

# Submission to Productivity Commission Review of Australia's Consumer Policy Framework

Dr Christine Parker, Associate Professor and Reader, and ARC Australian Research Fellow, Law Faculty, University of Melbourne.

I am in the midst of a major empirical evaluation of the impact of Australian Competition and Consumer Commission (ACCC) enforcement action in terms of Australian business compliance with the Trade Practices Act (both competition and consumer protection provisions).<sup>1</sup> I would like to draw the attention of the Productivity Commission to two aspects of my empirical findings to date that are relevant to the Commission's review of Australia's consumer policy framework.

## **1. The Commission's Issues paper asks at p20: *Are there significant enforcement gaps in the current framework?***

The most gaping gap is the lack of capacity under the Trade Practices Act for the ACCC to take civil action for the recovery of penalties or damages in relation to breaches of the consumer protection and fair trading provisions of the Trade Practices Act. Criminal penalties are available for some breaches of the consumer protection provisions.<sup>2</sup> But criminal prosecutions of these provisions have always been (and remain) rarely, if ever, used. In almost all cases where the ACCC took enforcement action in relation to consumer protection breaches, it does so as a civil matter – with the only remedies available being declarations that particular conduct breaches the TPA, injunctions to prevent the prohibited action continuing or to require some action be taken, damages, rescission, setting aside or variation of contracts, adverse publicity orders, and community service orders, probation orders, and corrective advertising.

This means that there is an imbalance between the enforcement options available for breach of the competition and consumer protection provisions of the Trade practices Act. It makes the possibility of criminal enforcement laughable and of little deterrent power since it is rarely used, and it means that the ACCC has a truncated set of enforcement options available to it when voluntary compliance, negotiated solutions to customer complaints, industry codes and other less interventionist compliance measures fail. As point 2 below argues, codes and other voluntary compliance strategies can only be relied upon where there are general provisions setting out

---

<sup>1</sup> For a general description of this research and preliminary findings see Christine Parker and Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2003) <<http://www.cccp.anu.edu.au/Preliminary%20Research%20Report.pdf>> and Vibeke Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2005). <<http://cccp.anu.edu.au/projects/CCCPReport%20Final.pdf>>

<sup>2</sup> Criminal offences in relation to consumer protection and fair trading matters are set out in Part VC TPA.

consumer protection standards (as in the TPA) that can be enforced quickly and effectively through a range of enforcement options.

In one of the papers from my research I reported on what I had found from interviews with ACCC staff and trade practices lawyers about criminal prosecution of consumer protection matters as follows:<sup>3</sup>

As a number of interviewees pointed out, the ACCC has rarely run criminal proceedings in the past even where it is available for consumer protection matters because of practical problems of winning such cases quickly and getting a good result. According to ACCC staff, it is rare for the ACCC to take criminal proceedings because the level of proof required is so much higher, the case takes longer, there is a perception that the Director of Public Prosecution is unlikely to prioritise the type of case the ACCC is likely to bring (eg. misleading conduct) and, there is also a perception that the courts themselves see the ACCC taking criminal action as an inappropriate waste of their time.

[Why didn't you run criminal proceedings in the fire protection failure to service case?] The answer is very simple – evidence. We talked about running criminal cases. But the companies were saying 'We were there, but just didn't fill in the books.' It would be very difficult to prove non-servicing. We would have needed to use log book evidence and audits of buildings. We didn't think we would be able to prove it beyond reasonable doubt.... We would have gathered enough evidence for taking it to court [on a civil charge] but we would have never had enough evidence for criminal proceedings. [Do you think the companies would have realized you were thinking about criminal proceedings?] I did not say that to them myself but it was definitely one of the options. It is just common sense. (01-018)

Moreover the focus of the ACCC has been on stopping the conduct and getting remedies for affected businesses and customers, where possible. Criminal action is not necessarily appropriate to that aim and may hinder it (by slowing down the process):

We were actually thinking of taking criminal proceedings [on a misleading labelling matter]. This was because it was A Current Affair that were doing the story – they rang the ACCC the morning they were showing the story and told the ACCC — and the CEO went on TV saying 'I did do it and does it matter?'. It ended up with a consent order [on a civil charge] and an enforceable undertaking. It was not really appropriate to take criminal proceedings because it wouldn't get us the quick resolution and outcome with an impact on the industry. And for the DPP, it would be at the bottom of the pile and while criminal proceedings were happening, it would sidetrack the other remedies we wanted. In fact the whole thing was all wrapped up in 30 days. (01-012)

In this office we've never sought criminal proceedings under Part V because it raises the threshold and limits the orders you can get. I

---

<sup>3</sup> Christine Parker, Paul Ainsworth and Natalie Stepanenko, *Working Paper: ACCC Enforcement and Compliance Project: The Impact of ACCC Activity in Cartel Cases* (Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2004) <<http://www.cccp.anu.edu.au/projects/cartelreport.pdf>> at pp90-92. (Numbers in brackets after quotes from interviews are code numbers for anonymous interviewees.

always think the most important thing is to get remedies for consumers. It is always the main point to get back the three thousand dollars they've lost or whatever. (01-030)

It is for this reason that John Braithwaite has commented in public forums that the ACCC should be given its own internal prosecution unit and allowed to prosecute the matters itself in the way that it prosecutes its own civil cases (with the assistance of external solicitors and barristers) (see Gooch 2002).<sup>4</sup>

In my view two policy conclusions can be drawn from this:

- (a) The ACCC should be able to take civil action to recover penalties and damages for breach of at least those consumer protection provisions for which criminal offences are available.
- (b) The ACCC should have its own inhouse criminal prosecution function, or at least resources should be set aside for the DPP to engage in criminal prosecution of consumer protection provisions as has occurred for the criminal prosecution of cartel offences (even though this has not even been made a criminal offence yet).

**2. The Commission asks at p21 of its Issues paper: *What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework?***

In 2004 we published an assessment of some of the ACCC's voluntary compliance strategies which included assessment of the ACCC's use of codes of conduct.<sup>5</sup> In that paper we concluded, again on the basis of empirical evaluation using qualitative interviews, as follows:

- Business and lawyer interviewees, as well as ACCC interviewees, did cite many examples of effective compliance education activities (some initiated by business and some initiated by the ACCC) that were related in one way or another to ACCC enforcement action. Indeed, *almost all positive mentions of compliance education activities, including publications and guidelines, were activities initiated in response to ACCC enforcement actions or as part of the remedies ordered through ACCC enforcement action.*
- *In almost all cases of voluntary codes that were mentioned in the interviews, one of the reasons for industry to be committed to the code, or for the ACCC to get involved in the code was breaches of the law that had led to ACCC enforcement action.* Even in the case of a purely preventive code (where there had been no enforcement action yet), one of the reasons the relevant industry association was so proactive in developing the code was its experience of recent ACCC enforcement action on a different matter in the industry.

---

<sup>4</sup> Reference is to a report of John Braithwaite's views quoted in Elizabeth Gooch, 'Corporate Crime Law "Not Used Enough"', *The Age*, 14 July 2002.

<sup>5</sup> Christine Parker, John Braithwaite and Natalie Stepanenko, *ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education and Liaison Strategies* (Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2004) <<http://www.cccp.anu.edu.au/projects/compliancereportapril2004.pdf>>

- Effective compliance strategies, especially voluntary codes, are not set in place then forgotten. Where they work effectively they are likely to generate ongoing queries and will also require ongoing monitoring and evaluation. For example, the publication of guidelines on a particular issue, if effective, is likely to mean that businesses will contact the ACCC about preventive compliance or as soon as a potential problem arises in order to resolve it quickly. Similarly, a voluntary code will create a mechanism for complaints to be made about breaches of the code to business signatories, to the code administrators and ultimately to the ACCC. At the same time, *the ACCC will have a responsibility to monitor whether codes and guidelines and other compliance strategies continue to work effectively, to resolve problems that arise and to take enforcement action if and when serious, widespread or recurrent non-compliance re-emerges.*

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

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

organises the tools around the work, rather than vice versa. It identifies important risks and then it develops coordinated, multi-functional responses. Often it invents new tools, techniques, or solutions tailor made for the problem in hand. Almost every problem-solving success story reveals this: effective solutions to identified risks involve either artfully crafted, properly coordinated combinations of actions or the design of something new. Such solutions could never be created by moving resources between existing functions or programs and allowing them to operate in isolation. (Sparrow 2000: 201-202)<sup>6</sup>

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

In my view then, there is place for self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework – but only if they are buttressed with the possibility of effective regulatory enforcement under a generic framework such as that offered by the Trade Practices Act augmented with better enforcement options for the ACCC (as described above).

---

<sup>6</sup> Reference here is to Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (The Brookings Institute, Washington DC, 2000).

I have also made the point at length in my book, *The Open Corporation* (Cambridge University Press, 2002) that ‘self-regulation can work well but only where there is also effective legal accountability and oversight of self-regulation processes and outcomes, and the possibility for consumers to always enforce their rights outside of self-regulatory processes where self-regulatory processes fail. In that book I also argued that in addition to formal legal accountability, there is also a need for informal, third party, and NGO input into self-regulation. For that reason I strongly support the creation of a well-funded consumer advocacy body (along similar lines to the National Consumer Council in England and Wales). The more we rely on self-regulation and co-regulation, the more important it is to have well funded and organised advocacy of consumer interests to make it work fairly and effectively.

**3. Finally, the Productivity Commission may find the following data about Australian business’ implementation of consumer-oriented complaints handling systems useful empirical background for this review:**

As part of my work on the evaluation of ACCC enforcement, a survey of Australian business compliance with the TPA and experience of ACCC enforcement was also conducted. 999 large Australian businesses responded (a 43% response rate).<sup>7</sup> Among other things, we asked the business to what extent they had implemented trade practices compliance systems. We found that complaints handling systems had been implemented far more than other aspects of compliance systems. This suggests that the Australian consumer policy framework has been effective to the extent that larger Australian businesses tend to see having a complaints handling systems of some kind as a basic requirement for carrying on business in this country. However we also found that other elements of trade practices compliance systems that are widely seen by the ACCC and other regulators, professional practitioners such as lawyers and compliance professionals, and researchers to be essential for ensuring compliance with the law were implemented only very partially or not at all. Overall our data suggested that Australian business responses to the Trade Practices Act are reactive, rather than proactively orienting themselves toward consumers and competition in the market in ways that might promote fair and efficient markets and high levels of consumer satisfaction.

In an article we published on this data we stated that:

Any business that provides products or services to consumers (or even to other businesses) is likely to receive complaints, and poorly resolved complaints can damage business. Putting in place a system to deal with and keep records of those complaints is likely to be essentially a reaction to the fact that complaints have been received.

Even within the complaints handling group of elements, it is the more reactive elements that were more likely to be implemented. Almost all businesses said that they had a ‘clearly defined system for handling complaints’ (91 per cent) and that they kept ‘records of complaints’ (87 per cent). Approximately half (53 per cent) also reported that they had a system

---

<sup>7</sup> For a detailed explanation of the methodology of the survey and the basic findings, see Vibeke Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2005).

for 'handling compliance failures identified by staff, competitors, suppliers or the ACCC'. However, only 40 per cent said they 'actively' sought out 'consumer opinion about new advertising and/or new products', suggesting a more proactive approach to preventing consumer complaints before they occurred. Only 13 per cent said they had a hotline in place for complaints about compliance, an initiative that would tend to actively encourage reporting and frank discussion of potential compliance problems inside the organisation.<sup>8</sup>

We concluded:

It is true that most businesses have implemented some complaints handling systems without a direct experience of ACCC enforcement action. However, it is likely that this was a response to the fear of ACCC enforcement action, or other public or private litigation and reputational damage, should those complaints remain unresolved. The policy question is why Australian businesses seem to feel it is essential to have in place systems to handle and record complaints from customers, competitors and/or suppliers, as a response to the risk of bad trade practices, but they do not feel that they must have in place the other more proactive elements of a best practice trade practices compliance system.<sup>9</sup>

I am attaching a copy of the paper from which these findings are quoted to my submission in case the Commission is interested in reading it further. The other research papers I have referred to can be easily downloaded from the webpage of the Centre for Competition and Consumer Policy at the Regulatory Institutions Network, Australian National University: <<http://www.cccp.anu.edu.au/projects/project1.html>>.

---

<sup>8</sup> Christine Parker and Vibeke Lehmann Nielsen, 'Do Business Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30 *Melbourne University Law Review* 441-494, 471.

<sup>9</sup> *Ibid*, 482-3.