‘Responsive regulation’ of privacy: Does the ALRC deliver?
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Effective enforcement?

• ‘Responsive regulation’
  (Braithwaite, Parker et al)
  – Effective regulation requires *multiple types of sanctions* of escalating seriousness
  – It is an enforcement *pyramid* because sanctions at the top get used far less
  – All forms of sanctions must be *actually used*
  – Use of each level of sanction must be *visible* to those regulated, and consumers
  – The higher levels are then *incentives* for the lower levels to be made to work

Enforcement pyramid in a licensing system (Braithwaite 1993)
Enforcement pyramid for individual complaints

+ Appeals on merits to AAT & Courts against decisions of Comm
  – In theory, overcomes most glaring pro-respondent bias in Act
  – Allows AAT and Courts to interpret both UPPs and their enforcement

Ø BUT appeals structure is fundamentally flawed

Ø No appeal unless there is a s52 determination (zero made, 2004-08)
+ New right to insist the Comm make a s52 determination
  • MINUS BUT only where there is conciliation underway and it fails (R 49-5(b))
+ If Comm considers successful conciliation ‘reasonably possible’, must attempt it (R 49-5(a))
  – No right to insist on a determination where Comm dismisses a complaint prior to mediation under s41 (majority of complaints)
    • PCO’s practice is to dismiss under s41 wherever it thinks respondent has dealt adequately with complaint, even if respondent does not
  Ø Extra s41 discretion for Comm to dismiss if investigation ‘not warranted’ (R 49-1)

Ø Result: Comm still able to avoid appeals, cover up mistakes.
Enforcement pyramid for individual complaints (2)

+ Civil penalties - Commissioner to be able to seek for 'serious or repeated' breaches
  – No reliance on criminal offences (removed re credit), but this is better
+ Comm to be able to prescribe the steps that a respondent must take to ensure compliance with the Act (R 49–6)
  – Overcomes perceived deficiency in Comm’s powers (TICA Determination)
+ Enforceable undertakings (R 50–4)
  – Comm to be able to accept an undertaking that an agency or organisation will take specified action to ensure compliance
  – If undertaking breached, Comm can seek compliance order in Federal Ct
Ø Transparency of complaint reporting - Nothing recommended
  – Comm’s practices significantly improved since 2002 (averages 2/month)
  – But still discretionary (no announced standards), and could be self-serving
  – Details still inadequate to be useful to legal advisers
  – Our argument: Without transparent reporting practices, there cannot be responsive regulation
Systemic compliance tools

+ PIAs may be required for public sector proposals by Comm.
  + required for multi-purpose identifiers.
  Ø No requirement to make PIAs public *(remember the ‘Access Card’ PIA?), only to ‘report to Minister’*
    – OK Consider extension to private sector after 5 years
+ Enforcement of own motion investigations
  – Comm to be able to ‘issue a notice’ requiring ‘specified action’ to ensure compliance with Act, enforceable in Fed Ct or FMC *(R 50-1)*
  – Differs from a s52 determination, no capacity to award compensation to individuals; more like a s98 injunction via Commissioner
  Ø No requirement to make commencement of an OMI public
+ Private sector ‘audits’
  – Comm to be able to conduct ‘Privacy Performance Assessments’ of records of PI maintained by organisations *(R 47–6)*
Does the ALRC deliver responsive regulation?

- It improves many parts of the individual enforcement pyramid
  - But appeals from Commissioner will still be flawed
  - And more transparency will be needed
- Systemic compliance tools will be much stronger
  - But again will not be transparent enough
- This regulatory tools will be better, the pyramids more complete, but the feedback loops necessary for responsive regulation will still be defective