From: [redacted]
To: vemissions
Subject: Fwd: Submission: Vehicle Emission Discussion Paper - Huxmills Pty Ltd.
Date: Thursday, 7 April 2016 12:28:17 PM
Attachments: The Compliance Trap...Parker-2006-Law_&_Society_Review.pdf

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---------- Forwarded message ----------
From: **Damien Mills** [redacted]
Date: Thu, Apr 7, 2016 at 11:24 AM
Subject: Submission: Vehicle Emission Discussion Paper - Huxmills Pty Ltd.
To: [redacted]

To whom it may concern,

This submission is made with the assumption that both the Environment Minister and the Infrastructure Minister have already received and reviewed previous correspondence from Huxmills P/L on matters relating to Vehicle Emissions Reductions. This submission is supplementary to those items of correspondence and focussed solely on the need to recognise that without enforcement compliance will not occur. The case of VW in 2015, and others noted in our previous correspondence, indicates that this is indeed the case.

The view of Huxmills is that the impact of any change to the approach to Vehicle Emissions will be zero unless a serious attempt to enforce the regulations is made. Our previous correspondence shows the economic benefits of compliance would far outweigh the costs by at least 100:1.

We have attached a study that was undertaken in Australia examining the effectiveness of the ACCC and some pertinent quotes are reproduced below.

This study emphatically concludes that without some kind of compliance enforcement capacity business will continue to ignore the requirements of the regulator. It also notes that where a simple fine is levied, companies will deduct the cost of the fine from the gain of non compliance and pay the fine, if the total gain is greater than the fine, and the penalty is simply financial. If the fine is unlikely to ever be levied, as detection is not possible, then compliance would be likely only where it does not impose a cost. After all what is the primary duty of the management of a company other than to maximise profit? Placing any other priority above the interests of the shareholder could be interpreted as a failure of a director's duty under the Corporations Law.

Some pertinent extracts:

- "... there is a low probability of detection and successful enforcement actions for most business offences, making the perception of deterrence even less potent." pg. 592

Australia has NO capacity to test for vehicle emissions compliance and with a ZERO likelihood of detection then the basis of the assumption of compliance is non existent.

- "... Simple deterrence will often fail to produce compliance because it does not

directly address business perceptions of the morality of regulated behaviour - it merely puts a price on non-compliance, and the ability of that price to deter misconduct will depend on the operation of the deterrence trap." pg. 592

With no capacity to test the price for business for non-compliance is zero however as noted in our previous correspondence the "price" of the toxic emissions in Asutralia is billions of dollars annually in reduced fuel bills (which when redeployed into productive investment is a significant economic stimulus), $500million annually in reduced productivity, $172 million annually in reduced healthcare costs, 4 million tonnes of CO2 removed annually from our emissions and significant reductions in non financial aspects such as pain and suffering from bronchial complaints. These figures wold be achieved by a simple 10% reduction in fuel consumption go the light vehicle fleet. Given the possibility of non-compliance beyond VW this 10% maybe achieved simply by manufacturers deciding to comply.

In short: it is likely that as we have no capacity to test for compliance the annual cost to Australia is in the billions of dollars but the cost to business is zero.

I would encourage you to read the attached paper. This paper lays out the issues surrounding compliance, including the difficulties of politics, and shows that a comprehensive, sophisticated approach will achieve compliance. Although it addresses cartel behaviour the principles being examined apply directly to the issues of compliance in emissions. No doubt this also goes beyond vehicles.

We are happy for this submission to be made public. All other previous correspondence remains confidential.

Yours

Damien Mills
CEO Huxmills Pty. Ltd.
[redacted]

The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement

Christine Parker

Simple deterrence will often fail to produce compliance commitment because it does not directly address business perceptions of the morality of regulated behavior. Responsive regulation, by contrast, seeks to build moral commitment to compliance with the law. This article shows that a regulator can overcome the deterrence trap to improve compliance commitment with the skillful use of responsive regulatory techniques that "leverage" the deterrence impact of its enforcement strategies with moral judgments. But this leads it into the "compliance trap." The compliance trap occurs where there is a lack of political support for the moral seriousness of the law it must enforce, such as is the case with cartel enforcement in Australia. In these circumstances, business offenders are likely to interpret the moral leveraging of responsive regulation as unfair or stigmatizing, and business perceptions of regulator unfairness are likely to have a negative influence on long-term compliance with the law. Moreover, big businesses that perceive regulatory enforcement as illegitimate are also likely to actively lobby for the political emasculation of the regulator. In these circumstances, most regulators are likely to avoid conflict by taking the easy option of enforcing the law "softly," and therefore ineffectively.

Introduction

The scholarly literature on enforcement suggests that enforcement often fails to improve compliance because it insufficiently deters. The "deterrence trap" means that penalties for

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noncompliance will either not be big enough to deter rational misconduct, or they will be so large that they exceed the capacity of firms to pay, thereby damaging innocent employees and creditors (Coffee 1981; see also J. Braithwaite 2002:108). Moreover, there is a low probability of detection and successful enforcement action for most business offenses, making the perception of deterrence even less potent. Scholarly evidence and regulatory best practice suggest that regulators should generally use mixes of regulatory styles or strategies to improve compliance, rather than relying on deterrence alone (e.g., Gunningham & Grabosky 1998; Gunningham & Johnstone 1999; May 2005; Winter & May 2001; Simpson 2002; Sparrow 2000). The leading theory for explaining and prescribing that mix is responsive regulation (Ayres & Braithwaite 1992; J. Braithwaite 2002). It proposes that enforcement strategies tend to be, and should be, arranged in a regulatory pyramid, with more cooperative strategies deployed at the base of the pyramid and progressively more punitive approaches utilized if and when more cooperative strategies fail. The objective is that firms and individuals will comply, even without enforcement action, through internalization and institutionalization of compliance norms, informal pressure, and the indirect threat of the "benign big gun" at the top of the pyramid. This article argues, however, that these strategies too will lead regulators into a trap—the "compliance trap"—that can only be resolved with political support.

Simple deterrence will often fail to produce compliance commitment because it does not directly address business perceptions of the morality of regulated behavior—it merely puts a price on noncompliance, and the ability of that price to deter misconduct will depend on the operation of the deterrence trap. Responsive regulation, by contrast, seeks to build moral commitment to compliance with the law. This article shows that a regulator can overcome the deterrence trap with the skillful use of responsive regulatory techniques that "leverage" the deterrence impact of its enforcement (and settlement) strategies with moral judgments and public interest considerations (such as failing to settle early if public interest conditions are not met, or using publicity to underline the social unacceptability of the conduct). But this leads it into the compliance trap.

As this article shows, business offenders and onlookers are likely to interpret morally leveraged deterrence as unfair or stigmatizing, and business perceptions of regulator unfairness are likely to have a negative influence on long-term compliance with the law and cooperation with the regulator (V. Braithwaite et al. 1994; V. Braithwaite 2003; Tyler 1990; Tyler & Huo 2002). Moreover, big businesses that perceive regulatory enforcement as illegitimate are also likely to actively lobby for the removal or non-

appointment of key regulatory staff and for accountability mechanisms to rein in "illegitimate" enforcement activities.

Where fulsome political and moral support for the enforcement regime is lacking, then the compliance trap is set. Responsive regulators find themselves in a dilemma: overcome the deterrence trap by making morally tough demands that may not only undermine business commitment to compliance in the longer term (because they lack political legitimacy), but also undermine their own political support (because business will respond by lobbying government to emasculate the regulatory enforcement agency). Or avoid conflict with businesses by not making any difference at all. Since political support for a tough, moralizing enforcement approach to business regulation is often lacking (Snider 1991), "responsive" regulators are likely to find themselves jumping out of the deterrence trap frying pan into the compliance trap fire.

It is a *compliance* trap because it occurs only when regulators are actively seeking to improve business compliance, and commitment to compliance, through their enforcement activity. A regulator that engages in formalistic enforcement activity for its own sake will not face this dilemma. It is a *trap* because, in the absence of external political support, there is nothing the regulator can do to escape. The regulator must either choose weakness (no compliance impact) or have weakness thrust upon it (lack of legitimacy leading to emasculation). The regulator itself can overcome the *deterrence* trap by the skillful use of responsive regulatory technique. The *compliance* trap can only be resolved politically, external to any particular regulatory enforcement encounter.

The empirical evidence in this article comes from qualitative research on the impact of Australian Competition and Consumer Commission (ACCC) cartel enforcement activity on business compliance with competition law between mid-1997 and mid-2003. The ACCC is Australia's federal competition and consumer law regulator, responsible for investigating and enforcing provisions of the Trade Practices Act 1974 (Commonwealth) ("the Act"), including Section 45, which prohibits anticompetitive agreements (which can include price-fixing and market-sharing agreements). At the time of the enforcement activity reported on in this article, the ACCC was explicitly committed to using a responsive regulatory pyramid of enforcement strategies (see J. Braithwaite 2002:231; Parker 1999).

The data are based on qualitative interviews with ACCC enforcement staff, business people, and their external lawyers, focusing on four major cases—the Freight, Concrete, Transformers, and Fire Protection cases—in which the ACCC took enforcement action against cartel conduct and in which the interviewees (or their firm) were personally involved. Table 1 provides a brief

Table 1. Summary of Case Studies

Matter	Year	Defendants	Conduct	Enforcement Outcome	Estimated Cartel Gains
Freight[a]	1992 to 1994	Three large companies that dominated the market—TNT Australia, Ansett Transport Industries, Mayne Nickless—and 20 individual managers and officers.	Agreed informally that they would not "poach" each other's customers, that they would "compensate" each other for customers that moved, and that uniform prices would be charged for "air satchels."	Agreed on court orders totaling A$14.2 million in penalties and injunctions.	not available
Pre-Mix Concrete[b]	1994 to 1998	Three largest companies in the market—Pioneer, CSR, and Boral—as instigators of a cartel that also involved smaller competitors—Goodmix, Hymix, Amatek, and Excell—and six individual managers and officers from the three big firms.	Agreed on shares of the market, collaborated about pricing on tenders, and agreed not to poach regular long-term customers from each other at regular covert meetings recorded by an accountant in the "Brisbane Concrete Survey."	Agreed on court orders totaling A$20.15 million in penalties and injunctions and promised to set up compliance programs.	A$88 million[c]
Transformers[d]	1999 to 2004	All the transformer companies operating in Australia—Alstom Australia, Schneider Electrical, Wilson Transformer Company, AW Tyree Transformers, ABB Power Transmission, and ABB Transmission and Distribution—and each of their managing directors and four other ABB executives.	Two sets of market-sharing arrangements among producers of electric power and distribution transformers through a number of covert meetings in which market shares were agreed on and tenders were allocated to particular suppliers by setting tender prices.	Total penalties of A$36.5 million. Penalties agreed on with Alstom and its managing director (cooperated from the beginning) and ABB (had been moving toward a trial until 2004). Penalties imposed against Wilson, Schneider, and Tyree firms and their managing directors (agreed on facts but contested penalties).	A$70–80 million[e]

Fire Protection	1999 to 2000	45 companies, including large companies such as Tyco Australia, Wormald, O'Donnell Griffin, FFE, and many smaller companies, and individual managers of those companies.	Agreed on market shares (in both the fire alarm and sprinkler markets) among members, allocated tenders at meetings known as the alarm and sprinkler "coffee clubs." Also agreed on a common formula for quoting prices to builders for installation of alarm and sprinkler systems. Cartel coerced its members and new entrants to the market to comply by threatening to undercut those who resisted to the point where they would find it difficult to win any business.	Total agreed penalties of more than $15 million and compliance programs, compensation, and other undertakings. Cartel investigation also uncovered misleading conduct and secondary boycott conduct, which was also penalized.	A$750 million[f]

[a] Justice Burchett, in *TPC v. TNT Australia Pty Ltd and ORS,* ATPR 41-375 at 9 (1995).

[b] See *ACCC v. Hymix Industries Pty Ltd,* ATPR 41-465 (1996); *ACCC v. Pioneer Concrete (Qld) Pty Ltd,* ATPR 41-457 (1996).

[c] Concrete sold at approximately $A10 a cubic meter above what would have been achieved in a more competitive environment according to ACCC investigation.

[d] *ACCC v. ABB Transmission and Distribution Ltd,* FCA 383, ATPR 41-815 at paras 22 & 25 (5 April 2001) (Justice Finkelstein); *Schneider Electric (Australia) Pty Ltd v. ACCC,* FCAFC 2 (14 February 2003); *ACCC v. ABB Transmission and Distribution Ltd* (No. 2), FCA 558 (3 May 2002) (Justice Finkelstein); *ACCC v. ABB Transmission and Distribution Ltd* (No. 2), FCA 559 (3 May 2002) (Justice Finkelstein); ACCC, "ACCC Transformer Cartel Bust: Record $35 Million Penalties" Media Release 057/04, issued 7 April 2004; http://www.accc.gov.au.

[e] According to a report commissioned by the ACCC and on the ACCC's enforcement file in relation to this case.

[f] The Fire Protection cartel raised prices by 5–15%, according to cooperating parties' statements, in an industry worth $A50 million a year, for 15 years.

background to each of these cases and their outcomes. These data are supplemented with secondary analyses of contemporaneous accounts of the same four cases (e.g., court documents and newspaper reports), and interviews with 37 ACCC staff and 21 specialist trade practices lawyers on the impact of ACCC enforcement activity generally. The Appendix contains a more detailed description of the methodology used in this research. The empirical details of these case studies, but not the analysis set out here, have been reported in more detail previously (Parker et al. 2004).

The Freight case (see brief description in Table 1) was the ACCC's first major cartel enforcement action success, and it is therefore used as the central case study in this article. As shown below, even in this first apparently very successful case, the contours of the deterrence and compliance traps are already visible. The other three cases and the general interviews are used to confirm that the problems identified with the ACCC's approach to the Freight case arose more generally in the ACCC's cartel enforcement activity. The four cases studied in detail in this research were generally considered by all interviewees to be four of the most successful ACCC cartel enforcement actions. Indeed, that was the principle on which they were selected for the study (see Appendix). This selection bias renders the methodology conservative—if the compliance trap applies even in cases considered on all sides as successful, then it is more likely that it represents a fundamental and widespread problem in cases and among regulators seen as less successful.

Overcoming the Deterrence Trap with Leveraged Deterrence: Responsive Regulation

A Failure of Simple Deterrence

Australia's antitrust provisions do not set in place a tough enforcement regime. The enforcement agency, the ACCC, must prosecute contraventions of the competition provisions of the Act in court through a civil, not a criminal, process, and it has no power to impose penalties of its own.[1] The main compliance mechanism evident in the Act is to deter misconduct through the application of penalties (Yeung 2004:63–72). While the penalties available in court since 1993 amendments to the Act are large relative to other Australian regulatory regimes (A$25,000 for individuals and A$10

[1] The Australian government announced in late 2004 that cartel conduct would be criminalized (The Hon. Peter Costello MP, Treasurer of the Commonwealth of Australia, "Criminal Penalties for Serious Cartel Behavior," Press Release No. 4 of 2005, 2 February 2005; see Clarke 2005; see also OECD 1998, 2003).

million for firms per offense[2]), they are paltry compared with the possibility of jail sentences and fines of a percentage of turnover in other jurisdictions, such as the United States, European Community, and Japan.[3] Moreover, penalties never even approach the maxima in practice (Round 2000).

Looking at three of the four of the ACCC's most successful cartel cases studied here—the Concrete, Transformers, and Fire Protection cases[4]—we find little evidence that the penalties outweighed the gains made, especially once a discount for a less than 100% chance of detection is factored in.[5] For each case, the total penalties awarded and estimates of cartel profits are shown in Table 1. In the Transformers case, the estimated profits were more than twice the penalties, while in the Fire Protection case, the profits exceeded the penalties by a factor of more than 50. In only one of the cases studied was there evidence of any economic hardship caused by the penalties (i.e., evidence that companies may go out of business because of the penalties, in the Transformers case). The penalties in each of the four cases were all well below the legislated maximum, although all except Fire Protection set records for the amount of penalties awarded. As we see below, in at least one of the four cases studied here, firm management felt they had got out of the case "lightly" by agreeing to the penalties with the ACCC.

Even maximum penalties under the Act would not have achieved effective deterrence in those cases where a large turnover was affected (see Dawson et al. 2003:164–5). But in cases such as Fire Protection, which involved many small businesses (as well as larger ones), maximum penalties would have been beyond the capacity of many participants to pay. Moreover, the general deterrent impact of cartel fines on other industry players can be questioned. In a number of the ACCC's later cartel enforcement actions, it found evidence that cartel participants were well aware of the penalties levied in earlier cases but continued their activity anyway (Parker et al. 2004:60–1).

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[2] At the time of this writing, A$1 = 77 cents U.S. For evidence that penalties do have some deterrent impact, see Parker et al. 2004:86–7; Nielsen & Parker 2005.

[3] Before 1993, the penalties were even smaller—only a maximum of A$250,000 for corporations and A$50,000 for individuals, with the actual imposition of penalties much lower than that (the highest corporate penalty was A$65,000: see Round et al. 1996).

[4] Quantitative evidence on the size of the gains made by the Freight cartel were not available, but evidence on the subjective deterrent impact is discussed in "Leveraged Deterrence Success" below.

[5] On the basis of its research, the OECD states, "Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six [for effective deterrence]. A multiple of three is more commonly cited however" (2003:27). On the basis of their review of the research on cartel cases, Harding & Joshua suggest that "the threshold for a deterrent impact of a fine would be 300 percent of the annual turnover in the products covered by the violation" (2003:256).

Leveraged Deterrence Success

There has been enormous change in what is considered appropriate or normal market behavior in terms of market sharing and price-fixing since the introduction of the Act in 1974.[6] When Ron Bannerman became the first Commissioner of Trade Practices in 1965, restrictive practices were formalized, although kept secret, in hundreds of Australian trade associations (Bannerman 1985:84). Explicitly anticompetitive practices (or "orderly marketing") are no longer considered a normal part of Australian business practice. Many of the interviewees in this research made it very clear that over the last 20 years they had seen a significant "generational" change in management attitudes to competition law compliance. A recent review of the Act even recommended criminalizing the cartel provisions of the Act (Dawson et al. 2003:161–2), a suggestion that has been accepted by the federal government.[7] This was virtually unthinkable in Australia 20 or 30 years ago, yet big business acquiesced in the recommendation. (This does not mean, however, that business, or perhaps even the government, believes that the ACCC should use its investigation and enforcement powers in the same way that police would in relation to street crime, as we shall see below.) Elite trade practices lawyers interviewed for this study also reported that over the last 10 years they have been kept increasingly busy with preventive compliance activities for clients, such as educational programs and proactive monitoring and investigation of trade practices compliance risks (Parker & Stepanenko 2003:48–52).

As can be seen in Table 2, between 1997 and 2003 most cartel cases settled. Of the 21% that were litigated, the ACCC won the vast majority. The Freight and Concrete cases, two of the earliest cartel cases finalized after the higher penalty regime had been introduced in 1993, set a benchmark for high penalties that received much media coverage and gave the ACCC an "image of invincibility" (Ayres & Braithwaite 1992:45; see also Hawkins

[6] In 1962, Karmel & Brunt famously commented:

> Restrictive practices have a long history in Australia and have come to be regarded by businessmen and consumers alike as normal business behavior. Indeed, certainly until very recently, the average businessman would have been rather hurt to hear his trade agreement described as restrictive . . . While just about every restrictive practice known to man is used in Australia (other than those subject to common law restraints), price agreements, both horizontal and vertical, are undoubtedly the most common (1962:94–5; see also Marr 1980:185; Pengilley 1984:44–5).

[7] It has also recommended that civil penalties be increased to the greater of $A10 million or three times the gain from the contravention or, where the gain cannot be readily ascertained, 10% of the turnover of the body corporate and associated bodies corporate (Dawson et al. 2003:161–5).

Table 2. Disposition of ACCC s45 Matters mid-1997 to mid-2003[a]

Discontinued		Number	%
Litigated[b]		3	4%
	Unsuccessful	2	3%
	Partially Unsuccessful	1	1%
	Successful	13	17%
	Total Litigated	16	21%
Settled			
	Agreed on Court Orders (Penalties)	23	30%
	Agreed on Court Orders (No Penalties)	17	22%
	Enforceable Undertakings as Supplement to Court Orders	20	26%
	Enforceable Undertakings Alone (no court orders)	23	30%
	Total Settled	63	83%
Total	76[c]	100%	

[a] Based on data from the ACCC's annual reports from 1997 to 2003 (ACCC, Canberra).
[b] Includes cases litigated only on facts, facts and penalties, and only penalties.
[c] Numbers in this column add up to more than 76 because some of the matters had several outcomes.

1984).[8] Both cases were settled via agreed court orders (essentially a form of plea bargain) after lengthy investigations and negotiations early in the leadership of the chair of the ACCC, Allan Fels. After Freight and Concrete, the vast majority of ACCC cartel enforcement actions were settled via statements of agreed facts to the court and usually submissions of agreed penalties and orders. Litigation about liability was rare, decisive defeats in the courts for the ACCC extremely rare. A few cases were settled on the facts but argued on the penalties (e.g., three companies in the Transformers case). Before 1993, by contrast, the ACCC generally had a poor record at both settling matters and winning in cartel litigation (Round et al. 1996:298).[9]

The ACCC strategically and intentionally overcame deterrence failure in two ways to achieve these successes. First, the ACCC leveraged up the deterrence value of the modest financial penalties available under Australian competition law with the administrative and personal cost and inconvenience of the investigation process and the reputational damage caused by publicity (compare Feeley 1979). Consistent with previous research on motivations for compliance (e.g., Fisse & Braithwaite 1983; Genn 1993), all the interviews indicated that businesses and their lawyers saw the *process* of ACCC investigations, and the *publicity* associated with ACCC enforcements, as more effective motivators of compliance than penalties (see Parker & Stepanenko 2003:42–3).

TNT's settlement in the Freight case illustrates well the ways in which the process becomes the main punishment for those firms

[8] Note that the Freight case penalties were determined under the old penalty regime, however.

[9] Although in the "golden years" of 1983–1985, the ACCC won seven cases (Round et al. 1996:298).

that face enforcement action (see also Simpson 2002:134). It also shows that the penalties, which are the outcome of that process, will often have little if any specific deterrent effect. After many previous failed attempts at settlement, the case against TNT and its executives was settled in one afternoon in a meeting between the ACCC chair and two other senior ACCC officers and the CEO of TNT without lawyers present (at the insistence of the ACCC). Settlement negotiations began with the ACCC suggesting $A23 million in penalties and concluded with an agreed penalty of $A6 million (including costs). The other defendant, Mayne Nickless, settled soon after. ACCC and ex-ACCC staff generally believe that both companies realized that they could not win against the overwhelming weight of evidence collected by the ACCC. According to one ACCC interviewee, the companies were keen to settle because "the evidence in most price-fixing cases is so horrible, management would not want to go through a trial." Many of the witnesses "would have been clients [who] would get up and say you screwed me'" (02–002).[10]

The ACCC interviewees believed that TNT had caved in because the weight of evidence collected by the regulator indubitably demonstrated their guilt. However, company insiders put a slightly different slant on it. Although TNT had admitted to the misconduct for the purposes of the settlement, the company also stated publicly at the time that:

> I wish to emphasize that the withdrawal of our defense was taken purely for commercial reasons and under no circumstances does TNT accept guilt or liability, nor do we have any evidence that these alleged activities ever took place. In fact, if we had continued our defense we believe we could have won (quote attributed to Mr. Fred Millar, General Manager TNT Australia, in "Record Fine For TNT, Ansett Over Price-fixing," *The Age,* 8 Nov., n.p.; http://www.theage.com.au).[11]

As this suggests, and both interviewees explained, the amount of the agreed penalties was a "good deal" in terms of the likely reputational damage, legal costs, and costs of management distraction if the matter had continued on the pathway to trial. The potential penalty, if found liable for the cartel conduct, did not even have to be factored into the equation to make this a wise decision:

> [m]ake no mistake when the litigation was proceeding there was at least one story per week in the Australian Financial Review about [the] litigation. The company and its advisors had no doubt that the TPC [Trade Practices Commission] kept feeding the media.

[10] At the same time, a generational change in the management of TNT had also made settlement discussions possible.

[11] There does not appear to have ever been any public response by the Commission to this statement.

> This exposure generated a negative sentiment about the company within the financial sector and make no mistake this may have been a bigger incentive to settle than the costs of the litigation.
> There is equally no doubt that the costs of the litigation were a major issue for the TNT group. Despite what the TPC may say about its belief in the success of the claim there is no doubt that the defendants were anything but convinced... But again make no mistake that management becomes substantially diverted by such proceedings to the detriment of the performance of the business. It is of course difficult to place amounts upon such matters but it was accepted by the CEO that this detriment far exceeded the legal costs. On a straight financial analysis there could be little extra needed to justify settlement (02–007).

The Freight case began a trend of settling trade practices enforcement matters with the Commission. The interviews with lawyers indicated that in most of these cases, the reputational, legal, and management costs of the enforcement process were what provided these firms with the commercial imperative to settle, rather than the amount of penalties that might be awarded by the court. These process costs also became a greater specific and general deterrent against further noncompliance than the (agreed) penalties themselves (Parker et al. 2004:34).

Second, the ACCC targeted a range of individuals and organizations (such as industry associations, compliance professionals, and potential whistle-blowers) with the capacity to improve business compliance by putting in place a web of controls that reduced the opportunities for, or the advantages of, offenses (V. Braithwaite 2003:25) and embedding norms and practices for avoiding noncompliance in the social structure of industry.

The ACCC developed a policy of holding as many parties—individual and corporate—legally liable as actually contributed to the conduct, rather than just focusing on the main corporate participants in the cartel. Even if penalties against firms are too small relative to the 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 even just to the shame of having a finding of liability and an injunction against re-offending against them (see J. Braithwaite 2002:109–22; Simpson 1998:121).[12] ACCC enforcement action also almost always includes a requirement that the firm implement or upgrade a trade prac-

[12] The ACCC uses injunctions against reoffending extensively as an outcome of its enforcement action. This may seem odd since reoffending would be against the law anyway. But there are two reasons for it. First, it means that if the party subject to the injunction reoffends within the injunction period, the party will be liable for criminal penalties of contempt, not just the underlying civil offense. Second, 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.

tices compliance program, which is supposed to be independently and rigorously audited by a compliance specialist—institutionalization of a form of corporate conscience (Parker 1999, 2003).

Finally, ACCC enforcement action has often forced other parties who had some capacity to regulate the market practices of the relevant industry or individual firms in the case to do so. For example in a number of cases, as a result of enforcement action, relevant industry associations became committed to educating and empowering business members to take competition law compliance seriously.[13] Where a variety of agents, not just the ACCC, but industry groups, consumers, and lawyers and compliance officers within the company, are all committed to stopping cartel conduct, not only does the network of control make it more difficult for potential offenders to engage in cartel conduct, but it also helps convince them that such conduct is not generally considered acceptable or right.

Responsive Regulation

These two strategies reflect John Braithwaite's responsive regulation prescriptions for overcoming the deterrence trap by using, respectively, "broad, informal, weak sanctions" (2002:109), and enforcement targeting not confined to the actor who benefits from the crime. According to responsive regulation theory, the deterrence trap is a trap not only because regulators may not be able to levy a financial penalty sufficient to deter, but also because assuming that people make decisions about compliance on the basis of cost-benefit calculations is often likely to be a mistake. Responsive regulation responds to the complexity of the motivations and contextual factors that influence compliant and noncompliant behavior. It seeks to build on people's intrinsic commitment to comply, where it exists, and broaden the targets of regulatory enforcement so that the regulator is more likely to find "softer" targets that can be motivated by modest deterrent penalties or by the shame of being implicated in wrongdoing (J. Braithwaite 2002:110). As we see in the next section, however, these strategies communicated too potent a message about the moral seriousness of cartel conduct to

[13] This was particularly true of the Australian Electrical and Electronic Manufacturers Association (AEEMA), the relevant industry association in the Transformers case. In that case, the cartel conduct had taken place immediately after AEEMA meetings in some instances. Indeed the ACCC investigated AEEMA as a potential party to the conduct early in the preparation of its case. In the Fire Protection case, it became evident that state regulation of the fire protection industry and of building fire safety standards was inadequate. Therefore state legislation was amended and the regulators become more active. It was also discovered that the relevant union's behavior had significantly contributed to the consumer protection misconduct and probably the anticompetitive conduct. The union faced enforcement proceedings too and apparently changed its ways.

be palatable to businesses and their lawyers. The resulting conflict between businesses and the ACCC showed that the ACCC was in a compliance trap.

The Compliance Trap

Business Criticism of ACCC Cartel Enforcement Activity

The most intriguing aspect of ACCC enforcement action, including in cartel cases, is the way in which businesses have criticized and openly expressed their resentment for the ACCC's enforcement methods, even while settling most cases with the ACCC (as shown in Table 2) and apparently improving cooperative compliance at the base of the pyramid. It has even been suggested that Fels's chairmanship of the ACCC between 1991 and 2003 was "Australia's competition watershed . . . he electrified business into taking competition law seriously" (Brenchley 2003:278–9). Yet at the same time, businesses, including the CEOs of a number of Australia's biggest companies, regularly and openly criticized the ACCC for adversarialism that they perceived as procedurally unfair, and publicity that was stigmatizing. For example, Dick Warburton, chairman of Caltex, has said that the manner in which Fels went about his job was "unfair, unjust and immoral" (Gittins 2002:13). David Murray, CEO of the Commonwealth Bank, has said the ACCC's behavior is "a corruption of administration of the Trade Practices Act" and "false and misleading behavior on the part of the cop" (Gittins 2002:13). Geoff Dixon, CEO of Qantas, said the ACCC uses the media "in a way that damages companies before they are proven guilty," while Roger Corbett, CEO of Woolworths, said the ACCC "really doesn't have any line of accountability at all" (Gittins 2002:13; see also Brenchley 2003:211–36).

Businesses have even settled matters and then denied their legal liability and moral responsibility for the conduct they admitted for the purposes of settlements, as well as criticizing the ACCC for taking enforcement action in the first place, and for the manner in which it has enforced the law. Businesses have perceived the ACCC's conduct of investigations, and even negotiated the settlement of enforcement matters, as excessively adversarial and moralizing, and in some cases a possible abuse of the ACCC's legal authority (Yeung 2004).

The Moral Message of ACCC Cartel Enforcement Action

As we have seen, Australian business clearly saw cartel behavior as normal before the Act was introduced. Even after the Act was

introduced, the formal sanctions against cartel conduct were civil only, the penalties relatively modest, and the moral status of these offenses therefore ambiguous (see Harding & Joshua 2003:9–11; Yeung 2004:81). There was no great political commitment or consensus that cartel behavior should be perceived as morally bad (Yeung 2004:253). There is no reason why cartel behavior (and other anticompetitive behavior) should not be seen as bad by business—most businesses think it is morally bad when they themselves are the victims of bid-rigging, abuse of market power, or bullying to join a cartel.[14] Most see a fair and competitive marketplace as more sustainable in the long term. But they also more strongly agree with the consumer protection policy goals of the Act than with the competition policy goals (see Nielsen & Parker 2005:173).[15] Achieving the objectives of the Act, especially the competition policy objectives, required a culture change at the industry and internal firm level. And the deterrence trap meant that this could not be achieved by the application of financial penalties alone.

Rather than acquiescing with ineffective, formalistic, or captured enforcement, the ACCC turned its attention to its more informal sources of power in an attempt to attract social sanctions (reputational damage, feelings of shame, and so on) to cartel offenses and to change social norms to define cartel behavior as socially and morally unacceptable (see J. Braithwaite 2002:73–136). These "leveraging" strategies worked (to an extent) because they were infused with moral content—they incorporated a moral message. In order to mobilize publicity to shame offenders, convince them of their responsibility for their wrongdoing, and encourage them to rehabilitate themselves (J. Braithwaite & Drahos 2002; J. Braithwaite 2002:110; Fisse & Braithwaite 1983; Parker 2004; Yeung 2005), the ACCC portrayed cartel conduct as morally bad. In order to evoke feelings of organizational and personal responsibility to prevent future noncompliance, a wide range of individuals and organizations were targeted in the investigation process for the purposes of potential enforcement action.

[14] Some might object that competitive market behavior has nothing to do with morality or ethics. However, if we take a utilitarian view of ethics, then there is no problem with seeing cartel behavior or any other noncompliance with economic regulation designed with some idea of either efficient or fair competition to be seen as a "moral requirement." If we see it as good that the marketplace is competitive, then it is quite appropriate to say that it is a moral or ethical requirement to act in a way that ensures this is so, even though competitive market behavior may not be prescribed by most traditional deontological theories of ethics (e.g., Kant's categorical imperative) or by other nonutilitarian ethical theories (e.g., virtue ethics or the ethics of care).

[15] Note that, unusually, Australian legislation includes the main federal consumer protection and competition provisions in one piece of legislation, enforced by one regulator, the ACCC.

However, in taking on so wholeheartedly the mission of promoting the policy and values of the Act, the ACCC became a political agent, and was perceived as such by business. The ACCC tried consciously to exercise power to change business practices, consumer expectations, and, therefore, economic and social structures. From the business point of view, the ACCC's leveraged deterrence strategies lacked legitimacy because they disagreed with the ACCC's implicit and explicit moral stand on cartel conduct and how it should be treated in the enforcement process. Businesses would prefer the ACCC to take a technical, purely economically rational deterrent approach, where noncompliance has a financial price but not a moral and reputational one.

This difference of opinion about the moral status of cartel offenses and therefore how the ACCC should exercise its enforcement powers in this area is evident in the two sides' conflicting views about (1) the ACCC's use of its powers of investigation, (2) the ACCC's use of publicity to draw attention to offenses, and (3) the meaning of a settlement of enforcement action, as shown in the following sections. In each case, businesses (and business lawyers) complained that ACCC enforcement action was stigmatizing, overly aggressive, and adversarial. They would prefer a more cooperative, reparative, and rehabilitative approach.

ACCC's Use of Powers of Investigation

Businesses criticized the ACCC for using its investigation and enforcement powers fully. Despite the fact that the Act gives the ACCC fairly substantial powers to compel the production of documents and attendance at interviews, and even to enter premises to make copies of documents, businesses and business lawyers seemed to feel that the ACCC should avoid appearing to act "like police." Several lawyers mentioned the case of the oil company "raids" as an inappropriate use of the ACCC's powers to enter premises and inspect documents. In this case, the ACCC entered the premises of several major oil companies looking for evidence of price-fixing alleged by a whistle-blower, but without any other evidence of breaches of the law (see Brenchley 2003:153–61 for a fuller account of the raids). One of the main criticisms of the raids was that it was inappropriate and unnecessarily adversarial for the ACCC to begin an investigation with unannounced visits to businesses using its powers under the Act. Lawyer interviewees thought that by making unannounced visits, the ACCC treated businesses as if they were likely to commit criminal offenses to hide or destroy documents and evidence (Parker et al. 2004:77).

Similarly, the ACCC was also criticized by lawyers interviewed for using Section 155 notices (requiring individuals and businesses

to produce evidence or answer questions) too early in other investigations and without adequately trying cooperative methods of investigation first—a practice that makes businesses feel they are being treated like criminals:

> They don't call first or anything—they just start with a s155 notice. They're cautious of tipping people off, I suppose. They feel the people they are investigating are baddies and they don't want them to go away and start shredding documents (03-014; see also Parker et al. 2004:76–9).

ACCC's Use of Publicity

Similarly, the publicity that the ACCC, and especially former Chair Fels, attracted for its enforcement activities has been an issue of some controversy and concern for trade practices lawyers and business, and the interviews reflected the broader issues that have been raised in public debate on the topic (see Dawson et al. 2003: Ch. 12; Yeung 2005). Some interviewees believed that the ACCC intentionally and unfairly made an example of cases for the sake of publicity, or that the ACCC had publicized enforcement activity before there was any court decision to announce (see Parker & Stepanenko 2003:57–9).[16]

Business and lawyer interviewees criticized ACCC publicity for portraying offenders too starkly as evildoers motivated purely by the possibility of obtaining excessive profits and gains for themselves by price gouging. The ACCC did intentionally make media statements pointing out each of its successes in cartel enforcement and identifying what it believed to be the social harm of each case of cartel conduct as it was settled. At the same time, the ACCC had also been campaigning for criminalization of cartel conduct. The juxtaposition of the ACCC's campaign for criminalization of cartels with its proactive media statements about the social harmfulness of the conduct in particular cases made some offenders who settled with the ACCC feel stigmatized.

This was particularly true in the Transformers case (see Parker et al. 2004:45–8). It is evident from the press reports of the case that the ACCC and at least one of the Australian offenders had quite opposing ideas about what was at stake in the case, its severity and level of moral blameworthiness, and that this was exacerbated by ACCC statements to the media after the case. Following the finalization of the ACCC case against four of the cartel participants, Fels was quoted in the media as saying:

[16] However, it should be cautioned that Yeung's 2005 analysis of the ACCC's use of media releases found that only 12% concerned ongoing enforcement action, and 88% of these refrained from stating the ACCC's opinion on the case.

> "This is substantial, sustained secret, senior collusion that affected the price everyone pays for electricity: consumers, business large and small, people in city and country areas," he said . . . Professor Fels estimated the cartel, which controlled almost the entire market in transformers, had illegally gained tens of millions of dollars by pushing up the prices paid by electricity companies for equipment. Consumers ultimately paid with higher prices, he said (Heasley & Myer 2000: n.p.).

These comments are phrased as estimates because the ACCC did not in fact present evidence (agreed or otherwise) to the court that the cartel included arrangements to inflate prices or that unjustified price increases had been passed onto customers. Robert Wilson, the managing director of Wilson Transformer Company, responded by pointing this out and asserting that his firm had not "defrauded or disadvantaged" their customers (Heasley & Myer 2000: n.p.).

Wilson Transformer Company, through Wilson, in fact, cooperated fully with the ACCC from the very day that the ACCC contacted him about the cartels. Yet Wilson had a very different view of the reasons for the breach than the ACCC. For Wilson, the motivations for doing something he knew to be illegal were complex and included patriotism and loyalty to his employees and a business that his father had started, as well as a rational calculation about the benefits versus the costs of doing so. He explained them in an interview:

> The key reason for us to enter into those arrangements was not to make profits, but for survival and to retain jobs within Australia . . . I am very emotionally committed to Australian manufacturing and keeping jobs here . . . They [the distribution and power transformer cartels] were both driven by the need to ensure a reasonable base-load for the factories . . . At the time I knew I was breaking the law. I knew all the basics of the TPA . . . At that time we had gone from an employment high of 350 down to 190. I had been involved in retrenching people and that had involved a lot of pain . . . In that time fines were relatively small—A$100 000. Fines that small were unquestionably palatable in the context . . .

In comparison to the motivational complexity set out here (see also Geis 1967; Simpson 1986, 1987 for other examples of complex motivations for cartel behavior), the apparent message of the media publicity prompted by the ACCC relating to the case was much more simple—businesspeople enter cartels for the purposes of raising prices in order to make excessive profits, and this should be seen as criminal behavior and preferably punished with jail terms. From the point of view of the ACCC and competition law, this makes perfect sense. But for a businessperson it may lack sense. The motivations evident for entering into cartels in the case studies

analyzed here were often more complex and less dramatic than pure greed. They included the desire for stability in new market conditions (the Transformers cartel was a response to market uncertainty in the context of the deregulation of the electricity industry), simply accepting market-sharing and price-fixing as an established part of the job (a number of the defendants in the Concrete case commented on this), and the fear of retaliation and being driven out of the industry if one did not submit to a cartel (there was very strong evidence of this in the Fire Protection case).[17]

The Meaning of Settlement of Enforcement Action

Businesses and business lawyers also tended to think that the ACCC was excessively adversarial in its approach to negotiating settlements. The ACCC's approach to cooperative settlement of cartel enforcement matters clashed with the business approach, which sees decisions about settlement or litigation as a commercial matter implying no admission of moral blameworthiness:

> The Commission is obsessive about getting declarations of guilt . . . (03-018)
> It is a problem that you can't settle a case on the basis that you won't admit the conduct, but are nonetheless prepared to accept the consequences. (03–004)
> [The ACCC] don't take the commercial advice. They don't weigh up the costs of taking action. They just run the case. For example, Company X caved in on the actual conduct but they wouldn't agree to declarations. So they had a bit of a fight about that and [the ACCC] went to court asking for declarations . . . From a commercial point of view, you would say it is better to cut the deal even if it is not perfect. On the other hand with the ACCC, you know that if they say they are going to litigate something, they will. A commercial litigant might cave in and settle when it gets near court and the costs start going up. The ACCC doesn't look at costs—it just keeps going. (03–007)

Businesses saw agreeing penalties, court orders and enforceable undertakings with the ACCC as a nolo contendere. They simply saw themselves as "not contesting" the regulator's case but making admissions "for the purposes of proceedings only." In doing so, they expected to escape moral opprobrium and accountability, just as they normally try to do in private civil law disputes. The ACCC, by contrast, saw the bringing of enforcement proceedings as a matter of public morality to show that standards were being main-

[17] However, interviewee reporting of some of these motivations may have been influenced by offenders' desire to rationalize what they have done in order to protect themselves from self-blame (see Cohen 2001:58–64; Sykes & Matza 1957).

tained and misconduct remedied (Hawkins 2002:3–13). The ACCC was not willing to abandon this objective merely to get a settlement. Settlements would often only be negotiated if the ACCC could secure admissions of liability, and the ACCC would go on to publicly comment on the socially harmful nature of the conduct and the need for criminal sanctions against cartel conduct even after achieving a cooperative settlement—things that business saw as inappropriate, unfair, and stigmatizing where the matter had been cooperatively settled.

On a simple deterrence model, the cost of cartel behavior was the possibility of a modest penalty combined with the costs of litigation and discounted by the probability of detection. The ACCC, however, leveraged up deterrence by adding to those costs the possibility of damaging publicity, highlighting the costs of the investigation and litigation process, targeting a wide range of individuals and entities for enforcement action, and requiring implementation of a compliance program and its independent audit. This motivated businesses to seek cooperative settlements with the ACCC. But business and ACCC understandings of what a cooperative process of settlement would involve diverged. It is apparent from the interviews that businesses expected a settlement with the ACCC to be negotiated administratively behind closed doors and to involve a modest financial penalty (discounted for cooperation) and perhaps some renewed commitment to making efforts to promote compliance. The ACCC, by contrast, was certainly willing to settle matters, but only if the agreed settlement would take the form of a court order that included an injunction to cease the conduct (a clear public statement of the legal wrongfulness of the conduct, stamped with the authority of the court) and the opportunity for the ACCC to make public statements about the social harmfulness or immorality of the conduct.

The Compliance Trap and the Failure of Responsive Regulation

What amounts to compliance with the law is a matter of interpretation, negotiation, and frequently argumentation, between businesses and regulators, their lawyers, and, where matters are litigated, the courts (Black 1997; McBarnet 1994, 2003; Reichman 1992). *Compliance* is meaningless, or rather has contested meanings, in the absence of some commonly accepted understanding of the way regulatory requirements should be interpreted and applied. The literature on regulatory compliance and responsive regulation (e.g., Bardach & Kagan 1982) suggests that enforcement action should be an opportunity to bring regulators and those regulated closer together in their views of compliance with the law. Enforcement action might provide an opportunity (1) for

businesspeople to be persuaded of the value of compliance with the law (through both deterrence and conversion to the values of the law), and for (2) regulators to understand more fully the motivational complexity that leads to violations of the law and learn how to improve the law and their enforcement of it to cope with that motivational complexity in a fair and nonstigmatizing way.

This subjective interpretation of the process of regulatory enforcement action, however, is fueled by a conflict about the substance of the morality of businesses' own involvement in cartel conduct that has not been resolved. Businesses may subjectively believe that theirs is a posture of compliance in settling matters with the ACCC. But if this posture exists in concert with what the regulator sees as noncompliance behavior, then a conflict must occur. There are at least four possibilities.

First, the firm may claim it is the "victim" of a rogue employee who has engaged in misconduct on a frolic of his or her own and therefore the business should not be treated as morally and legally responsible. If this is true, then there should be no conflict because business and the regulator should both be equally interested in seeing the responsible party dealt with according to the law and with the appropriate degree of moral seriousness.

Second, the business and the regulator may be in fervent disagreement about what compliance with the Act means and/or what priority it should be accorded as against other legitimate business goals (such as making a profit or keeping Australian jobs). If so, then this is a fundamental underlying conflict, which means that cooperative compliance is not achievable until the conflict has been resolved one way or another. This is likely to be quite common in the early years and decades of regulatory regimes as norms of interpretation of acceptable conduct are institutionalized. It may also be common where a risk management mentality holds sway in business (Rosen 2003).

Third, the firm, or individuals within it, may have been badly motivated and intended to break the law, yet the firm objects to the ACCC characterizing the conduct as morally blameworthy.

Fourth, the firm's management is responsible in some way for the fact that its norms of compliance do not match up with its behavior. This could be for any of a variety of reasons, including that firm management is lazy, negligent, or incompetent, or too focused on other matters to ensure compliance with the prohibition on cartel conduct.

In these last two cases, in order for a business to comply with the law, it must be confronted with the fact that the reality of its own behavior does not match its ideological posture of compliance. Simple deterrence via economic penalties on its own generally will not provoke an adequate conflict about the businessperson or

firm's identity because penalties can be readily reconciled with a purely commercial rationality.

This is the heart of the compliance trap dilemma. In the absence of authoritative, broader political and cultural support for the regulator's view of the law, the regulator is trapped. There is no technique, style, or approach the regulator can utilize to improve compliance where the meaning of compliance is politically contested. The regulator has only three choices:

First, the regulator can revert to going soft on compliance in order to avoid criticism and illegitimacy. In other words, the regulator can capitulate to business interpretations of what compliance requires and how the Act should be enforced. Regulators that lack the financial and human resources to take on business and win, as well as those that lack cultural and political support for tough regulation of business, are likely to take this approach (Snider 1991). Here the regulator gives up.

Second, the regulator can revert to taking more enforcement matters through the formal court process—a more formal, punitive enforcement style, which leaves it to the courts to determine any conflicts. But this approach runs the risk of falling back into the trap of simple deterrence and failing to promote the cultural and moral change that is necessary for compliance. This approach becomes as ineffective as the first.

Third, and from the regulator's point of view, ideally, a business's views of the morality of its own conduct and the social context for cartel conduct might change so that the regulator's enforcement methods come to be seen as legitimate after all and compliance with the regulator's interpretation of the law comes to be seen as normal.

The ACCC tried to take the third path with its leveraged deterrence strategy. But ultimately it appears to have failed to garner the political support necessary to sustain the legitimacy of its interpretation of the law and its moral seriousness. The ACCC's apparently most successful cartel enforcement action ultimately lacked legitimacy in the eyes of business regulatees. Much of the ACCC's leveraging was viewed as procedurally unfair and stigmatizing of "ordinary honest businesspeople." As predicted by Valerie Braithwaite's (2003) research on motivational postures toward regulatory authorities, Tyler's research on procedural justice (1990; Tyler & Huo 2002; see also Murphy 2003), reintegrative shaming theory (Ahmed et al. 2001), and responsive regulation theory itself, the lawyers and compliance advisers interviewed for this project cited many instances where they believed that clients were certainly willing to *behave* in compliance with competition law after ACCC enforcement action, but they felt that the ACCC's actions had broken down the *intrinsic motivation* to comply, leading to

the development of attitudes of resistance, defiance, or disengagement toward the ACCC and its enforcement of the Act (see Parker et al. 2004:94–8). There is also no doubt that, despite changes in the social acceptability of explicit cartel behavior, Australian industry remains highly concentrated and cartelized (Dignam 2005:769–70, 778–82).

More significant than this, however, is evidence that big business has regularly attempted to influence the way the ACCC carries out its statutory functions by complaining to government ministers, including the Prime Minister, both openly and secretly, about particular ACCC decisions, enforcement strategies, and investigations and about ACCC commissioners, particularly the chair (see Brenchley 2003:22, 143, 211–236). Such complaints can result in legislative and administrative reform, media attention, and public critique. The Dawson Review of the Act (Dawson et al. 2003) was prompted by both big business and small business complaints about the ACCC and resulted in various reforms to ACCC procedures and accountability in relation to decisionmaking and publicity (see Bartholomeusz 2002; Dignam 2005:782). Or complaints can result in less-public consequences such as the failure to reappoint particular commissioners or to promote particular staff members. At his retirement halfway through 2003, Fels himself expressed surprise at how long he had lasted in the job given the opposition expressed about him by big business and the frequency of backroom political lobbying around the activities of the ACCC by business.[18] Deputy Commissioner Allan Asher, a labor government appointment, was not reappointed by a conservative government, presumably because of the unpopularity of his vigorous enforcement methods (Brenchley 2003:118–21). The position was left vacant from November 2000 until November 2003. Fels himself retired after the same conservative government reappointed him, but for only three years and eight months instead of the customary five: "Costello [the Australian Treasurer], in effect, was sending Fels a message: 'You've become very powerful and we want to keep a rein on you. If you behave, you might get a further term'" (Brenchley 2003:215; see also Ryan 2002). A new chair was ap-

[18] According to this report, Fels commented that "in the past we got knocked off in behind-the-scenes lobbying by powerful interest groups with politicians. Now it's not quite so easy, if everyone knows all about the Act and its importance, to get the business concessions that used to be made in the past," and "Prof Fels rejected calls by big companies for more safeguards against 'a so-called zealous regulator' and said there were insufficient safeguards against a lax regulator" (Australian Associated Press Financial News Wire, "Allan Fels Surprised He Lasted So Long at the ACCC," 29 June 2003: n.p.). Upon the retirement of Fels, Geoff Harvey, CEO of a major Australian retailer, continued his attacks on Fels, saying that he was "mischievous and dangerous," "egotistical," a "megalomaniac," and "too powerful"; see *Illawarra Mercury,* "Fels Just Way Too Powerful–Harvey," 30 June 2003, p. 9.

pointed who was seen as much more acceptable to business (Oldfield & Mitchell 2002).

The compliance trap analysis in this article suggests that where a regulator fails to gain political and community support for its moral messages, it will tend to relapse into one of the first two options above. Regulators are forced into a situation where they feel they have to avoid the conflict engendered by strong enforcement action and strong statements of moral responsibility. This may be one reason why regulatory enforcement agencies often seem to seesaw between formal and punitive, or soft and facilitative enforcement approaches (Bernstein 1955). It is so difficult to escape the two traps that most regulators most of the time take comfort in a formalism that verges on industry capture—capitulating to business most of the time and taking only the most egregious cases to court in simple deterrence mode the rest of the time. This may well be true of the current ACCC. Although the federal government has now announced that it will criminalize cartel conduct (Clarke 2005), this decision was made more than a year after the leadership of the ACCC had been changed. It remains to be seen whether, and if so how quickly, the ACCC under its new leadership succeeds in building a moral commitment to comply. At the time of this writing, it seems just as likely that the new, more "business-friendly" leadership will take the route of taming any new criminal offenses via formal and legalistic enforcement, rather than inventing new leveraging strategies (see Grant 2005; O'Loughlin 2004; Tingle & Skulley 2002).

Conclusion

Much of the recent literature on the compliance impact of enforcement action in general, and responsive regulation in particular, is concerned mostly with the identification and impact of different procedural approaches or styles in different situations (May & Winter 2000; May & Wood 2003; see also V. Braithwaite et al. 1994; Grabosky & Braithwaite 1986; Hutter 1989), and whether it is possible for regulators (and businesses) to have the social and emotional intelligence to consistently or even mostly act in a responsive way (Nielsen n.d.). The analysis reported here shows that responsive regulation is not merely a matter of technique, style, or skill that can be controlled by the regulator. Ultimately, whatever *processes* a regulator uses to take enforcement action, there are likely to be conflicts between business and regulator over the *substance* of the law, its application in business contexts, and the moral seriousness of the social harm caused by its breach (see Tyler & Darley 1999–2000). The ACCC cartel enforce-

ment data in this article show that businesses will interpret regulatory enforcement processes in the light of any substantive conflict over the moral message implicit in that enforcement action. The ACCC may avoid stigmatization of cartel offenders by being careful to label the *conduct* as so harmful it should be criminalized, rather than labeling the *people* as criminals. But if businesses do not see the conduct as criminal, then they will perceive this as stigmatizing. In this context, conflict between businesses and a regulatory enforcement agency is necessary. It is a sign that the regulator is doing its job and is raising the issues that need to be decided. Confrontation about the moral and social consequences of wrongdoing is required.

The compliance trap highlights the moral and political instability of cooperative strategies in the absence of broad political and democratic support. In order for responsive regulation to even be possible, regulators must have the capacity to convince people that regulatory offenses represent shared values as criminal offenses do (Simpson 2002:49, 151). The conflict between business and regulator over enforcement in the context of the 30-year-old Australian competition regime can be best understood as a sign of continuing social change in relation to cartel behavior and norms. It is a very public contest between regulator and business as to what compliance with the Act should mean, and whether enforcement should assume that antitrust offenses should attract moral opprobrium or not.

Similar contests are occurring or have occurred over other areas of business regulation (e.g., Johnstone 2003; Snider 1991). Recently, Gunningham et alia (2003:41–74) and May (2005) have noted the way in which regulatees' motivations to comply, and indeed to go beyond compliance, are shaped by the terms of a multifaceted regulatory, social, and economic "license to operate" (Gunningham et al. 2003) or by the existence or not of a "social contract" involving shared expectations about what constitutes compliance established through repeated regulatory interaction and a sense of civic duty to comply (May 2005) in environmental, building safety, and boatyard regulation. ACCC cartel enforcement appears to be not (yet) supported by any implicit social contract nor by the terms of a firm's economic and social license to operate. Economic and social pressures on firms to comply with the prohibition against cartel conduct in Australia are probably not as strong and self-evident as economic and social pressures to comply with environmental and safety regulations have become over the last 20 years (Gunningham et al. 2003). Nor does the ACCC engage in the type of repeated, reciprocal interactions with firms that May (2005) suggests are necessary for regulators and firms to negotiate shared expectations about compliance.

We might equally say that regulatory enforcement agencies themselves operate under the terms of their social, political, and regulatory licenses.'' As Ayres and Braithwaite argue, regulatory responses to wrongdoing must be (and be seen to be) morally and politically acceptable (1992:36). Regulators only come to be ''granted the credibility of being benign big guns'' because of their ''political power'' (Ayres & Braithwaite 1992:45). Ayres and Braithwaite suggest that we can only understand how responsive regulation might work by understanding how regulatory agencies construct or fail to construct ''appearances of invincibility by displaying their firepower in strategic contests,'' how they ''handle the crucial tests of their strength that occur at watersheds in their history'' (Ayres & Braithwaite 1992:46). The compliance trap suggests that regulatory enforcement agencies may do all they can to display their firepower, but if they do not receive external political support, they will be left without ''license'' to regulate effectively.

The usual scholarly critique of responsive regulation is that by advocating cooperative compliance as the first preferred enforcement strategy, it fails to treat business offenses as ''real'' crime subject to ''adversarial, punitive and interventionist forms of regulation'' (Tombs 2002:126; see also Abel 1981; Glasbeek 2002; Pearce & Tombs 1997). This article argues that on the whole the ACCC did not fall into this trap between mid-1997 and mid-2003. Rather, it took responsive regulation seriously enough to settle most matters cooperatively, while simultaneously taking a tough stand on the immorality of cartel conduct and the need for wide-ranging admissions of liability and correction and prevention of breaches by business offenders and their managers. Settlements of enforcement action *can* often avoid conflict rather than resolve it. But this does not disprove the potency of responsive regulation and restorative justice theory as a guide for regulatory enforcement. It should remind us that responsive regulation scholarship and practice must include consideration of substantive legitimacy and morality, not just procedural fairness and cooperation. This suggests two specific practical lessons for how regulatory enforcement agencies should implement responsive regulation strategies.

First, regulators should not settle enforcement matters with ''for the purposes of proceedings'' admissions. If business offenders settle a matter with admissions and later renege on those admissions by stating that they believe they were not legally or morally liable for the conduct, then the regulator should confront them about their denials, making the conflict explicit and able to be resolved one way or another. ''For the purposes of proceedings'' admissions that are later revoked for other purposes are likely to be a particular problem in a regulatory regime such as Australia's, where cartel conduct is a civil penalty offense and most matters are

settled privately. However, the same problem can still arise under a criminal penalty regime, such as in the United States, because of the availability of nolo contendere pleas in which the offender submits a guilty plea without admitting guilt (see Bibas 2003),[19] and the extensive use of consent decrees to settle matters (Blizzard 1998; McDavid et al. 1983). Regulators should only settle where offenders show remorse, apologize, and make a commitment to repair the harm caused by their misconduct; that is where "restorative justice" is demonstrated in substance (J. Braithwaite 2002).

Restorative justice theory suggests that this is unlikely to be achieved where regulatory staff lecture and moralize—sincere and substantive moral commitments occur where offenders find remorse for themselves. Restorative justice processes seek to overcome offenders' rationalizations, denials, and neutralizations of their wrongdoing by making them meet victims and be confronted with the details of how the misconduct has harmed them. In some cases, the ACCC has been able to use a deeper restorative dialogue of this kind to dissolve the compliance trap dilemma. For example, in a famous case of misleading and deceptive conduct in the sale of insurance to uneducated indigenous people, senior company executives traveled to remote parts of northern Australia to meet with the victims of their agents' scams in physically and emotionally uncomfortable circumstances, called a media conference to publicly apologize, and voluntarily chose to generously compensate their victims and donate money to set up an Aboriginal Consumer Education Fund (see J. Braithwaite 2002:22–4; Parker 2004:221–3). There could be no denial of substantive (business) responsibility or (ACCC enforcement action) legitimacy after such a process.

Similarly, in the field of ordinary criminal prosecutions, Johnson (2002:179–92) has shown the way in which Japanese prosecutors prioritize offender remorse as a factor in the prosecution decisionmaking process, while it is irrelevant to U.S. prosecutors. John Braithwaite (1989:164–5) argues that Western justice systems often "crush" possibilities for remorse that would make regulation more effective, while the Japanese regard for remorse makes their regulatory systems more effective.

Second, the ACCC's cartel enforcement experience affirms that enforcement is more successful in promoting compliance at the bottom of the pyramid the greater the range of gradated sanctions available toward the tip of the pyramid. Generally that means that regulators should have a full range of sanctions, including high

[19] However, according to Bibas (2003:1380), the U.S. Justice Department, Antitrust Division (rightly) opposes all nolo contendere pleas, although they are widely used in other areas.

penalties and criminal sanctions, available to them. The availability of criminal law and high penalties are important not so much because of their deterrent impact but because of their moral impact in legitimating the substantive content of the message at the bottom of the pyramid. This is not to say that procedural fairness is less important for the legitimacy of regulators. It is merely to demonstrate the truth of the responsive regulation insight that it is the range of different enforcement tools and their messages that is significant in promoting compliance.

John Braithwaite (2002:30) puts a rider on his theory of responsive regulation that regulators must be enforcing a "just" law—otherwise most activity at the bottom of the pyramid will need to be dialogue about whether the law is just or not. Presumably, he means not only that the law must be just, but that it must be *recognized* as just (or morally appropriate and democratically supported), in order for the pyramid of responsive regulation to promote compliance rather than conflict. This rider should be printed in capital letters on every page of every scholarly or policy-oriented discussion of responsive business regulation. The type of criticism and conflict suffered by the ACCC is a symptom of a socio-polity that does not take business crime seriously enough to treat it as crime. In the absence of a full arsenal of enforcement tools, and political and cultural support for the law that they are required to enforce, business regulators are being given an impossible task to promote compliance—even if they are skillful enough to overcome the deterrence trap, they will fall into the compliance trap, which can only be resolved politically.

Appendix: Data Collection

The empirical research reported here is part of a larger study, the *ACCC Enforcement and Compliance Project,* which uses qualitative and quantitative methods to identify and evaluate the impact of the mix of techniques used by the ACCC in both competition and consumer protection enforcement. The data used in this article come from two phases of qualitative data collection within the larger project.

First, interviews were conducted around Australia with (1) 37 ACCC staff (including some former senior officers and commissioners), and (2) 21 trade practices lawyers and other advisers to gather examples of key cases of ACCC compliance and enforcement activity and general information on the nature of ACCC enforcement activity and its impact on compliance. An analysis of the frequency and outcomes of different types of ACCC enforcement

activity was also made using ACCC annual reports and the data from interviews (see Parker & Stepanenko 2003.)

Second, 15 ACCC enforcement matters were examined in more detail. This involved a further 25 focused interviews with people in the businesses or industries affected by ACCC enforcement action in these cases and analysis of data obtained via contemporaneous newspaper reports and other documentary sources. Among these 15 cases were four major Australian price-fixing and cartel enforcement cases. Each of these cases was identified as a particularly significant and successful cartel enforcement case in preliminary interviews with ACCC staff.[20] A brief account of each is given in Table 1.

The four case studies formed the basis for an analysis of the compliance impact of ACCC enforcement activity in cartel cases that was then tested, supplemented, and expanded by analysis of all 83 interviews (using the Glaser & Strauss 1967 constant comparative method) insofar as they were relevant to the issues raised by cartel enforcement. This led to a fifth matter, the Oil Raids case, being investigated in the same detail as the other four cases. The full descriptive analysis of these data can be found in Parker et alia (2004). This article proposes further explanation and analysis than is provided in that report. References to Parker et alia (2004) are included throughout this article wherever further supporting interview quotations and empirical evidence can be found in that earlier report.

The main aim of the interviews and other data collection was to establish in as much detail as possible (1) what had occurred in the course of the ACCC's investigation and enforcement of misconduct, what investigative and enforcement techniques had been used, and how regulator and business people had interacted, and (2) the response of the individuals, businesses, related industry associations, and any other parties involved in the enforcement process, as well as the response of business bystanders and industry more generally. Evidence of the compliance impact of enforcement action was sought in a "grounded" way by asking the interviewees (regulators, lawyers, and businesspeople) themselves what they saw as the impact of the enforcement matters in which they had been personally involved (see Parker & Stepanenko 2003:30–4 for a description of what this involved). All interviews were conducted by the author (many with the assistance of Natalie Stepanenko, a

[20] The original research design prescribed choosing a mix of successful and unsuccessful ACCC cartel cases for further study. However, the ACCC had so rarely been unsuccessful in pursuing enforcement proceedings in cartel cases in the period under study that it proved impossible to pursue this strategy. This does not mean that the ACCC does not commence cartel investigations that ultimately fail to result in penalties. But usually when the ACCC is unsuccessful in cartel cases it is because the investigation fizzles out before becoming public, hence it was difficult to obtain information about these cases.

research assistant), except for seven interviews that were conducted by John Braithwaite, a collaborator on the larger project. Interviews were not taped, as it was believed that this would lead to a more candid discussion of sensitive matters. Copious notes were taken during the interviews, and then they were typed up as quickly as possible after the interview in order to include as much verbatim material as possible. The data collection did not involve direct observation of interactions between regulators and business. Nevertheless, the five cases chosen for detailed study were chosen partly because we had been able to establish in a reasonable degree of detail what had actually occurred via interviews with at least one participant from both the ACCC and business sides in each case.

The quotations in the text of this article, unless otherwise attributed, are from the interviews with ACCC staff, business lawyers, and businesspeople described above. The author's code numbers for the interviewees have been retained so that readers can see to what extent the quotations are from different people.

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