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

CHRISTINE PARKER* AND VIBEKE LEHMANN NIELSEN†

[Law-makers, courts and regulators all assume that businesses' compliance with the law is at least partly influenced by management's rational calculations about the costs and gains of compliance and noncompliance. In this article, the authors use evidence from a survey of 999 large Australian businesses and these businesses' experiences of compliance and enforcement under the Trade Practices Act 1974 *(Cth) ('*TPA*') to examine how large Australian businesses perceive the costs and gains of compliance and noncompliance with the Act. First, the authors look at how serious these businesses perceive the threat of financial penalties, criminal convictions, and economic and social losses to be in the event of noncompliance, as well as whether they see benefits such as organisational learning as gains of compliance. Secondly, the authors examine whether enforcement action of the Australian Competition and Consumer Commission ('ACCC') or stakeholder criticism changes the way that these businesses calculate the costs and gains of compliance and noncompliance. The authors end by drawing some policy conclusions for the* TPA *and the ACCC.]*

CONTENTS

* BA (Hons), LLB (Hons) (Qld), PhD (ANU); Australian Research Council Research Fellow and Associate Professor, Melbourne Law School, The University of Melbourne.

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I INTRODUCTION

The Federal Court of Australia has long stated that deterrence is the guiding principle for quantification of penalties in cases where the competition provisions of the *Trade Practices Act 1974* (Cth) ('*TPA*') are breached.[1] Recently, these penalties have been increased on the basis that they should be high enough to 'take into account the expected gains' from anti-competitive behaviour in

[1] See Caron Beaton-Wells, 'Recent Corporate Penalty Assessments under the *Trade Practices Act* and the Rise of General Deterrence' (2006) 14 *Competition & Consumer Law Journal* 65; Anne-Marie Allgrove, 'The Assessment of Penalties under the *Trade Practices Act* for Breaches of the Competitive Conduct Rules' (1996) 4 *Trade Practices Law Journal* 104. Cf Karen Yeung, *Securing Compliance — A Principled Approach* (2004) 96–101, in which Yeung argues that, despite the Federal Court's statements that deterrence is the guiding principle for setting penalties for breach of the *TPA*'s competition provisions, 'the Court has also referred to the importance of penalties being proportionate to the seriousness of the offence': at 101. Similarly, it has been argued that the Federal Court's actual practice in imposing penalties does not reflect a consistent deterrence approach: David K Round, 'An Empirical Analysis of Price-Fixing Penalties in Australia from 1974 to 1999: Have Australia's Corporate Colluders Been Corralled?' (2000) 8 *Competition & Consumer Law Journal* 83, 88. For a discussion of the sanctions available for breach of the consumer protection provisions of the *TPA*, see below Part II(B).

breach of the *TPA*.[2] Moreover, criminal penalties have been promised as an additional deterrent, with the possibility of imprisonment for 'serious cartel conduct'.[3]

Underlying the deterrence approach to penalising a breach of the *TPA* is the assumption that businesses and individuals calculate the personal costs and gains of compliance and noncompliance and go on to behave, at least to some extent, in a way calculated to minimise costs and maximise benefits. It is certainly plausible to assume that calculated self-interested thinking does play an important part in motivating businesses' compliance and noncompliance.[4] However, empirical regulatory compliance research clearly shows that self-interested calculation (that is, deterrence) is not the only factor determining whether or not individuals and businesses comply with the law in any given situation.[5]

This article uses systematic, representative and quantitative survey evidence collected from mid 2004 to mid 2005 to examine how large Australian businesses perceive the costs and gains of compliance and noncompliance with the *TPA*. Recent policy discussions have tended to assume that deterrence will automatically increase when legislators increase the amount and range of formal legal sanctions available under the *TPA* and when the Australian Competition and Consumer Commission ('ACCC') increases its enforcement activity.[6] This article argues that this is not necessarily a correct assumption when one considers scholarly literature on deterrence and our own empirical data. It is necessary to extend our understanding of deterrence beyond the 'sheer deterrence'[7] of formal legal sanctions. In doing so, we see that businesses' calculations of the costs and gains of compliance and noncompliance are influenced by a complex range of factors beyond merely the risk of enforcement action by an official government enforcement agency and the amount of any formal legal penalty.

[2] Sir Daryl Dawson, Jillian Segal and Curt Rendall, Trade Practices Act Review Committee, *Review of the Competition Provisions of the* Trade Practices Act (2003) 160 ('Dawson Review'). For a description of the new penalties, see below n 21 and accompanying text.

[3] See below nn 22–4 and accompanying text.

[4] For a summary of the literature and the reasons why this assumption is reasonable, see John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law & Society Review* 7, 10; Diane Vaughan, 'Rational Choice, Situated Action, and the Social Control of Organizations' (1998) 32 *Law & Society Review* 23, 27–8. However, Vaughan herself argues that the reality is more complex: at 28–30.

[5] Empirical regulatory compliance research generally finds the following factors to be equally important in explaining compliance and noncompliance: the characteristics of individuals within the business, the organisational structure and governance arrangements of the firm, the normative commitments of leaders and employees, and the social and market relationships within which the firm and its leaders are embedded — see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 19–53; Joseph F DiMento, 'Can Social Science Explain Organizational Noncompliance with Environmental Law?' (1989) 45(1) *Journal of Social Issues* 109; Mark C Suchman, 'On beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law' [1997] *Wisconsin Law Review* 475; Jon G Sutinen and K Kuperan, 'A Socio-Economic Theory of Regulatory Compliance' (1999) 26 *International Journal of Social Economics* 174; Søren C Winter and Peter J May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675.

[6] See below Part II(A).

[7] Marius Aalders and Ton Wilthagen, 'Moving beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment' (1997) 19 *Law & Policy* 415, 416.

This article sets out what those factors are and how they influence the thinking of Australian businesses about compliance with the *TPA*.

In Part II of this article, we consider how the provisions of the *TPA* and the enforcement activities of the ACCC attempt to deter noncompliance with the *TPA*. We also briefly review the key concepts in the literature on deterrence and rational calculation in relation to regulatory compliance. To explain and ultimately influence the way people in business perceive the costs and gains of compliance, we need to extend our view of 'deterrence' beyond the likelihood and amount of legal penalties to businesses' perceptions of the informal social and economic costs of noncompliance, as well as to the costs and gains of compliance. Moreover, since people and firms will generally be motivated to act only on what they subjectively perceive to be true, we also need to understand the range of internal and external factors that affect businesses' very perception of the risks and benefits of compliance and noncompliance.[8]

In Part III of this article, we briefly describe the interview and survey methodology used to gather the empirical data from Australian businesses. In Part IV, we use these data to critically examine how Australian businesses perceive the broader social and economic costs of noncompliance with the *TPA*, as well as the potential for formal enforcement and sanctions in the event of noncompliance. We also examine how Australian businesses that have breached the *TPA* assess the benefits of noncompliance in hindsight, and how they perceive the costs and benefits of positive *TPA* compliance — the 'business case' for compliance.

Part V of this article examines what factors most influence businesses' perceptions of the costs and gains of compliance and noncompliance. We also consider the influence of various factors on the way that different businesses perceive the costs and gains of compliance. Our analysis includes internal factors (such as whether firm leaders take a long- or short-term view of management), external factors (such as the market position of the firm), and the influence of the key people or agencies who have brought about awareness of the *TPA*.

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

It is not our purpose to test the extent to which calculations about the costs and benefits of compliance and noncompliance are more or less significant than *other* explanations for compliance with the *TPA*.[9] We start from the assumption that the weighing of costs and benefits is likely to be one (but only one) strand that helps explain business compliance or noncompliance with the *TPA*. Further research is required to consider how much impact, if any, these perceptions of

[8] See below n 61 and accompanying text.

[9] For a thorough review of the literature and empirical evidence on deterrence as an explanation for business compliance against other factors, see Sally S Simpson, *Corporate Crime, Law, and Social Control* (2002) 22–44. See also Braithwaite and Makkai, 'Testing an Expected Utility Model of Corporate Deterrence', above n 4; K Kuperan and Jon G Sutinen, 'Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries' (1998) 32 *Law & Society Review* 309; Toni Makkai and John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31 *Journal of Research in Crime and Delinquency* 347; Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 *Law & Policy* 262.

the costs and gains of compliance and noncompliance actually have on compliance of Australian businesses with the *TPA*.

II THE *TPA*, THE ACCC AND DETERRENCE THEORY

A *The* TPA *and Deterrence of Anti-Competitive Conduct*

When the *TPA* was first introduced in 1974, the sanctions available for anti-competitive conduct were poorly suited to deterrence. Only civil, not criminal, penalties for breach of the relevant provisions of the Act are available (at the time of writing). In 1974, the maximum penalties were minuscule — only $250 000 for corporations and $50 000 for individuals.[10] Indeed, an individual interviewed for our research who admitted being part of a cartel commented that when the cartel first began before 1993, 'the fines were relatively small — $100 000. Fines that small were unquestionably palatable in the context. We never would have done it if we had known what fines we would subsequently receive.'[11] Moreover, the actual penalties imposed by the courts were much lower than the maximum penalties available.[12]

In 1993, the civil penalties available for breach of the *TPA* anti-competitive conduct provisions were increased to $500 000 for individuals and $10 million for corporations.[13] This reform is still seen by ACCC staff and trade practices lawyers as a quantum leap in the deterrent power of the sanctions available under the *TPA*.[14] Nevertheless, the penalties introduced in 1993 were still paltry compared with the possibility of imprisonment and fines of a percentage of turnover, penalties that are available in other jurisdictions such as the United States, Europe and Japan.[15] Additionally, by 2000 the penalties actually levied by the courts had not increased in proportion to the legislative increase of the maximum penalty.[16] In fact, in three of the most 'successful' ACCC cartel enforcement actions between 1992 and 2002, the penalties imposed did not

[10] See the original *Trade Practices Act 1974* (Cth) s 76, now amended.

[11] See Christine Parker, Paul Ainsworth and Natalie Stepanenko, 'ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases' (Working Paper, Centre for Competition and Consumer Policy, The Australian National University, 2004) 47.

[12] See David K Round, John J Siegfried and Anna J Baillie, 'Collusive Markets in Australia: An Assessment of Their Economic Characteristics and Judicial Penalties' (1996) 24 *Australian Business Law Review* 292, 299–300.

[13] *Trade Practices Act 1974* (Cth) s 76, amended by *Trade Practices Legislation Amendment Act 1992* (Cth) s 10.

[14] See interviews with ACCC staff and commercial lawyers reported in Christine Parker and Natalie Stepanenko, Centre for Competition and Consumer Policy, The Australian National University, *Compliance and Enforcement Project: Preliminary Research Report* (2003) 37, 43–4.

[15] OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) 27–9.

[16] Round, above n 1, 94. This is partly because the ACCC frequently settles enforcement matters with agreed penalties that include discounts for cooperation: at 7–10.

outweigh the gains made.[17] There are, however, more recent indications that actual penalties are beginning to increase.[18]

As a result of the recommendations of the Dawson Review,[19] penalties were increased in 2007.[20] Pecuniary penalties available against corporations for cartel offences now include, as an alternative to the maximum penalty of $10 million, three times the value of the illegal benefit or, when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover in the preceding 12 months.[21] The Dawson Review also recommended creating criminal offences for serious cartel behaviour on the basis that the possibility of imprisonment (which, of course, is only available for criminal offences) is needed to provide adequate deterrence against cartel conduct.[22] This recommendation was adopted as policy by the former Coalition Government in late 2004,[23] and as a priority by the federal Labor Government upon election to office in late 2007.[24]

17 Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law & Society Review* 591, 597. Indeed, median penalties for private international cartels discovered anywhere in the world are only 1.4 to 4.9 per cent of affected sales: see John M Connor and C Gustav Helmers, 'Statistics on Modern Private International Cartels, 1990–2005' (Working Paper No 06-11, Department of Agricultural Economics, Purdue University, 2006). See also Parker, Ainsworth and Stepanenko, above n 11, 86–8. In a number of the ACCC's later cartel enforcement actions, the authors found evidence that cartel participants continued their activity despite being well aware of the penalties levied in earlier cases: at 60–1. The deterrent value of penalties for breach of the *TPA* has been questioned in light of the fact that they rarely outweigh the gains made by noncompliant conduct: see Submission to the Trade Practices Act Review Committee Review of the Competition Provisions of the *Trade Practices Act*, July 2002, Submission No 125, 39–44 (Productivity Commission).

18 See Beaton-Wells, 'Recent Corporate Penalty Assessments under the *Trade Practices Act*', above n 1.

19 See Dawson Review, above n 2, 164–5.

20 The data reported in this article were collected prior to the increase in penalties, though these changes were foreshadowed at the time we conducted our survey.

21 *TPA* s 76(1A), as amended by *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) s 3, sch 9 s 4. The Dawson Review recommended this change: Dawson Review, above n 2, 162–5. As a result of the 2006 amendments, the court can also make an order disqualifying persons from managing corporations as the result of their involvement in a breach of the anti-competitive conduct provisions: *TPA* s 86E, inserted by *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) s 3, sch 9 s 20.

22 Dawson Review, above n 2, 153–4, 161–2. The Committee concluded by noting that it was 'persuaded, in light of submissions made to it and growing overseas experience, that criminal sanctions deter serious cartel behaviour and should be introduced': at 163. Consideration was given to the findings and recommendations of the OECD: see OECD, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002). See also OECD, *Hard Core Cartels*, above n 15, 46.

23 The policy was announced by Peter Costello, the then federal Treasurer: Peter Costello, The Treasury, Australian Government, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005). Soon after, it was announced that 'the Trade Practices Amendment (Cartel Conduct) Bill 2005 is currently being prepared' and that the government was 'consulting the states and territories for a three month period commencing 2 February 2005 in relation to the proposals': see Peter Costello and Fran Bailey, The Treasury, Australian Government, 'Government Progressing *Trade Practices Act* Reforms' (Press Release, 10 March 2005). In August 2007, the Bill was listed on the webpage of the Department of the Prime Minister and Cabinet as 'legislation proposed for introduction in the 2007 spring sittings'. However, an election was called for 24 November 2007 without any Bill being made public. For discussion of these proposals, see Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 675; Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the *Trade Practices Act*' (2003) 31 *Australian Business Law Review* 192; Brent Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 *Australian Business Law Review* 235; Brent Fisse, 'The Australian Cartel Criminalisa-

B *The* TPA *and Deterrence of Breaches of the Consumer Protection Provisions*

The deterrent capacity of the consumer protection and fair trading provisions of the *TPA* has always been considerably more ambiguous than that of the anti-competitive provisions.[25] Criminal penalties are available for some breaches of the consumer protection provisions, and now stand at $1.1 million for corporations and $220 000 for individuals.[26] However, criminal prosecution for breach of these provisions has always been (and remains) rarely used.[27] In almost all cases where the ACCC takes enforcement action in relation to consumer protection breaches, it does so as a civil matter. The remedies available in these civil enforcement actions are: declarations that particular conduct is in breach of the *TPA*;[28] injunctions to prevent the prohibited action continuing or to require some action be taken;[29] damages;[30] rescission, setting aside or variation of contracts;[31] adverse publicity orders;[32] and community service orders, probation orders and corrective advertising.[33] While these remedies are also available for breaches of the competition provisions of the *TPA*, neither civil

tion Proposals: An Overview and Critique' (2007) 4 *Competition Law Review* 51. On the lack of government commitment to criminalising cartels, see Caron Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 29 *European Competition Law Review* 185.

24 See Ruth Williams, 'Labor Eyes Time for Cartel Crime', *The Sydney Morning Herald* (online edition), 4 December 2007 <http://business.smh.com.au/business/labor-eyes-time-for-cartel-crime-20071203-1end.html>; Stephen Moynihan, 'Cartels to Face Jail over Collusion', *The Age* (online edition), 10 December 2007 <http://www.theage.com.au/news/national/cartels-to-face-jail-over-collusion/2007/12/09/1197135287354.html>. On 11 January 2008, the new federal Labor Government released an exposure draft of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 and a discussion paper relating to the proposed criminalisation of serious cartel conduct in Australia: see Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, 'Jail Terms for Serious Cartel Conduct' (Press Release, 11 January 2008).

25 In 2005, the ACCC called for a review of the consumer protection aspects of the *TPA*, including the possibility of introducing civil penalties and better provision for the ACCC to take action for damages on behalf of consumers: see Fred Brenchley, 'ACCC to Tighten Consumer Protection', *The Australian Financial Review* (Melbourne), 17 January 2005, 1, 6. The Productivity Commission has recently completed a review of the consumer policy framework in Australia: see Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No 45 (2008).

26 Offences for breach of consumer protection and fair trading provisions are set out in *TPA* pt VC.

27 See Parker and Stepanenko, *Compliance and Enforcement Project*, above n 14, 23.

28 *TPA* s 163A.

29 *TPA* s 80.

30 Compensation is only available under the *TPA* where the ACCC takes representative action on behalf of specific named parties with their consent (ss 87(1A)(b), (1B)) or where the person who suffered loss or damage takes action (s 82). The ACCC cannot take action under the *TPA* to seek compensation for a class of unidentified people in cases of breach of the consumer protection provisions: see *Medibank Private Ltd v Cassidy* (2002) 124 FCR 40, 47–9 (Sundberg, Emmett and Conti JJ); *ACCC v Danoz Direct Pty Ltd* [2003] FCA 1580 (Unreported, Dowsett J, 28 August 2003). The ACCC can also bring a representative proceeding (that is, a class action) on behalf of consumers under the *Federal Court of Australia Act 1976* (Cth) pt IVA. However, for a discussion of the difficulties of bringing such an action, see Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework, 29 May 2007, Submission No 80, 102 (ACCC).

31 *TPA* ss 87(2)(a), (b), (ba).

32 *TPA* s 86D.

33 *TPA* s 86C.

penalties nor prison terms are available for breach of the consumer protection provisions of the *TPA*.

C *The ACCC and 'Leveraged Deterrence'*

Government policy and court decisions have focused on the deterrent power of the formal sanctions available for breach of the *TPA*.[34] However, the ACCC — especially under the leadership of Chairperson Allan Fels and his deputy, Allan Asher, between 1992 and 2002 — realised that the formal sanctions available under the *TPA* lacked sufficient deterrent power. Therefore, the ACCC deployed a range of other de facto 'deterrents' through the creative use of investigation and enforcement powers.[35] This has been termed 'leveraged deterrence'.[36]

First, the ACCC leveraged up the deterrence value of the modest penalties available under the *TPA* with the administrative and personal costs and the inconvenience of the investigative process, as well as with the damage to reputation caused by publicity.

Secondly, the ACCC developed a policy of holding multiple parties legally liable for contributing to the conduct, rather than only focusing on the main corporate participants. These parties included individuals, as well as corporate stakeholders such as industry associations, compliance professionals and potential whistleblowers. Even if penalties against firms are too small relative to a firm's size and profits to be of deterrent value, this strategy spreads the deterrent threat to individuals, who are likely to be more sensitive to smaller penalties or to the shame which results from a finding of liability and an injunction against reoffending.[37]

Thirdly, the ACCC settled potential enforcement matters with alleged offenders, thereby leveraging deterrence in consumer protection cases where civil penalties were not available and the ACCC's capacity to sue for consumer compensation was limited.[38] Settlements included enforceable undertakings to compensate consumers, an agreement to undertake compliance reviews, and the requirement that compliance systems be implemented to an extent that was often more costly than some of the penalties that were likely to be awarded.[39]

Moreover, the ACCC did much to build businesses' knowledge and understanding of the benefits of, or 'business case' for, proactive compliance. This was

34 See, eg, above nn 1, 22.

35 See Fred Brenchley, *Allan Fels: A Portrait of Power* (2003) 117–61.

36 Parker, 'The "Compliance" Trap', above n 17, 598.

37 See John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 109–22; Sally S Simpson, 'Assessing Corporate Crime Control Policies: Criminalization versus Cooperation' (1998) 32 *Kobe University Law Review* 101, 121. The ACCC extensively uses injunctions against reoffending as an outcome of its enforcement action. This may seem odd since reoffending would be in itself against the law. However, there are two reasons for seeking injunctions. First, if the party subject to the injunction reoffends within the injunction period, they will be liable for criminal penalties of contempt, not only the underlying civil offence. Secondly, the granting of the injunction entails a clear statement by the court that the conduct in question is in fact a breach of the law.

38 See above n 30.

39 See Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 249–50.

achieved by seeding the development of two professional associations for people working in business to help businesses comply with the law — the Society of Consumer Affairs Professionals and the Australasian Compliance Institute (previously the Association for Compliance Professionals Australia). Both associations have become significant advocates for the 'business case' for compliance with the *TPA*.[40]

The ACCC's leveraged deterrence strategy was based on an implicit theory of how business people think about the costs and gains of compliance and noncompliance which reached far beyond the 'mere deterrence' of legal penalties. As the following sections illustrate, understanding 'extended deterrence' and 'perceptual' (or 'behavioural') deterrence provides a more realistic understanding of calculative motivations for compliance and noncompliance than 'mere deterrence' does alone.[41]

D *'Mere Deterrence' — The Likelihood and the Costs of Formal Legal Enforcement*

'Mere deterrence' is concerned only with the costs of formal legal sanctions associated with noncompliance, calculated by comparison with the profit to be obtained. Classical deterrence theory suggests that people are deterred from breaking the law when the legal penalty they will receive for a breach multiplied by the likelihood of detection and conviction outweighs the gain.[42]

Courts, legislators and regulators often seem to assume that it is only mere deterrence that informs businesses' calculations of the costs and gains of complying with the law. Therefore, increasing penalties and enforcement activity are viewed as the main means of encouraging businesses to comply with the law. For example, the highly influential recommendations of the Organisation for Economic Co-Operation and Development ('OECD') in relation to cartel conduct are explicitly based on this narrow view of how businesses calculate the costs and benefits of noncompliance.[43] It is these OECD recommendations that formed the basis of the most recent amendments to the penalties available under the *TPA* and the criminalisation of cartels.[44]

40 Ibid 250–1.

41 The labels 'mere deterrence' and 'behavioural deterrence' are from Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 42, 91–2, respectively. The label 'extended deterrence' is from Harold G Grasmick and Robert J Bursik Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law & Society Review* 837. 'Perceptual deterrence' is not a different kind of deterrence but in fact a condition necessary for mere and extended deterrence to have any effect at all. Perceptual and extended deterrence are therefore complementary. This article adopts both a perceptual and extended deterrence approach.

42 Questions have been raised in social psychology literature about whether this relationship should be multiplicative or additive: see, eg, Grasmick and Bursik, above n 41, 846. On 'mere deterrence', see generally Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; John T Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253. Note that the swiftness with which the conduct will be discovered and sanctioned is also important in classical deterrence literature, although less commonly discussed in contemporary research: see Charles R Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (1980) 8.

43 See OECD, *Fighting Hard-Core Cartels*, above n 22, 72–3.

44 See above nn 19–24 and accompanying text.

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

E *'Extended Deterrence' — Informal Social and Economic Sanctions*

A number of deterrence theorists have argued that when people think about the costs of noncompliance, as well as considering the likelihood and costs of potential formal legal penalties, they also consider informal economic and social sanctions for breach, including social embarrassment that might be imposed by the various people who they relate to on a personal and business level.[45] Informal sanctions influence compliance by affecting not only people's conscience and sense of moral obligation to comply,[46] but also businesses' calculations about the costs and gains of compliance and noncompliance.

There is evidence that many informal social and economic sanctions may be more effective at influencing calculative thinking and behaviour than mere formal legal sanctions. This is because they bring to bear a range of costs and benefits of compliance or noncompliance that can be much more salient to an individual or firm's own priorities than the application of a legal penalty.[47] Certainly, to the extent that potential informal economic and social sanctions augment formal enforcement activity, we would expect individuals and businesses to be more motivated to comply with the law because the mere quantity of costs of noncompliance has increased. Similarly, to the extent that various third parties provide rewards for compliance (such as consumers paying a higher price for compliant products), we would expect compliance to increase. We would also expect individuals and firms to comply more consistently where they feel they are being monitored from a number of different angles rather than just by the official regulatory agency.[48]

Moreover, in an age where much of business is about managing brand value and reputation, we would expect that the financial and moral costs of bad publicity from noncompliance would loom particularly large in businesses' thinking about the costs and gains of compliance and noncompliance.[49] The

45 See Grasmick and Bursik, above n 41; Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 43; Thornton, Gunningham and Kagan, 'General Deterrence and Corporate Environmental Behavior', above n 9, 264.

46 See John Braithwaite, *Crime, Shame and Reintegration* (1989) 71–5. Braithwaite labels this impact the 'moralizing qualities of social control': at 9. See also Grasmick and Bursik, above n 41, 841.

47 See Braithwaite, *Crime, Shame and Reintegration*, above n 46, 69–70; Tittle, above n 42, 320.

48 See Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (2003) 35–8; Vibeke Lehmann Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2008) 35 *Journal of Law & Society* 309; Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] *Public Law* 63; Peter J May and Søren Winter, 'Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy' (1999) 18 *Journal of Policy Analysis and Management* 625; Peter N Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance: An International Journal of Policy, Administration, and Institutions* 527.

49 See Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (2nd ed, 2002) 164; Wallace N Davidson III, Dan L Worrell and Louis T W Cheng, 'Are OSHA Penalties Effective?' (1995) 92 *Business and Society Review* 25; Gunning-

ACCC itself sought to use its enforcement powers creatively to heighten businesses' fear of the informal costs of negative publicity and a poor relationship with the ACCC.[50] Australian businesses are also likely to fear the social and economic reaction of a range of social and economic stakeholders on discovery of noncompliance. Therefore, our article measures Australian businesses' perceptions of a range of economic and social costs of noncompliance, rather than simply the perceived likelihood and severity of formal enforcement action and sanctions.

F *Extending Deterrence Analysis to Include the Costs and Gains of Compliance*

When examining calculative thinking about compliance, it is equally important to consider the way that the costs and gains of compliance (not only noncompliance) are likely to influence people's decision-making. Organisations are likely to incur costs in becoming aware of their legal responsibilities, understanding how the various actions of individuals and teams within the organisation might lead to breaches of those responsibilities, and making, implementing and monitoring controls to prevent breaches. Moreover, compliance with the law, especially the *TPA*, might mean forgoing opportunities for innovation and profit-making. Indeed, businesses sometimes argue that these latter potential costs of compliance might 'over-deter' or 'chill' socially or economically useful business behaviour by inhibiting 'responsible risk taking and commercial decision making.'[51]

If the costs of compliance are too high, or if a business sees the benefits of compliance as insufficient to justify the costs of compliance, then it would be rational not to comply even in the presence of strong sanctions against breach and low gains from noncompliance. This is why it might be worthwhile for regulators such as the ACCC to invest resources not only in legal enforcement and education about the sanctions for breaking the law, but also in education and dialogue with businesses about the positive 'business case' for compliance (such as improvements in customer retention and satisfaction), and ways to efficiently achieve compliance.[52] Businesses that see benefits to compliance, apart from avoiding sanction, might invest more effort into complying with the law.

In this article, we measure a range of costs and gains of compliance and noncompliance, and do so in a way that is broad enough to incorporate costs and gains relevant to businesses' own internal goals and purposes as well as to

ham, Kagan and Thornton, *Shades of Green*, above n 48, 35–8. As Fisse and Braithwaite note, 'corporations fear the sting of adverse publicity attacks on their reputations more than they fear the law itself': Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) 249. This fear of adverse publicity is 'not so much by reason of its financial impacts but because of a variety of non-financial effects, the most important of which is loss of corporate prestige': at 247.

50 See above Part II(C).

51 Commonwealth Treasury, *Review of Sanctions in Corporate Law* (2007) 9. See also Parker and Stepanenko, *Compliance and Enforcement Project*, above n 14, 62–3. For a discussion of 'optimal deterrence', see Yeung, *Securing Compliance*, above n 1, 65–6.

52 See Bardach and Kagan, above n 49; Jay A Sigler and Joseph E Murphy, *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988).

relationships with various third parties, rather than focusing only on costs and gains in relation to the formal legal system.

G *'Perceptual' (or 'Behavioural') Deterrence — How Businesses Perceive the Likelihood and the Costs of Being Caught*

Much empirical and theoretical work has shown that people do not necessarily know the *objective* likelihood and severity of being caught in noncompliance. Even commercial firms, which we might expect to engage in calculative thinking about compliance with the law, 'have not been particularly attentive to penalty information, nor have they made special efforts to obtain timely and accurate information'.[53] Individual personalities, levels of emotionality and sense of moral obligation to obey the law are likely to play a part in how individuals perceive the costs and gains of noncompliance[54] and, indeed, whether they even seek out information about the costs and gains of compliance and noncompliance at all.[55] Within a firm, the characteristics of the individual officers and employees in a position to make decisions and implement compliant behaviour — and the way they interact with one another in different work teams — will contribute to the firm's thinking on the costs and gains of compliance.

A raft of research on organisational theory, rational neo-institutionalism and behavioural economics shows that apparently rational choices in business decision-making are often not objectively optimal.[56] This is likely to be equally true of decision-making in relation to compliance. However, despite the fact that firms and their managers exhibit 'bounded' rationality, calculations of the costs and gains of compliance may still be very important to their thinking, decision-making and behaviour. Moreover, decision-making and behaviour that are not optimally rational will often still be consistent and predictable and, therefore, amenable to empirical study.

One lesson drawn from this research is that many business managers do not make cost–benefit calculations about compliance at all until something like a

[53] Thornton, Gunningham and Kagan, 'General Deterrence and Corporate Environmental Behavior', above n 9, 279.

[54] See, eg, Makkai and Braithwaite, 'The Dialectics of Corporate Deterrence', above n 9; Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 136, 149. A study has found that citizens reporting greater obedience of tax laws will systematically overestimate the expected penalty for noncompliance: see John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 *American Journal of Political Science* 490.

[55] See Toni Makkai and John Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and a Case for Empiricism' (1993) 15 *Law & Policy* 271, 284, where the authors found that regulatees who disengage from the regulatory process estimate compliance costs as very low because they think that they will do nothing, or very little, to ensure compliance. Elsewhere, it has been suggested that '[g]ood apples do not calculate and calibrate the costs of non-compliance; they *assume* that those costs are potentially disastrous': Thornton, Gunningham and Kagan, 'General Deterrence and Corporate Environmental Behavior', above n 9, 280 (emphasis in original).

[56] See generally Emma Dawnay and Hetan Shah, New Economics Foundation, *Behavioural Economics: Seven Principles for Policy-Makers* (2005); Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993) 101–32; James G March and Herbert A Simon, *Organizations* (2nd ed, 1993); Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99; Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 91–2.

regulatory enforcement action or publicly reported breach or accident brings the risks of *noncompliance* to their attention.[57] As John Mendeloff and Wayne B Gray conclude from their empirical research,

> managers cannot optimize with respect to all aspects of their operations and tend to focus their attention on what appears to be most important at the time. … [A]n inspection that finds serious problems at a workplace may surprise management and lead them to pay more attention to safety issues.[58]

Similarly, in her investigation of health and safety programmes in companies in the United Kingdom, Hazel Genn found that it is when 'there is a potential for catastrophe of either an economic or political nature' that the firm is more likely to have an occupational health and safety system in place.[59] They are also more likely to have implemented a system addressing that particular high-profile hazard or short-term possibility of disaster than they are to have a system addressing longer-term health issues — managers seem more likely to perceive and act on high-profile risks of disaster.[60]

It is their *subjective* estimation of factors, such as the risk of being caught and sanctioned, that is more relevant in influencing compliance behaviour.[61] Therefore, many researchers argue that it is more important to examine the 'percep-

[57] See Andrew Hopkins, *Making Safety Work: Getting Management Commitment to Occupational Health and Safety* (1995) 88–95. See also David P McCaffrey and David W Hart, *Wall Street Polices Itself: How Securities Firms Manage the Legal Hazards of Competitive Pressures* (1998) 87, in which the authors find that, in the wake of a regulatory incident, Wall Street firms 'will make heavier investments in compliance than they otherwise would'. Similarly, it has been noted that imposing penalties results in improved safety because penalties 'focus managerial attention on risks' that may otherwise have been overlooked: see John T Scholz and Wayne B Gray, 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment' (1990) 3 *Journal of Risk and Uncertainty* 283, 302.

[58] John Mendeloff and Wayne B Gray, 'Inside the Black Box: How Do OSHA Inspections Lead to Reductions in Workplace Injuries?' (2005) 27 *Law & Policy* 219, 220–1.

[59] Hazel Genn, 'Business Responses to the Regulation of Health and Safety in England' (1993) 15 *Law & Policy* 219, 223.

[60] Ibid.

[61] See Braithwaite and Makkai, 'Testing an Expected Utility Model of Corporate Deterrence', above n 4, 7–9, in which the authors summarise the criminological literature on perceptual deterrence. They note that there is little evidential support for the impact of perceived severity of punishment on compliance: at 8. In contrast, perceived certainty of sanction or perceived informal sanctions do have some impact on compliance: at 8. Perceptions of the costs of compliance (which differ significantly from actual costs) also have some influence on compliance: see Makkai and Braithwaite, 'The Limits of the Economic Analysis of Regulation', above n 55. Cf Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 28–42, where Simpson provides a summary of the literature on perceptual deterrence in relation to corporate compliance and finds little impact of perceptual deterrence overall. For suggestions that the related concept of awareness does influence compliance, see DiMento, above n 5, 118–20; Robinson and Darley, above n 42, 175–8; Søren C Winter and Peter J May, 'Information, Interests, and Environmental Regulation' (2002) 4 *Journal of Comparative Policy Analysis: Research and Practice* 115. Cf Henk Elffers, Peter van der Heijden and Merlijn Hezemans, 'Explaining Regulatory Non-Compliance: A Survey Study of Rule Transgression for Two Dutch Instrumental Laws, Applying the Randomized Response Method' (2003) 19 *Journal of Quantitative Criminology* 409, where the authors find that knowledge of rules, and their clarity, have no effect on compliance.

tual' rather than 'objective' deterrence of sanctions since it is these perceptions that are likely to make a difference to businesses' compliance behaviour.[62]

H *Understanding and Explaining Perceptions of the Costs and Gains of Compliance and Noncompliance*

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

The mere deterrence view assumes that the factors explaining businesses' compliance mainly emanate from the law and the regulator, such as the size of the penalty and the resources available to the regulator to monitor, investigate and prosecute breaches. A broader focus on calculative thinking forces us to recognise that there are a range of factors other than the objective size and certainty of formal legal sanctions that affect businesses' perceptions of the benefits and risks of compliance and noncompliance, and businesses' calculations about how to gauge the relative weight of those risks and benefits.[63] Convincing businesses to calculate that it *is* in their interests to comply with the law is not simply a matter of increasing penalties or prosecution resources and then expecting to see a concomitant increase in compliance; businesses engage in a more complicated process of perception and internal consideration of a range of costs and gains of compliance and noncompliance. Part IV of this article provides empirical evidence about the way Australian businesses think about the costs and gains of compliance and noncompliance with the *TPA*. Part V then

[62] See, eg, Tittle, above n 42, 323, where it is argued that 'it is now essential for researchers to try to explicate the perceptual process, treating actual sanctions as only one of many possible influences on sanction perceptions.'

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

seeks to identify some of the factors that create variation in businesses' perceptions of these costs and gains.

III METHODOLOGY

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

The first part of our research involved qualitative interviews with 39 current and former ACCC staff members, 24 leading specialist trade practices lawyers, 7 compliance advisers and 30 business people from businesses or industries which have faced ACCC enforcement action.[64] The purposes of the qualitative research were to establish the nature and range of the ACCC's enforcement activities, to collect evidence as to the impact of the ACCC's enforcement activities on businesses' compliance and to explore the ways in which businesses have reacted to these enforcement activities. ACCC staff were chosen to be interviewed on the basis of their seniority and experience in leading investigations of important cases. Lawyers and compliance advisers were chosen on the basis that they were specialist trade practices lawyers who had represented clients in many significant enforcement actions and were considered leaders in their field. The business people interviewed had experienced enforcement action in some of the cases identified as particularly significant in the interviews with ACCC staff. A large variety of ACCC policy documents and reports of enforcement activity were also read.

The second part of the research was the collection of quantitative data — the responses to a self-completion questionnaire of 999 of Australia's largest businesses across all industries. It was intended to be completed by the most senior person in the organisation responsible for trade practices compliance, with a focus on contacting first the compliance manager, then the in-house counsel, the company secretary, the chief financial officer and, finally, the chief executive officer. In that order, these individuals were considered to be the people most likely to be able to fill out the questionnaire on behalf of the business. Forty-two per cent of those who filled out a questionnaire were chief executive officers, company secretaries or chief financial officers, and a further 20 per cent were general counsel or compliance managers.[65] The survey achieved a response rate

[64] For further information about the methodology used for this part of the research and a preliminary analysis of this data, see Parker and Stepanenko, *Compliance and Enforcement Project*, above n 14.

[65] For further information about this part of the project and its methodology, see Vibeke Lehmann Nielsen and Christine Parker, Centre for Competition and Consumer Policy, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005).

of 43 per cent,[66] which compares well with average response rates for similar questionnaire research of businesses.[67] The profile of our respondents also compares well with the profile of the largest Australian businesses in terms of size and industry,[68] suggesting that our data are likely to be representative of large Australian businesses.

As the survey responses came in between the end of 2004 and the middle of 2005, we checked whether there was any systematic difference between responses that were completed earlier and those completed later in the relevant period (particularly before and after two widely publicised ACCC cartel-related stories).[69] We found no significant variation between responses at these different times, suggesting that the sample is a robust representation of businesses' perceptions of the costs and gains of compliance over the relevant period.[70]

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

Previous studies of deterrence have sometimes been criticised for drawing attention to the costs and gains of noncompliance when respondents might not have even thought in a calculative manner about compliance in the first place. It has been suggested that researchers thereby created the phenomenon that they were seeking to identify or explain.[71] Our methodology partially overcomes this problem by asking the person responsible for trade practices compliance in the organisation to complete the questionnaire on behalf of the organisation, and also to report how 'most managers in the organisation' think about the given matter. This means that those whose thinking is actually being reported have not had their attention artificially drawn to the various costs and gains of compliance and noncompliance; the person who does fill out the survey is the person most likely to have already thought about these matters. However, this is not a perfect way of dealing with this problem because for the many respondents without a dedicated compliance position, the person filling out the survey would have been

66 In fact, this underestimates the actual response rate because we omitted 4.3 per cent of the responses received from the study because the respondents were too small (less than 100 employees) to fit our sample of large businesses. If we assume that 4.3 per cent of the entire list of companies surveyed (including non-respondents) were 'too small', then we would have a response rate of 45 per cent.

67 In articles published in high quality management journals in 1975, 1985 and 1995, the average response rate for questionnaire research was 35.5 per cent where the targets for filling out the questionnaire were top managers or someone acting as a representative of a business: see Yehuda Baruch, 'Response Rate in Academic Studies — A Comparative Analysis' (1999) 52 *Human Relations* 421. See also Michael K Bednar and James D Westphal, 'Surveying the Corporate Elite: Theoretical and Practical Guidance on Improving Response Rates and Response Quality in Top Management Survey Questionnaires' in David J Ketchen and Donald D Bergh (eds), *Research Methodology in Strategy and Management* (2006) vol 3, 37.

68 Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 65, 12–13.

69 These two stories related to the announcement of the Amcor cartel investigation and the announcement that criminal penalties would be introduced into the *TPA*. For further details, see ibid 279–80.

70 For further details of this test, see ibid 279–82.

71 See Vaughan, above n 4, 28; Makkai and Braithwaite, 'The Limits of the Economic Analysis of Regulation', above n 55, 285–6.

essentially reporting on their own views. The measures and questions in the survey relevant to this article are described in more detail alongside the results below.

We begin by looking at how our respondents perceive the extended costs and gains of compliance and noncompliance. These perceptions presumably form the basis of any calculative decision-making about whether to comply with or breach the law. In Part V, we test some of the factors that might influence these perceptions and, therefore, have the capacity to influence businesses' calculations about whether or not to comply.

IV How Australian Businesses Perceive the Costs and Gains of *TPA* Compliance and Noncompliance

A *Introduction*

We asked our survey respondents a number of questions about how senior management in their organisation perceive the costs and gains of both compliance and noncompliance with the *TPA*. Specifically, respondents were asked to consider: the perceived costs of sanctions associated with ACCC enforcement action if they were to be caught breaching the *TPA* (Table 1); the likelihood and severity of ACCC enforcement (Table 2); how they perceive the costs of informal economic and social sanctions from various other parties if they were to be accused of noncompliance (Table 3); how they perceive the risk of being caught in noncompliance by third parties (Table 4); how they perceive the gains of noncompliance if they had breached the *TPA* (Table 5); and how they perceive the costs and gains of compliance with the *TPA* (Table 6).[72]

The measures and results are discussed in turn below. In each case, the tables report the mean rating given by our respondents to each item.

B *Australian Businesses' Perceptions of the Costs of* TPA *Noncompliance*

1 *Sanctions Resulting from ACCC Enforcement Action*

We asked respondents to rate 'how much of a problem' managers in their organisation would regard various formal sanctions available (or that may be available in the future) under the *TPA* if their organisation were found to be in breach of the *TPA* (see Table 1). We also asked them to consider how problematic they viewed two broader consequences of ACCC investigation and sanctions: 'announcement of an investigation of your organisation at a televised press conference by the Chairperson of the ACCC' and 'loss of morale in our organisation'.[73]

[72] For further details of these statistics, including the number of responses and standard deviations for each individual rating for each item, see Nielsen and Parker, The *ACCC Enforcement and Compliance Survey*, above n 65, 225–31.

[73] Our qualitative interviews suggest that both of these matters are likely to be an important aspect of businesses' fear of ACCC enforcement action, despite not being formal sanctions for breaching the *TPA*. In this sense, they represent part of the 'extended' informal deterrence that formal ACCC enforcement action might bring with it: see above Part II(E).

Overall, these potential costs of noncompliance are assessed as very high, with little variation among ratings of the various items by individual respondents. Almost all items garner ratings as a 'large' or 'very large' problem from 90 per cent or more of the respondents.[74] Nevertheless, some sanctions are seen as more 'of a problem' than others, as shown by the distinction in Table 1 between 'serious' and 'very serious' sanctions.

Overwhelmingly, respondents consider a penalty of 10 per cent of turnover and criminal conviction with the possibility of a senior manager going to prison as the most problematic sanctions.[75] Of these two, the fine is considered to be a worse sanction than a senior manager going to jail.[76] We do, however, have two reasons to be cautious when interpreting this slightly surprising finding.

First, our questions asked the respondent to report on what 'most managers' would fear. It may be that the person filling out the survey thought that most managers believed that it would not be they themselves personally facing jail. However, the possibility of imprisonment is a much more powerful deterrent force on the actual individual senior manager who would be facing the prospect of imprisonment. On the other hand, humans have a seemingly infinite capacity for denial[77] and organisations are the perfect context for people to blame others, or 'the system', for their wrongdoing.[78] In that context, our findings might reflect the worrying fact that in an organisational context the fear of serving a jail term may never attach sufficiently to any one person to deter breaches of the law.

Secondly, our questions only asked respondents to consider and rate 'how much of a problem' each sanction would be individually on a scale of one to five. We did not explicitly ask respondents to compare and rank the different sanctions and should therefore be cautious in drawing conclusions about how respondents would rank the different sanctions. It may be that jail would in fact be seen as much more problematic than a fine in most people's minds even though both are seen as 'very serious'.

74 The exceptions are 'publication of advertising that corrected former advertising or informed the public about our breach' and 'loss of morale in our organisation' — these measures have, respectively, an 80 per cent and 79 per cent rating as a 'large' or 'very large problem'.

75 Note that the fine of 10 per cent of turnover was only added to the *TPA* as a penalty for anti-competitive conduct after the questionnaire was designed and administered. At the time of writing, the possibility of criminal conviction is still only a proposed addition to the *TPA* as a penalty for serious cartel conduct: see above nn 22–4 and accompanying text. A maximum of five years' jail is proposed, but no particular number of years was mentioned in the questionnaire. Unfortunately, at the time that the questionnaire was prepared the Dawson Review had not yet recommended the inclusion of penalties of three times the value of the illegal benefit, a penalty that was subsequently included in the *TPA*: see *TPA* s 76(1A)(b)(ii), inserted by the *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) s 3, sch 9 s 4. Therefore, the questionnaire did not include an item concerning the manner of calculating the penalty.

76 This is true both in terms of mean score and also the absolute number of respondents rating this as a 'very large problem': 93 per cent consider 10 per cent of turnover to be a 'very large problem' (with 6 per cent rating it a 'large problem'), while 87 per cent rate 'criminal conviction and the senior manager goes to prison' as a 'very large problem' (with 12 per cent considering it a 'large problem').

77 See generally Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (2001).

78 See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (2000) 193–203, 236–53; Fisse and Braithwaite, *Corporations, Crime and Accountability*, above n 56, 1–16.

Nevertheless, the previously available sanctions — fines of $1 million, implementation of a compliance system combined with consumer compensation of $1 million, and ACCC representative action seeking compensation on behalf of consumers — are all ranked as 'very serious'. Thus, it is doubtful whether any quantum leap in general 'deterrence' is likely to result from the introduction of either the harsher new fines of 10 per cent of turnover (that have been available since 2007) or from the proposed introduction of criminalisation and jail penalties.

This confirms the observation from other empirical research on deterrence that there is no linear relationship between the severity of penalties available and the perceived costs of those penalties by those at whom regulation is targeted: greater penalties do not automatically mean greater deterrence in equal measure.[79] Any sanction above a certain threshold, and with a certain likelihood of being applied in the case of noncompliance, may be seen as equally disastrous or worrying to many business people. This was certainly the view of some of the specialist trade practices lawyers we interviewed before administering the survey. They thought that the 1993 increase in penalties and enforcement activity,[80] particularly in relation to cartels, had already made such a substantial difference to business perceptions of deterrence that criminalisation and jail sentences would add little to the deterrent power of the *TPA*:

> You couldn't say that the introduction of criminal sanctions wouldn't have an impact, but it may not be a very substantial one on top of the changes that have already occurred.[81]

Another lawyer said that:

> Criminal sanctions won't make a big difference — perhaps a little bit of a difference … What was helpful to compliance started seriously under [Chairperson] Fels. … It changed the landscape in compliance. Now I think that landscape is well entrenched. I understand that the ACCC is frustrated that despite all the action there is still unlawful conduct. I think that because of all of this frustration they are pushing for criminal sanctions. There is the death penalty for murder yet people still commit murder. It is human nature. Companies getting fined do not have much impact anymore, I agree. However, if they stopped getting fined it would become a big deal again. Particular cases don't have a big impact now. They are just a reinforcing mechanism.[82]

[79] See Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 30; Tittle, above n 42, 322–3; Braithwaite and Makkai, 'Testing an Expected Utility Model of Corporate Deterrence', above n 4, 31–2. See also Makkai and Braithwaite, 'The Dialectics of Corporate Deterrence', above n 9, 358, 366–7, where the authors, despite not finding evidence of this tipping point effect, find that the relationship between deterrence and compliance is nonlinear and that an element of deterrent capacity is important for securing compliance. A nonlinear relationship between expected costs of compliance and actual compliance was also observed in Makkai and Braithwaite, 'The Limits of the Economic Analysis of Regulation', above n 55.

[80] For a discussion of the 1993 amendments, see above nn 13–14 and accompanying text.

[81] Christine Parker, Interview with an anonymous lawyer (Sydney, 1 April 2003).

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

These comments suggest that once the threshold is reached at which the perceived likelihood and costs of enforcement action become large or certain enough for deterrence to become a relevant motivation for businesses to comply with the *TPA*, any greater penalties or likelihood of being caught will produce only marginal gains in deterrence. Indeed, some regulatory scholars have argued that there is also a point at which greater penalties might produce a counter-reaction of disengagement or resistance because they are seen as too heavy-handed or as threatening the very viability of the business.[83]

The possibility of ACCC representative action, on behalf of consumers who have been harmed by a breach of the *TPA*, was seen as one of the more serious sanctions available under the Act. Presumably, this is at least partly because the amount of compensation awarded could potentially be very large. Indeed, ACCC representative action, or a private lawsuit, is likely to be the most serious sanction ever actually applied for breaches of the consumer protection aspects of the *TPA*, given that civil penalties are not available and criminal penalties are rarely pursued.[84]

Our findings also point to the potential impact of 'coat-tails' actions on businesses' calculations of the costs and gains of compliance. Coat-tails actions are where customers (or competitors) who have incurred loss from breaches of the *TPA* sue the offender for compensation after the breach has been established by ACCC enforcement action (something we did not ask about in our survey). Private actions are heavily used in relation to breach of the misleading and deceptive conduct provisions of the *TPA* — indeed, it may be the most commonly pleaded cause of action in Australia. By contrast, coat-tails actions have not been widely used in Australia.[85] This is partly because the ACCC usually settles its enforcement proceedings without the facts of the offence being proven in court.[86] Thus, any party seeking to claim damages after an ACCC enforcement action must usually still prove its whole case. Our findings suggest that if ACCC representative actions were allowed under the *TPA*, and private coat-tails actions occurred more frequently, these could each have a substantial deterrent impact.

The ranking of 'announcement of investigation of your organisation at a televised press conference' in the set of more serious sanctions confirms material from our qualitative interviews and also anecdotal reporting about businesses' opinion of the ACCC. Publicity associated with *TPA* enforcement action is a very significant factor in businesses' thinking about the costs of noncompliance.[87]

[83] See Makkai and Braithwaite, 'The Dialectics of Corporate Deterrence', above n 9, 364. See also John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 389–93. Ultimately, the deterrent power of fines imposed on corporations is limited by the wealth of the corporation, a 'barrier' referred to as the 'deterrence trap': at 389–90. As we only measure our respondents' perceptions of deterrence, not the actual impact of these sanctions on behaviour, we cannot say for sure how these different sanctions affect behaviour.

[84] See above Part II(B).

[85] See Parker, Ainsworth and Stepanenko, above n 11, 23, 41, 98–9.

[86] See Round, above n 1, 7–10.

[87] Some view televised announcement of an investigation (a more informal sanction) as an inappropriate use of the ACCC's powers as a governmental prosecuting agency: see Karen Yeung, 'Does the Australian Competition and Consumer Commission Engage in "Trial by Media"?' (2005) 27 *Law & Policy* 549.

However, the publicity associated with ACCC enforcements is not necessarily seen as being any *more* serious than financial penalties, contrary to what some of our interviewees had suggested.[88]

[88] See Parker and Stepanenko, *Compliance and Enforcement Project*, above n 14, 43–6. It has been noted that, while publicity should theoretically improve deterrence, there can be negative repercussions: see Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?' [2005] *Public Law* 360, 372–6. Expectations of scandal in the media can have no impact on compliance: see, eg, Makkai and Braithwaite 'The Dialectics of Corporate Deterrence', above n 9, 360. However, publicity might still be a better motivator of compliance than penalties because it incorporates moral as well as deterrent elements: see Braithwaite, *Crime, Shame and Reintegration*, above n 46, 70–5.

Table 1: Australian Businesses' Perceptions of the Costs of *TPA* Noncompliance — Sanctions Resulting from ACCC Enforcement Action

Perceived Costs of Sanction	**Mean (and Standard Deviation)**
How much of a problem do you think senior management of your organisation would find the following costs if you were ever caught by the ACCC in breach of the TPA*?*	*Scale from 1–5: 'very small problem' to 'very large problem'*
Very serious sanctions (n: 967–73)	
Conviction in court and a fine of 10% of your turnover	4.92 (0.32)
Criminal conviction and the senior manager goes to prison	4.85 (0.44)
Conviction in court and a fine of $1 million	4.84 (0.46)
An enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of $1 million	4.82 (0.49)
A private law suit where the ACCC takes a representative action on behalf of victims	4.69 (0.60)
Announcement of an investigation of your organisation at a televised press conference by the Chairperson of the ACCC	4.51 (0.79)
Serious sanctions (n: 969–73)	
Conviction in court and a fine of $100 000	4.48 (0.70)
An enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of $100 000	4.45 (0.73)
Publication of advertising that corrected former advertising or informed the public about our breach	4.06 (0.93)
Loss of morale in our organisation	4.02 (0.91)

2 *Likelihood and Severity of ACCC Enforcement Action*

The certainty of sanction is generally considered to be more important than the severity of sanction for making deterrence work.[89] Yet the probability of detection and successful enforcement action against business offenders in most areas of business regulation is not very high[90] since the resources and capacity of enforcement agencies are stretched. If business people do not perceive severe ACCC enforcement as likely, then imposing even very high penalties would not be a very effective deterrent. Our survey asked respondents how their organisations perceive the resources and the capacity of the ACCC to find out about noncompliance and take enforcement action, the possibility of investigation, the threshold for prosecution and the level of sanctions actually in use (as opposed to those available in the legislation). The questions and mean responses received are shown in Table 2.

There is a lot of variation in the responses to these questions, making it hard to generalise about the respondents' views. Overall, most perceive the likelihood of being caught and facing successful ACCC enforcement action for breach of the *TPA* to be high, but not overwhelmingly high. The highest scores for individual items in this group relate to the likelihood of the ACCC taking enforcement action upon actually finding out about a breach,[91] and the fact that the ACCC has a wide range of effective sanctions available to it.[92] A small majority see the ACCC as more likely to catch breaches, take enforcement action and have high penalties imposed.[93] On the other hand, the mean scores for three of the items were below the midpoint on the scale. These items relate to whether the ACCC can find out when organisations breach the law, the resources available to the ACCC in relation to the size and complexity of its task, and the competence of the investigative staff of the ACCC compared with the competence of the staff of the organisations they regulate.

Although our respondents' perceptions of the likelihood of ACCC enforcement action in the event of a breach of the *TPA* are not overwhelmingly high, this may still represent a higher estimation of the possibility of detection and enforcement action than is in fact reality. In relation to anti-competitive conduct, there is research that suggests that 'as few as one in six or seven cartels are detected and

89 For a summary of relevant literature, see Braithwaite and Makkai, 'Testing an Expected Utility Model of Corporate Deterrence', above n 4, 8–9.

90 See Brent Fisse, 'Sentencing Options against Corporations' (1990) 1 *Criminal Law Forum* 211, 215–16; Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (2002) 118.

91 The majority (73 per cent) disagree or strongly disagree that '[i]f [they] were caught by the ACCC in breach of the *TPA* the prospects of ACCC enforcement against the organisation are slight'. Arguably, it would be preferable for the purposes of deterrence to have much closer to 100 per cent of businesses disagreeing or strongly disagreeing with this statement.

92 Sixty-one per cent of businesses agree that 'the ACCC has a wide range of effective sanctions against non-complying organisations'.

93 Fifty-five per cent of respondents disagree that the chances of the ACCC catching them if they breached the *TPA* were slight.

prosecuted'.[94] While cartels are among the most difficult business offences to detect (as they are secretive by nature), we might expect a higher percentage of consumer protection breaches to be detected since such abuses are more likely to become known to consumers themselves. On the other hand, the ACCC receives thousands of consumer complaints every year about business conduct and only investigates and prosecutes a tiny proportion of these,[95] suggesting a very low chance of actually being prosecuted for consumer protection breaches even if noncompliance is detected.

It is also relevant that the ACCC must prosecute most contraventions of the *TPA* in court and has no power to impose penalties of its own. The ACCC has generally settled most enforcement actions, but where it does take matters to court this process usually takes a number of years. Even when the matter is settled, the investigation and settlement negotiations usually take several months. This means that the costs of noncompliance with the *TPA* have not only been historically relatively low, but have also been slow in coming, a factor that diminishes the deterrent power of enforcement according to classical deterrence theory.[96]

Table 2: Australian Businesses' Perceptions of the Costs of *TPA* Noncompliance — Likelihood and Severity of ACCC Enforcement Action

Perception of Likelihood and Severity of ACCC Enforcement Action (n: 990–3)	**Mean (and Standard Deviation)** *Scale from 1–5: 'strongly disagree' to 'strongly agree'*
If we were caught by the ACCC in breach of the *TPA*, the prospects of ACCC enforcement against the organisation are large[97]	3.77 (0.91)
The ACCC has a wide range of effective sanctions against non-complying organisations	3.65 (0.90)
The ACCC is generally keeping a close eye on our industry	3.23 (1.07)
The level of sanctions imposed for trade practices breaches is generally very high[98]	3.35 (0.98)

94 OECD, *Hard Core Cartels*, above n 15, 27. The 'historically low probability of detection' of cartels is also noted in Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) 256.

95 Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework, above n 30, 36.

96 See Tittle, above n 42, 8.

97 In the questionnaire, this question was actually asked in reverse: 'If we were caught by the ACCC in breach of the *TPA*, the prospects of ACCC enforcement against the organisation are slight'. The responses have been reversed as reported in Table 2.

98 In the questionnaire, this question was actually asked in reverse: 'The level of sanctions imposed for trade practices breaches is generally very low'. The responses have been reversed as reported in Table 2.

Perception of Likelihood and Severity of ACCC Enforcement Action (n: 990–3)	**Mean (and Standard Deviation)** *Scale from 1–5: 'strongly disagree' to 'strongly agree'*
If we breach the *TPA*, the chances of the ACCC catching us are large[99]	3.35 (1.01)
A breach of the *TPA* does not have to be severe before the ACCC bothers to do anything about it[100]	3.18 (1.02)
It is easy for the ACCC to find out when organisations breach the law[101]	2.82 (1.03)
The investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating	2.89 (0.80)
In the light of the size and complexity of their task, the ACCC has appropriate resources[102]	2.67 (1.01)

3 *Informal Social and Economic Sanctions from Third Parties*

Many researchers have suggested that since official government enforcement agencies will never have the resources and capacity to discover and take enforcement action against every breach, various third parties should be 'enrolled' to monitor and enforce compliance.[103] Indeed, in the case of a largely '"reactive"' regulator[104] such as the ACCC, third parties can have considerable influence on compliance with the *TPA* through their complaints to the regulator. Moreover, since the ACCC does not investigate or take enforcement action in relation to most complaints,[105] the only direct experience of 'enforcement' that many noncompliant businesses are likely to experience is the actions of third parties.

99 In the questionnaire, this question was actually asked in reverse: 'If we breach the *TPA*, the chances of the ACCC catching us are slight'. The responses have been reversed as reported in Table 2.

100 In the questionnaire, this question was actually asked in reverse: 'A breach of the *TPA* has to be severe before the ACCC bothers to do anything about it'. The responses have been reversed as reported Table 2.

101 In the questionnaire, this question was actually asked in reverse: 'It is hard for the ACCC to find out when organisations breach the law'. The responses have been reversed as reported in Table 2.

102 In the questionnaire, this question was actually asked in reverse: 'In the light of the size and complexity of their task, the ACCC has few resources'. The responses have been reversed as reported in Table 2.

103 See, eg, Black, above n 48.

104 Robert A Kagan, 'Regulatory Enforcement' in D H Rosenbloom and Richard D Schwartz (eds), *Handbook of Regulation and Administrative Law* (1994) 383, 387.

105 Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework, above n 30, 36.

Our questionnaire asked respondents to rate the extent to which their organisation would worry about economic and social losses in relation to various 'third parties' if they were 'accused of breaches of the *TPA* one day in the future'.[106] Table 3 sets out their responses.

Our respondents view social losses from third parties' sanctions as no less severe than economic losses,[107] indicating that both would be highly concerning in the event of noncompliance. In relation to economic losses, our respondents' key worry is customers (83 per cent worry 'a lot' or 'very much'), followed by shareholders (80 per cent worry 'a lot' or 'very much'). The next highest, at only 39 per cent, is worrying 'a lot' or 'very much' about economic losses from employees. As for social losses, our respondents worry most about losing 'the respect and esteem' of customers (91 per cent worry 'a lot' or 'very much') and shareholders (84 per cent worry 'a lot' or 'very much'). However, the vast majority (83 per cent) suggested that they also worry 'a lot' or 'very much' about losing the respect and esteem of employees, and 73 per cent worry 'a lot' or 'very much' about business partners.

These findings suggest that certain third parties — particularly customers, shareholders, employees and business partners — can potentially act as powerful deterring influences compelling compliance with the *TPA*. For this potential to be realised, however, third parties need to monitor compliance and react to noncompliance, something that they are not always motivated or equipped to do. Given this reality, we looked at how our respondents perceive third parties' monitoring of their compliance with the *TPA*.

[106] We report on and analyse the responses to this part of the questionnaire in more detail in Nielsen and Parker, 'To What Extent Do Third Parties Influence Business Compliance?', above n 48.

[107] This may be partly because loss of respect and esteem can lead to financial losses.

Table 3: Australian Businesses' Perceptions of the Costs of Noncompliance — Informal Economic and Social Sanctions from Third Parties

Costs of Informal Economic and Social Sanctions of Third Parties	**Mean (and Standard Deviation)**
If your organisation were accused of breaches of the TPA *one day in the future, how much would your organisation worry about …*	*Scale from 1–5: 'worry very little' to 'worry very much'*
Economic losses in relation to the following groups of people (n: 924–64)	
Your customers	4.18 (0.99)
Your shareholders	4.08 (1.06)
Your employees	3.87 (1.04)
The media	3.52 (1.27)
Your business partners	3.50 (1.12)
Consumer groups/NGOs	3.13 (1.29)
Informal business networks	2.99 (1.17)
Other organisations in your industry	2.90 (1.23)
Your suppliers	2.82 (1.28)
Your industry association	2.73 (1.31)
Losing the respect and esteem of the following groups of people (n: 939–73)	
Your customers	4.41 (0.87)
Your shareholders	4.22 (1.02)
Your employees	4.13 (0.97)
Your business partners	3.83 (1.02)
The media	3.66 (1.22)
Consumer groups/NGOs	3.51 (1.20)
Other organisations in your industry	3.28 (1.24)
Your industry association	3.27 (1.24)
Your suppliers	3.26 (1.23)

Costs of Informal Economic and Social Sanctions of Third Parties	**Mean (and Standard Deviation)**
If your organisation were accused of breaches of the TPA *one day in the future, how much would your organisation worry about …*	*Scale from 1–5: 'worry very little' to 'worry very much'*
Informal business networks	3.21 (1.19)
Lawyers/compliance professionals[108]	3.14 (1.26)
Politicians	3.13 (1.30)
Relatives	3.03 (1.27)

4 *Risk of Being Caught by Third Parties*

We asked respondents about their perceptions of whether their consumers, suppliers and business partners were monitoring their compliance with the *TPA*. In response, only 48, 37 and 33 per cent agree or strongly agree that their customers, business partners and suppliers, respectively, are keeping a close eye on their compliance. Table 4 shows the mean responses.

Hence, despite the potential for various third parties to wield a powerful deterrent threat,[109] businesses do not perceive consumers, suppliers and business partners as being very likely to detect a breach. If businesses do not think that third parties are actually watching them, their concerns about third party losses in the event of noncompliance are highly unlikely to make much difference to their behaviour. However, we did not ask respondents about their perception as to whether *TPA* compliance is monitored by the other two groups that businesses are concerned about — shareholders and employees.

[108] Note that lawyers/compliance professionals, politicians and relatives have been included in this set of measures because, although they have no direct capacity to cause the respondents economic loss, loss of their respect and esteem might still be important.

[109] See above Part IV(B)(3).

Table 4: Australian Businesses' Perceptions of the Risk of Being Caught in Noncompliance by Third Parties

Perceived Risk of Being Caught in Noncompliance by Third Parties (n: 881–4)	**Mean (and Standard Deviation)** *Scale from 1–5: 'strongly disagree' to 'strongly agree'*
Our customers are aware of the *TPA* and keep a close eye on our compliance	3.59 (1.00)
Our suppliers are keeping a close eye on our trade practices	3.52 (0.96)
Our business partners focus a lot on the *TPA* and keep an eye on our compliance	3.47 (0.95)

C *Gains of Noncompliance*

We have seen that Australian businesses rate many of the costs of noncompliance, particularly the costs of formal legal sanctions, as quite high. However, it may be that the gains of noncompliance with the *TPA* outweigh its costs, particularly where the potential commercial gains are large or where the firm sees noncompliance as necessary in order to stay in business.

It did not make sense to ask all our respondents to hypothesise about the gains of any potential noncompliance with the *TPA* in the future, since the likely gains will very much depend on the kind and circumstances of breach.[110] Instead, we asked those respondents who had 'ever breached the *TPA*' (whether or not they had been caught) to estimate the gains from that breach. Of our respondents, 106 answered this question, thereby indicating that they had breached the *TPA*.[111] Table 5 lists the measures and results of our respondents' perceptions of the gains from breaching the *TPA*.

Overall, our respondents see the gains of their noncompliance as very low. Indeed, the majority of respondents see most of the gains as irrelevant. The exception is 'gain of market share': two-thirds see this gain as relevant to their breach of the *TPA* and, of those, 23 per cent see the gain as 'large' or 'very large'. The next two most relevant gains are 'instant one shot economic gain' and 'saved costs on lawyers and/or compliance professionals'. Just under half of our respondents see each of these gains as relevant to their breach, with 12 per cent and 14 per cent, respectively, viewing the gain as 'large' or 'very large'. Well

[110] Perhaps this is why it has been suggested that 'few studies of deterrence actually measure the potential gains of crime — and most of these employ objective deterrence research designs': Simpson, *Corporate Crime, Law, and Social Control*, above n 9, 32.

[111] Given the anonymity and confidentiality of the survey in general and the very non-specific nature of this question, we believe that this is likely to be a reasonably reliable representation of those respondents who actually knew that they had breached the *TPA*. For further discussion of the reliability of our respondents' answers to questions about their compliance and contact with the ACCC, see Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 65, 12–19, 30–67.

under half of the respondents reported that each of the other potential gains listed in Table 5 are relevant to their breach. Only those respondents who saw each gain as relevant to their own noncompliance with the *TPA* were asked to rate the value of the gain. Therefore, Table 5 shows the mean rating for each item only in relation to those respondents that marked each as relevant to their noncompliance with the *TPA*.

We also asked respondents to estimate the average 'expected value of the breaches of the *TPA* committed by your organisation in the last six years' (whether the breaches were detected or not). Of the 143 respondents who answered this question, only 6 per cent see the breaches as amounting to a 'substantial' or 'very substantial improvement' of their income. The majority (55.6 per cent) see the breaches as a 'tiny' or 'very tiny improvement' of their income.

We also asked them to answer 'yes' or 'no' to the proposition that 'without the breaches we would have gone out of business'. We asked this because Australian businesses have sometimes argued that breaches of the anti-competitive conduct provisions of the *TPA* have been a matter of necessity to stay in business, rather than a matter of greed for the potential gains of noncompliance.[112] Of the 131 respondents who answered this question, only one respondent answered 'yes'.

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

[112] Parker, 'The "Compliance" Trap', above n 17, 607–8.

Table 5: Australian Businesses' Perceptions of the Gains of Noncompliance with the *TPA*

Gains of Breach — For Those Who Have Admitted Breach Only (n: 54–87)	**Mean (and Standard Deviation)**
This question is only to be answered if your organisation has ever breached the TPA *— no matter whether you have been caught by the ACCC or not ... How large were or would the gains from breaching the* TPA *have been?*	*Scale from 1–5: 'very small' to 'very large'*[113]
Gain of market share	2.40 (1.32)
Saved competition costs	2.32 (1.30)
Saved time and money that would otherwise have been spent on unproductive paperwork	2.24 (1.37)
Saved costs on lawyers and/or compliance professionals	2.23 (1.29)
Instant one shot economic gain	2.08 (1.31)
Prevention of a slow down in our investments in the market	2.07 (1.22)
Saved investment costs (for example, in new machinery because of demands in relation to product safety)	1.98 (1.27)
Saved production costs	1.76 (1.03)

D *Costs and Gains of Compliance*

Finally, respondents were asked to rate the costs and gains of compliance for their organisations. With respect to gains, this was done on a scale from 'no gain' to 'very large' gain rather than on a monetary scale because, on the basis of our qualitative interviews and previous research on compliance, we believe that it would not have been meaningful to ask respondents to put a dollar value on each of the costs and gains of compliance. It is hard enough to put a dollar value on something like the costs of a lost opportunity or time spent on paperwork, let alone expecting our respondents to put a dollar value on a 'higher level of organisational learning'. Our non-monetised scale is also better suited than a monetised scale to measuring relative perceptions among organisations of different size and wealth.

Overall, the businesses see both the costs and gains of compliance as fairly low, with mean scores for perceptions of the costs of compliance a little lower than the mean scores for gains of compliance.[114]

[113] There was also a sixth option of marking 'not relevant'. Those who marked 'not relevant' have been disregarded in these statistics.

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

The cost of compliance that is rated highest by the greatest number of respondents (at 29 per cent for 'large' or 'very large' cost) is 'expenses on lawyers and/or compliance professionals whenever we have plans or ideas that are relevant to the *TPA*'. The next highest is 'costs of compliance systems and training', with 18 per cent of respondents seeing these as a 'large' or 'very large' expense of compliance. However, overall, more than half of our respondents see each of the costs of compliance as 'small' or 'very small'.

The mean scores for the items measuring gains from compliance cluster around the neutral midpoint of the scale. However, these averages mask the fact that businesses' responses to these questions were fairly well spread over the whole scale for each item, including a few respondents who perceive the gains as very high or as very low. It is therefore difficult to discuss an overall tendency in Australian businesses' perceptions of the gains from compliance. The gains rated highest overall are 'absence of problems with the ACCC' (51 per cent rating this as a 'large' or 'very large' gain of compliance) and 'a better image' (with 47 per cent rating this gain to be 'large' or 'very large'). The next highest perceived gains are 'a higher level of organisational learning' and 'a better way of handling consumer complaints', with just under a third of respondents rating each of these gains as 'large' or 'very large'.

Table 6: Australian Businesses' Perceptions of the Costs and Gains of *TPA* Compliance

Costs of Compliance (n: 961–77)	**Mean (and Standard Deviation)**
How large do you believe that each of the following types of compliance costs with the TPA *is to your organisation?*	*Scale from 1–5: 'very small' to 'very large'*
Expenses on lawyers and/or compliance professionals whenever we have plans or ideas that are relevant to the *TPA*	2.53 (1.21)
Costs of compliance systems and training	2.26 (1.12)
Administrative costs: time and money spent on paper-work in relation to the *TPA*	2.17 (1.03)
The costs of a lost opportunity, for example not being able to take over another company	2.14 (1.13)
Production costs, such as more expensive ways of production	2.02 (1.01)
Gains of Compliance (n: 957–70)	**Mean (and Standard Deviation)**
Do most managers in your organisation think there is a business case for complying with the TPA*? That is, how large is the gain to the organisation from the following benefits of complying with the* TPA*?*	*Scale from 1–6: 'no gain' to 'very large'*
Absence of problems with the ACCC	4.06 (1.53)
A better image	3.94 (1.44)
A higher level of organisational learning as we respond to different kinds of mistakes in the organisation	3.40 (1.45)
A better way of handling consumer complaints	3.37 (1.50)
Better tools for monitoring our organisation	3.22 (1.47)
A better knowledge of our organisation	3.20 (1.44)
A higher level of product development and therefore a better product	3.09 (1.52)
More up-to-date investments in research and new technology	2.92 (1.47)

V WHY DO BUSINESSES PERCEIVE THE COSTS AND GAINS OF COMPLIANCE AND NONCOMPLIANCE THE WAY THEY DO?

A *Introduction: Research Strategy and Measures*

From a policy perspective, it is certainly useful to understand how businesses perceive the costs and gains of compliance and noncompliance in order to predict how calculative thinking might affect compliance. However, if policy-makers want to understand how best to change businesses' calculations to increase compliance, it is equally important to explain why firms have different perceptions of the costs and gains of compliance and noncompliance. Our analysis of the significance of extended and perceptual deterrence suggests that management's calculation of the costs and gains of compliance and noncompliance is influenced by a range of factors beyond the size of available formal sanctions and visibility of official enforcement action.[115] These factors include internal factors, such as the size, resources and managerial style of the firm, and external factors, such as a firm's market position, and the people and agencies that have been most influential in forming a firm's awareness of the *TPA*.

In this Part of the article, we test the extent to which each of a range of factors explains variation in the way our respondents calculate costs and gains related to compliance and noncompliance. We use five regression analyses[116] (shown in Table 7 below) which test variation in five aggregate measures of businesses' perceptions of costs and gains of compliance and noncompliance. These five measures, created from the variables described in Part IV, are:

- businesses' perceived aggregated costs of compliance;
- businesses' perceived aggregated gains of compliance;[117]
- fear of serious sanctions — taking into account perceived risk of complaints, and likelihood and severity of ACCC enforcement action;
- fear of very serious sanctions — taking into account perceived risk of complaints, and likelihood and severity of ACCC enforcement action; and
- fear of third party economic and social losses — taking into account perceived risk of complaints, and likelihood and severity of ACCC enforcement action.[118]

115 See above n 63 and accompanying text.

116 We use regression analysis as it is a powerful statistical technique for isolating and testing the relative influence of a range of potentially explanatory variables on the phenomenon that is to be explained. Originally, we had also sought to explain variation in respondents' perceptions of the gains of noncompliance, but this seemed to require a completely different model to the perceived costs and gains of compliance and costs of noncompliance. Therefore, we have not included it in our final version. Using the same independent variables as in Table 7 resulted in a model that was insignificant, with an R^2 of only 0.04.

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

Deterrence theorists hypothesise that the degree to which people fear noncompliance is a function of their perception of the risk of being caught combined with their perception of the severity of the potential sanctions to be applied if they are caught.[119] Therefore, the three measures of respondents' fear of the various costs of noncompliance are weighted variables that take into account respondents' perceptions of the risk of being caught in noncompliance (by customers, business partners or suppliers), their perception of the likelihood and severity of ACCC enforcement action, and also how much they fear the different sanctions that might be applied in the event of breach.[120]

We tested the relative influence of a range of explanatory variables on each of these five measures. First, we tested the extent to which calculations about compliance are affected by the fact that a business has been investigated by the ACCC in the last six years,[121] or has experienced criticism of business-specific or industry-wide *TPA* compliance in the last six years.[122] We also tested the influence on a business of having breached the *TPA* in the last six years (regardless of whether or not noncompliance was detected).[123]

Deterrence theory generally assumes that businesses that have experienced investigation or third party criticism fear the costs of noncompliance more than those that have not. This is 'specific deterrence'.[124] On the other hand, if a business breached the *TPA* without being detected, or faced criticism or enforcement action and found that it was 'not so bad', then they might see the costs of

118 The measures of serious sanctions, very serious sanctions and third party economic and social losses are based on the individual items in Tables 1 and 3. The measures of the likelihood and severity of ACCC enforcement action are based on the items in Table 2. However, as there is little variance in some of the items relating to very serious sanctions and likelihood and severity of ACCC enforcement action, those items have been excluded from the measure. The Table 1 items excluded from the measure of very serious sanctions are: 'conviction in court and a fine of 10% of your turnover', 'criminal conviction and the senior manager goes to prison', 'conviction in court and a fine of $1 million', and 'an enforceable undertaking to improve trade practices compliance systems and pay compensation to consumers of $1 million'. The Table 2 item excluded from the measure of likelihood and severity of ACCC enforcement action is 'the ACCC has a wide range of effective sanctions against non-complying organisations'.

119 See above n 42 and accompanying text.

120 The details of each of these measures are shown in Table A1 in the Appendix.

121 We asked respondents to self-report whether the ACCC had investigated the organisation in the last six years. Fourteen per cent (141) of the respondents report that they have been the subject of an ACCC investigation. This figure does not completely tally with official ACCC annual report records: see Nielsen and Parker, *The ACCC Enforcement and Compliance Survey*, above n 65, 17. We used the self-reported ACCC investigation measure for our analyses, rather than the official record of whether the organisation had experienced ACCC enforcement matter, since it is more salient to consider those organisations that actually remember being investigated by the ACCC. Furthermore, the self-reported investigation measure is likely to capture cases where a preliminary investigation took place but was settled or otherwise not pursued to an enforcement action recorded in the ACCC annual reports.

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

123 This measure is based on the same question discussed above in Part IV(C).

124 Tittle, above n 42, 4. By contrast, 'general deterrence' is achieved by businesses becoming aware of the imposition of sanctions for noncompliance on other businesses, and thereby fearing 'sanction threats'.

noncompliance as lower. Furthermore, if businesses believe that the chance of being detected is small, then this would decrease their perception of the costs of compliance. To test this, we looked at the influence of businesses' perceptions of the risk of complaints from third parties, and their opinion of the likelihood and severity of ACCC enforcement action.[125]

Secondly, we examined how a number of factors internal to businesses affect their perceptions of costs and gains related to compliance and noncompliance. These included: the size of the business (measured by number of employees); how well-resourced the organisation considers itself, in terms of knowledge and expertise in a range of areas relevant to *TPA* compliance;[126] and the degree to which the organisation's senior management utilises a long-term managerial approach.[127] Managers who concern themselves with long-term, strategic issues might have clearer perceptions of both the potential long-term gains of compliance and the costs of noncompliance in the context of stakeholder concerns. Similarly, companies that have greater resources to understand the *TPA* and their strategic environment might also have a clearer perception of the benefits of compliance and the potential costs of noncompliance. Businesses that are larger and better resourced might also perceive the costs of compliance as lower, since administrative costs should be relatively lower for them. On the other hand, the costs of noncompliance might actually be perceived as higher since some larger businesses consider themselves to be a larger target for ACCC enforcement action.[128]

Thirdly, we tested whether our respondents' market position makes a difference to their thinking about the costs and gains of compliance.[129] We expected that the extent to which firms fear different sanctions, particularly informal social and economic losses in relation to customers, would depend on their market position and their vulnerability to market competition. Additionally, greater sensitivity to risk was expected for those with larger brand presence, more contact with consumers and more 'substitutable' products.[130] We also tested whether the respondents' industry influenced their thinking about the costs

125 Note that these factors are included in the measures of fear of noncompliance: see Tables 2 and 3. Therefore, they were not included as explanatory variables in the models explaining variation in the three measures of fear of noncompliance.

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

127 The items used for this measure, and relevant statistical details for the whole measure, are shown in Table A3 in the Appendix.

128 See Christine Parker and Vibeke Lehmann Nielsen, 'What Do Australian Businesses Really Think of the ACCC, and Does It Matter?' (2007) 35 *Federal Law Review* 187, 202, 211. However, in that study the authors found that large businesses did not consider the ACCC 'biased in targeting': at 211.

129 The measure for market position is a single item asking respondents to rate on a scale from 1–5 whether they agree that 'customers can easily switch to substitute products or services': see Table A3 in the Appendix.

130 David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005) 53.

and gains of compliance. However, as we found that this was of no significance, we have not included the results.[131]

Finally, we hypothesised that businesses will have different perceptions of the costs and gains of compliance and noncompliance depending on who has been most influential in forming their awareness of *TPA* compliance issues. The literature on both deterrence and risk perception suggests that by whom, and in what way, the potential risks are communicated can make a big difference as to how people perceive and act on those risks.[132] To test this, we used a measure of the extent to which our respondents rate the ACCC, compliance professionals, the media, the organisation's industry association and consumer groups as having formed their organisation's awareness of the *TPA*.[133] This is not a measure of how much they worry about these different actors' views of their compliance and noncompliance (as with our previous measure of worries about social and economic losses from third parties). Nor is it a measure of whether they are aware of the *TPA* at all. It is a measure of who or what formed that awareness, to the extent that the firm is aware of *TPA* compliance. We expected that actors with a greater influence over organisations' awareness of the *TPA* will also influence their perceptions of the costs and gains of compliance and noncompliance.

B *Results*

Table 7 contains the results of our tests of the relative influence of explanatory variables on perceptions of the costs and gains of compliance, and on three measures of the costs of noncompliance. The bolded entries in the table are situations where a significant association exists between the two variables, controlling for all the other variables. The number of asterisks indicates how confident we can be about the strength of the significance: *** $p < 0.005$; ** $p < 0.01$; * $p < 0.05$ (two-tailed).

The adjusted R^2 value shown near the bottom of each column indicates the total explanatory power of all of the factors shown. At 32 per cent, the adjusted R^2 for explaining costs of compliance is quite high for this type of social science research. The adjusted R^2 for how the model explains gains of compliance is not as high, while the other adjusted R^2 values are fair.

131 Statistics are on file with the authors. We also tested the influence of another single item — that '[t]he competition is much tougher in this industry than in most' — but this too was not significant.

132 See, eg, Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93 *The American Economic Review* 1449, 1458–60; Tittle, above n 42, 11–12.

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

Table 7: Explaining Variation in How Australian Businesses Perceive the Costs and Gains of *TPA* Compliance, and the Costs of *TPA* Noncompliance[134]

	Costs of Compliance	**Gains of Compliance**	**Costs of Noncompliance**[135]		
			Fear of Serious Sanctions	**Fear of Very Serious Sanctions**	**Fear of Third Party Economic and Social Losses**
Explanatory Variables:					
ACCC investigation in the past six years[136]	0.05 (1.48)	0.02 (0.55)	**0.10***** (2.92)	**0.07*** (2.25)	0.05 (1.41)
Breached the *TPA* in the past six years[137]	**0.07*** (2.18)	**0.08*** (2.25)	-0.03 (0.81)	-0.01 (0.39)	-0.04 (1.29)
Third party criticism in the past six years	0.05 (1.74)	0.06 (1.63)	**0.08**** (2.54)	**0.11***** (3.36)	0.05 (1.57)
Risk of being caught by third parties	**0.09***** (2.93)	**0.08*** (2.37)			
Likelihood and seriousness of ACCC enforcement	0.06 (1.89)	0.06 (1.60)			
Size	0.06 (1.91)	-0.01 (0.25)	**0.07*** (2.27)	**0.10***** (2.99)	**0.07*** (2.18)
Well-resourced[138]	**0.07*** (2.18)	0.06 (1.68)	**0.08*** (2.28)	**0.08*** (2.23)	**0.09*** (2.73)

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

[135] Note that each of these measures is actually a weighted variable also including items measuring the perception of risk of complaints, and likelihood and severity of ACCC enforcement: see above Part V(A).

[136] 0: no; 1: yes.

[137] 0: no; 1: yes.

[138] See above n 126 and accompanying text for an explanation of this measure.

	Costs of Compliance	**Gains of Compliance**	**Costs of Noncompliance**[139]		
			Fear of Serious Sanctions	**Fear of Very Serious Sanctions**	**Fear of Third Party Economic and Social Losses**
Long-term management[140]	0.03 (1.00)	**0.09*** (2.57)	**0.12***** (3.53)	**0.12***** (3.65)	**0.11***** (3.39)
Market position[141]	**0.09***** (3.04)	0.01 (0.19)	**0.12***** (3.98)	**0.12***** (3.87)	**0.11***** (3.48)
Awareness formed by:					
ACCC	**0.13***** (3.58)	**0.16***** (3.94)	**0.12***** (3.22)	**0.13***** (3.26)	**0.17***** (4.30)
Compliance professionals	**0.28***** (7.82)	0.01 (0.32)	**0.17***** (4.67)	**0.18***** (4.96)	**0.16***** (4.16)
Consumer groups	**0.08*** (2.51)	**0.15***** (4.06)	0.04 (1.17)	0.04 (1.05)	**0.07*** (2.09)
Industry association	0.04 (1.26)	0.06 (1.76)	**0.10***** (2.97)	**0.08*** (2.34)	**0.11***** (3.48)
Media	-0.01 (0.28)	0.06 (1.82)	0.04 (1.16)	0.04 (1.13)	0.03 (0.79)
Model Statistics:					
n	856	851	853	853	856
Adjusted R^2	0.32	0.19	0.22	0.24	0.22
F-value of full model	29.62***	14.93***	21.46***	23.05***	21.60***

[139] Note that each of these measures is actually a weighted variable also including items measuring the perception of risk of complaints, and likelihood and severity of ACCC enforcement: see above Part V(A).

[140] See above n 127 and accompanying text for an explanation of this measure.

[141] See above n 129 and accompanying text for an explanation of this measure.

1 *Influence of Experience of Breach, Investigation and Third Party Criticism*

Those respondents who report that they have breached the *TPA* at some time in the last six years rate the costs and gains of compliance as higher than those who have not breached. However, there is no significant difference in their view as to the costs of noncompliance, although there is a tendency towards seeing the costs of noncompliance as lower (the numbers here are negative). This is consistent with previous research which suggests that people who breach the law often learn that the consequences are not as concerning as they feared they might be.[142]

Our separate measures on being investigated by the ACCC for an alleged breach and being criticised by third parties for noncompliance allow us to independently analyse the influence of these events on businesses' calculations of the costs and gains of compliance and noncompliance. We find that those firms that have experienced an ACCC investigation or third party criticism of their or their industries' compliance fear sanctions more than those who have not had an investigation or third party criticism. This clearly supports the assumption of deterrence theory that official enforcement action against an organisation will affect that organisation's calculations about compliance for the future ('specific deterrence').[143] These results also suggest that the deterrent power of official enforcement action will be supported by monitoring and criticism of noncompliance by a range of third parties.

Surprisingly, however, neither those who have been investigated by the ACCC nor those who experienced third party criticism for noncompliance fear broader informal third party economic and social sanctions any more than those who have not. Hence, the 'extended' deterrent power of third parties does not seem to be increased by the experience of official investigation or third party criticism. This could be because those who experienced ACCC investigation and enforcement or third party criticism did not in fact find that this led to broader informal third party sanctions.[144]

Businesses that have experienced ACCC investigation and third party criticism for noncompliance do not have a significantly different perception of the costs and gains of compliance (as opposed to noncompliance) when compared with

142 See, eg, Grasmick and Bursik, above n 41, 843. The authors note that it is well-established in the literature that illegal behaviour in the past tends to reduce the level of perceived risk in the present. Since our research did not ask before and after questions, we have not tested whether the experience of breach caused businesses to lower their estimation of the costs of noncompliance, or whether they had this lower perception of the costs of noncompliance from the onset (which could have led them to breach in the first place).

143 See above n 124 and accompanying text.

144 See, eg, the messages of support for Richard Pratt from the former Prime Minister, John Howard, and other senior political and business leaders after Pratt admitted that he knew that his company was engaged in cartel conduct: see David Crowe, Andrew Burrell and Duncan Hughes, 'PM Back-Pedals on Cartel Penalties', *The Australian Financial Review* (Melbourne), 10 October 2007, 1, 10; Malcolm Maiden, 'Australian Corporate Culture Yet to Appreciate Damage Cartels Cause', *Business Day*, *The Age* (Melbourne), 13 October 2007, 1. The former Prime Minister also expressed support for Pratt when the ACCC first announced its investigation of Pratt's company: Jewel Topsfield and Marc Moncrief, 'Prison Terms for Price Fixers', *The Age* (online), 24 December 2005 <http://www.theage.com.au/news/national/prison-terms-for-price-fixers/2005/12/22/1135032135974.html>. See also Nielsen and Parker, 'To What Extent Do Third Parties Influence Business Compliance?', above n 48.

businesses who have not. However, the greater the perception of the risk of being caught in noncompliance by third parties, the higher the respondents perceive both the costs and gains of compliance to be. This seems to support risk perception and behavioural economics literature which suggests that the fear of an unknown future phenomenon is bigger and more effective than the memory of having actually experienced the same thing.[145] It is also consistent with a persistent finding in deterrence research that those who have actually experienced sanctions for noncompliance often fear noncompliance less, as they learn that it is not so significant.[146] Different perceptions of the likelihood and severity of ACCC enforcement make no significant difference.

2 *Influence of Internal Factors: Size, Resources and Managerial Approach*

Larger organisations fear noncompliance more than smaller organisations, perhaps because they see themselves as a more conspicuous target for complaints and enforcement action. However, size makes no difference to perceptions of the costs and gains of compliance, even though smaller organisations might have been expected to find it costlier to achieve compliance than larger organisations. Presumably, smaller organisations ensure compliance through less costly mechanisms than larger organisations or, more pessimistically, both large and small organisations do so little that it makes no difference to their relative assessments of the costs.

As predicted, organisations that rate themselves as better resourced in terms of legal and economic knowledge, technical knowledge relevant to compliance, and research and development, fear the costs of noncompliance more than others. Those that rate themselves as taking a longer-term managerial approach also fear noncompliance more than others. This indicates the level to which a firm's organisation and managerial structure is likely to influence calculative thinking about compliance. Those that take a longer-term approach to managerial strategy, and those who have the resources to develop organisational knowledge about the costs and gains of *TPA* compliance, are more worried about the potential for noncompliance faced by their organisations. They might also, of course, be better equipped to address and avoid those risks. Indeed, larger, better resourced organisations and those with a longer-term managerial view will be more influenced by calculative motivations to comply with the law. This is because they will have a greater perception of the risks of noncompliance that can be expected to justify a 'business case' for compliance.

We do not, however, find that better resourced organisations and those with a longer-term managerial approach see any greater *gain* from compliance than those who do not have the relevant resources or managerial approach. This could mean that, while the benefits of compliance are equally apparent to all, the risks of noncompliance become more worrying as management gains a better understanding of them or as management takes a longer-term view of the organisation.

[145] See, eg, Casey and Scholz, above n 63, 838–9, where the authors report research showing that people tend to overestimate low but vague probabilities in relation to the severity and probability of sanction.

[146] Grasmick and Bursik, above n 41, 843.

More pessimistically, our findings can be interpreted to mean that the 'business case' for *TPA* compliance is seen solely in negative terms — as avoiding the costs of noncompliance — even among those firms we might expect to have the greatest potential for seeing positive strategic advantages in excelling in *TPA* compliance. This suggests that there is much room for improvement for regulators and others parties in building positive calculative motivations for compliance among business managers.

3 *Influence of Market Position*

Those firms that are in a weaker market position see the costs of noncompliance *and* compliance as higher. This finding is easy to explain: the weaker the market position of the firm, the lower the ability to absorb costs and the shock of sanctions in the event of breach. Moreover, a more competitive marketplace leads to a greater likelihood that noncompliance will be detected by consumers or other businesses in that industry. The marketplace might impose a sanction itself or, alternatively, raise the risk of official enforcement action by complaining to the ACCC.

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

These findings mean that we cannot assume that simply because more competitive markets increase businesses' fear of noncompliance, this will actually motivate them to comply more — for although businesses in competitive markets fear the consequences of noncompliance, they also see compliance as more costly than businesses in other types of markets. Hence, businesses operating in a competitive market may choose to risk noncompliance, or choose to ignore the conundrum posed when they simultaneously cannot afford the time and money on ensuring compliance, nor afford the risk of noncompliance.

4 *Influence of Source of Awareness*

The measure of the ACCC's role in forming firms' awareness of the *TPA* included items asking about the influence of ACCC investigations of other businesses as well as ACCC publications and educational activities (in Table A5 in the Appendix). The impact of ACCC-derived awareness of *TPA* compliance is clear: the greater the influence of the ACCC in a firm's awareness, the greater the fear of the costs of noncompliance, and the costs and gains of compliance. However, we find that few firms in fact rate the ACCC as having a big influence on their awareness of the *TPA*. Nevertheless, to the extent that firms do pay attention to the ACCC, it has a powerful effect on their calculations about compliance.

A similar correlation is observed with compliance professionals, including lawyers, compliance people within the firm and compliance consultants (in Table A5). The greater the involvement of compliance professionals in forming awareness of the *TPA*, the more the firms fear the costs of noncompliance and compliance. It seems that the respondent firms pay compliance professionals (including lawyers) a lot to make them more worried about noncompliance! Interviewed compliance professionals do indeed consider it their job to ensure

that business managers are sufficiently concerned about noncompliance to make sure they behave compliantly. They would probably be disappointed, however, that their work does not result in managers' increased perception of not only the costs of noncompliance, but also the benefits of compliance. Those firms whose awareness was formed primarily by compliance professionals do not see the benefits of compliance as any greater than others. In contrast, those whose awareness was formed by the ACCC and consumer groups do see the gains of compliance as greater.

Industry associations also have an impact on businesses' estimations of the costs of noncompliance, to the extent that they influence organisations' awareness of the *TPA*. This is probably because those industry associations that have educated their members about the *TPA* are generally those where industry members have faced severe ACCC enforcement action. The ACCC has adopted an explicit strategy of working with associations in those industries to publicise their enforcement action and to educate others about their *TPA* compliance obligations.[147] The building of compliance awareness by industry associations is therefore likely to emphasise the availability and likelihood of official sanctions in the specific circumstances of that industry.[148]

To the extent that consumer groups form firms' awareness of the *TPA*, they influence firms into seeing the costs and the gains of compliance as higher, but have no effect on fear of noncompliance.

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

VI CONCLUSION

A *Summary of Findings*

Overall, Australian businesses rate the costs of TPA noncompliance as quite high, especially the formal sanctions available from ACCC enforcement action. However, they are also concerned about informal economic and social losses, especially in relation to customers, shareholders and employees. On the other

147 Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework, above n 30, 58–60; Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26 *Journal of Law and Society* 215, 220.

148 See May and Winter, 'Regulatory Enforcement and Compliance', above n 48. The authors found that agricultural consultants to farmers supplied through an industry association were very important in influencing compliance commitment and behaviour: at 641–2.

hand, those who have breached the *TPA* report that the gains of TPA noncompliance are fairly low, at least in the dimensions surveyed. Our respondents also see both the costs and gains of *TPA* compliance as quite low.

We also find that a range of factors have an important influence on how much businesses fear noncompliance. The extents to which ACCC activities, compliance professionals and industry associations have formed an organisation's awareness of the *TPA* are each important predictors of how much they fear noncompliance. Additional factors are the organisation's size, resources, whether they take a long-term managerial approach and their market position. Previous experience of ACCC investigation or third party criticism of noncompliance is also important in relation to the degree to which businesses fear formal enforcement activity for noncompliance, but not for fears of social and economic losses.

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

Different perceptions of the gains of compliance are more difficult to explain. Those respondents with longer-term managerial approaches, greater resources and *TPA* awareness highly influenced by compliance professionals might all have been expected to understand and act on the positive 'business case', considering factors such as better reputation and organisational learning. However, there is no evidence of this in our findings. Nevertheless, those who have breached the *TPA* in the past do see the gains of compliance as higher, as do those whose awareness is formed primarily by the ACCC and consumer groups, and those who have a greater perception of the risk of being caught in noncompliance by third parties. There must be other factors that explain which firms perceive the gains of compliance as greater.[149] Nonetheless, those factors that are significant all suggest that an appreciation of the gains of compliance is not endogenous in the sense of being sourced from good management. Rather, such perception is gained from the experience of engagement, criticism and investigation by the ACCC and other third parties.

B *Implications for Understanding Deterrence and Business Calculations about Compliance*

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

> (1) corporations are fully-informed utility maximizers; (2) legal statutes unambiguously define misbehavior; (3) legal punishment provides the primary in-

[149] Note the low adjusted R^2 figure for this regression. This indicates a poor total explanatory power of the factors tested.

> centive for corporate compliance; and (4) enforcement agencies optimally detect and punish misbehavior, given available resources.[150]

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

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

Information about legal punishment is refracted through the organisation and its level of resources, the short- or long-sightedness of its managers and the perspectives of external sources of information about compliance. Each firm's calculations of how to maximise its own utility are likely to be slightly different depending on which resources, actors (internal and external to the firm) and managerial style 'interpret' information about the costs and gains of compliance and noncompliance. This means that it is not solely in the power of an enforcement agency (such as the ACCC), the law-makers who set the penalties and the courts who determine penalties in individual cases to establish the deterrent power of legal punishment. The ACCC has long recognised this in its efforts at leveraged deterrence.[151]

This does not mean that important information — which fully informed utility maximisers would take into account in making optimally rational, calculated decisions about compliance — is not consistently important for the firms in our sample. We find that the firm's market position, past experience of ACCC investigation and past experience of third party criticism are all significant factors in thinking about the costs of noncompliance. This is consistent with what deterrence theory expects of fully informed utility maximisers. However, the range of other factors that are significant confirm that researchers and policymakers need a sophisticated model of firm decision-making in order to understand calculative thinking about compliance and to predict its likely impact on behaviour.

Nor can a realistic model of businesses' calculative thinking about compliance assume that 'legal punishment provides *the* primary incentive for corporate compliance'.[152] There is a great *potential* for businesses' worries about the reactions of a range of third parties beyond regulators to have an influence on their compliance behaviour. This is tempered by our finding that respondents did not in fact think that certain third parties were very likely to find out about their noncompliance. However, there is every indication that a number of third parties *could* create a range of highly significant incentives for compliance (or noncompliance) given the opportunity, motivation and resources to do so. Moreover, we find that to the extent that various third parties do find out about businesses'

[150] Scholz, above n 42, 254.
[151] See above Part II(C).
[152] Scholz, above n 42, 254 (emphasis added).

noncompliance and criticise businesses for it, this heightens businesses' fear of legal punishment. Similarly, where consumer groups, industry associations and compliance professionals form firms' awareness of the *TPA*, this too heightens their perception of various costs and gains of compliance and noncompliance. At the very least, there is an important interaction here between legal punishment and third party impact that should be included in models of how deterrence might work.

C *Increasing the Deterrent Power of the* TPA*: Criminalisation and Imprisonment*

It has been suggested that part of the trick of effective regulation (to promote compliance) is 'for regulators to project an image of invincibility to industries that may be more powerful than themselves.'[153] Our results suggest that, although the ACCC may not have quite achieved 'an image of invincibility', it may well have achieved an appearance of tough, swift and sure enforcement action. Nevertheless, there are still proposals to further increase the deterrent power of the *TPA*, most notably the proposal to criminalise serious cartel conduct and introduce jail terms for individuals involved in breaches of the law.[154]

Assuming that increasing the deterrent power of the *TPA* is an important reason for the proposed criminalisation of cartel conduct, both our findings and the literature on deterrence reviewed here cast doubt on whether the simple availability of jail terms will automatically lead to a significant increase in deterrence for cartel conduct. A sophisticated understanding of businesses' calculations about the costs and gains of compliance and noncompliance cautions against seeing the mere introduction of the formal legal sanction of imprisonment as sufficient to change businesses' thinking and behaviour. For example, since the ACCC has rarely used the criminal penalties currently available for breach of consumer protection provisions (even under the relatively activist leadership of Allan Fels) and because there are many practical problems with the ACCC's ability to prosecute criminal cases,[155] business people might think that criminal penalties will rarely be used even in the event of serious cartel conduct.[156] This

153 Ayres and Braithwaite, above n 5, 44–5.

154 See above nn 23–4 and accompanying text.

155 According to staff, it is rare for the ACCC to bring criminal proceedings. A variety of reasons are cited: the level of proof required is much higher, the case takes longer, there is a perception that the Director of Public Prosecutions is unlikely to prioritise the type of case that the ACCC is likely to bring (such as a misleading conduct action), and there is also a perception that the courts view such action as an inappropriate waste of their time. The most significant practical problem is that, under current protocols, the ACCC cannot run a criminal prosecution itself but must refer it to the Director of Public Prosecutions. The Dawson Review recognised the need for a system to streamline this referral and decision-making process if there was to be a credible threat of criminal enforcement: Dawson Review, above n 2, 157. One option would be to give the ACCC its own criminal prosecution arm. Although that proposal is yet to be considered, the previous government provided increased funding for the ACCC, the Director of Public Prosecutions and the Federal Court to enable the investigation, prosecution and hearing of criminal cartel conduct cases: see Peter Costello, The Treasury, Australian Government, 'Additional Funding for the ACCC: Criminal Cartel Enforcement' (Press Release, 9 May 2006).

156 Moreover, the ACCC does not have a reputation for getting the maximum available civil penalty in anti-competitive conduct cases, although the penalties awarded are increasing: see Beaton-Wells, 'Recent Corporate Penalty Assessments under the *Trade Practices Act*', above n 1.

aspect of the deterrent influence of criminalisation is, however, at least partly within the power of the ACCC to address. What requires more creativity is how the criminalisation of cartels, and the other sanctions available under the *TPA*, are interpreted and translated into action by internal and external stakeholders for each firm.

Our data does not support the proposition that business people see imprisonment as substantially more serious than the penalties already available, although this may reflect the way we asked the questions rather than how business people in fact respond to criminalisation and jail penalties for cartel conduct. However, it is clear from our data that there are already a range of penalties in the *TPA* that respondents see as very serious. These can act as powerful deterrents where business people are sufficiently aware of the sanctions *and* believe that the ACCC and third parties are likely to detect and take action against noncompliance.

Paying large amounts of compensation to consumers is one of the existing sanctions viewed as a very serious penalty. This suggests that, if the policy objective is strengthening the deterrence power of the ACCC, then expansion of the ACCC's ability to obtain compensation for consumers in enforcement and representative actions is just as important as introducing jail terms for serious cartel conduct.[157] Moreover, the imbalance between the penalties available for breach of consumer protection provisions compared with those for anti-competitive conduct is a greater weakness in the *TPA* than is the lack of jail penalties for cartel conduct.[158] Our data show that the type of fines that are available as civil penalties for breach of the anti-competitive conduct provisions are feared by businesses. Yet, these powerful deterrents are not available for breach of the consumer protection provisions of the *TPA*.[159] An obvious conclusion is that the same sort of penalties that are currently available for breach of the competition provisions should also be available for breach of the consumer protection provisions.

This is not to say that there are no pressing reasons to criminalise serious cartel conduct other than increasing deterrence. For example, criminalisation may be necessary as a matter of justice to treat like offences alike (comparing cartel conduct to theft and fraud, which are both crimes), and to reflect the moral standards of the community. Additionally, criminalisation can increase compli-

Some businesses may believe that it is unlikely that the ACCC will successfully seek tough penalties, such as fines of 10 per cent of turnover and imprisonment, in future civil or criminal prosecutions.

157 The ACCC's ability to take representative and class actions on behalf of consumers seeking compensation for harm caused by breaches of the *TPA* is severely limited by the procedural requirements of the court: see above n 30 and accompanying text. The ACCC and various consumer groups have asked for the ACCC to have the power to seek civil penalties for breaches of the consumer protection provisions of the *TPA*: see Brenchley, 'ACCC to Tighten Consumer Protection', above n 25.

158 For a similar argument in the US context, see Stephen Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60(3) *Law and Contemporary Problems* 127.

159 Though criminal penalties are available for consumer protection breaches, they are so rarely used that it seems unlikely that they have much power to affect businesses' calculations of the costs and gains of compliance: see Parker and Stepanenko, *Compliance and Enforcement Project*, above n 14, 23.

ance by providing a strong moral message to business people about the unacceptability of this conduct, thereby activating their moral commitment to comply (rather than calculative motivations to comply).[160] However, we should be cautious about criminalising cartel conduct with the primary purpose of achieving the deterrent impact of imprisonment without first considering whether certain breaches of the *TPA* are morally serious or socially harmful enough to warrant criminalisation in the first place.[161] Furthermore, putting the possibility of imprisonment for serious cartel conduct into the *TPA* without considering whether and how the ACCC will be able to enforce the provisions, and how internal and external stakeholders in firms will factor it into the firm's behaviour, could easily mean that those provisions become purely symbolic statements that are rarely used.

[160] See Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (Working Paper No 07-12, Economic & Social Research Council, Centre for Competition Policy, University of East Anglia, 2007). See also Dawson Review, above n 2, 153–4, 161–2.

[161] This 'putting the cart before the horse' is at the core of Brent Fisse's arguments against the former Coalition Government's proposals for creating a new criminal offence of hard core cartel conduct. He argues that policymakers have accepted the recommendation to introduce an offence based on dishonesty without clearly conceptualising the aspects of cartel conduct that should be criminalised: Fisse, 'The Australian Cartel Criminalisation Proposals', above n 23. See also Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels', above n 23.

VII APPENDIX: ADDITIONAL STATISTICAL INFORMATION

Table A1: Statistical Details of Aggregate Measures of the Costs of Compliance, the Gains of Compliance and the Fear of the Costs of Noncompliance

Measures and Items Included in Each Measure (mean shown in brackets where relevant)	Whole Index
Costs of compliance[162]	
Individual items as shown in Table 6	Mean: 2.23 Standard deviation: 0.91 Cronbach's Alpha: 0.88 n: 977
Gains of compliance[163]	
Individual items as shown in Table 6	Mean: 3.40 Standard deviation: 1.26 Cronbach's Alpha: 0.95 n: 970
Fear of costs of noncompliance	
Serious sanctions[164]	
Individual items as shown in Table 1	Mean: 4.25 Standard deviation: 0.65 Cronbach's Alpha: 0.80 n: 973
Very serious sanctions[165]	
Announcement of an investigation of your organisation at a televised press conference by the Chairperson of the ACCC (4.51) A private law suit where the ACCC takes a representative action on behalf of victims (4.69)	Mean: 4.60 Standard deviation: 0.57 Cronbach's Alpha: 0.47 n: 965

[162] Responses are on a scale from 1–5: 'very small' to 'very large'.
[163] Responses are on a scale from 1–6: 'no gain' to 'very large'.
[164] Responses are on a scale from 1–5: 'very small problem' to 'very large problem'.
[165] Responses are on a scale from 1–5: 'very small problem' to 'very large problem'.

Measures and Items Included in Each Measure (mean shown in brackets where relevant)	**Whole Index**
Third party economic and social losses[166]	
Individual items as shown in Table 3	Mean: 3.46 Standard deviation: 0.79 Cronbach's Alpha: 0.88 n: 973
Likelihood and severity of ACCC enforcement action[167]	
In the light of the size and complexity of their task, the ACCC has appropriate resources (2.67)*	
It is easy for the ACCC to find out when organisations breach the law (2.82)*	
The investigative staff of the ACCC are very competent compared to the staff and lawyers of the companies they are regulating (2.89)	
A breach of the *TPA* does not have to be severe before the ACCC bothers to do anything about it (3.18)*	Mean: 3.16 Standard deviation: 0.67 Cronbach's Alpha: 0.81[168] n: 985
The ACCC is generally keeping a close eye on our industry (3.23)	
If we breach the *TPA*, the chances of the ACCC catching us are large (3.35)*	
The level of sanctions imposed for trade practices breaches is generally very high (3.35)*	
If we were caught by the ACCC in breach of the *TPA*, the prospects of ACCC enforcement against the organisation are slight (3.77)*	

166 Responses are on a scale from 1–5: 'worry very little' to 'worry very much'.

167 Responses are on a scale from 1–5: 'strongly disagree' to 'strongly agree'. Statements marked with an asterisk were put to the respondents of the questionnaire in reverse. The responses have been reversed as reported: see above nn 98–102.

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

Measures and Items Included in Each Measure (mean shown in brackets where relevant)	**Whole Index**
Perceived risk of being caught in noncompliance by third parties[169]	
Individual items as shown in Table 4	Mean: 3.19 Standard deviation: 0.86 Cronbach's Alpha: 0.85 n: 927

Table A2: Measure of the Respondent's Resources

Question	**Mean Responses (and Standard Deviation)**	**Whole Index**
How 'well-resourced' — either by contracting out or by using in-house expertise — do you think your organisation is in the following respects?	*Scale from 1–5: 'very badly resourced' to 'very well-resourced'*[170]	
Research and development	3.20 (1.11)	Mean: 3.54
Legal knowledge	3.66 (0.96)	Standard deviation: 0.75
Economic knowledge	3.69 (0.86)	Cronbach's Alpha: 0.78
Technical knowledge relevant to compliance	3.60 (0.97)	n: 970

[169] Responses are on a scale from 1–5: 'strongly disagree' to 'strongly agree'.
[170] The midpoint of this scale is 'neither well nor badly resourced'.

Table A3: Measures of Managerial Oversight, Long-Term Managerial Approach and Market Position

Measures and Items Included in Each Measure	**Mean Responses (and Standard Deviation)** *Scale from 1–5: 'strongly disagree' to 'strongly agree'*	**Whole Index**
Measure of long-term managerial approach		
Our managers give a lot of priority to long-term strategic planning (n: 972)	3.63 (0.92)	Mean: 3.14 Standard deviation: 0.78 Cronbach's Alpha: 0.74 n: 999
Our managers spend most of their time on day-to-day problem solving and short-term planning[171] (n: 969)	3.24 (0.93)	
Our management is more interested in being nimble than in long-range plans[172] (n: 999)	2.88 (0.922)	
Market position		
Our customers can easily switch to substitute products or services (n: 964)	3.65 (1.2)	

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

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

Table A4: Measure of Level of Criticism by Third Parties

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

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

Measures and Items Included in Each Measure (mean shown in brackets)	**Whole Index**
To what degree have the following persons, organisations and activities formed your organisation's awareness of the TPA *over the years? (Scale from 1–5: 'not at all' to 'a very large degree')*	
Media Media stories about breaches of the *TPA* (3.11) Media articles about ACCC and their work in general (3.02) Media articles about rights/obligations under the *TPA* (2.91)	Mean: 3.01 Standard deviation: 0.84 Cronbach's Alpha: 0.90 n: 985
Industry association Our industry association (2.57)	
Compliance professionals Our lawyers (3.00) Another champion inside our organisation (2.27) Compliance training programmes provided by consultancy firms (2.02)	Mean: 2.43 Standard deviation: 0.97 Cronbach's Alpha: 0.65 n: 983
Consumer groups Consumer groups (2.24)	

Measures and Items Included in Each Measure (mean shown in brackets)	**Whole Index**
To what degree have the following persons, organisations, and activities formed your organisation's awareness of the TPA *over the years? (Scale from 1–5: 'not at all' to 'a very large degree')*	
The ACCC ACCC investigations against our suppliers and/or buyers (1.93) ACCC investigations against other organisations in our industry (2.25) Compliance training programmes made by the ACCC (for example, Best and Fairest training programme) (1.60) Seminars/events where ACCC staff members or Commissioners talked about the *TPA* (1.70) ACCC formed or chaired consultative committees (1.33) The ACCC information call centre (1.32) ACCC publications (1.88) The ACCC website (1.89)	Mean: 1.71 Standard deviation: 0.64 Cronbach's Alpha: 0.84 n: 984