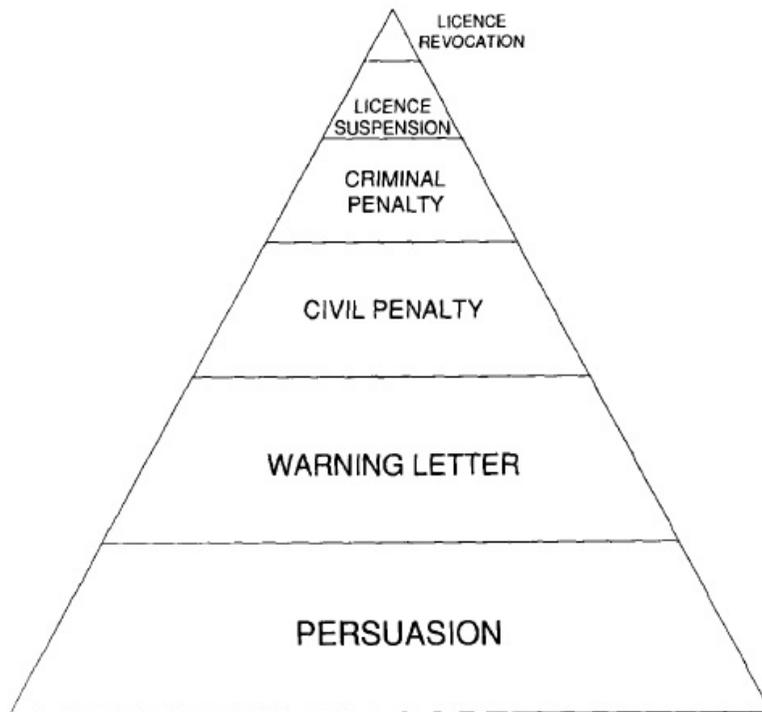


‘Responsive regulation’ of privacy: Does the ALRC deliver?



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Effective enforcement?



Enforcement pyramid in a licensing system (Braithwaite 1993)

- ‘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 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.
 - ∅ 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
 - ∅ 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