country.' The mean response has also been reversed to reflect the wording shown in the table.

¹⁵ The n ranges from 958 to 982 with some respondents not answering some questions. The questions have been grouped into four categories in this Table for ease of comprehension, not for the purposes of analyses.

	In my organisation managers are asked to report regularly on compliance;	26
	In my organisation we have systematic audits by external professionals to check for trade practices breaches.	17
Compliance Performance Measurement & Discipline	Trade practices compliance performance indicators are included in the corporate plan;	20
	Compliance performance indicators relevant for the TPA are among the individual performance indicators for our employees;	13
	In my organisation in the last 5 years employees have been disciplined for breaching our trade practices compliance policy.	12

TABLE 3: MEASURE OF NORMATIVE COMMITMENT TO TPA COMPLIANCE VALUES

Items Included in Measure (Mean/Standard Deviation) (Mark the number closest to the opinion held by most managers in your organisation: 1 to 5 - 'Strongly disagree' to 'Strongly agree'.)	Statistics for Whole Measure
Our organisation feels a moral obligation to observe the TPA (4.15/0.71) Most managers in this organisation would feel ashamed if the organisation was caught breaching the TPA (4.07/0.73) Most managers in this organisation would in general feel ashamed if the organisation committed a breach of the TPA (4.04/0.73) Many senior managers in this organisation have serious doubts about aspects of the TPA (reversed) (2.78/0.82) The TPA interferes far too much in private enterprise (reversed) (2.58/0.75) It is appropriate to breach the TPA if the purpose is to project Australian products from foreign competitors (reversed) (2.13/0.76) It is appropriate to breach the TPA if the purpose is to save Australian jobs (reversed) (2.11/0.74) It is appropriate to breach the TPA if others are contravening the law (reversed) (1.91/0.70)	n: 992 Mean: 3.85 Standard deviation: 0.45 Min: 2.25 Max: 5.00 Cronbach's Alpha: 0.77

Adding Data to the Study to Measure Compliance Better

We also considered various ways of improving our measuring of compliance and non-compliance by collecting further data. The possibilities we considered were:

Whether a firm had had any ACCC enforcement action after the time of the survey according to ACCC Annual Reports, and if so, what the outcome was:

- This would solve the timing/direction of causation issue.
- It would otherwise have the same advantages and disadvantages as option 1 above.
- The criminological literature suggests that official statistics are going to be as good a measure of compliance as we can get for this area since the definition of what is a breach outside of it being taken through the official investigation and prosecution process is likely to be contested. At least we can say that official statistics bear some relation to the 'true' breach rate. It is also a more objective measure than relying on self-reports both for the explanatory variables and the compliance rate which is to be explained. However, it will still be under-inclusive since the ACCC is a regulator that generally only investigates matters when a complaint is made to it and only a very small proportion of those complaints.
- It is relatively simple and efficient since the new data is already publicly available. There is no need to do another survey or get access to confidential information from the ACCC.

We did in fact collect this data in early 2008, but unfortunately only 5 respondents to our survey had had ACCC enforcement action in between filling out the survey and early 2008. Therefore this strategy is useless for any statistical analyses at this stage.

Using ACCC files about complaints and investigations from after the survey to measure firms' compliance with the TPA since the survey.

- The advantages of this are that since the ACCC is only able to take enforcement action in a small minority of cases of complaints, many cases where there may have been sufficient evidence of breach (particularly minor breaches or breaches of more consumer-oriented provision such as misleading and deceptive conduct in advertising) are filtered out of the ACCC's enforcement statistics. By going back into the ACCC's files for investigations (that may have simply consisted of a 'please explain' letter that resulted in a more minor breach being remedied) and complaints, we would get access to data that has been less filtered by the ACCC's internal processes and might give a more accurate picture of levels of non-compliance.
- The disadvantage is that complaints and investigations would also in many cases relate to situations where there was not in fact a breach, and we would not necessarily be able to tell the difference.
- The ACCC would not allow us access to their confidential database for this purpose – partly because of general confidentiality and privacy concerns and more specifically because the ACCC does not see it as appropriate to use complaints and investigations that do not result in enforcement actions (and are therefore not reported in the ACCC's Annual Reports) as indicators of non-compliance.

Making another survey of the respondents to the original survey asking them to report on their compliance since the original survey:

- This would mean we had a measure from after the survey therefore resolving many issues of causation. It would also allow us to reformulate the questions about compliance and perhaps ask about compliance management activities and also ask more specifically about various aspects of actual compliance, or use other proxies that might be seen as more reliable.
- This has the disadvantage that it would still be a self-report measure, and of course, not all of the original respondents would respond or be able to be contacted. We have not done this at this stage because of the expense and time involved.

Comparing Measures of Non-Compliance Based on Options 1, 2 and 3 - ACCC Enforcement Records, Self-Reported Breach of the TPA and Self-Reported Investigation by the ACCC

The first three measures above provide the most direct and obvious measures of actual compliance. Figure 1 shows the overlap in respondents between these three key variables as a diagram.

There is an apparent discrepancy in our data to the extent that many more respondents self-report that they have been 'investigated' by the ACCC than those publicly reported in the ACCC Annual Reports to have had enforcement action. However it is quite likely that many of these respondents who were not mentioned in ACCC Annual Reports did in fact have complaints made about them to the ACCC and receive an inquiry or preliminary investigation from the ACCC, or even an enforcement action, that was not reported in the Annual Reports.) With the self-reported investigation measure we asked respondents to tell us about even minor investigations – so we should expect those appearing in the Annual Reports to be a subset of those self-reporting investigations. Ideally we might have been able to use the ACCC's database of complaints and investigations to check whether firms had in fact had an ACCC investigation (even if it was not report in ACCC Annual Reports) when they self-reported that they had. Unfortunately, the ACCC no longer has this information in an accessible, electronic database for before 2004.

The measure of successful enforcement action based on Annual Report data is therefore, of course, not an accurate measure of which firms have had an ACCC investigation interpreted broadly – and therefore should not match up with the measure of self-reported investigation. It should however be a subset of self-reported investigations. Indeed the majority of those who ACCC data shows faced successful enforcement action did also self-report that they had been investigated by the ACCC in the relevant period (that is 64 out of 100).

There is no reason to believe the measure based on Annual Report data is not a reasonably accurate measure of which firms have had some sort of public formal enforcement action from the ACCC. It is a formal measure and should be a reasonable reflection of who has become part of the formal enforcement process – and what the outcome was. It is also the only objectively anchored measure that we have in our study, but one may point to the fact that it is not inclusive enough.

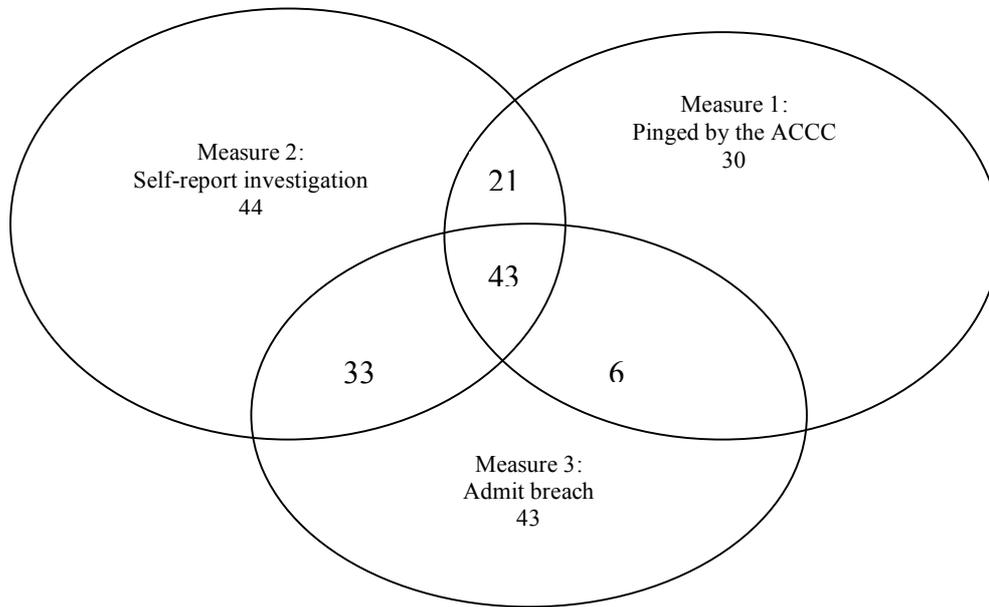
To the extent that some firms that ACCC records show has an enforcement action did not self-report an investigation by the ACCC (36), there are a number of possible explanations:

- Respondents may have been confused about the timing of investigations and enforcement actions eg they self-reported enforcement actions that date from earlier years than the Annual Report years we included in the database or did not self-report investigations that they thought were earlier but were not.
- Another timing problem is that ACCC investigations, enforcement actions and reporting in Annual Reports can lag by years behind the actual conduct that breached the TPA and the organisation's first inkling that a complaint has been made to the ACCC. Investigations may have in fact started years earlier than they are reported in the Annual Reports.
- Discrepancies should **not** be because some businesses are confused about who investigated them (eg confusing the ACCC with a state fair trading body) or whether the ACCC was investigating them for a potential breach. This is because we asked the businesses to write down what the investigation was about and we eliminated those that had clearly got confused from the measure. Some however may be confused about when they were investigated by the ACCC.
- Some discrepancy is also due to the fact that businesses using different names for different purposes or at different times (including because of mergers etc) and despite our efforts at data-matching we have not been able to match organizations self-reporting ACCC investigations to those named in Annual Reports.
- Some of the discrepancy may be due to social desirability bias with some firms perhaps choosing not to admit in the questionnaire to having had an ACCC investigation of breach.
- Some of the discrepancy may be due to the person filling out the questionnaire simply not being aware of an ACCC investigation that occurred some time in the past 6 years.

We should also expect all those who have faced successful enforcement action by the ACCC to also admit to having breached the TPA at some point in the past. As Figure 1 shows, about half of those who faced successful enforcement action do in fact admit to having breached the TPA (that is, 49 out of 100). (About half of those who self-reported having been investigated by the ACCC also admit to having breached the TPA, that is 76 out of 141.) The discrepancy between those who have faced successful enforcement action and those who admit having breached could be accounted for in the following ways:

- The ACCC only 'gets it right' in enforcement only about half the time. That is, it is true that only half of those investigated or half of those who face enforcement action actually breached the TPA.
- Or at least only half *believe* that they breached the TPA. This is quite possible given that the ACCC settles the vast majority of potential enforcement actions without any formal decision being made by a court. It may well be that a significant proportion of businesses walk away believing that they had not breached the TPA, but just settled to get the ACCC off their back.
- Some respondents know that they faced ACCC investigation but simply do not know whether the alleged breach really was committed and therefore do not feel that they can admit that the organisation breached the law on the questionnaire.
- Respondents did not want to admit that the organisational breached the law on the questionnaire.

FIGURE 1: COMPARING RESPONSES ON OPTIONS 1, 2 AND 3: DATA BASED ON ACCC ANNUAL REPORTS, SELF-REPORTS OF ACCC INVESTIGATION AND SELF-REPORTS OF EVER BREACHED THE TPA IN THE PAST



Comparing All 13 Options for Measuring Compliance Using Correlations

Table 4 shows the results of tests of correlation of all measures discussed above. (Note that we use only options 7 and 8, the means of actual compliance and culture of compliance, not 5 and 6, the year by year scores here. Compliance system implementation is broken into four separate factors.) Those correlations that are significant and in the direction we would expect are shaded.

As can be seen, there are significant positive correlation between a number of measures where we would expect significant positive correlations (shown by shading). *Overall this suggests that our respondents have generally been consistent in their responses to the measures of admit breach, ACCC investigation and interaction and also compliance management in practice and compliance system implementation, and that their responses are therefore likely to be reliable.* In particular:

- The first three measures (admit breach, self-reported investigation and formal ACCC enforcement) which are the three most direct measures of breach all correlate strongly with one another despite the discrepancies shown in Figure 1. This gives us some confidence in the reliability of each of these measures. (Having had an ACCC interaction also correlates significantly and positively with these three measures as one would expect.)
- The measures of compliance values, compliance management in practice and compliance system implementation which are our three main potential proxies of compliance, all correlate positively with one another as would be expected.
- Similarly, self-reported levels of compliance and culture of compliance, and also the direction of change over 6 years in actual compliance and culture of compliance both correlate significantly and positively with compliance management in practice and compliance system implementation, as one would expect. There is however no significant correlation between compliance values and the direction of change,

although there is a significant positive correlation between values and the mean of actual compliance and compliance culture over the 6 years.

There are also some surprising results in Table 4 that illustrate some of the limitations and difficult questions about these measures:

- It is surprising that the three measures of breaches of the TPA (the first three measures) correlate significantly and positively with compliance management in practice and implementation of compliance systems (shown in bold on Table 4). If a business for instance admits having breached the law, the business has also a high level of compliance management in practice and has to a high degree implemented compliance system elements. The most plausible explanation is that the breaches reported by the regulatees themselves and recorded in the ACCC's Annual Reports were committed prior to the time at which the reported organizational practices and attitudes became current. Thus, as between those data, the causality is actually the other way around to what we might at first assume: breaching the law, especially if one is caught, leads to the implementation of better compliance systems, and to better compliance management in practice. *This shows that there are likely to be significant problems in seeking to use the first three measures as dependent variables in analyses based on these data since the order in time between breach (actual compliance) and our different measures of pro-compliance behavior is reversed.*
- It is also surprising that there is no significant correlation between compliance values and the four measures of breach, ACCC investigation, enforcement, and interaction. Nor is there any correlation between the measure of compliance values and the direction of change in actual compliance or compliance culture. This highlights the danger of using what we believe, but do not know, to be proxies for explaining compliance as dependent variables. Many proxies are likely to only contribute partly to legal compliance, and some only in a complex combination with other independent variables. Compliance values might only lead to compliance, where they are backed up with the right skills and capabilities. It is therefore dangerous to cut short the explanatory model and only use indirect measures as dependent variables.
- The correlations between the means of self-reported actual compliance and culture of compliance on the one hand and the more direct measures of breach (admit breach, ACCC formal enforcement action, self-reported ACCC investigation and ACCC interaction) do not give us any clear patterns (shown in bold in Table 4). There is no clear indication that those who have (likely) breached the TPA as indicated by the first three measures self-report themselves as having lower levels of actual compliance or culture of compliance than others. So there is:
 - Lack of any correlation between the mean measure of culture of compliance and whether the respondent has admitted that they have ever breached the TPA and also whether the respondent has been the subject of formal ACCC enforcement action according to ACCC Annual Reports.
 - There is also a lack of any correlation between actual compliance and whether the respondent has self-reported having an ACCC investigation.
 - There is significant positive correlation between having had an ACCC investigation and the mean of culture of compliance – which is the opposite direction to that expected.
 - Out of this group of correlations only the negative correlation between level of compliance and admitting breach is a significant correlation in the direction expected.
- There are however significant, positive correlations between the measures of the direction of change over the 6 years in actual compliance and culture of compliance on the one hand, and the measures of breach, ACCC investigation, enforcement and interaction on the other. This may indicate, as we would expect, that those who have suffered a breach at some point have rated themselves more lowly for actual compliance or culture of compliance at that point and then rated themselves as having improved. *This would give us some confidence that the measure of direction of change in the self-report measures of actual compliance and culture of compliance has some reliability.*
- Finally, the significant negative correlations between the direction of change in actual compliance and culture of compliance on the one hand and the means of actual compliance and culture of compliance

on the other appear strange at first (shown in bold in Table 4). But the logical interpretation is that those respondents who to a greater degree than others have improved over the years on each measure reported themselves as starting from a lower base and therefore have lower overall means for these two measures despite their positive trajectory of change. *This confirms the value of looking at direction of change rather than the means of self-reported actual compliance and culture of compliance.* (The two measures of direction of change correlate significantly and positively with one another, as one would expect.)

Conclusion: Measures of Compliance Used in our Studies

On the basis of the material above, in our studies to date we have taken two different approaches to measuring compliance depending on whether we are using compliance as an independent variable or dependent variable.

Measure of Compliance for Use as Independent Variable:

In a number of our studies we use past non-compliance or having had an ACCC investigation or enforcement action as an independent variable, that is as a potential explanation of the phenomenon we are interesting in studying. In these studies we use one or other of measures 1, 2 or 3, that is, whether the business has been the subject of a successful enforcement action according to ACCC annual reports, whether the business has self-reported in the survey that it has been the subject of an ACCC investigation or whether the business has self-reported in our survey that it has breached the Trade Practices Act in the past. We see all three as valid. No one measure is completely reliable and therefore it is not surprising that there are some discrepancies between them in our data.

The best measure of whether a business has breached the TPA is an either or measure. That is, if the business is positive for any one of these three measures then they have likely breached the TPA at some stage.

Measure of Compliance for Use as Dependent Variable:

The main point of many of our studies is to use compliance as a dependent variable. That is we want to explain what factors lead to compliance or non-compliance. On the basis of the analysis of all the possibilities set out above, we have decided that it is best to use Measure 11, compliance management in practice rather than attempting to measure actual compliance. We see the measure of compliance management in practice as a reliable and specific measure of the way management of the business respondents have attempted to respond to the need to comply with the TPA and show their commitment to compliance. This is a theoretically appropriate dependent variable for the purposes of our studies since we are interested in understanding why business behave in the way they do in relation to compliance and non-compliance. It is also a more appropriate dependent variable than the variables we use as independent variables (as above) because it is forward-looking. It impacts on business behaviour into the future, whereas the variables used as independent variables are largely historical.