

2009

# The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation

Christine E. Parker

*Melbourne Law School, University of Melbourne*

Robert E. Rosen

*University of Miami School of Law, rrosen@law.miami.edu*

Vibeke Lehmann Nielsen

*Department of Political Science, University of Aarhus*

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

## Recommended Citation

Christine E. Parker, Robert E. Rosen, and Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 *Geo. J. L. Ethics* 201 (2009).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation

CHRISTINE E. PARKER,\* ROBERT ELI ROSEN,\*\* AND  
VIBEKE LEHMANN NIELSEN\*\*\*

## TABLE OF CONTENTS

I.	INTERROGATING BUSINESS ABOUT THE USE AND INFLUENCE OF LAWYERS . . . . .	202
II.	THE TWO FACES OF LAWYERS . . . . .	207
	A. THE PROFESSIONALISM THESIS: LAWYERS AS COMPLIANCE MONITORS . . . . .	207
	B. THE DEVOLUTION OF THE PROFESSIONALISM THESIS: LAWYERS DISCOURAGING BUSINESS COMPLIANCE. . . . .	210
III.	THE MECHANISMS IN PRACTICE: THE TWO FACES OF CLIENTS . . . . .	214
	A. RESEARCH STRATEGY. . . . .	214
	B. DATA. . . . .	215
	C. THE USE OF LAWYERS. . . . .	217
	D. THE FOUR MECHANISMS FOR MONITORING COMPLIANCE. . . . .	219
	E. GAME-PLAYING AND ADVERSARIALISM . . . . .	224
	F. TWO FACES OF CLIENTS? . . . . .	227
IV.	TWO-FACED LAWYERS OR ONLY TWO-FACED CLIENTS? . . . . .	229
	A. TO WHAT EXTENT DO ATTITUDES TOWARDS COMPLIANCE ORIGINATE IN LAWYER RATHER THAN THE CLIENT?. . . . .	229
	B. RESEARCH STRATEGY. . . . .	231
	C. DO CLIENTS WORRY ABOUT WHAT THEIR LAWYERS THINK OF THEM?. . . . .	231
	D. IMPACT OF LAWYERS BEING RESPONSIBLE FOR THE COMPLIANCE FUNCTION. . . . .	233
V.	LAWYERS AS MONITORS, GAMESTERS AND ADVERSARIALISTS: FINDINGS AND IMPLICATIONS. . . . .	238
	APPENDIX: ADDITIONAL STATISTICAL TABLES . . . . .	242

---

\* Associate Professor and Reader, and ARC Australian Research Fellow, Melbourne Law School, University of Melbourne.

\*\* Professor of Law, University of Miami.

\*\*\* Associate Professor, Department of Political Science, University of Aarhus.

## I. INTERROGATING BUSINESS ABOUT THE USE AND INFLUENCE OF LAWYERS

When corporate irresponsibility is discovered, it is common to ask “where were the attorneys when these transactions were effectuated?” This was famously asked by Judge Sporkin in relation to the U.S. Savings and Loan Scandals of the 1980s.<sup>1</sup> In the U.S. it was repeated after the stock market scandals of the 1990s.<sup>2</sup> And it is being asked in relation to the 2007 stock option backdating scandals.<sup>3</sup> This question assumes that lawyers are involved in company action or inaction, and that lawyers can influence company compliance with the law. Where companies use lawyers and lawyers can influence company action or inaction, then lawyers can be asked why did they not prevent or mitigate corporate irresponsibility. Why did they not serve as compliance monitors?

“Where were the lawyers” presumes that lawyers were or could have been present when the relevant compliance decisions were made. This is a claim about how clients use lawyers. Yet, we know very little about client search behavior for advice on compliance issues.<sup>4</sup> To argue that lawyers would have made a difference, we need to know when businesses use lawyers and how lawyers may influence compliance decisions. We also need to understand lawyers’ abilities to shape client demand. Detailing the mechanisms through which lawyers can influence compliance behavior is necessary before giving credence to lawyer responsibility for irresponsible client conduct.

“Where were the lawyers?” derives its force from the hope that lawyers would use their influence to promote business legal compliance.<sup>5</sup> But this hope is conjoined to the fear that lawyers’ influence derives from and is limited by business commitments to non-compliance. The hope that lawyers can determine the ethical content of the services they supply meets the fear that clients demand a lack of ethical constraint in the legal services they receive and that lawyers may even promote non-compliance.

Two competing theses explain what lawyers supply as market phenomena. The first, the professionalism thesis, emphasizes the formation and regulation of what is supplied in the market. It argues that, given uncertainty and informational asymmetry, there is sufficient slack in the market that client demand will be met

---

1. See *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.).

2. See Deborah L. Rhode, *Legal Ethics: Moral Counseling* 75 *FORDHAM L. REV.* 1317 (2006).

3. See, e.g., U.S. Securities and Exchange Commission Chairman, Christopher Cox, Speech to the 2007 Corporate Counsel Institute (Mar. 8, 2007), available at <http://www.sec.gov/news/speech/2007/spch030807cc.htm>.

4. See *infra* Part II for a summary of what is known about lawyer behavior.

5. See Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 *CONN. L. REV.* 1185, 1204-07 (2003) [hereinafter Gordon, *A New Role for Lawyers?*]; see also Robert A. Kagan & Robert E. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 *STAN. L. REV.* 399, 404-15 (1985) (describing corporate lawyers as independent counselors and conduits); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206-34 (1988); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 *YALE J. REG.* 1 (2005).

by service according to professional norms,<sup>6</sup> including ethical norms about compliance with the law. Lawyers will act as ‘monitors’ of their clients’ compliance.<sup>7</sup> Professionals define both what is the problem and the remedy, and clients will get what lawyers choose for them to receive. The only problem that the professionalism thesis can see that might lead to lawyers providing unethical services is that some rogue practitioners might escape professional control over the services they supply.

The devolution of the professionalism thesis emphasizes control by clients over professionals. It argues that in certain markets, such as those for corporate legal services, the client can easily switch lawyers and informational asymmetries are less likely to exist as the client is a sophisticated repeat-player.<sup>8</sup> As a result, the client will select the lawyer who provides the services it demands, including services with the goal of evading or resisting the law.<sup>9</sup> If the lawyer does not serve as the client wishes, the client will simply switch to a lawyer who does. In this market, lawyers supply what clients demand. The problem set by the devolution of the profession thesis is the extent to which practitioners can provide anything other than profit-maximizing, the “law-be-damned” services. Many scholars and commentators on business lawyers’ ethics decry the way in which lawyers *in fact* devalue compliance with the law by their clients,<sup>10</sup> while arguing, consistent with the professionalism thesis, that lawyers have great *potential* to act as promoters of business compliance.<sup>11</sup> They argue that the suppliers of legal services could determine the ethical content of the services they provide, but that lawyers are not sufficiently taking advantage of their opportunities to promote compliance. The lawyers’ excuse, consistent with the devolution thesis, is that clients devalue compliance, not them, and that client demand explains why lawyers do not act as compliance monitors.

In order to resolve these arguments, we need to be able to segregate client

---

6. See, e.g., Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 52 AM. ECON. REV. 941 (1963); M. S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 828-37 (1987).

7. See *infra* Part II.A.

8. See Robert Dingwall, “Is ‘Professional Dominance’ an Obsolete Concept?” KNOWLEDGE, WORK AND SOCIETY 77 (2006); ROBERT DINGWALL, *PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM* (C. Derber ed., 1982); see, e.g., Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 900 (1990);

9. See *infra* Part II.B.

10. Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL’Y 195 (2003); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998); see Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998); Milton C. Regan Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139 (2005); E. Wald, *Lawyers and Corporate Scandals*, 7 LEGAL ETHICS 54 (2004).

11. See CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS’ ETHICS* Chapter 9 (Cambridge University Press, 2007) [hereinafter PARKER & EVANS].

compliance commitments from those of the lawyers whom they employ. As commitments can shift, we also need to examine lawyer influence on their clients' commitments.

Much of the empirical evidence on the influence that lawyers have on business compliance is based on qualitative interviews with lawyers or case studies of documented corporate scandals in which lawyers have been involved.<sup>12</sup> If lawyers are like everybody else, then lawyer self-reports are likely to misreport their influence.<sup>13</sup> After the event examinations of particular cases of what has been revealed to be scandalous behavior are also likely to overestimate the preventive power of lawyers.<sup>14</sup> In-depth research into particular companies is less likely to overstate the role lawyers might play because the focus is on the company, not the lawyer. But this type of research suffers from being anecdotal.<sup>15</sup> There is little systematic, quantitative data on these issues;<sup>16</sup> and there is little evidence on business clients' point of view on how they use lawyers, and what influence it has on their compliance with the law.<sup>17</sup>

In this paper we use quantitative and qualitative data to examine the influence that professional advice has on business compliance: is it true that the more professional advice a business receives about compliance with the law, the more it complies with the law? Or is seeking advice from lawyers associated with an adversarial, game-playing approach to regulators and regulatory compliance? Our quantitative data<sup>18</sup> allow us to address these questions because they capture business commitments to compliance and use of lawyers from the business' point of view. Because our quantitative data do not derive from lawyer reports about their own behaviour, we believe our findings are particularly robust regarding how lawyers act. Our survey interrogates businesses about lawyers, rather than asking lawyers to testify about themselves. Our qualitative interview

---

12. See Gordon, *A New Role for Lawyers?*, *supra* note 5, at 1204-07.

13. See, e.g., Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. OF PERSONALITY & SOC. PSYCHOL. 322 (1979) (describing the egocentric bias by which individuals claim responsibility for themselves for the results of joint action).

14. See, e.g., E.J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975) (describing bias of belief in control especially in situations in which "skill cues" are present).

15. See, e.g., Robert Eli Rosen, *Problem-setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence*, 56 U. MIAMI L. REV. 179 (2001) [hereinafter Rosen, *Problem-setting*].

16. See also Eleanor M. Myers, "Simple Truths" about Moral Education, 45 AM. U. L. REV. 823, 855 (1996) (calling for the development of such evidence). But see Hugh P. Gunz and Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002) (evaluating lawyer responses to hypothetical cases); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 81-164 (1994) (quantitative evidence on similar questions primarily in the context of criminal law and family advising).

17. There is also a dearth of quality research on business persons' own ethics, see sources cited in Elizabeth Chambliss, *What Do We Know About Lawyers' Lives?: The Professionalization of Law Firm In-House Counsel* 84 N.C. L. REV. 1515, 1571 (2006).

18. Our study and data are described immediately below.

and documentary data from lawyers, businesses, and regulatory enforcement staff give us the context to interpret the quantitative data meaningfully.

In the *first* part of the paper we set out the mechanisms by which the scholarly literature on lawyers' ethics and regulatory compliance predicts that the use of lawyers should promote business clients' compliance with the law. We label this the use of lawyers as 'monitors.' We then set out the mechanisms by which the literature predicts that the use of lawyers as 'gamesters' and 'adversarialists' enables and motivates client 'game-playing' with compliance or 'resistance' to compliance.

In the *second* part of the paper we use the responses to our survey to examine how frequently businesses use lawyers in making decisions with regulatory compliance dimensions. We then set out to determine whether businesses that use lawyers more also value compliance more, or instead whether they exhibit a more resistant or game-playing approach to compliance. We find evidence that both are true. Some businesses that use lawyers more value compliance more, while others exhibit a more resistant or game-playing approach to compliance.

In the *third* part of the paper we try to determine whether this is because lawyers with different ethics influence their clients to take different approaches to regulators and regulatory compliance, or whether it is the other way around—that businesses choose and instruct their lawyers according to their own underlying attitude towards compliance. We find evidence that clients generally pick lawyers who are aligned with the client's commitments to compliance, but that some lawyers also influence their clients to take a legalistic, game-playing approach to law. Clients who are committed to compliance hire lawyers to help promote compliance in their organizations, and those who are committed to resistance hire lawyers to resist compliance. Our data suggest that to the extent lawyers influence clients, it is towards game-playing, not commitment to compliance or resistance to compliance.

We find that neither thesis applies to the market for corporate legal services. The devolution thesis fails to recognize that clients vary in their attitudes towards law and legal risk. As a result of client demand, a significant portion of what lawyers supply is a service as compliance monitors. The professionalism thesis fails to recognize that norms of legal professionalism support lawyers' action as gamesters and adversarial advocates. As a result, even when clients demand lawyers who act as compliance monitors, lawyers supply services that incline clients to increasingly accept legal risk and adopt a gamester approach to law and regulation.

As these data derive from Australian businesses, U.S. lawyers might question their applicability to them. Even between common-law jurisdictions, contexts and cultures differ, making generalization suspect. Although a case can be made for how similar forces are at work between Australian and U.S. lawyers and their corporate clients, to the extent that they are different, we would expect it to be easier to find evidence of Australian lawyers having a positive compliance influence on their clients than U.S. lawyers. The law and practice of lawyering in Australia have long imposed stronger obligations on lawyers to act as 'officers of

the court' to restrain client misconduct than in the United States.<sup>19</sup> Australian lawyers also have a more cooperative, proactive relationship with business regulators generally, and with the regulator relevant to this study (the Australian Competition and Consumer Commission) in particular, than do U.S. lawyers with their regulators.<sup>20</sup> We would generally expect Australian lawyers to act more as mediators between the compliance demands of regulators with their corporate clients, than U.S. lawyers who overall see their job in more adversarial terms.

Moreover, even the largest Australian law firms and businesses are smaller than those in the United States.<sup>21</sup> Because the standard account of the decline in professional ethics is a story of the increasing size of law firms and the power of clients over them,<sup>22</sup> U.S. lawyers would expect to still find in Australia more of the tradition of the influential and independent counsellor than currently exists in the United States. Consequently, if we were to find, as we do, that even Australian lawyers take their marching orders from their clients and even, in some cases, influence clients away from compliance, it would cast in doubt the account of how a whiggish past has been lost in the U.S. megalopolis.<sup>23</sup>

More importantly, it would suggest that increasing reliance on lawyers by regulators to increase business legal compliance, as in Sarbanes-Oxley<sup>24</sup> or

---

19. For example, in Australia professional conduct law has always given lawyers the obligation to report misconduct up the corporate hierarchy as high as the board where a breach of the law is occurring, and has also given them the ethical discretion to report crimes to external regulators. See PARKER & EVANS, *supra* note 11, at 229-31. On lawyers' duties as officers of the court in Australia and Britain (on which Australian rules and practice are based), see David A. Ipp, *Lawyers' Duties to the Court*, 114 L. Q. REV. 63 (1998); Camille Cameron, *Hired Guns and Smoking Guns: McCabe v. British American Tobacco Australia Ltd*, 25 U. NEW S. WALES L.J. 768 (2002); PARKER & EVANS, *supra* note 11, at 24-27, 66-95. For a comparison of Australian and U.S. conduct rules and practice on duties to the court and duties of fairness, see Abbe Smith, *Defending the Unpopular Down Under*, 30 (2) MELBOURNE U. L. REV. 495, 530-53 (2006). And for comparison of U.S. and British approaches to conflict between duty to the court and duty to the client, see Christopher J. Whelan, *Ethical Conflicts in Legal Practice: Creating Professional Responsibility*, 52 S.C. L. REV. 697 (2001).

20. See, e.g., Robert J. Glance, *Merging Down Under: A Comparative Analysis of Australian and United States Merger Guidelines*, 28 CORNELL INT'L L.J. 501 (1995); see discussion of relationship between ACCC and compliance professionals including lawyers in text at note 86, *infra*.

21. The largest six law firms in Australia have between approximately 600 and 1,000 legal practitioners each (partners plus employees) and law firm size rapidly drops off after that the largest six. Only the largest thirty law firms in Australia have more than 100 lawyers. Statistics on file with the authors (collated from the records of the legal profession regulatory bodies in the various states of Australia). All of the thirty largest law firms in the US by contrast have more than 800 lawyers. Similarly, among the largest 2,321 businesses surveyed in this study, were many businesses of only approximately 100 employees. The market is small and concentrated in Australia.

22. Marc Galanter, *Mega-law and Mega-lawyering in the Contemporary United States*, in THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS, AND OTHERS 152 (Robert Dingwall & Philip S.C. Lewis, eds. 1983); ROBERT L. NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988).

23. For descriptions of the whiggish account and its problems, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (Gerald L. Geison, ed. 1983); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS' IDEALS AND LAWYERS' PRACTICES: PROFESSIONALISM AND THE TRANSFORMATION OF THE AMERICAN LEGAL PROFESSION (Robert Nelson, David Trubek, & Rayman Solomon, eds., 1992).

24. Compare John C. Coffee, Jr., *Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003) (supporting SEC's attempts pursuant to Sarbanes-Oxley to make lawyers accountable) with Jill E. Fisch

Ethics 2000,<sup>25</sup> may not be successful. It may be self-defeating because even in Australia, where lawyers still have stronger legal obligations and traditions along these lines, some lawyers will still influence their clients to take a game-playing approach to regulation. Simply increasing external regulation on lawyers that tells them to do more to promote compliance will not necessarily solve this problem since this game-playing approach may well be a fundamental style of lawyering. The Australian experience shows that even with a stronger tradition of duties to the court and legal compliance, gamester lawyers in Australia still influence their clients, while lawyers as compliance monitors are limited in their influence. This underlines our suggestion above that regulators and business clients should be careful about relying on lawyers as regulatory gatekeepers. Our data suggest they might be better to put their faith in (non-finance officer, non-lawyer) business executives and the emerging compliance profession. More fundamentally, our data raise questions about the formation of professional skills and character among lawyers: how is it that we can be teaching and socialising young lawyers into ways of professional practice in which they are expert at transferring their game-playing commitments to their clients, but not normative commitments to the value of compliance with the law—even where clients themselves want to comply and lawyers want to promote compliance?

## II. THE TWO FACES OF LAWYERS

### A. THE PROFESSIONALISM THESIS: LAWYERS AS COMPLIANCE MONITORS

There are four main mechanisms through which previous empirical and theoretical research has suggested that businesses' use of lawyers should increase business compliance with the law. We see each of these mechanisms as examples of lawyers being expected to act as 'monitors' of their clients' compliance. This use of the term 'monitor' is based in the etymology of the word from classical Latin 'monitor'—a person who suggests or advises, and the root 'monere' to advise, warn, remind.<sup>26</sup> The first two of these mechanisms represent a weaker role as monitor in the sense of being "[a] person who gives advice or warning as to conduct"<sup>27</sup> through providing information or motivation that influences business clients to comply with the law. The other two mechanisms are situations where lawyers monitor clients in the strong sense of being "[a] person who

---

& Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003) (criticizing reliance on lawyers as gatekeepers).

25. E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1, 6, 8-12 (2002); Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003).

26. See *Oxford English Dictionary Online*, (last visited accessed February 27, 2007). See text immediately below for further definition and explanation of this term.

27. *Id.*



oversees . . . [or] controls the running of other programs”<sup>28</sup> by regulating and reporting client action in a way that limits client action that is non-compliant.

The *first* mechanism is that lawyers and other professionals can influence compliance for the better by providing salient and authoritative *information* to business. This information can raise business awareness of their legal obligations or explain to them how to comply with the law in their own individual circumstances. For example, in a different context—a quantitative study of Danish farmers’ compliance with agro-environmental regulation—Søren Winter and Peter May find that the farmers’ use of professional sources of information about compliance (in this case agricultural consultants) has a “statistically and substantively noteworthy influence on awareness of rules,” which in turn affects the level of compliance with the rules.<sup>29</sup> They point out that regulatory enforcement agencies and other official sources of information “are likely to be discounted as credible sources of this information,”<sup>30</sup> but independent professionals will be seen as trusted and credible.

*Second*, Winter and May also argue that compliance information from professionals *raises regulatees’ sense of duty to comply with the rules* because it “updates regulatees’ sense of civic commitment, of the need and fairness of application of rules, and of regulatees’ beliefs about the level of other regulatees’ compliance.”<sup>31</sup> Thus a professional who clearly counsels clients against illegal behavior, and informs their client of what other businesses are doing to comply with the law, is likely to have a significant influence on their clients’ sense of social and moral obligation to comply.<sup>32</sup> Winter and May find that even though the Danish farmers they studied had initially fiercely protested the introduction of agro-environmental regulation that would substantially change their traditional farming methods, “professional sources enjoy a trust that makes farmers rely on their advice to such extent that the farmers [now] feel a moral obligation to comply with agro-environmental regulations.”<sup>33</sup> Use of a professional’s services can thus create a *motivational mechanism* that leads to greater compliance.<sup>34</sup>

*Third*, and more strongly, professionals can reduce clients’ non-compliance by *regulating* client conduct. In the simplest sense, a lawyer regulates a client’s conduct toward compliance by providing the means for the client to comply with the law, whether it be through drafting standard form contracts or providing

---

28. *Id.* “A person who oversees or observes; one who observes or comments on a process or activity, *esp.* in an official capacity to ensure that correct procedure is followed.” *Id.* In its strongest form, the exercise of power is the explicit object of monitoring.

29. Soren Winter & Peter J. May, *Information, Interests, and Environmental Regulation*, 4 J. COMP. POL’Y ANALYSIS: RES. & PRAC. 115, 135 (2002).

30. *Id.* at 121.

31. *Id.*

32. For evidence that most lawyers do try to persuade clients to avoid wrongdoing and most believe they succeed in doing so, see Levin, *supra* note 16, at 117-19.

33. Winter & May, *supra* note 29, at 136.

34. *Id.* at 120.

customized services to accomplish the client's purposes within the law.<sup>35</sup> In a stronger sense, the positive law may require that professionals act as "gatekeepers," placing them in a position to "prevent wrongdoing by withholding necessary cooperation or consent" to a client's activities.<sup>36</sup> Lawyers also regulate their clients' conduct because, for example, third parties might require that lawyers for a business "sign-off" on a deal, such as by requiring opinion letters; or a client's usual way of doing business, or the custom of a commercial community, may require that deals be "run-by" a lawyer before they are consummated. Lawyers may also control client conduct by covert means, such as by not informing clients of options or overstating the risks of different courses of action.

Lawyers can also act as gatekeepers more indirectly by training others to comply, by establishing a procedure within the organization to protect whistleblowers, and by ensuring that the compliance requirements of laws, regulations, codes, and organizational standards are integrated into the organization's day-to-day operating procedures by implementing the Trade Practices Act of 1974 (TPA) compliance systems. These compliance systems inform and motivate managers and staff. They are also a way of making sure that managers and staff identify decisions that might require professional regulation, compliance advice, or a 'sign-off' from a lawyer or compliance advisor before going ahead. Lawyers thus can institutionalize monitoring by lawyers or compliance professionals.<sup>37</sup> Here, rather than providing individual advice promoting compliance when clients ask for it, lawyers help clients regulate themselves to comply with the law.<sup>38</sup> In all these ways, the use of legal professionals can be a *regulatory mechanism* that limits or controls the behaviour of clients.

*Fourth, professionals might prevent corporate misconduct by reporting it 'up the ladder' to higher authorities within the organization or even to an appropriate person outside of the organization, such as a regulatory enforcement agency.<sup>39</sup> This is a way in which legal professionals help their organizational clients control*

---

35. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 255-92 (1990); Kagan & Rosen, *supra* note 5, at 399-443.

36. J. C. COFFEE, *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2* (New York, Oxford University Press, 2006); Gordon, *A New Role for Lawyers?*, *supra* note 5; Peter Grabosky, *Professional Advisers and White Collar Illegality: Towards Explaining and Excusing Professional Failure*, 13 U. NEW S. WALES L.J. 73, 74 (1990).

37. On the implementation of TPA compliance systems by Australian businesses and lawyers' role in promoting them, see Christine Parker & Vibeke Nielsen, *Do Businesses Take Compliance Systems Seriously? An Empirical Study of Implementation of Trade Practices Compliance Systems in Australia*, 30 MELB. U. L. REV. 441, 452-54 (2006) [hereinafter Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*]. For evaluation of whether implementation of compliance systems does lead to greater compliance, see Christine Parker & Vibeke Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?* (unpublished paper on file with the authors).

38. See Tanina Rostain, *The Emergence of "Law Consultants"*, 75 FORDHAM L. REV. 1397 (2006).

39. COFFEE, *supra* note 36; William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003); Gordon, *A New Role for Lawyers?*, *supra* note 5, at 1204-07; see generally Simon, *supra* note 5.

and integrate themselves.<sup>40</sup> Businesses create governance structures in order to control and integrate the activities of their multiple employees. One of the functions of legal professionals may be to ensure that decisions are made by the appropriate authorities within this structure by, for example, reporting-up matters when the interests of the line management are incongruent with those of the organization as an entity.

Legal professionals may also serve regulatory and integrative functions within societies by reporting out. Business actions may be incongruent with social interests. Identifying their clients as subjects of the state, professionals may report to appropriate governmental authorities about such unregulated actions. In both cases, the professional behaves as part of the operating system to oversee the running of other programs. Therefore, we might expect that where businesses seek professional advice more often, professionals are more likely to become aware of actions not properly governed by the business or the state and have the opportunity to act as *reporting mechanisms* that can lead to greater compliance.

Thus the literature suggests that lawyers have the potential to act as 'monitors' promoting their clients' compliance by providing information, motivating civic purpose, regulating certain business actions, and integrating employee and organizational activities to accord with corporate policy and the regulatory purposes of the state. Critiques of legal professional ethics in practice, however, predict that lawyers will not only fail to promote compliance in many cases, but that the use of lawyers by businesses is just as likely to actively discourage business compliance with the law. Many of the things that lawyers do for clients can just as easily be used to resist or play games with compliance as to promote compliance.

#### B. THE DEVOLUTION OF THE PROFESSIONALISM THESIS: LAWYERS DISCOURAGING BUSINESS COMPLIANCE

There are two main mechanisms by which the use of lawyers is thought to discourage compliance with the law. Lawyers may function as "gamesters,"<sup>41</sup> expanding what constitutes 'legal' compliance so that their clients do not have to bring their activities in accord with what regulators and the community see as the "purposes" of the law. Lawyers may also function as "adversarialists," motivating clients to resist law and its enforcement. They do this by utilizing the same skills and techniques as those described above as compliance "monitoring" mechanisms, to a different purpose.

*First*, lawyers may play games with the law, using their considerable expertise in interpreting and manipulating the law to *help their clients avoid or evade the*

---

40. Rosen, *Problem-setting*, *supra* note 15, at 2.

41. "Gamester" can be defined as "a person who habitually plays games for money." COLLINS CONCISE DICTIONARY (Australian Edition) (3d ed. 1995). We use this instead of more obvious term 'game-player' to indicate that lawyers may be playing multiple games at the same time (not just one 'game'), and that this is done for profit (i.e. fees obtained from clients) not fun.

*effects of the law.* Much of the “genius” of corporate lawyering is to contrive ways in which business conduct that defeats the purpose of the law can be performed “legally”,<sup>42</sup> or at least to create enough “wobble” room to make the application of law to corporate activities uncertain.<sup>43</sup> A regulator or the public might expect that the law should be interpreted or applied to business activity in a particular way, but, with the help of lawyers, business may be informed that the law can be interpreted differently, or their activities may be “regulated” (or organized) by lawyers to avoid the imposition of the law at all while carrying on business as usual.<sup>44</sup> Game-playing is an attitude where “law is seen as something to be moulded to suit one’s purposes rather than as something to be respected as defining the limits of acceptable activity.”<sup>45</sup> The client of the gamester lawyer understands the law as a potential hindrance and the search for loopholes is understood to be the proper attitude of the lawyer.

In a weak sense, game-playing occurs when lawyers provide information and advice to clients about the wobble room in the law; rather than advising about how to comply, the lawyer essentially advises how not to comply. The law may be understood as a tax and the lawyer advises how to avoid or minimize the tax liability.

In a stronger sense, game-playing is the opposite of lawyer as gatekeeper. Here, the lawyer organizes and controls the client’s activities in order to make sure that they do not have to comply with the purpose or expected effect of the law. So the lawyer drafts the documents or helps restructure the company’s activities to evade regulation. The law may be understood as a tariff and the lawyer brings in the client’s business outside the ambit of the tariff.

By its nature, it is very difficult to test in any systematic, quantitative way the extent to which, by informing clients about the law and regulating their activities, a lawyer acts as a gamester rather than as a monitor promoting compliance, because gaming what can “legally” be accomplished changes or muddies the very meaning of compliance. Gamesters present themselves as merely working

---

42. Doreen McBarnet, *Legal Creativity: Law, Capital and Legal Avoidance*, in M. CAIN AND C. HARRINGTON EDS., *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 73, 82-3 (New York University Press, 1994); M. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 L. & SOC. INQUIRY 423 (1993); see also Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067 (2007). For a good example, see J. BRAITHWAITE, *MARKETS IN VICE: MARKETS IN VIRTUE* 6, 37, 43, 48, 110-11 (Leichhardt, NSW, Federation Press, 2005) (on lawyers designing and selling schemes to evade taxation obligations).

43. Simon, *supra* note 5, at 207.

44. See Nancy Reichman, *Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy*, in *WHITE-COLLAR CRIME RECONSIDERED* 245 (K. Schlegel & D. Weisburd eds, 1992).

45. Consistent with the motivational posture of ‘game-playing’ see Valerie Braithwaite, *Dancing with Tax Authorities: Motivational Postures and Non-Compliance Actions*, in *TAXING DEMOCRACY: UNDERSTANDING TAX AVOIDANCE AND EVASION* 19; Doreen McBarnet, *When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude*, in *TAXING DEMOCRACY: UNDERSTANDING TAX AVOIDANCE AND EVASION* 229 (Valerie Braithwaite ed., 2003).

out what it means for the law to be applied, translated or negotiated.<sup>46</sup> The client of the gamester-lawyer avoids or evades regulation without having to choose to not comply. We need to look at the *attitudes and motivations* of the client (and lawyer) rather than mere technique in order to understand what is happening. By identifying games-playing by its motivational posture, we are sure to miss much non-compliance because clients and lawyers are quite capable of presenting themselves in normatively desirable ways. Similarly, those motivated to be gamesters are likely to find themselves in situations in which the use of loopholes or other legal techniques can be interpreted as consistent with compliance. Our choice to define games-playing as a motivational posture allows us to isolate the style of legal advice independent of whether or not in a particular situation its application will result in compliant behaviour. Our hypothesis is that the adoption of the gamester style will result in non-compliance because although compliance always can be gamed, it cannot always be successfully gamed.

*Second*, lawyers have been criticized for encouraging *resistance* towards legal obligations rather than cooperation with regulators to comply with the law.<sup>47</sup> Lawyers as adversarialists might actively discourage compliance by leading their business clients to focus on their rights and independence as against both regulation and regulatory enforcement agents. For example, where a client faces a regulator's query or investigation, an adversarialist might help and encourage the client to argue with the regulator and even to obstruct and delay investigation and enforcement.<sup>48</sup> Resistance towards regulation is about the businesses feeling they should 'fight for their rights' and 'curb' regulators' 'power.'<sup>49</sup>

In the weak sense of adversarialism, lawyers' advice to clients as to their rights (including the wobble room in the law as above) can demotivate clients' sense of obligation towards the law and cooperation toward the regulator. For

---

46. We would like to thank Elizabeth Chambliss for this point.

47. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); PARKER & EVANS, *supra* note 11, at 14-19 (setting out adversarial advocacy conception of legal ethics), 66-95 (on problems of excessive adversarialism); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30 (1978); DONALD NICOLSON & JULIAN WEBB, *PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS* 182-212 (Oxford University Press, 1999).

48. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (Yale University Press 1985); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candour and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998). A classic case of this type of adversarial behavior by corporate lawyers is the case of the involvement of lawyers for tobacco companies all around the world in protecting their clients from public scrutiny, government regulation, and potential plaintiff's claims, see Martha Derthick, *The Lawyers Did It: The Cigarette Manufacturers' Policy Towards Smoking and Health*, in *LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK* 281 (R. Kagan, M. Krygier, & K. Winston eds., 2002); Bruce A. Green, *Thoughts About Corporate Lawyers after Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?* 51 DEPAUL L. REV. 407 (2001).

49. Consistent with the motivational posture of 'resistance,' see Valerie Braithwaite, *Dancing with Tax Authorities: Motivational Postures and Non-Compliance Actions*, in *TAXING DEMOCRACY: UNDERSTANDING TAX AVOIDANCE AND EVASION* 18, 20 (Valerie Braithwaite ed., 2003). This is discussed further below. See *infra* note 93 and accompanying text.

example, by casting litigation as a battle, regulatory authority can be re-cast as simply a regulator's power. Or, a lawyer might motivate clients not to comply with the law by leading the client to understand their legal obligations as hindrances to be 'gamed' (as above).<sup>50</sup> This is the opposite of lawyer as monitor, providing information about the law that updates and raises clients' sense of civic obligation.

The strong sense of adversarialism is the opposite of reporting misconduct as a monitor. It is about the lawyer helping the client to hide misconduct (in the most extreme cases by destroying evidence).<sup>51</sup> Within a business, it may involve helping managers avoid taking responsibility for their actions, for example, by not tying product liability litigation costs to the unit that profits from the product.<sup>52</sup> Adversarialism also can stimulate resistance to legal enforcement, for example, making any public request for information into a major battle.<sup>53</sup> In these ways, adversarial advocacy can be the opposite of integrating the client's internal authority structure or integrating the firm with the legitimate demands of its social and legal environment. It is about ensuring the client's resistance as against these demands.

Again, it is likely to be very difficult to systematically identify and ascertain the prevalence of these types of behaviour. First, adversarialists will often pursue strategies of resistance through the deployment of otherwise legitimate legal strategies, such as using legal professional privilege to avoid disclosure of information and standing on due process rights to delay processes. Second, clients will understand their resistance to compliance as legitimate because it appears to emerge from the formal equality of an adversarial enforcement process. Adversarialism muddies the distinction between the power and authority to resist regulatory interventions. Again, our approach is to identify adversarialists by their attitudes and motivations. Our hypothesis is that those who adopt the motivational posture of resistance will find themselves working for non-compliance, at least part of the time.

Both the difference between legitimate minimization of legal obligations and civic irresponsibility in the exploitation of loopholes and the difference between legitimate resistance to governmental action and non-compliance through the

---

50. See PARKER & EVANS, *supra* note 11, at 216-22 (possible examples of this sort of behavior in Australia); Richard Zitrin & Carol M. Langford, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 74-93 (Ballantine Books 1999).

51. See Cameron, *supra* note 19.

52. A dramatic example of this was the strategy developed by asbestos company James Hardie's to completely separate the company from its liability to compensate asbestos victims by changing the legal structure of the company and moving to another jurisdiction. Suzanne Le Mire, *The James Hardie Case and its Implications for the Teaching of Ethics*, in *INNOVATION IN CLINICAL LEGAL EDUCATION: EDUCATING LAWYERS FOR THE FUTURE* 25-33 (2007); PARKER & EVANS, *supra* note 11, at 237-241.

53. See William H. Simon, *The Confidentiality Fetish* 294(5) *THE ATLANTIC MONTHLY* 113 (2004). Tobacco companies' attempts to avoid any discovery of internal documents showing they knew about the harm of smoking and the addictiveness of their products is the most obvious and dramatic example. See Cameron, *supra* note 19; RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* (Alfred A. Knopf, 1996). For other examples, see PARKER & EVANS, *supra* note 11, 219-22.

exploitation of adversarial possibilities are difficult to neutrally define or pinpoint. It is difficult to know from the outside whether legal services promote or deter compliance. But so too is it difficult to ascertain whether the client instructed the lawyer to be a gamester or adversarialist or the lawyer motivated the client to look on their civic obligations from the perspective of game-playing and adversarial advocacy.

While some lawyers may provide clients with information that enables clients to comply with the law, other lawyers may be hired guns providing information that enables clients to evade it. While some lawyers may motivate higher levels of civic virtue, others may motivate a game-playing attitude towards civic obligations. While some lawyers may regulate client conduct to conform with the law, others may organize ways for clients to violate the law with impunity. While some lawyers may urge clients to report legal problems, others may be assisting clients to resist even the most banal requests for information. The very same mechanisms that might allow 'good' lawyers to encourage compliance with the TPA also may be used by 'bad' lawyers to discourage compliance. In the following parts of this paper we examine whether lawyers do encourage or discourage compliance in practice, and if so whether this is at the client's or the lawyer's initiation.

### III. THE MECHANISMS IN PRACTICE: THE TWO FACES OF CLIENTS

#### A. RESEARCH STRATEGY

If lawyers act as compliance monitors, we would expect businesses that use lawyers more in relation to TPA compliance to comply more with the law. If lawyers act as adversarialists or gamesters, we would expect businesses that use lawyers more in relation to TPA compliance issues to comply less with the law, all else being equal. In this part of the paper we test the extent to which either or both of these propositions is true using our survey of 999 large Australian businesses. We do this in two steps:

*First*, we look at the extent to which our business respondents used lawyers at all. Where business does not want to comply, or is unaware of the compliance obligations inherent in business decisions and practices, then they may not ask a lawyer for advice and therefore there will be little opportunity for the lawyer to influence compliance one way or the other.

*Second*, we test whether the use of lawyers is associated with attitudes and mechanisms which it is hypothesized promote compliance, suggesting that lawyers act as compliance monitors, and also whether use of lawyers is associated with mechanisms which it is hypothesized promote non-compliance, suggesting that lawyers act as gamesters and adversarialists. Ideally, we might go on to test what influence the frequency of seeking professional advice in relation to TPA compliance issues has on actual compliance with the TPA. However, we have just shown that the use of lawyers can muddy the very meaning of compliance. In this context, it does not make much sense to expect to find any simple measure of

compliance.<sup>54</sup> It is more useful to look at whether and how the use of lawyers is associated with different attitudes towards compliance and different mechanisms that might promote compliance, as we do.

## B. DATA

The data we use to test these hypotheses derive from a larger study of how large Australian businesses comply with competition and consumer protection legislation. The larger study's focus is on businesses, not lawyers, and business experience of enforcement and compliance in relation to Australia's national competition and consumer protection legislation, the TPA.<sup>55</sup> The TPA applies to all Australian businesses and prohibits certain anti-competitive conduct (eg price-fixing, abuse of market power), unfair trading practices (especially misleading and deceptive advertising), non-compliance with legislated product safety standards, and unconscionable conduct in business dealings. These prohibitions are broadly worded, principles based provisions. They are not detailed rules.<sup>56</sup> Their lack of detail means they can support little potential for finding loopholes or detailed legal arguments about interpretation. The cases concern contested interpretations of facts, including economic facts, more than the law. The broadly worded prohibitions in the TPA also suggest little space for legalism with the values of the law quite apparent in the wording of the provisions.

The first part of the research involved qualitative interviews with thirty-nine current and former staff of the Australian Competition and Consumer Commission (ACCC), the regulator responsible for enforcing the TPA, twenty-four leading specialist trade practices lawyers, seven compliance advisers, and thirty business people from businesses or industries that had faced ACCC enforcement action. The purpose of the qualitative research was to establish the nature and range of the ACCC's enforcement activities, to collect evidence as to the impact of ACCC enforcement activity on business compliance, and to explore the ways in which businesses reacted to ACCC enforcement activity. ACCC staff were chosen for interviews on the basis of their seniority and experience with leading investigations in important cases. Lawyers and compliance advisers were chosen

---

54. However, it was impossible to find a reliable, meaningful, and practical measure of compliance for this purpose in this research. For further discussion of the various ways in which compliance could have been measured in this study, see VIBEKE NIELSEN & CHRISTINE PARKER, *THE ACCC ENFORCEMENT AND COMPLIANCE SURVEY: REPORT OF PRELIMINARY FINDINGS 30-64* (Canberra, Centre for Competition and Consumer Policy, Australian National University, 2005), available at <http://ssrn.com/abstract=906945> [hereinafter NIELSEN & PARKER, ACCC ENFORCEMENT].

55. NIELSEN & PARKER, ACCC ENFORCEMENT, *supra* note 54.

56. The TPA does also include more detailed rules-based provisions that apply to certain specific industries which were previously government owned and operated. We are not concerned with compliance and legal advice in relation to these specific provisions here. We are only concerned with compliance and legal advice in relation to the TPA's broad prohibitions on anti-competition conduct, unfair trade practices, and unconscionable conduct that apply to all businesses.



for interview on the basis that they were specialist trade practices lawyers who had represented clients in many significant enforcement actions and were considered leaders in their field. The business people interviewed were people who had experienced enforcement action in some of the cases identified as particularly significant on the basis of the interviews with ACCC staff. Quotations in the text of this article, unless otherwise attributed, are from these (anonymous) interviews.<sup>57</sup> A great variety of ACCC policy documents and reports of enforcement activity were also read.<sup>58</sup>

The second part of the research was the collection of quantitative data. The 2,321 largest businesses in Australia across all industries were invited to respond to a self-completion survey questionnaire, and 999 responded.<sup>59</sup> As this is a sample of the largest business operating in Australia, our respondents are likely to be the clients of the largest law firms operating in Australia, including some global law firms—and therefore our data will give us a sense of how large commercial law firm lawyers advise and influence their clients. Indeed since our sample includes the Australian branches and head offices of various multinationals, it also includes some of the most desirable, and potentially powerful, clients of many other large law firms around the world.

The survey achieved a response rate of 43%,<sup>60</sup> which compares well with average response rates for similar questionnaire research of businesses.<sup>61</sup> The

---

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

58. For further information about the methodology for this part of the research and a general preliminary analysis of this data, see Christine E. Parker & Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (Canberra, Centre for Competition and Consumer Policy, Australian National University, 2003), (available at <http://ssrn.com/abstract=906945>).

59. The questionnaire was to be filled in by the most senior person in the organization responsible for trade practices compliance, with a focus on contacting first the compliance manager, then the in-house counsel, the company secretary, the chief financial officer and, finally, the chief executive officer, in that order, as the people most likely to be able to fill out the questionnaire on behalf of the business. Forty-two percent of those who filled out a questionnaire were chief executive officers, company secretaries or chief financial officers, and a further twenty percent general counsel or compliance managers. For further information about this part of the project and its methodology, see NIELSEN & PARKER, ACCC ENFORCEMENT, *supra* note 54.

60. In fact this under-estimates the actual response rate because we cut 4.3% of the responses actually received from the study because we discovered that the respondents were too small (less than 100 employees) to fit into our sample of large businesses. If we, quite reasonably, assume that similarly 4.3% of the entire list of companies surveyed (including non-respondents) were "too small," then we would have a response rate of 45%.

61. Yehuda Baruch, *Response Rate in Academic Studies—A Comparative Analysis*, 52 HUM. REL. 421-439 (1999) (reports that the average response rate for questionnaire research where the targets for filling out the questionnaire were top managers or someone acting as a representative of a business in articles published in high quality management journals in 1975, 1985, and 1995 was 35.5%). See also Michael Bednar & James D. Westphal, *Surveying the Corporate Elite: Theoretical and Practical Guidance on Improving Response Rates and Response Quality in Top Management Survey Questionnaires*, in DAVID KETCHEN & DONALD BERGH EDs., RESEARCH METHODOLOGY IN STRATEGY AND MANAGEMENT (JAI Press, Forthcoming) (available at <http://ssrn.com/abstract=936714>).

profile of our respondents compares well with the profile of the whole list of the largest Australian businesses in terms of size and industry, suggesting that our data are likely to be representative of large Australian businesses.<sup>62</sup> The measures and questions in the survey relevant to this paper are described in more detail in the second part of the paper below.

### C. THE USE OF LAWYERS

The various mechanisms by which lawyers might promote or discourage compliance depend on the business actually seeking advice on compliance issues from a lawyer in the first place. Our survey measures use of lawyers by business in two ways: the *frequency* with which respondents seek advice in relation to TPA compliance, and the *level of expense* the respondents report that they use on lawyers.

The measure of *frequency of use* of lawyers asks respondents to rate how often their organization asked 'either internal or external lawyers or other professionals for advice about the TPA'<sup>63</sup> in regards to fourteen specified ordinary commercial activities that each raises a risk of breaching a different provision of the TPA. These fourteen activities were carefully chosen on the basis that they represented commercial activities that many businesses do engage in and might raise TPA compliance issues that warrant seeking legal advice.

The extent to which the businesses did seek legal advice when engaging in each of these fourteen activities is shown in Table A1 in the Appendix. For the purposes of the analyses reported in the following subsections, the activities have been clustered into three groups depending on whether the activity raises the risk of breach of the (a) *consumer protection* provisions of the TPA, (b) *mergers and takeovers* provisions, or (3) *anti-competitive conduct* provisions. Usually, discussions of the TPA differentiate between the consumer protection and anti-competitive conduct aspects of the Act since these are two quite different, even potentially conflicting areas, of the law with different objectives and different types of provisions. We further disaggregate the provisions concerning mergers and takeovers from the other anti-competitive conduct provisions mainly because we would expect mergers and takeovers to be an area where lawyers are often involved from an early stage in order to help their clients obtain informal ACCC clearance for the merger or takeover. Some larger businesses would have a lot of activity in this area, while others would have none at all.

---

62. NIELSEN & PARKER, ACCC ENFORCEMENT, *supra* note 54, at 12-13.

63. Note that our question asked respondents to what extent they asked 'either internal or external lawyers or other professionals for advice about the Trade Practices Act' in relation to a number of activities. The responses therefore include use of other professionals to give advice on the TPA, not just lawyers. Nevertheless since the question specifically mentioned lawyers and asked about the frequency of seeking 'advice about the Trade Practices Act', we expect that answers will mainly relate to the use of lawyers or other lawyer-like professionals, most likely in-house compliance managers or external compliance consultants. There is no market in Australia for any other professionals to provide advice on TPA compliance issues.

Our respondents were most likely to seek professional advice about TPA compliance when engaged in *mergers or takeovers* activity: more than half of those who had ever been involved in such an activity 'always' sought legal advice when it occurred.<sup>64</sup> This is not surprising since larger businesses will frequently seek an informal clearance from the ACCC where contemplating a merger or takeover to check that the ACCC will not object to the merger on the grounds that the new bigger business would mean a substantial lessening of competition in the marketplace.

Professional advice was least often sought in relation to the range of activities that we had identified as potentially raising the risk of breach of the various prohibitions on *anti-competitive conduct* in the TPA, including price-fixing and market-sharing agreements, misuse of market power, exclusive dealing, and resale price maintenance.

The activities asked about in relation to *consumer protection* are necessarily broader since the main provision protecting consumers in the TPA is a prohibition against misleading and deceptive conduct.<sup>65</sup> Allegations of misleading and deceptive conduct often revolve around advertising so we ask about the use of lawyers in relation to checking advertising. We also ask about the use of lawyers in relation to putting new products on the market because it is when a product is developed, and its labeling and advertising strategy first conceived, that misleading and deceptive conduct might also be conceived. We would also expect the product safety requirements of the TPA to be considered and designed in at this product development stage, and therefore legal advice might be relevant for that reason too. Around a third of those who ever put a new product on the market 'mostly' (14.5%) or 'always' (14.7%) sought professional TPA compliance advice in relation to those activities, with about a quarter 'sometimes' (26.4%) doing so.<sup>66</sup> Similar proportions of those who ever produced advertising materials 'mostly' (13.5%), 'always' (13.4%) or 'sometimes' (39%) sought professional TPA compliance.<sup>67</sup> This reflects the fact that some businesses choose to make sure that all marketing materials and new products are 'legalled' before being made public.

The measure of *level of expenses* used on lawyers was a single question that asks respondents to rate<sup>68</sup> how large they believe to be the costs of compliance with the TPA for their organization in relation to 'expenses on lawyer and/or compliance professionals whenever we have plans or ideas that are relevant to the Trade Practices Act.'<sup>69</sup> Just under one third of the respondents (29%) reported their expenses in this area to be large or very large. Almost one half (54.5%)

---

64. 30.5% always sought professional advice when 'thinking about merging with another organization' and 31.5% always sought professional advice in relation to 'plans about the takeover of another organization.' See Table A1.

65. Trade Practices Act, 1974, § 52 (Austl.).

66. See Table A1.

67. See *id.*

68. On a 5 point scale from "very small" to "very large."

69. Again this question asks about both "lawyers and/or compliance professionals." For the same reasons as set out in note 63, we believe that the answers to these questions will relate mainly to expenses in relation to legal professionals and others who provide legal advice.

reported their expenses on legal services to be small or very small.<sup>70</sup>

These two measures are significantly and positively correlated with one another, giving us some confidence in their reliability.<sup>71</sup> However, since they measure slightly different things—behaviour versus expenditure—and are therefore likely to be biased in slightly different ways, we use both throughout our analysis as a check on one another.

#### D. THE FOUR MECHANISMS FOR MONITORING COMPLIANCE

Rather than asking *lawyers* whether they perform these monitoring functions for their business clients, our survey asked *businesses* how much they used lawyers (as described above) and then separately asked them to rate the extent to which the four mechanisms that we hypothesize promote client compliance are present in their business. This means that we can statistically test the extent to which the use of lawyers is associated with each of these mechanisms without having to rely on either businesses or lawyers, with their inherent biases, to rate their opinion of how much lawyers in fact promote compliance. If lawyers do in fact behave as compliance monitors for their clients, then the more frequently businesses use lawyers, the more we would expect them to report that they also have in existence the four monitoring mechanisms: compliance information, compliance motivation, internal corporate regulation of compliance, and reporting up of potential non-compliance.

We also do the same in relation to the mechanisms that it is hypothesized promote non-compliance (in the following subsection).

Table One below shows how we measure each of the four mechanisms that should promote business compliance and the two mechanisms that should discourage business compliance. (These measures are set out in more detail in Tables A2 to A4 in the Appendix). Table One also shows that each of the positive mechanisms is associated, as expected, with greater use of lawyers. However, the use of lawyers is also associated with mechanisms that discourage compliance.<sup>72</sup>

---

70. 977 respondents answered this question. The remainder marked "neither."

71. Pearson Correlations were calculated between the expenses spent on lawyers and/or compliance professionals and each of the three groups of activities included in the questions on the frequency of seeking professional advice. The Pearson Correlation (i.e. Pearson's Product Moment Correlation Coefficient) is a measure of strength of the linear correlation between two variables with 0.00 representing no correlation and 1.00 representing perfect correlation. Here and in all other places in this paper showing Pearson Correlations: \*\* = sig. 0.01; \* = sig. 0.05 (two-tailed); and statistics shown without asterisk are not significant. The Pearson Correlations between expenses spent on lawyers and/or compliance professionals and frequency of seeking professional advice in relation to activities raising the risk of breach of the consumer protection, mergers and takeovers, and anti-competitive conduct were 0.435\*\*, 0.432\*\* and 0.436\*\* respectively.

72. Since use of lawyers correlates with size (see Table A3) and some of the mechanisms for compliance and non-compliance might also correlate with size (such as implementation of compliance system elements), we also made some simple regression analyses controlling for size to check whether the significant correlations reported in Table 1 would disappear once size was taken into account. This was not the case (statistics on file with the authors).

**TABLE 1:  
CORRELATIONS BETWEEN USE OF LAWYERS AND DIFFERENT POSITIVE AND  
NEGATIVE MECHANISMS FOR PROMOTING COMPLIANCE AND NON-COMPLIANCE<sup>73</sup>**

Mechanisms by which Lawyers Promote Compliance and Non-Compliance	Frequency of seeking TPA compliance advice concerning ..			Expenses on Lawyers and/or Compliance Professionals
	Consumer Protection	Mergers and Takeovers	Anti-Competitive Conduct	
<b>1. Mechanisms Promoting Compliance<sup>74</sup></b>				
<b>1.1 Information and Advice</b>				
Lawyer formed organizational awareness	0.365**	0.436**	0.380**	0.457**
Employees know TPA	0.348**	0.251**	0.308**	0.298**
Employees understand TPA	0.334**	0.255**	0.304**	0.238**
<b>1.2 Raise Sense of Duty to Comply</b>				
Management priority to obeying TPA	0.289**	0.249**	0.327**	0.233**
Normative commitment to TPA compliance	0.129**	0.173**	0.144**	0.054
<b>1.3 Gatekeeper Controls</b>				
Compliance system implementation	0.516**	0.366**	0.515**	0.486**
Compliance management in practice	0.385**	0.281**	0.394**	0.322**
<b>1.4 Reporting Misconduct</b>				
Better tools for monitoring our organization	0.257**	0.215**	0.294**	0.293**
<b>2. Mechanisms Promoting Non-Compliance<sup>75</sup></b>				
<b>2.1 Avoiding or Evading the Law (Game-Playing)<sup>76</sup></b>				
My organization spends time figuring out how we to get what we want without directly breaching the TPA	0.187**	0.158**	0.182**	0.271**
Wise organization uses loopholes	-0.011	-0.043	-0.083*	-0.018
<b>2.2 Resistance (Adversarialism)</b>				
Lack of senior management priority to keeping good relations with the ACCC	-0.257**	-0.224**	-0.305**	-0.232**
Most managers believe we should stand up to the ACCC	0.116**	0.098**	0.116**	0.115**

73. Statistics shown are Pearson Correlations as explained at note 71. \*\* = sig. 0.01; \* = sig. 0.05 (two-tailed); and statistics shown without asterisk are not significant.

74. See Tables A2 and A3 in the Appendix for a detailed description of each of these measures, and mean responses to them.

75. See Table A2 in the Appendix for a detailed description of each of these measures, and mean responses to them.

76. This row shows the associations for both items shown below added together as an index.

As section 1.1 of Table One shows, use of lawyers and expenses on legal services are both strongly associated with the first mechanisms by which lawyers can promote compliance—compliance *information*. Respondents were asked to rate the degree to which their lawyers have “formed your organization’s awareness of the Trade Practices Act over the years”, whether or not the employees “who needed to know were well informed about the TPA”, and also whether employees “understood the philosophy and economic principles behind the TPA.”<sup>77</sup> The use of lawyers strongly correlates with each of these measures. This suggests that lawyers are instrumental in providing awareness and knowledge of the TPA. It also suggests that their advice is not solely and narrowly legalistic but rather grounds a broad understanding of the principles behind the TPA.<sup>78</sup> However, these findings are neutral with respect to the question of how the information provided by the use of lawyers is used in regards to compliance behaviour. We discuss this further below.

As section 1.2 of Table One shows, greater use of lawyers and expenditure on lawyers is also associated with greater *motivation* to comply, measured in terms of how much of a priority to management is TPA compliance, and also managers’ *normative commitments* towards TPA compliance.<sup>79</sup> Our respondents agree on the importance and desirability of compliance with the TPA, as might be expected.<sup>80</sup> However, we also find that the more frequently the respondents seek professional advice on all aspects of the TPA, the more likely they are also to report that compliance is a priority for the business and that management has strong normative commitment to comply with the TPA. We discuss below the extent to which this is likely to be a matter of lawyers influencing clients or

---

77. The exact questions used for each of these measures and mean responses to the questions are shown in Table A4 in the Appendix.

78. We cannot be certain here whether it is the lawyers who provide information and understanding to their clients, or whether it is clients with greater information and understanding who use lawyers more. However, in another question we also asked respondents to rate the extent to which lawyers formed their organizational awareness of the TPA. A high rating on this question correlates with respondents also reporting that their employees both knew and understood the TPA which suggests that it is the lawyers influencing the clients rather than the other way around: the Pearson Correlation between “lawyers formed organizational awareness” and “employees well-informed about the TPA” is 0.371\*\*, and for “lawyers formed organizational awareness” and “employees understand the TPA” it is 0.309\*\*.

79. This measure is a sum of eight questions reflecting managers’ beliefs about the desirability of the TPA and its policies and feelings of moral obligation to comply with the TPA which should reflect the posture that will guide particular decisions. This measure is similar to Valerie Braithwaite’s ‘motivational posture’ of ‘commitment.’ See v. Braithwaite, *Dancing with Tax Authorities: Motivational Postures and Non-Compliance Actions*, in VALERIE BRAITHWAITE ED., *TAXING DEMOCRACY: UNDERSTANDING TAX AVOIDANCE AND EVASION* 18, 20 (2003). The exact questions used for each of these measures and mean responses to the questions are shown in Table A2 in the Appendix. Note that there is no significant correlation between normative commitment and expenses on lawyers and compliance professionals (unlike frequency of seeking TPA compliance advice).

80. See Table A2 for the actual levels of agreement with the various statements about normative commitments to compliance. See, e.g., Robert J. Fisher & James E. Katz, *Social-Desirability Bias and the Validity of Self-Reported Values*, 17 *PSYCHOL. & MARKETING* 105 (2000) (self-reports are biased toward conformity with cultural values).

clients hiring lawyers because of clients' own predisposition to comply.

Section 1.3 of Table One examines whether use of lawyers and expenditure on lawyers is associated with companies doing more to organize and *regulate* themselves to comply with the TPA. We find that the more organizations use lawyers, then the more aspects of a TPA compliance system they have implemented.<sup>81</sup> Moreover, they have implemented them in a way that suggests a will to use them effectively in practice.<sup>82</sup> Organizations that have TPA compliance systems will usually have internal systems and staff that make it easy to seek professional advice on TPA compliance issues, so implementation of a compliance system in itself is likely to create more use of lawyers. But this is not necessarily inconsistent with the argument that it is lawyers and other professionals acting as monitors whose advice prompts business implementation of a TPA compliance system in the first place. Implementation of a TPA compliance system is a technical and systematic endeavor that businesses are only likely to enter into if they are advised to do so by a lawyer or other professional. For example, although most businesses have complaints handling systems in place, most have not ventured beyond this (see Table A3). Businesses are only likely to implement more fulsome compliance systems as a result, and with the guidance, of professional advice. Businesses spend on compliance systems and training when they have primed the pump with expenses paid to lawyers and other

---

81. Measured as shown in Table A3 in the Appendix. The questionnaire asked respondents to provide yes or no answers to a series of 21 very specific questions about whether their organization had implemented various procedures, actions, and behaviors expected to be part of a good compliance system. The elements comprise systems for complaints handling, communication and training, management accountability, whistle-blowing, and compliance performance measurement and discipline. These elements were derived from a review of the literature on what makes for an effective compliance system based on CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 197-244 (2002) and the literature cited therein [hereinafter PARKER, *THE OPEN CORPORATION*]. See also Christine Parker & Vibeke Lehmann Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?*, (2007) (on file with authors). For further detail and justification of these four measures, see Parker & Nielsen, *Do Businesses Take Compliance Seriously?*, *supra* note 37.

82. The implementation of a compliance system can be used to instantiate a substantive commitment to compliance, or it can be a purely formal, symbolic activity that deflects attention away from non-compliance, see BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* 158-217 (1993); Kimberly Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 501-02, 510-15, 541-42 (2003); DAVID McCAFFREY AND DAVID HART, *WALL STREET POLICES ITSELF: HOW SECURITIES FIRMS MANAGE THE LEGAL HAZARDS OF COMPETITIVE PRESSURES* 176, 184 (1998); PARKER, *THE OPEN CORPORATION*, *supra* note 81; JOSEPH REES, *REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY* 58 (1988). Therefore our second measure (shown in Table A2 in the Appendix) of internal regulation of compliance is composed of questions that address behavioral responses to compliance problems. These responses are more subjective than those ticking off whether or not a compliance element is in place, but they capture attitudes towards the compliance system. The 'compliance management in practice' measure gives some indication as to whether or not the compliance system is mere window-dressing or exercises more control in compliance decision-making. For further discussion and justification of the value of differentiating compliance management in practice from compliance system implementation on these data, see Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*, *supra* note 37.

compliance professionals.<sup>83</sup>

We have no data in relation to reporting out of misconduct, but we do ask our respondents about the *reporting up* of potential compliance problems. They were asked whether or not one of the benefits of complying was that it resulted in “better tools for monitoring our organization.”<sup>84</sup> As Section 1.4 of Table One shows, use of lawyers and expenditure on lawyers were correlated with this capacity for improved organizational integration.

Our data verify the existence of the mechanisms by which the literature argues that lawyers monitor client compliance. The more lawyers are used, the more clients are informed about the law (measured in terms of awareness, knowledge and understanding)—the informational mechanism. The more lawyers are used, the higher is the reported sense of duty to comply (measured both as a managerial priority and as a normative commitment)—the motivational mechanism. The more lawyers are used, the more compliance system elements are in place and the stronger is compliance management in practice—the regulatory mechanism. The more lawyers are used, the better is the organization monitored—the reporting-up element.

This also fits with much of what we were told in our qualitative interviews with Australia’s elite specialist trade practices lawyers and senior ACCC staff. Almost all lawyer interviewees reported that their clients were keen to comply and also stated that they regularly advised clients to implement a Trade Practices compliance system. The regulator also believes that professional lawyers and compliance consultants are likely to be effective monitors promoting compliance. In May 2004 ACCC Deputy Chair Louise Sylvan told a gathering of in-house lawyers that they should contact the ACCC whenever dealing with potential breaches of the TPA, especially in gray areas of the law.<sup>85</sup>

The ACCC was also instrumental in prompting the development of a compliance profession to advise business on how to marry their regulatory compliance obligations under the TPA and their business concerns. The ACCC makes an effort to take advantage of opportunities to communicate with trade practices lawyers and compliance professionals in order to create a ‘regulatory community’ in which the ACCC’s expectations are made clear to lawyers and compliance professionals so that they can be communicated on to business.<sup>86</sup> This regulatory community not only shares information and regulatory tech-

---

83. Indeed, our data show a significant correlation between respondents’ ratings of the ‘costs of compliance systems and training’ and each of our measures of the frequency of using lawyers and expenses spent on lawyers. (Statistics on file with the authors).

84. See Table A2 for the exact question and mean responses.

85. Tracy Lee, *In-house Lawyers Urged to Alert ACCC*, 23 AUSTL. FIN. REV. 62 (2004).

86. Christine Parker, *Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime*, 26 J. L. & SOC’Y 215, 226-27 (1999); PARKER, *THE OPEN CORPORATION*, *supra* note 81, at 247. For example, every year senior members of the ACCC attend a national conference workshop organized by a network of elite trade practices lawyers where ACCC staff and lawyers discuss their interpretations of



niques, but also motivates its members to motivate their company clients. This regulatory community also seeks to further reporting by professionals to the regulator.

These findings would suggest that the more companies use lawyers, the more they comply with the law. But that is not the whole story. As we have seen, as a theoretical matter, the same mechanisms, with the employment of different strategies and motivations, can lead to non-compliance. Before concluding that lawyers generally promote compliance, relegating the scandals to the behaviour of bad apples, we need to test whether using legal services was also associated with client commitments to game-playing and adversarial advocacy.

#### E. GAME-PLAYING AND ADVERSARIALISM

Lawyers can supply clients with information that leads them to avoid or evade the law. Lawyers can help clients regulate their activities so that they are technically compliant, but only in the most 'legalistic' of senses. We labeled lawyers as 'gamesters' when they used their expertise to promote legal non-compliance. Lawyers can portray the law in ways that lead their clients to be unmotivated to comply with it. Lawyers can portray the regulator in ways that lead their clients to take a resistive posture towards it. We labeled lawyers as 'adversarialists' when they used their expertise to assist their clients to resist the law and its enforcement when cooperation might have been more appropriate.

First, we test whether the use of lawyers is associated with a game-playing approach that seeks to *avoid or evade compliance* with the law. The respondents were asked about their organization's behaviour and whether their "organization sometimes spends time and resources figuring out how to get what we want without directly breaching" the TPA, and also whether "[a] wise organization uses the loopholes on the law."<sup>87</sup>

As shown in section 2.1 of Table One, greater use of lawyers, and expenditure on lawyers, strongly correlates<sup>88</sup> with expenditures on "figuring out" ways not to "directly breach" the TPA. Our respondents, therefore, seem to use lawyers to enable them to actually breach the TPA, without 'legally' breaching it. The question, however, also might be read to refer to instances in which a legal face was put on proper conduct and there was no masking of any impropriety. As we have noted, it is difficult to neutrally define the difference between game-playing and other lawyering.

There is no significant positive relationship between use of lawyers and expenses on legal services, and whether respondents thought that using loopholes

---

provisions of the law, how they should apply to business, and the merits of various cases that have been recently decided.

87. These measures are set out in Table A2 in the Appendix.

88. All are significant at the 0.01 level.

was wise.<sup>89</sup> This is surprising in light of the previous result. This could be because the use of the word “loophole” in the questionnaire elicited more of a social-desirability bias in the responses than the other items reported in section 2 of Table 1.<sup>90</sup> This different finding suggests the central (and contested) value of “loopholes” to compliance behaviors.<sup>91</sup> Indeed not seeing loopholes as non-compliance (using loopholes without seeing them as ‘loopholes’) might be the precise mechanism that lawyers bring to those clients who are not oriented to legal compliance—to see the use of loopholes as following the dictates of statute. As we shall see below, there is some evidence that lawyers (together with Chief Financial Officers) are more likely to agree that a wise organization uses ‘loopholes’ than are other business managers.<sup>92</sup>

Second, we test the relationship between an adversarial attitude on the part of clients and use of lawyers. Promoting client attitudes of *resistance* to regulation and regulators is what distinguishes adversarial advocacy from compliance-oriented lawyering. Respondents were therefore asked to rank the priority to their organization of ‘keeping good relations with the ACCC,’ the TPA’s regulator.<sup>93</sup> They also were asked whether managers ‘believe that we should stand up to the ACCC when we can.’ As section 2.2 of Table One shows, the more frequently our respondents seek professional advice on the TPA, and the more they spend on legal services, the more likely they are to have an attitude of resistance towards the ACCC.<sup>94</sup> This finding holds true across all three categories of type of advice and also expenditure on lawyers.

We have seen evidence that lawyers may act as compliance monitors but equally we find here evidence that lawyers might provide advice, motivational influence, and other services that assist avoidance, evasion and resistance towards the TPA. There is also evidence from the qualitative part of our study to support this ‘face’ of lawyering, just as there was qualitative evidence supporting lawyers’ role as compliance monitors.

For example, the ACCC clearly believes that, in at least some cases, lawyers have been significant contributors to business breaches of the TPA. In a number of cases they have taken enforcement action against a lawyer for aiding and abetting a client’s breach of the TPA at the same time as taking enforcement action against the client for the main breach. In at least one case, the ACCC brought an aiding and abetting action against a lawyer who allegedly provided a

---

89. Apart from a weak relationship with respect to using lawyers in relation to conduct that might breach the anti-competitive conduct provisions of the TPA.

90. As Table A2 shows, fewer respondents were overall less willing to score themselves higher on this item than the other negatively stated items measuring games-playing and resistance.

91. See Fisher & Katz, *supra* note 80 (The degree to which self-reports are influenced by the social-desirability bias reflects the relative importance of the value).

92. See *infra* note 128 and accompanying text.

93. The exact measures are shown in Table A2 in the Appendix.

94. All are significant at the 0.01 level.

client with information and advice that allowed the client to evade the law.<sup>95</sup> In other cases, the ACCC has brought actions against lawyers who allegedly 'regulated' client conduct by drafting contracts that breached the competition provisions of the TPA.<sup>96</sup> The ACCC has also brought actions against lawyers who acted for both the vendors and purchasers (despite the conflict of interest) in an alleged scam involving the sale of property at inflated prices rather than disclosing the conflict of interest to the purchasers.<sup>97</sup>

There have also been a number of cases in which the ACCC believes that lawyers have been complicit in business resistance to cooperation with the ACCC's investigation and enforcement processes, and that lawyers have even been involved in obstructing enforcement proceedings.<sup>98</sup> In November 2005,

---

95. In an unconscionable conduct case, a lawyer was sued for providing advice aiding and abetting unconscionable conduct by a shopping landlord towards a tenant: the lawyer helped the landlord client get around a prohibition on requiring the tenant to pay a premium known as 'key money' for a new lease by having the extra money paid to another company. Enforcement against the lawyer was eventually withdrawn. *ACCC v. Samton Holdings Party Ltd.* (2000) 41 ATPR (Austl.) (2000). See also Eileen Webb, *Fayre Play for Commercial Landlords and Tenants: Lessons for Lawyers*, *AUSTL. PROP. L. J.* 99 (2001); *The Law Report: The ACCC Sets Sights on Lawyers*, (ABC Radio, broadcast June 15, 1999).

96. The ACCC has taken action against a lawyer for aiding and abetting price-fixing where the lawyer drafted a contract that the ACCC alleged contained provisions breaching the anti-competitive conduct provisions of the TPA. *ACCC v. Real Institute of Western Australia* (1999) ATPR 41-673 (Austl.). The solicitor in this case agreed to court declarations that he was knowingly concerned in price fixing and to orders that he refrain from engaging in similar conduct in future and take part in trade practices compliance education program. In a similar matter the ACCC settled a case with Mr. Miller, a law firm partner, for aiding and abetting a client to breach the TPA by preparing standard contracts that allegedly breached the prohibition on third line forcing. *ACCC v. Miller* (1998) F.C.R. No. WG84 (Austl.) (orders were made by consent and no judgment is available); see also Media Release 054/99, *Action Against Lawyer Highlights Risks for Legal Profession ACCC* (May 7, 1999).

97. In an unconscionable conduct case the ACCC took enforcement action against a number of people and institutions, including two solicitors, for their parts in a misleading and deceptive property-marketing scheme. The solicitors acted for customers buying property at an inflated price under the scheme. The ACCC alleged that the solicitors were essentially part of the scheme, acted for the property marketers as well as their customers, and knew that it was a scam. *ACCC v. Oceana Party Ltd.* (2001) F.C.A. 1516 (Austl.) (Unreported, Justice Kiefel); *ACCC v. Oceana Party Ltd.* (2004) FCAFC 174. Findings were made against one of the solicitors, but the judge could not make any orders against him under the Trade Practices Act. Much later (July 11, 2005) the lawyer entered into an enforceable undertaking with the Queensland Department of Fair Trading in relation to failure to properly disclose to clients a relationship between himself and the vendor of property being sold to the clients. On March 28, 2006 a real estate industry group reported that a number of other Queensland lawyers had also been required to enter into enforceable undertakings for similar conduct. One lawyer was disciplined by the Legal Services Commission. See Tim O'Dwyer, *Serial Offending Solicitors*, *JENMAN* (March 28, 2006) (available at [www.jenman.com.au/NewsArticlesPrint.php?id=180](http://www.jenman.com.au/NewsArticlesPrint.php?id=180)).

98. This is the reason that the ACCC took a particular interest in the allegations of lawyer misconduct raised in *McCabe v. British American Tobacco Australia Services Ltd* (2002) V.S.C 73 (Austl.) (Unreported, Justice Eames). In that case lawyers were implicated in helping a big tobacco company develop a document 'retention' policy that ensured that damaging documents would not be available for discovery to be used against the company in future negligence litigation. Soon afterwards the ACCC announced that they would be investigating the conduct of the lawyers for possible breaches of the TPA: Media Release 076/02, *Tobacco decision—ACCC investigates* (April 12, 2002) (ACCC, Canberra). See also Cameron, *supra* note 19. The original McCabe decision finding that British American Tobacco Australia Services had destroyed documents relevant to McCabe's case and then mislead the court about the extent of the destruction was overturned on appeal in

ACCC Chairman Graeme Samuel warned trade practices lawyers that “[t]actics to frustrate the Australian Competition and Consumer Commission in its enforcement of the competition law would draw an aggressive response.” The Chairman commented that:

It has come to our attention that some legal advisers are interpreting our desire for speedy litigation as an invitation for them to delay litigation in the hope this will persuade us to back off . . . We are aware of the legal firms employing these tactics and I want to send a warning to them that we are becoming increasingly intolerant of their attitude. We anticipate that the Federal Court will be sympathetic to approaches by the ACCC to counter these tactics.<sup>99</sup>

In the same media release and speech, the Chairman also warned against misleading (but not necessarily inaccurate) responses to ACCC investigations.

Not surprisingly none of the lawyers interviewed for this research admitted to aiding and abetting clients in illegal practices or the obstruction of justice. However we did examine one case in which the ACCC initiated (but later withdrew) enforcement action against a solicitor for providing advice to a client that aided and abetted unconscionable conduct in breach of the TPA. One lawyer we interviewed about the impact of the case commented that this case would not stop them giving advice like that given by the lawyer who was prosecuted but that they “would give it chapter and verse now” in order to create a documentary trail that it was “legal”.<sup>100</sup> This response suggests a lawyer who is more interested in protecting him or herself from complicity with a client they assume wants to evade the law than a lawyer who is seeking to influence clients towards compliance.

#### F. TWO FACES OF CLIENTS?

How do the apparently inconsistent significant positive relationships between the use of lawyers and both the use of monitoring mechanisms and the presence

---

British American Tobacco Australia Services Ltd. v. Cowell (2002) 7 V.R. 524 (Austl.). The ACCC appears to have never publicized any outcome to its inquiry into the culpability of the lawyers. However in 2006 an internal document from the law firm investigating allegations of misconduct was leaked to a newspaper. If true, this memo reports that there was significant evidence of serious misconduct by lawyers in the firm. William Birnbauer, *Cheated by the Law*, THE SUNDAY AGE (Melbourne), October 29, 2006, at 1.

99. Media Release MR 270/05, ACCC Warns of Aggressive Response to Tactics to Frustrate Law Processes (November 11, 2005) (available at <http://www.accc.gov.au/content/index.php/ml/itemId/714142/fromItemId/2332>); see also Graeme Samuel, Competition Law Conference, The Enforcement Priorities of the ACCC (November 12, 2005). It seems that the ACCC was threatening to bring abuse of process or even contempt of court allegations against lawyers who used legal maneuvers inappropriately to delay enforcement proceedings.

100. Interview by Christine Parker with anonymous lawyer, Perth (February 2003). The case was ACCC v. Samton Holdings Party Ltd. (2002) 17 F.C.R. 301 (Austl.). See Michelle Sharpe & Christine Parker, The ACCC Enforcement and Compliance Project: Assessment of the Impact of ACCC Regulatory Enforcement Action in Unconscionable Conduct Cases 27 (November 2006) (unpublished manuscript, on file with Centre for Competition and Consumer Policy, Australian National University, Canberra) [hereinafter Sharpe & Parker, The ACCC Enforcement and Compliance Project].

**TABLE 2:**  
**TWO DIFFERENT GROUPS OF CLIENTS—TESTS OF CORRELATION BETWEEN**  
**NORMATIVE COMMITMENT, GAME-PLAYING AND RESISTANCE ATTITUDES<sup>101</sup>**

	Normative Commitment
Game-Playing	
My organization spends time figuring out how to get what we want without directly breaching the TPA	-0.142**
Wise organization uses loopholes	-0.347**
Resistance	
Lack of management priority to keeping good relations with the ACCC	-0.186**
Most managers believe we should stand up to the ACCC	-0.118**

of negative attitudes towards compliance fit together? Apparently, the use of lawyers is related to the promotion of compliance and *also* to game-playing with and resistance to the TPA. To explore this relation, we use the variable of normative commitment to TPA compliance as a summary statistic for the various mechanisms by which the use of lawyers can promote compliance. We find that there is a significant negative correlation between normative commitment to TPA compliance and each of the two measures of resistance to the TPA regulator (see Table 2). Similarly there is a significant negative correlation between normative commitment to the TPA and both measures of game-playing with the TPA. Remember, as shown in section 2.1 of Table 2, that whether or not a wise organization uses loopholes is not significantly related to the use of lawyers. It is, however, significantly and negatively related to normative commitment to TPA compliance.

These findings mean that we can demarcate two different groups of business respondents with different attitudes towards TPA compliance—those with an attitude of normative commitment towards TPA compliance and those with an attitude of games-playing with the TPA or resistance to the ACCC. If client demand determines what services lawyers supply, then there are indeed two faces to the type of professional advice offered by lawyers. Advice to some businesses is likely to be focused on either resisting the ACCC's interpretations of the TPA or gaming the TPA, while advice to other businesses will be more focused on figuring out how to comply with the spirit of the law for its own sake. If client demand determines what lawyers supply, because clients have two faces, lawyers will appear to have two faces. But each lawyer's face is merely a mirror of his or her client's face.

<sup>101</sup>. Pearson Correlations as explained *supra* note 71.

On the other hand, it may be argued that we find two groups of clients because lawyers have influenced clients into two different groups. Some lawyers produce clients who are normatively committed to compliance. Others produce clients who game or resist the law. In this story, not only do the normative commitments of lawyers matter, but they dominate and shape client attitudes to the law.

It is clear that either way the normative commitments of clients matters to compliance behaviors. The question is: do the normative commitments of lawyers have any influence on them? This is the topic of the third part of the paper.

#### IV. TWO-FACED LAWYERS OR ONLY TWO-FACED CLIENTS?

##### A. TO WHAT EXTENT DO ATTITUDES TOWARDS COMPLIANCE ORIGINATE IN LAWYER RATHER THAN THE CLIENT?

When faced with the potential for moral responsibility for irresponsible company behaviour, lawyers are quick to retreat into an affirmation that they are merely agents of their clients.<sup>102</sup> According to them, it is the client who seeks out a lawyer to be a compliance monitor, adversarialist or gamester. Lawyers act responsibly in being faithful agents, carrying out the tasks in the manner determined by their principals. They argue that their capacity to influence clients is highly limited and they are to be excused as long as they advised within the rather flexible limits of the law. They argue for a demand-driven understanding of the legal market.

Thus, in our qualitative interviews with Australia's elite specialist trade practices lawyers, we find lawyers telling us both of clients that are keen to comply and of those that will always violate the law. Most lawyer interviewees reported that most of their clients were keen to comply:

[Our clients] approach us all the time with proposals and ask how to comply with the Act. Or they come up and say, 'We have this, will it breach?' *They do not want to breach.* Most want to comply—they are very cautious—but they still want to be able to do their business from a business point of view. They want a sign off to go ahead (which doesn't mean just a sign-off on whatever they put in front of us—you [as lawyer] can re-structure things [to make sure it complies]).<sup>103</sup>

But we also have examples of lawyers who assume that their clients are 'bad' actors who will always seek to avoid, evade or resist compliance, no matter who their lawyers are. These lawyers see very strong limits on what they can supply to their clients. At best, they can resist demand by deterring the most extreme of breaches and can shape demand only by putting a good face on the rest (for the sake of both the client and themselves). The lawyer quoted above who would now give suspect legal advice "chapter and verse" was an example of this.<sup>104</sup>

102. See, e.g., Mann, *supra* note 48.

103. Interview by Christine Parker and Natalie Stepanenko with anonymous lawyer, Sydney (April 3, 2003) (emphasis added).

104. *Supra* note 100 and accompanying text.

Similarly, in an interview with another lawyer about a very high profile misuse of market power (predatory pricing) case, the lawyer commented that the main lesson from the ACCC's vigorous attempts to enforce the law was that clients will violate the law:

From a compliance perspective [the lesson] is very easy. Do not use purple prose in internal company communications . . . First, be careful with your internal communications, and second, even though there is a fine line between tough hard competition and exclusionary conduct, in practice, the conduct is identical—it is the purpose that is different . . . the conduct is going to be the same, so the only thing the ACCC and the court can look at is internal communications . . . You can be ruthless as you like in beating down the competition but you can't say 'knock out' the competition . . . Be careful what you put down on paper. At the end of the day it is what you write. People tend to get a bit emotional in a time like that [competition] and do a lot of chest beating. You are trying to protect them from themselves. You are trying to prevent them from doing the wrong thing and at the same time protecting them.<sup>105</sup>

These two quotations stand in stark contrast to one another. Yet, both lawyers are alike in eliding the possibility of lawyers influencing client commitments. In both cases the lawyers see themselves as only providing the means for compliance or non-compliance, not influencing client ends. The claim that lawyers discourage business compliance, like the one that lawyers influence compliance, involves lawyers influencing not just what clients do, but what clients seek to do in regards to compliance. Lawyers deny this by asserting that there is a fit between lawyer behavior and client interests.<sup>106</sup> Lawyers say they act as they do because that is what the client wants, and the client will find another lawyer to so act should this lawyer refrain.

Lawyers readily admit that clients have two faces, although most speak of their own clients in saintly terms (except in regards to paying the bills). When it is asked, 'Where were the lawyers?' they reply, 'Serving client interests.' They deny the hope that lawyers can influence client attitudes towards compliance.

But, are lawyers correct? Below we turn the tables and examine whether client goals and lawyer advice are aligned from the clients' perspective. Because our data derive from clients, we are able to segregate client commitments from those of the lawyers whom they employ. Because some of the respondents were lawyers, we can compare lawyer commitments to those of non-lawyer business executives. Do clients get the types of lawyers they seek? Or do lawyers, to some extent, pursue their own compliance agendas?

---

105. Interview by Christine Parker and Natalie Stepanenko of an anonymous lawyer, Melbourne (December 12, 2002).

106. This is the traditional adversarial conception of the lawyer's role as being solely to advance the interests of the client. *See supra* note 47.

## B. RESEARCH STRATEGY

*First*, we compare our business respondents' own attitudes towards compliance with their beliefs about their lawyers' attitudes on compliance. If the agentic denial of responsibility is correct, then clients need not have any concerns about what their lawyers believe regarding compliance. And, if the client were to consider their lawyer's attitude, the client would expect (if not demand) that it be the mirror of their own.

*Second*, we compare compliance attitudes and activities at the companies by whether or not the questionnaire was filled out by a lawyer. In general if we find differences, then we might conclude that the professional indeed influences the client's compliance behaviour. This finding would lead us to be skeptical of any lawyer claims that they have no capacity to prevent or mitigate company irresponsibility.

## C. DO CLIENTS WORRY ABOUT WHAT THEIR LAWYERS THINK OF THEM?

The agentic denial of responsibility does not only deny that lawyers have the capacity to influence clients but also that whatever lawyers bring to the representation—in terms of values, character, or other pre-dispositions—does not matter. It holds that clients seek faceless agents. In hiring lawyers, clients are hiring ciphers to perform technically difficult, but impersonal, tasks. In the agentic excuse, there may be two faces of clients, but lawyers do not have their own face.

We tested whether clients thought lawyers were ciphers or had their own normative commitments by asking respondents whether their 'organization would worry about losing the *respect* and *esteem*'<sup>107</sup> of various groups including their lawyers if their organization were "accused of breaches of the" TPA. We hypothesized that if lawyers were merely servants, then clients would not worry about whether their lawyer held them in esteem or respected them.

In answer to this question, the highest proportion of our respondents (44%) said they would worry 'a lot' or 'very much' about losses of respect and esteem from their lawyers. Just under a third (30%) said they would worry 'very little' or a little and a similar proportion (27%) said 'neither.'<sup>108</sup> Almost half of respondents, then, report that they can see their lawyers' faces. This suggests that these clients at least do not perceive themselves to be in a market for services where they can seek out a lawyer who matches their views regarding compliance. It suggests that lawyers have the potential to act as promoters of business compliance, at the least by communicating their loss of respect or esteem.

This finding appears to mean that these 44% of clients are observing lawyers' faces and worrying about seeing indignation, for example. But, on the other hand, these responses might be describing clients "losing face," where they report

---

107. Emphasis in original question.

108. On a scale of 1 to 5 ('worry very little' to 'worry very much') our respondents scored a mean of 3.14 (with a standard deviation of 1.26). N = 967.



seeing the lawyer's face but only as a mirror of their own. What appears to be a report of client sensitivity to what their lawyers bring to the representation may only be a report about the client's own worries.

Consequently, we tested whether worries about the lawyer's face was related to the client's face. As Table 3 shows, there is a significant positive correlation<sup>109</sup> between clients with a greater normative commitment to the TPA and worries about losing the respect and esteem of their lawyer. Those who value a resistant or game-playing attitude to TPA compliance are significantly less worried<sup>110</sup> about losing the respect and esteem of their lawyer for breaching the law.

**TABLE 3:  
RESULTS OF CORRELATION TESTS BETWEEN DIFFERENT MOTIVATIONS TO COMPLY  
OR NOT COMPLY AND DEGREE OF WORRIES ABOUT LOSING THE RESPECT AND  
ESTEEM OF LAWYER IN CASE OF BEING ACCUSED OF NON-COMPLIANCE**

	Worry about losing respect and esteem of lawyer
Normative Commitment	0.269**
Resistance <sup>111</sup> (Mean of 1-5 rating)	-0.231**
Game-playing <sup>112</sup> (Mean of 1-5 rating)	-0.147**

These findings again demonstrate that there are two faces of clients: some clients worry about their lawyers' respect and esteem and others do not. They are consistent with the conclusion that clients committed to compliance seek—and think they have found—lawyers who are in favor of compliance, while clients who want to play games or resist compliance seek and think they have found lawyers who do not care too much about legal breaches. They are not inconsistent with finding that lawyers have two faces. But, they do not establish it.

Our results also suggest that client demand means that a significant feature for some lawyers is work in the promotion of compliance. At the least, management will want to see in lawyers their own priority to TPA compliance.<sup>113</sup> They want lawyers who demonstrate normative commitment to TPA compliance.

For these clients what lawyers supply can create a positive spiral in which lawyer influence may be much more important to client commitments than corporate lawyers would like to admit. We find clients committed to compliance who worry a lot about what their lawyer thinks about their compliance. In seeking lawyers who confirm their

109. At the 0.01 level of significance. Pearson Correlation and significance tests as explained *supra*, note 71.

110. At the 0.01 level of significance. Pearson Correlation and significance tests as explained *supra*, note 71.

111. Index of both items as shown in Table A2.

112. Index of both items as shown in Table A2.

113. As we have seen, Table 3 shows that businesses with high normative commitment to compliance worry about losing the respect and esteem of their lawyers suggesting that they want lawyers who share their commitment.

own commitments to compliance, they may see more than their own reflection and be open to their lawyers' influence in terms of not only information, advice, self-regulation, and internal monitoring of compliance, but also open to lawyers updating their sense of duty to comply—their very motivation for and commitment to compliance. Yet the traditional adversarial ideology of lawyers seems to eschew this possibility of influence.<sup>114</sup>

On the other hand, we also see resistant and gamester clients who are not worried about their lawyers' respect and esteem. This may be because they do not see their lawyers' faces. Or it may be that they find support from their lawyers in their attitudes regarding compliance. In which case, again, lawyers will be influential—in a negative spiral.

We need to go a second step to determine whether lawyers have two faces, whether in this market all is demand, or whether there also are supply side effects.

#### D. IMPACT OF LAWYERS BEING RESPONSIBLE FOR THE COMPLIANCE FUNCTION

Our survey was to be filled out on behalf of the organization by the most senior person in the organization with day to day responsibility for TPA compliance. We asked this person to write down their job description in free text. The various answers were then coded into business executives (including CEO of the business), legal counsel (including General Counsel), finance officers (including CFOs), compliance officers and company secretaries. Of the respondents, 288 were business executives (123 CEO's), 181 were lawyers (81 Chief Legal Officers), 316 were finance officers (263 CFO's), 85 were compliance officers and 95 were Company Secretaries. In Australia, the Company Secretary is an executive managerial position, fundamentally different in responsibilities than in the U.S.<sup>115</sup>

We have no reason to believe that the identity of the person filling out the questionnaire was random. In fact, the larger the company, the more likely it was that a lawyer filled out the survey.<sup>116</sup> Also if the company had contact with the

---

114. See *supra* note 47.

115. Compare CHARTERED SECRETARIES AUSTRALIA, WHAT DOES A GOVERNANCE PROFESSIONAL DO? 1, 8 (available at [http://www.csaust.com/Content/NavigationMenu/AboutCSA/WhatdoesaGovernanceProfessionaldo/What\\_does\\_a\\_Company\\_.htm](http://www.csaust.com/Content/NavigationMenu/AboutCSA/WhatdoesaGovernanceProfessionaldo/What_does_a_Company_.htm)) (describing best practices for company secretaries) with SOCIETY OF CORPORATE SECRETARIES AND GOVERNANCE PROFESSIONALS, WHO WE ARE 1, [http://www.governanceprofessionals.org/society/Who\\_We\\_Are.asp?SnID=707370484](http://www.governanceprofessionals.org/society/Who_We_Are.asp?SnID=707370484)). See also the discussion of different understandings of the role of corporate secretary in Robert Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 *FORDHAM L. REV.* 1251, 1304-08 (2005). In 31 responses to our survey a person described themselves as both a legal counsel and also a company secretary or compliance officer. Wherever a person described themselves as legal counsel, they have been counted only as legal counsel for the purposes of the analyses reported in this paper. This is because we are interested in whether identifying oneself as a lawyer makes a difference.

116. We also know from our data that larger respondents use lawyers more for all the matters reported in Table A1. They also spend more on lawyers and other compliance professionals in relation to TPA compliance: Statistics on file with the authors. Larger, better-resourced organizations are more likely to be able to afford external and in-house professionals to provide advice as and when required. Larger organizations are also more

ACCC, the more likely it was that it was filled out by a lawyer.<sup>117</sup> But as Table 4 indicates, whether or not a lawyer filled out the questionnaire was not significantly related to the normative commitment of the company. If lawyers are mere agents, then they, like non-lawyers, should engage in compliance activities in furtherance of the company's normative commitments. In a company with low normative commitment, the agents of that company—lawyers or non lawyers—should take actions that reflect that normative commitment, and vice versa. Our data above have shown that there are two types of clients—those with high normative commitment and those with commitments to resistance and adversarialism, and that both use lawyers.<sup>118</sup> Consistent with that, we find here that clients high in normative commitment to TPA compliance and those who are not both can have lawyers in charge of compliance in their organization.

Given this finding that companies with lawyers and non-lawyers in charge of compliance are not reported to differ significantly from one another in terms of their overall normative commitment to TPA compliance, neither should we expect companies with lawyers and non-lawyers in charge of TPA compliance to significantly differ in the other compliance and adversarial or resistance practices they report their company as having taken. To the extent that they do significantly differ from companies with non-lawyers in charge of compliance on these various dimensions, we can plausibly assume that it is the lawyer in charge of compliance who is having some influence.

Thus, we hypothesize that if lawyers influence businesses' attitude towards TPA compliance, then the following should be true: there should be a significant difference between the practices and attitudes towards compliance of those businesses where a lawyer is responsible for day-by-day TPA compliance compared to those in which someone else is responsible for day by day TPA compliance.<sup>119</sup> If there is no significant difference between companies where people with different job descriptions and professional backgrounds are responsible for compliance, then we infer that it is more likely to be the organization's pre-existing orientation towards compliance that influences the way professional advisors are chosen and used rather than the professional advisors' advice that influences the company. The lawyer's claim is that the client's commitment cannot be influenced by lawyers. Our data allows us to

---

likely to experience more activities and decisions that could require compliance advice. They are also more exposed to criticism if they make a mistake.

117. We also know from our data that those businesses that have been the subject of an ACCC investigation at some point in the last six years seek professional TPA compliance advice significantly more frequently than the others. They also spend more on lawyers and other compliance professionals. Statistics on file with the authors.

118. See findings in Table 2 and accompanying discussion; see also findings in Table 3 and accompanying discussion.

119. One potential problem with this inference is that we are relying on this person to fill out the survey on behalf of the business respondent and therefore their reports of the businesses' compliance management activities and attitudes and biases might itself be biased by their professional viewpoint and interests. We do not see this bias as a major problem for this part of our analysis since even if their answers are biased by their professional viewpoint, we will still be able to see whether lawyers consistently have a significantly different attitude towards compliance than business executives and others. If so, this would suggest that lawyers have a pre-existing approach that they bring with them to the business.

demonstrate, to the contrary, that where lawyers are responsible for compliance activity, companies do have different compliance commitments.

Table 4 shows the results of tests of correlation between each of our measures of use of lawyers and the mechanisms by which lawyers could promote or discourage compliance against whether a lawyer or someone else was the people responsible for compliance in our respondent organizations.<sup>120</sup>

**TABLE 4:**  
**MEAN SCORE FOR ALL VARIABLES BY JOB DESCRIPTION OF PERSON**  
**RESPONSIBLE FOR COMPLIANCE**

	Legal Counsel	Non-Lawyer	Significant difference <sup>121</sup>
<b>1. Normative Commitment</b>	2.13	2.13	NS
<b>2. Mechanisms of Compliance</b>			
<i>Information</i>			
Lawyer formed organizational awareness (1-5)	3.78	2.82	***
Employees who need to know understand the law (1-5)	3.79	3.34	***
Employees understand philosophy and economic principles behind the TPA (1-5)	3.52	3.31	***
<i>Motivation</i>			
Management priority to TPA compliance (1-5)	4.07	3.81	**
<i>Regulation</i>			
Implementation of compliance system elements (0-1)	0.48	0.30	***
Compliance management in practice (1-5)	3.82	3.57	***
<i>Reporting</i>			
Better tools for monitoring compliance (1-5)	3.79	3.07	***
<b>3. Mechanisms of Non-Compliance</b>			
<i>Avoiding or Evading the Law (Game-Playing)</i>			
Wise organization uses loopholes (1-5)	2.71	2.54	NS <sup>122</sup>
My organization spends time figuring out how to get what we want without directly breaching the TPA (1-5)	3.02	2.62	***
<i>Resistance (Adversarialism)</i>			
Most managers believe we should stand up to the ACCC (1-5)	2.86	2.72	NS
Lack of management priority to keeping good relations with the ACCC (1-5)	2.27	2.66	***

120. Since use of lawyers correlates with size (see Table A3) and some of the other measures in this table might also correlate with size (especially whether the respondent has a lawyer in charge of compliance), we also made some simple regression analyses controlling for size to check whether the significant correlations reported in Table 1 would disappear once size was taken into account. This was not the case. Although size was important, it did not eliminate the significant differences between the responses from different persons responsible for compliance. (Statistics on file with the authors).

121. Independent Samples Test. T-test for Equality of Means. Two-tailed sig. \*\*\* =  $p < .001$  \*\* =  $p < .005$  \* =  $p < .01$ . The asterisks indicate whether there is a significant difference between the values in each row and to what level of significance. Two-tailed sig. \*\*\* =  $p < .001$  \*\* =  $p < .005$  \* =  $p < .01$  (two-tailed). 'NS' = not significant.

122. *But see infra* note 128 and accompanying text.

Turning first to lawyers' influence in *promoting compliance* (section 2 of Table 4), we find that where a lawyer is in charge of compliance in their organization, they are, not surprisingly, more likely to report that it is lawyers who have formed the organization's awareness of the law.<sup>123</sup> More significantly, they also report a greater knowledge of the TPA among employees including understanding of the philosophy and economic principles of the TPA.<sup>124</sup> We find then that lawyers do seem to make a difference to the levels of *information* and understanding that an organization and its employees have that might assist with compliance.<sup>125</sup> But is this information and understanding used for compliance or evasion? We need to look at how this information is put into practice.

The lawyers' argument that they are faithful agents who are not responsible for their clients' choice of objectives is not supported by our findings. Businesses have multiple priorities and must choose between them. Our finding that businesses with a lawyer in charge of compliance report a *significantly higher priority to compliance* (but not a significantly higher normative commitment to compliance) shows that it is more likely that in choosing among priorities, it is lawyers, not their principals, who place a higher priority on compliance. That is confirmed by the facts that where lawyers are in charge of compliance they also organize the greater *implementation of compliance system elements*, better *compliance management in practice* and stronger *compliance monitoring* (see further discussion immediately below) than where business executives, finance officers and company secretaries are in charge of compliance. Lawyers do regulate and monitor their clients' internal affairs in ways that could assist compliance.<sup>126</sup>

There are also suggestions in our data that lawyers can support business non-compliance. There is some evidence that lawyers promote a game-playing

---

123. Businesses with a legal counsel in charge of compliance have a mean score of 3.78 (on a scale of 1-5) for whether lawyers formed organizational awareness compared with a mean score of 2.82 for organizations with someone else in charge of compliance. This is significant at the 0.001 level.

124. A mean score of 3.52 on employees understanding the philosophy and economic principles behind the TPA for companies with legal counsel in charge of compliance compared with 3.31 for those with others in charge of compliance. There is also a mean score of 3.79 for employees who need to know understanding the law for those companies with legal counsel in charge of compliance, and 3.34 for those with others in charge of compliance. Both sets of differences in score are significant at the 0.001 level.

125. See also *supra* note 78 for evidence that it is lawyers who influence the organization's level of information rather than the level of information the organization has that explains how much the organization uses lawyers.

126. We interpret the correlation between having an in-house lawyer in charge of day-to-day compliance and implementation of compliance systems as meaning that it is the in-house lawyers themselves who advise and initiate implementation of compliance systems. This is because it has been common for a long time for larger Australian businesses to have in-house lawyers, regardless of whether they have a formal TPA compliance system suggesting that the causal chain is that companies employ an in-house lawyer and then later implement a compliance system, presumably because of the in-house lawyers' advice (or external advice procured by the in-house lawyer). It is unlikely that a business would implement a serious compliance system without legal advice. Indeed we also know from our qualitative interviews with external lawyers that they are much more likely to advise and want to sell more fulsome TPA compliance systems than businesses are to buy them. See Parker & Nielsen, *Do Businesses Take Compliance Systems Seriously?*, *supra* note 37, 452-54.

attitude towards the law: business respondents with a legal counsel responsible for day to day TPA compliance (and therefore filling out the questionnaire) are significantly more likely to score their organizations more highly for spending time 'figuring out how to get what we want without directly breaching the TPA' than are non-lawyers.<sup>127</sup> They are not more likely to rate their organization as one that sees the use of loopholes as wise. However, in a more detailed analysis in which we separately tested for differences between each of the different job descriptions coded, we found that lawyers and finance officers both had a significantly more positive attitude towards using loopholes than the other job descriptions we coded for.<sup>128</sup>

Turning to lawyers' influence on client attitudes of resistance and evasion towards regulatory compliance (third section of Table 4), we see that there is no significant difference between those with lawyers in charge of compliance and the others in terms of how they score their organizations on believing 'we should stand up to the ACCC'. However, there is a significant difference between lawyers and non-lawyers in the way they score their organization's management priority (or lack thereof) to keeping good relations with the ACCC, our other measure of resistance. Non-lawyers report a lower priority for keeping good relations with the ACCC.<sup>129</sup> These findings might be explained by the fact that lawyers are more likely to be in charge of compliance in organizations that have already had a run-in with the ACCC.<sup>130</sup> These organizations may well have learned that it is better not to directly stand up to the ACCC, and may well have hired a lawyer precisely in order to maintain good relations with the ACCC in the wake of problems.

Overall, then, there is evidence that lawyers are indeed associated with promoting the game-playing attitude in their clients for which they have traditionally been criticized. But there is no evidence that these lawyers who are employed in-house to look after TPA compliance promote a resistant attitude towards the ACCC. It may be a different story for external lawyers, given the findings in Table 1 that use of lawyers and expenses on lawyers are associated with both the games-playing and resistant attitudes towards the TPA and ACCC.

---

127. A mean score of 3.02 (on a scale of 1 to 5) for those companies with legal counsel in charge of compliance compared with 2.62 for those without. The difference is significant at the 0.001 level.

128. Statistics on file with the authors. Finance officers' gamester attitudes may extend beyond the TPA to financial regulation as well. Previously we found no significant association between use of lawyers and seeing the use of loopholes as wise (Table 1). We argued that seeing the use of loopholes as wise might be a distinctly lawyerly 'gift.' But this finding suggests that it is a gift that finance officers share with lawyers. This might be why we found no significant association between use of lawyers and approval of use of loopholes in Table 1 (i.e. use of lawyers is not the only thing that predicts approval of use of loopholes).

129. Those companies with a non-lawyer in charge of compliance give this item a mean score of 2.66 (on a scale of 1 to 5). Those with legal counsel in charge of compliance give a mean score of 2.27. The difference is significant at the 0.001 level.

130. See *supra* note 117.

## V. LAWYERS AS MONITORS, GAMESTERS AND ADVERSARIALISTS: FINDINGS AND IMPLICATIONS

According to our results, it is not inherently a part of commercial professional practice that lawyers promote client game playing or adversarialism to regulatory compliance. Nor is it true that lawyers always act as compliance monitors for their clients. We find that the use of lawyers by business is associated with mechanisms that encourage compliance and also with mechanisms that discourage it (see Table 1 and Table 4). Lawyers act sometimes as compliance monitors and at other times as gamesters and adversarialists. Legal advice can go either way. Lawyers, we find are two-faced.

We also find that clients matter. Some businesses use lawyers and compliance professionals to pursue a resistant or game-playing approach towards the ACCC and compliance with the TPA.<sup>131</sup> Others, however, do not adopt these postures, and instead are normatively committed to compliance.<sup>132</sup> These are different businesses.<sup>133</sup> There is truth, then, in the lawyer argument that they are faithful agents pursuing their different clients' different objectives.<sup>134</sup>

But the faithful agent argument is limited. We find evidence that lawyers do have some impact on client approaches towards compliance.<sup>135</sup> We find where lawyers are in charge of compliance, they report a stronger prioritization of compliance in their organizations than where business executives, finance officers, company secretaries and compliance officers are in charge of compliance.<sup>136</sup> We interpret this as a prioritization of legal compliance that reflects the lawyers' own view of the importance of legal compliance that they impute to their clients. Yet there is no evidence of organizations with lawyers in charge of compliance having a stronger normative commitment to compliance, although there is evidence that lawyers (and compliance officers) do more to implement compliance systems, improve knowledge and understanding of compliance and monitoring of compliance within the organization than where others are in charge of compliance.<sup>137</sup> These are all things that could and should lead to a greater degree of legal compliance, but do not necessarily lead to greater organizational commitment to compliance. This raises the possibility that some lawyers monitor (or influence) their clients in many ways that could in fact improve compliance, yet make no difference to management's commitment to comply—the very factor that is probably most important in determining whether the officers and

---

131. See *supra* Part III.D.

132. See *supra* Part III.C.

133. See *supra* Table 2 and accompanying text.

134. *Supra* note 47.

135. See *supra* Parts IV.C and IV.D.

136. See *supra* Part IV.D.

137. *Id.*

employees of a large business end up complying with the law.<sup>138</sup>

Perhaps these lawyers pull back from seeking to influence clients' motivation to comply, because they see themselves merely as agents for their clients' preconceived ends. If so, this is odd, since the argument that the lawyer is a mere agent is usually adopted as a shield to defend lawyers from the charge that they are complicit in furthering their clients' misconduct.<sup>139</sup> Yet our findings show that lawyers in fact do much to promote client compliance—there should be little need for the agentic denial of responsibility for many of our business respondents' lawyers.

But, as we saw above, there are also suggestions in our data that lawyers can support and promote business irresponsibility and non-compliance. This raises the possibility that some lawyers might provide their business clients with information about regulatory compliance and implementation of compliance system elements, but use these to play games with compliance rather than to promote commitment to comply. As we showed in the first part of the paper, the information, regulation and reporting mechanisms by which professional compliance advice might promote compliance are in fact normatively neutral. Their normative character comes from the motivations that lawyers and clients bring to them. They can be used to promote commitment to compliance. Equally, they may be used in a game-playing way. Our business respondents tend to either one or the other—committed to TPA compliance or taking an attitude of game-playing and resistance.<sup>140</sup>

We find no evidence that lawyers fuel client resistance to law and its enforcement. Lawyers are charged with being overly adversarial, putting stumbling blocks in the path of regulation, instigating clients not to comply with regulators, and souring relations between their clients and regulators.<sup>141</sup> It is clear that some clients take an adversarial, resistant posture to law. And, their lawyers do as well. But, these resistant client attitudes do not appear to stem from or be influenced by lawyers among our respondents.

The story is different for game-playing, however. Here we find evidence that lawyers are more likely than business executives, company secretaries, or compliance officers to lead their organizations into a game-playing posture when put in charge of compliance<sup>142</sup>—a finding that suggests some lawyers themselves take a game-playing approach that influences their clients. Although our evidence

---

138. See Christine Parker & Vibeke Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?*, 41 ADMIN. & SOC. 3 (2009).

139. See *supra* note 47.

140. See Table 2 above and accompanying text.

141. See *supra* Part II.B and notes 95-99 and accompanying discussion.

142. Our results show that finance officers also are gamesters. Lawyers beware! Although it was towards consumer protection, anti-competitive practices, and mergers and takeovers—and not financial accounts—that finance officers favored game-playing, they displayed an attitude towards regulation that may have more general applicability.



derives largely from in-house lawyers, outside counsel also may differ from business executives in carrying a game-playing attitude. It is easy to imagine how a large firm attorney would think that her fees can be justified by her ability to use her expertise to game the law.

For all their potential for providing advice that promotes compliance, when it comes to lawyers' influence on businesses' attitudes, commitments, and motivations towards compliance, the strongest evidence we have is that lawyers will, at least sometimes, take a game-playing approach to compliance that leads their clients to do likewise. Otherwise, they seem to eschew responsibility—acting in tune with clients' pre-existing commitments, or what they interpret these to be.

We conclude that neither the professionalism nor the devolution thesis accurately describes the market for legal services. First, neither thesis describes the mechanisms by which lawyers either apply professional norms or resist client demands. The terrain in which the battles for control occur must be described in order to appreciate the territory gained by either side. Second, both theses fail to account for the complexity of the subjects they describe. Lawyers are not simply professional/ unprofessional, but negotiate with themselves and the profession over the character of professionalism in the law. Clients are not simply motivated by profit but negotiate with themselves and their lawyers over attitudes toward legal risk and regulation. We find that lawyers operate within professional controls, but act not as compliance monitors, but as promoters of game-playing. We find that clients demand that lawyers act as compliance monitors, and sometimes as resisters.

As a result, lawyers will act as compliance monitors because of the controlling effects of client demand, not slack in the market for professional services. The devolution thesis better explains "professional service" than does the professionalism thesis. Also, we find that independent of client demand, lawyers will supply clients with services that promote their taking a game-playing attitude towards the law. The professionalism thesis, and the professional dominance it accords to what is supplied in the market, better explains "devolved service" than does the devolution thesis. In short, our statistics reveal an irony.

Our study shows that many businesses do in fact value compliance – they are normatively committed to comply. These businesses should be careful about the lawyers they choose—game-playing lawyers may in fact degrade their pre-existing commitment to compliance.<sup>143</sup> Unfortunately, as companies grow larger or have some interaction with regulators, they are more likely to respond by implementing compliance systems and hiring lawyers to take charge of their compliance functions. While this makes jobs for lawyers, it can do so at the expense of legal compliance. Clients must carefully choose their lawyers because gamester lawyers may degrade clients' commitments to compliance.

---

143. See also Christine Parker, *The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence*, 28 J. Bus. ETHICS 339 (2000) (for a similar argument from Parker's earlier qualitative work on lawyer and non-lawyer compliance professionals).

There are also implications here for lawyers themselves. Business lawyers, especially inside counsel, need to recognize that their lawyer identity often brings with it a commitment to game-playing that influences clients. More speculatively, since many clients do want to commit to compliance—rather than resistance or game-playing—more lawyers should recognize that their role can involve taking on responsibility for updating and informing clients of their duty to comply – influencing motivation to compliance for good, rather than ill. For external lawyers (usually attorneys from large commercial law firms), the lesson of our findings is that they must be careful in interpreting ‘client’ instructions in relation to regulatory compliance that are delivered to them by in-house counsel. We find that in-house counsel are much more likely than business executives to take a game-playing approach to compliance. This means that external lawyers should be skeptical as to whether requests for game-playing coming from the chief in-house legal officer actually reflect the client organization’s commitments as a whole.<sup>144</sup> These commitments may not in fact justify their lawyers providing game-playing legal services.

Interrogating business about their use and the influence of lawyers presents a more complex image than lawyers themselves portray. Not all clients are bad, nor are they all good. Clients differ in their acceptance of legal risk and their normative commitments to compliance.<sup>145</sup> That all clients want to succeed does not mean that all clients want to game or resist the law. Clients have two faces.

Businesses also portray lawyers as having two faces. To their clients, lawyers are not mere ciphers. Lawyers can be influential. Lawyers do not merely “go along to get along.” They lead their clients. “Where were the lawyers?” is a responsible question.

We find that even though clients do not significantly differ in their normative commitments between those who put lawyers in charge of compliance and those who put non-lawyers in charge, when lawyers are in charge, then implementing compliance systems is a greater priority for the client. For clients who have normative commitments to compliance, this means that lawyers may provoke a virtuous cycle. On the other hand, we also find that lawyers game the law. “Where were the lawyers?” “Putting in place paper compliance systems” is an answer that may occur independent of the face of the client. Lawyers have two faces.

---

144. For a discussion of the “bureaucratic pathologies” created by gaps between the interests of the corporation and its agents, see Rosen, *Problem-setting*, *supra* note 15, at 186-191.

145. Clients also differ in their commitments to different issues regarding legal compliance. *See, e.g.*, DAVID VOGEL, *THE SPLIT PERSONALITY OF CORPORATE AMERICA* 7, 8-9 (The Responsive Community, Winter 2002/2003). So ethical lawyers must make their decisions matter by matter.

## APPENDIX: ADDITIONAL STATISTICAL TABLES

**TABLE A1:**  
**FREQUENCY OF ASKING FOR PROFESSIONAL ADVICE ON THE TPA IN RELATION**  
**TO SPECIFIED ACTIVITIES**

	Never (1) (%)	Sometimes (2) (%)	Mostly (3) (%)	Always (4) (%)	Never had such activity (%)	Mean Rating (1-4)
<b>Consumer Protection (n = 911)</b>						<b>2.17</b>
Advertising materials (n = 993)	24.9	39.0	13.5	13.4	9.3	2.17
Putting a new product on the market (n = 990)	25.9	26.4	14.5	14.7	18.5	2.22
<b>Mergers and Takeovers (n = 749)</b>						<b>2.91</b>
Thinking about merging with another organization (n=988)	14.4	10.1	7.6	37.4	30.5	2.98
Plans about the takeover of another organization (n=985)	14.0	10.7	10.2	33.7	31.5	2.93
<b>Anti-Competitive Conduct (n = 966)</b>						<b>1.90</b>
Settling the price for a product (n = 990)	53.9	26.4	4.6	4.1	10.9	1.54
Discussions with suppliers about terms and conditions of supply (n = 988)	27.7	38.8	17.1	10.8	5.6	2.12
Discussions with other organizations about setting up a franchise chain (n = 985)	19.2	5.4	3.9	7.4	64.2	1.99
Discussions with buyers about conditions for delivery (n = 983)	33.3	34.9	11.5	6.8	13.5	1.91
A competitor contacts you because they want to discuss aspects of the market (n = 982)	26.3	23.1	7.6	10.4	32.6	2.03
Deciding conditions for buying a certain product (n = 986)	35.5	36.4	10.0	7.1	11.0	1.87
Sharing information with other organizations in your industry and/or competitors (n = 983)	31.8	32.6	11.8	9.1	14.8	1.98
Sharing information with your industry association (n = 984)	36.6	35.6	10.2	6.2	11.5	1.84
Thinking about offering special advantages to a specific segment of your customers (n = 988)	25.9	29.6	12.1	11.6	20.7	2.12
Attending industry association meetings with competitors (n = 987)	42.8	31.6	6.8	6.0	12.9	1.72

**TABLE A2:**  
**MEASURES OF MECHANISMS PROMOTING COMPLIANCE AND**  
**DISCOURAGING COMPLIANCE**

Questions included in Each Measure of Mechanisms Promoting Compliance	Mean Responses for Each Question (Std Dev.) (Scale from 1-5 'Strongly disagree' to 'Strongly agree' unless otherwise noted.)	Whole Measure (where applicable)
<b>Measures of Mechanisms Promoting Compliance</b>		
<b>1. Information</b>		
'Our lawyers' formed 'organization's awareness of the TPA' <sup>146</sup>	3.00 (1.297)	NA
'I believe our organization and those employees who need to know are well-informed about the Trade Practices Act.' <sup>147</sup>	3.42 (1.021)	
'How well do you believe that your organization and its employees, who need to know, understand the philosophy and the economic principles behind the TPA' <sup>148</sup>	3.34 (0.761)	
<b>2. Motivation to Comply</b>		
<i>Management priority to 'obeying the TPA'</i> <sup>149</sup>	3.86 (0.940)	NA
<i>Normative Commitment to TPA Compliance</i> <sup>150</sup>		
Our organization feels a moral obligation to observe the TPA;	4.15 (0.705)	Cronbach Alpha: 0.77
Most managers in this organization would feel ashamed if the organization was caught breaching the TPA;	4.07 (0.727)	
Most managers in this organization would in general feel ashamed if the organization committed a breach of the TPA;	4.04 (0.731)	

146. The question asked 'To what degree have the following persons, organizations, and activities formed your organization's awareness of the Trade Practices Act over the years?' Respondents were asked to rate a number of options, including 'our lawyers' on a 5 point scale from 'not at all' to 'to a very large degree.' 980 respondents answered this question.

147. On a scale from 1-5, 'Strongly disagree' to 'Strongly agree.' 992 respondents answered this question.

148. On a scale from 1-5, 'Very badly' to 'very well.' 992 respondents answered this question.

149. The question asked 'How would you rate the priority your organization's senior management gives to each of the following objectives?' Respondents were asked to rate a number of items including 'Obeying the Trade Practices Act' on a scale from 1-5: 'Very low priority' to 'very high priority.' 991 respondents answered this question.

150. For each item respondents were asked to 'Mark the number closest to the opinion held by most managers in your organization' on a scale from 1-5: 'Strongly disagree' to 'Strongly agree.'

**TABLE A2 (CONTINUED):  
MEASURES OF MECHANISMS PROMOTING COMPLIANCE AND  
DISCOURAGING COMPLIANCE**

Questions included in Each Measure of Mechanisms Promoting Compliance	Mean Responses for Each Question (Std Dev.) (Scale from 1-5 'Strongly disagree' to 'Strongly agree' unless otherwise noted.)	Whole Measure (where applicable)
Many senior managers in this organization have serious doubts about aspects of the TPA (reversed).	2.78 (0.823)	Mean: 3.85  n = 992  Min = 2.44  Max = 5.00  Std. dev. = 0.44
The TPA interferes far too much in private enterprise (reversed);	2.58 (0.752)	
It is appropriate to breach the TPA if the purpose is to project Australian products from foreign competitors (reversed);	2.13 (0.762)	
It is appropriate to breach the TPA if the purpose is to save Australian jobs (reversed);	2.11 (0.743)	
It is appropriate to breach the TPA if others are contravening the law (reversed).	1.91 (0.696)	
<b>3. Regulation (Gatekeeper)</b>		
<i>Compliance system implementation (see Table A3)</i>		
<i>Compliance management in practice</i> <sup>151</sup>		Cronbach Alpha: 0.90
In my organization compliance advice is rarely ignored by the board (If you don't have a board, please skip this question); <sup>152</sup>	4.21 (0.951)	Mean: 3.62
In our organization the people responsible for compliance find it easy to get access to top management;	4.10 (0.747)	n = 994
In my organization compliance problems are quickly communicated to those who can act on them;	3.99 (0.743)	Min = 1.33
In my organization compliance advice is rarely ignored by line managers; <sup>153</sup>	3.86 (0.792)	Max = 5.00
In my organization systemic and recurring problems of non-compliance are always reported to those with sufficient authority to correct them;	3.77 (0.840)	Std. dev. = 0.63

151. The question asked respondents to 'please tell us on a scale from 1 to 5 to what extent you agree with each of the statements': 1 = 'Strongly disagree' and 5 = 'Strongly agree.'

152. In our questionnaire, this item was asked in reverse to that shown here: 'In my organization, compliance advice is often ignored by the board (If you don't have a board, please skip this question)'. The mean response has also been reversed to reflect the wording shown here.

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

**TABLE A2 (CONTINUED):  
MEASURES OF MECHANISMS PROMOTING COMPLIANCE AND  
DISCOURAGING COMPLIANCE**

Questions included in Each Measure of Mechanisms Promoting Compliance	Mean Responses for Each Question (Std Dev.) (Scale from 1-5 'Strongly disagree' to 'Strongly agree' unless otherwise noted.)	Whole Measure (where applicable)
Compliance requirements of laws, regulations, codes and organizational standards are integrated into my organization's day to day operating procedures;	3.69 (1.001)	
Managers in our organization know what aspects of compliance they are responsible for;	3.61 (0.805)	
Compliance failures are always investigated to understand their cause;	3.58 (0.985)	
In our organization everyone knows where the buck stops for compliance	3.58 (0.952)	
In my organization we review our compliance program on a regular basis;	3.39 (1.044)	
My organization allocates adequate resources to enable the implementation of the compliance policy;	3.40 (0.960)	
My organization is one of those organizations that try to have the best compliance of any organization in the country; <sup>154</sup>	3.04 (1.071)	
My organization invests a lot of time and money in compliance training;	2.94 (1.172)	
<b>4. Reporting Misconduct.</b>		
There is a gain to the organization from compliance with the TPA in relation to better tools for monitoring our organization <sup>155</sup>	3.22 (1.468)	NA
<b>Measures of Mechanisms Discouraging Compliance</b>		
<b>1. Avoiding or Evading Compliance (Game-Playing)</b>		
'My organization sometimes spends time and resources figuring out how to get what we want without directly breaching the Trade Practices Act' <sup>156</sup>	2.69 (1.019)	NA

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

155. The question stated "Do most managers in your organization think there is a business case for complying with the Trade practices Act? That is, how large is the gain to the organization from compliance with the Trade Practices Act? If they believe that there is no such gain as mentioned, mark 1. If they believe that the gain is very large, mark 5." One of the items was "Better tools for monitoring our organization." 968 respondents answered this question.

156. 987 respondents answered this question.

**TABLE A2 (CONTINUED):  
MEASURES OF MECHANISMS PROMOTING COMPLIANCE AND  
DISCOURAGING COMPLIANCE**

Questions included in Each Measure of Mechanisms Promoting Compliance	Mean Responses for Each Question (Std Dev.) (Scale from 1-5 'Strongly disagree' to 'Strongly agree' unless otherwise noted.)	Whole Measure (where applicable)
A wise organization uses the loopholes in the law <sup>157</sup>	2.57 (0.989)	NA
<b>2. Resistance (Adversarialism)</b>		
Lack of senior management priority to keeping good relations with the ACCC <sup>158</sup>	2.58 (1.053)	NA
Most managers in this organization believe that we should stand up to the ACCC when we can <sup>159</sup>	2.75 (0.904)	NA

---

157. 989 respondents answered this question.

158. In the questionnaire this was asked the other way around. Respondents were asked to rate on a scale from 1-5 ('very low priority' to 'very high priority') 'the priority your organization's senior management gives to . . . keeping good relations with the ACCC.' The wording and statistics have been reversed in the table. 990 respondents answered this question.

159. 988 respondents answered this question.

**TABLE A3:**  
**MEASURE OF COMPLIANCE SYSTEMS: FOUR GROUPS OF (FORMAL)**  
**COMPLIANCE SYSTEM ELEMENTS<sup>160</sup>**

	Elements Included in Each Group (Yes/No)	% Implementing Each Element
<b>Complaints Handling</b>	In my organization there is a clearly defined system for handling complaints from customers/clients;	91
	In my organization we keep records of complaints from customers, competitors and/or suppliers;	87
	In my organization there is a clearly defined system for handling compliance failures identified by staff, competitors, suppliers or the ACCC;	53
	In my organization we actively seek out consumer opinion about new advertising and/or new products;	40
	In my organization we have a hotline for complaints about our compliance with the TPA.	13
<b>Communication &amp; Training</b>	My organization has a written compliance policy about trade practices compliance;	45
	In my organization employees are now and then sent to a brush up course on how to comply with the TPA;	38
	Live training sessions are a part of our training of employees in trade practices compliance;	34
	In our organization we use a compliance manual in trade practices compliance;	31
	My organization has a dedicated compliance function taking care of trade practices compliance;	30
	Induction for new employees includes substantial training in trade practices compliance;	28
	At least half our employees have attended an employee seminar about the TPA during the last 5 years;	21
	In my organization we use a computer based training program in trade practices compliance.	17
<b>Management Accountability &amp; Whistleblowing</b>	My organization has written policies to encourage and protect internal whistleblowers;	43
	In the last 5 years an external consultant has reviewed our compliance system;	35
	In my organization managers are asked to report regularly on compliance;	26
	In my organization we have systematic audits by external professionals to check for trade practices breaches.	17
<b>Compliance Performance Measurement &amp; Discipline</b>	Trade practices compliance performance indicators are included in the corporate plan;	20
	Compliance performance indicators relevant for the TPA are among the individual performance indicators for our employees;	13
	In my organization in the last 5 years employees have been disciplined for breaching our trade practices compliance policy.	12

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



**TABLE A4:**  
**EXPLAINING VARIATION IN WHETHER QUESTIONNAIRE FILLED OUT BY A**  
**LEGAL PROFESSIONAL**

Independent Variables	Respondent is a Lawyer <sup>161</sup>
<i>Size</i>	.58***
<i>Industry</i>	
1. Primary Industries	.34
2. Manufacturing & Construction	.29
3. Wholesale Trade	.01
4. Retail & Hospitality	-.22
5. Financial & Insurance, Property & Business Services, Transport & Storage	.29
6. Government & Essential Services	-.01
7. Education & Other Services	.01
<i>Admit breach (No = 0, Yes = 1)</i>	.09
<i>Investigated by the ACCC (No = 0, Yes = 1)</i>	.82*
<i>Interaction with the ACCC (No = 0, Yes = 1)</i>	.97***
<i>Level of experienced criticism</i>	.31
<i>Model statistics:</i>	
N =	919
Naglekerke's R <sup>2</sup>	.23***
F-value of full model	

Note: \*\*\* =  $p < .001$ ; \*\* =  $p < .005$ ; \* =  $p < .01$  (two-tailed). Cell entries are B-coefficients.

161. Including General Counsel there were 181 lawyer respondents.