

FROM 'COMMAND-AND-CONTROL' TO 'OPEN METHOD COORDINATION': THEORISING THE PRACTICE OF REGULATORY AGENCIES

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The role of regulatory agencies has increased rapidly over the last century and so too has their powers. The Australian Competition and Consumer Commission (ACCC), as one of Australia's main economic regulators, is a good illustration of these changes. Using the ACCC as an example, this article explores some of these changes to governance strategies that have occurred over the last four decades and the role of regulatory theory in contextualising these changes.

CHANGES IN THE GOVERNANCE STRATEGIES OF REGULATORY AGENCIES

The *Trade Practices Act 1974* established the Trade Practices Commission, the predecessor to the ACCC, with the responsibility of giving effect to the consumer protection and restrictive trade practices provisions. Since then its responsibilities have expanded to include: prices surveillance; regulating access to essential facilities; fostering compliance; protecting small businesses; facilitating international cooperation and agreements; and more recently providing price watch services to consumers.¹ Alongside these changes, regulatory theory has followed. It seeks to explain and critique our understanding of laws and our expectation of regulatory agencies while formulating other ways of seeing. Many of these theories challenge concepts of how regulatory agencies function and the manner in which they should be constrained. Regulators have been more receptive to some of these contributions than others, reflecting on and altering their own methodologies at different times, in different ways and to different extents. Each new strategy has had to be evaluated and re-evaluated in terms of certain core administrative law

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¹ See Australian Competition and Consumer Commission, GROCERYchoice, <<http://www.grocerychoice.gov.au/>> at 10 November 2008. For plans on a similar fuel watch service for consumers see Nicola Berkovic, 'Rudd to abandon fuel plan', *The Age* (Melbourne), 13 November 2008, 1.

principles embodied in the rule of law: authorised by law, procedural fairness, accountability and rationality.² Many of these strategies have challenged traditional administrative law principles giving rise to considerable scholarship in the area.³

It may be trite to say that law is not static and neither are regulatory theories and regulatory approaches adopted by regulators. Harlow's description of the changing nature of administration law and regulatory scholarship provides a lucid, big picture explanation of these changes and it is far from trite.⁴ It is relevant to an examination of regulatory agencies and regulatory scholars. Harlow points out that law's contribution to public administration varies according to time and place. As the role of government has changed, so too has the direction of administrative law, which is concerned with making administrators and regulators accountable. Regulatory scholars are from a multidisciplinary background which has added to the diversity and richness of the scholarship, some of which is examined herein.

Harlow suggests that the dominance of administrators in the twentieth century saw regulatory scholars seeking to develop greater strategies of controlling the manner in which regulatory agencies used their discretion.⁵ Considerable scholarship was devoted to the manner in which rules could be used and whether such rules constrained discretion or rather whether discretion flourished within such rules.⁶ The rise of New Public Management in the 1970s in the United States and Europe, and a decade or so later in Australia, with its emphasis on output oriented values, saw regulatory scholars beginning to push the case for procedural fairness and accountability. Regulators were asked to identify their objectives and look at different ways of achieving them. Responsive regulation and the development of 'soft law' were particularly influential, favouring informal dispute resolution schemes.⁷ The importance of human rights as a discourse has influenced public administration that was required to deliver services economically, efficiently and without violating human rights.⁸ The final episode Harlow discusses is global

² For a discussion of the core principles that constrain regulatory agencies, see Dennis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986); Keith Hawkins (ed), *The Uses of Discretion* (1992); Administrative Review Council, Parliament of Australia, *Automated Assistance in Administrative Decision Making*, Report No 46 (2004).

³ It is not within the scope of this paper to consider these challenges. For a discussion of some of these issues, see Dietmar Braun and Fabrizio Gilardi (eds), *Delegation in Contemporary Democracies* (2006); Michael Moran, 'Understanding the Regulatory State' (2002) 32(1) *British Journal of Political Science* 431; Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126.

⁴ Carol Harlow, 'Law and Public Administration: Convergence and Symbiosis' (2005) 71 *International Review of Administration Sciences* 279.

⁵ *Ibid* 284–5.

⁶ *Ibid* 282–3.

⁷ *Ibid* 291; see also Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

⁸ Harlow, above n 4, 287; see also Bronwen Morgan (ed), *The Intersection of Rights and Regulation – New Directions in Sociolegal Scholarship* (2007); Tom Campbell and Seumas

governance, which is being referred to by regulatory scholars as global administrative space, where international organisations, such as the World Bank and the Organisation for Economic Co-operation and Development (OECD), have a pivotal role in governance. They rely on national or international enforcements machinery, such as the European Commission, for enforcement and implementation.⁹ While a number of these discourses described by Harlow are evident in the activities of the ACCC, others are likely to become important in the future.

COMMAND-AND-CONTROL

Command-and-control is a form of direct regulation, where the legislature exercises direct responsibility for making laws regulating specific activity. With the expansion of business activity, the shortcomings of command-and-control strategies were realised and alternative forms of regulation, including the creation of independent regulatory agencies, became important. The expense of passing and amending legislation, the constraints on engaging in quick and creative responses, as well as the advantages of taking regulation out of politics, were all widely acknowledged, making a regulatory agency an attractive option.¹⁰ This type of agency could regulate much more freely than command-and-control forms of regulation allowed. It also fostered relations between regulator and businesses and provided for alternative regulatory strategies that emphasised compliance and self-regulation.¹¹ Further the shift to a market economy led to much more complex public policy implementation, which was not readily possible under the command-and-control strategies.¹² In the trade practices area, command-and-control strategies have been of secondary importance, with the Commission, since the early eighties, concentrating on promoting self-regulation strategies and encouraging a commitment to the principles of competition.¹³

Miller, *Human Rights and the Moral Responsibilities of the Corporate Sector and Public Sector Organisations* (2004).

⁹ Harlow, above n 4, 288–91; John Braithwaite and Peter Drahos, *Global Business Regulation* (2000); Imelda Maher, 'Competition Law in the International Domain: Networks as a New Form of Governance' (2002) 29(1) *Journal of Law and Society* 112; Imelda Maher 'Networking Competition Authorities in the European Union: Diversity and Change' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (2005) 223.

¹⁰ See Marver H Bernstein, *Regulating Business by Independent Commission* (1955) 66–71; Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 148.

¹¹ Marius Aalders and Ton Wilthagen, 'Moving beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment' (1997) 19(4) *Law and Policy* 529.

¹² Vijaya Nagarajan, 'Reconceiving Regulation: Finding a Place for the Consumer' (2007) 15(1) *Competition and Consumer Law Journal* 93.

¹³ Ron M Bannerman, 'Points from Experience 1967–1984' in Trade Practices Commission, *Annual Report 1983–84* (1984) 149, 166.

RESPONSIVE REGULATION

There are a number of contributions by regulatory scholars particularly relevant to the activities of the ACCC. Responsive regulation queried the dominance of command-and-control strategies, proposing that there was an alternative. It has been influential on the manner in which the ACCC has directed much of its regulatory activity and the important role played by John Braithwaite has been widely accepted.¹⁴ The core idea of responsive regulation is that regulators should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed and they should be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention.¹⁵ These scholars propose a variety of regulatory strategies in the form of a regulatory pyramid (Figure 1). The amount of space at each layer reflects the amount of enforcement activity at that level.

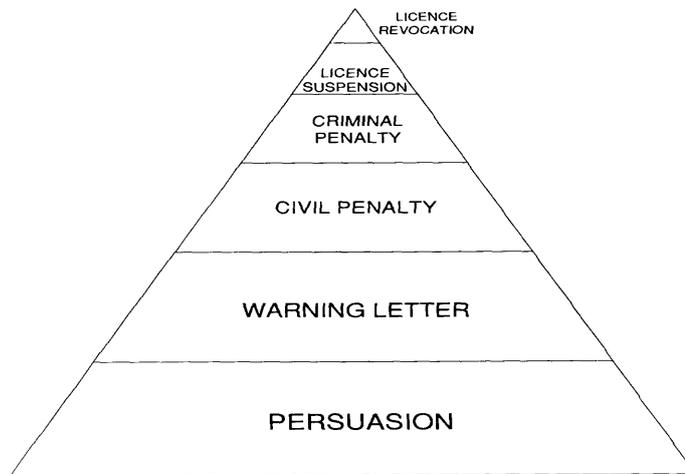


Figure 1: Example of the regulatory pyramid and regulatory strategies¹⁶

The base of the pyramid is persuasion – a responsive dialogue-based approach. This includes encouraging compliance and relying on self-regulation. Moving up the pyramid are more demanding and punitive approaches, including warnings, penalties, and criminal penalties and licence suspensions. The model is a dynamic one, which does not specify the types of matters that must be considered or the point in time when the regulator sees fit to move up the pyramid away from

¹⁴ See Department of Parliament Services, Parliament of Australia, 'Australia's Corporate Regulators – the ACCC, ASIC and APRA', 14 June 2005, Research Brief no 16, 2004–05, 22; see also Christine Parker, 'Compliance Professionalism and the Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215, 223.

¹⁵ Ayers and Braithwaite, above n 7; John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 231; Valerie Braithwaite, 'Special Issue on Responsive Regulation and Taxation' (2007) 29(1) *Law and Policy* 3.

¹⁶ See Ayers and Braithwaite, above n 7, 35.

persuasion to penalties. Both the ACCC and the Australian Securities and Investments Commission (ASIC) have acknowledged the commitment to this approach to enforcement.¹⁷ Implementation may be harder in certain areas than others. For the model to work there has to be a general understanding and acceptance of the kind of work the agency does and the meaning of the rule that is being enforced. The difficulties experienced by tax regulators in promoting an understanding of the basis, fairness and commitment to tax policy is perhaps much more than the difficulties experienced by other regulators, including ASIC and the ACCC.¹⁸

The early days of the trade practices regulation demonstrate the importance of creating a shared understanding; politicians and the Commissioner successfully raised concerns about the effects of anti-competitive conduct and began a dialogue between the regulator and businesses.¹⁹ Similar practices have been employed more recently, when the ACCC held prolonged consultation processes in order to increase familiarity with the legislation and the effects of deregulation on different industry sectors. One such example was in relation to the medical profession, which became subject to the Act in 1995. Here the ACCC held long consultation processes aimed at encouraging awareness and compliance with the law – a distinctive strategy not prescribed by the Act. The advantages of nurturing compliance, increasing institutional awareness, and being responsive to the needs of regulators/regulatees clearly motivated such practices.

Since the seventies the ACCC has encouraged self-regulation through the authorisation of voluntary codes of conduct, and during more recent times it has been committed to compliance.²⁰ Parker, in her study on the ACCC's role in the area of compliance, suggests that the ACCC's strategies have 'sought to foster deeper, more substantial changes in business behavior and commitment by expecting businesses to respond to ACCC investigation or prosecution by the implementation of an internal trade practices compliance system'.²¹ Parker points out that, although the ACCC's enforcement activity had little direct impact, it has

¹⁷ See Department of Parliament Services, Australia's Corporate Regulators, above n 14, 24–6.

¹⁸ For a discussion of the difficulties of fostering a shared understanding in taxation regulation, see Sol Piccioto, 'Constructing Compliance: Game Playing, Tax Law, and the Regulatory State' (2007) 299(1) *Law and Policy*, 11, 13.

¹⁹ J P Nieuwenhuysen, 'The Nature of Trade Practices and the Impact of the 1965 Act' in J P Nieuwenhuysen, *Australian Trade Practices: Readings*, (2nd ed, 1976) 34–5; David Merrett, Stephen Coronos and David Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman' (2007) 47(2) *Australian Economic History Review* 178.

²⁰ See Warren Pengilly, 'Competition Law and Voluntary Codes of Self Regulation: An Individual Assessment of What Has Happened to Date', (1991) 12(2) *University of New South Wales Law Journal* 212; Parker, 'Compliance Professionalism and the Regulatory Community', above n 14.

²¹ Christine Parker, 'Do Businesses take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) *Melbourne University Law Review* 15, 18.

indirectly contributed to the adoption of complaints handling systems by many bodies.²² The preference for such voluntary compliance has been acknowledged by the ACCC and has also been accepted by the Court in setting penalties.²³ More recently the ACCC has been pushing for criminal penalties for cartel conduct, with Commissioner Samuel saying that ‘nothing concentrates the mind of an executive contemplating creating or participating in a cartel more than the prospect of a criminal conviction and a stretch in jail’.²⁴ This move may be seen as an attempt to move up the regulatory pyramid with the threat of criminal penalties being in the shadows while compliance and self-regulation practices are at the fore.

This responsive regulation model has been criticised on many levels.²⁵ Some studies have found that, although persuasion may be a cheaper regulatory strategy, it is also more often subject to failure.²⁶ Many of these criticisms have been taken onboard and the model has been reworked considerably given changing contexts, specifically the changing role of the state in regulation.²⁷ Braithwaite himself has acknowledged the limitations of the original model as being ‘overly statist in its obsessions’ and states the core chapters were written at the end of the Regan-Thatcher leadership and reflects debates of that era.²⁸

More recently Baldwin and Black have attempted to rework the responsive regulation model and they have sought to develop some of these ideas in their article ‘Really Responsive Regulation’.²⁹ The key concept is that, to be really responsive, it is not only the regulators’ point of view but also the regulatee’s point of view that matters, and it is a continually reflexive process. They argue that, to be really responsive, ‘regulators have to [be] responsive not only to the compliance of the regulatee, but in five further ways’.³⁰ These include being responsive to: the firms’ own operational and cognitive frameworks (their attitudinal setting); the broader institutional environment of the regulatory regime; the different logics of regulatory tools and strategies; the regime’s own performance; and finally, changes in each of these elements.³¹ Baldwin and Black also argue this approach needs to be

²² Ibid 34.

²³ Department of Parliament Services, Australia’s Corporate Regulators, above n 14, 22.

²⁴ Cameron Stewart, ‘Pratt’s cartel “cost all of us”’ *The Age* (Melbourne), 3 November 2007 <<http://www.theaustralian.news.com.au/story/0.25197.22694426-601.00.html>> at 4 November 2008.

²⁵ Two examples of these critiques can be found in Parker, ‘Compliance Professionalism and the Regulatory Community’, above n 14, 223–5; Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59. For a summary of these criticisms, see Valerie Braithwaite, ‘Special Issue on Responsive Regulation and Taxation’, above n 15, 5.

²⁶ See Fiona Haines, *Corporate Regulation: Beyond ‘Punish or Persuade* 1997) 15–16.

²⁷ See John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008) 94–100.

²⁸ Ibid 87.

²⁹ Baldwin and Black, above n 25.

³⁰ Ibid 61.

³¹ Ibid.

applied across all the different tasks involved in the regulatory activity. They propose that this involves five elements: detecting undesirable or non-compliant behaviour; developing tools and strategies for responding to that behaviour; enforcing those tools and strategies on the ground; assessing their success or failure; and modifying approaches accordingly.³² This holistic approach is an extremely challenging one for the regulator, requiring the regulator: to have clear objectives; to know all there is to know about the regulatee and its changing environment; to be fully equipped to develop the necessary rules and tools; and to be sensitive to all changes and continuously reflexive. It is a big call and perhaps represents an ideal that regulators should always aim for while accepting that it may be difficult to attain.

RESTORATIVE JUSTICE AND RESPONSIVE REGULATION

The responsive regulation model has been further developed by linking it to restorative justice. Here Braithwaite has sought to examine the changing regulatory landscape and integrate three theories of a justice system – restorative justice, deterrence, and incapacitation. It is recognised that all of these three theories are flawed and the weakness of one is addressed by the strength of the others. However, restorative justice is seen as the goal where the greatest emphasis should be placed; this is reflected by its position at the base of the pyramid with the largest space devoted to it (Figure 2). Stepping up the pyramid are deterrence strategies, which include litigation and revocation of licences. These may be used by the regulatory institution where restorative practices are not effective. At the top of the pyramid are punitive sanctions, including criminal penalties and imprisonment.

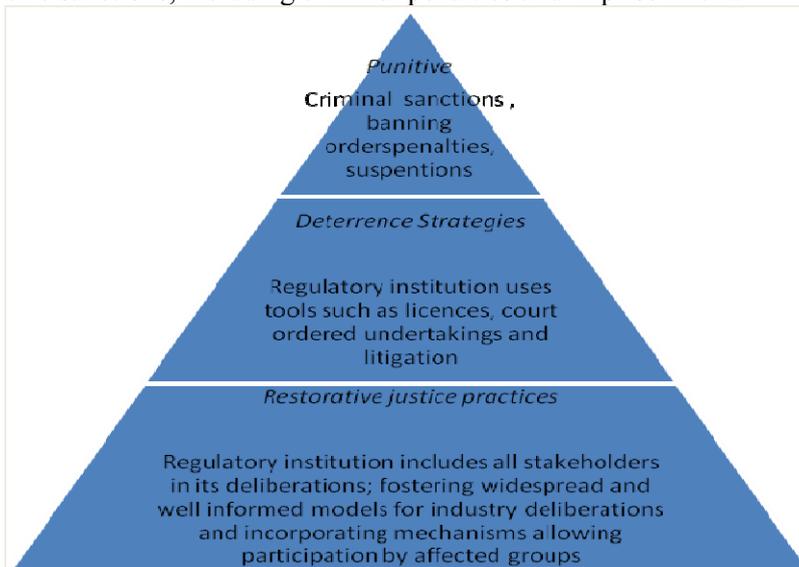


Figure 2: Strategies available to the regulatory institution

³² Ibid 76.

Restorative justice is described as an approach where all the stakeholders affected by an injustice have an opportunity to discuss how they have been hurt by it, and to discuss their needs and what might be done to repair the harm.³³ Its greatest attribute is that it is an approach informed by a 'set of values that defines not only a just legal order, but a caring civil society.'³⁴ It is proposed that restorative justice works best with a spectre of punishment in the background, but never in the foreground. Restorative justice is claimed to deepen democracy, as it moves away from being a coercive imposition of states upon citizens to something autonomous citizens take after listening to a democratic conversation, which may include concerns, harms and duties.³⁵

The democratic notions on which this is based come from the deliberative democracy discourse, which has been summarised as 'inclusive, reasoned debate in public which creates decisive working agreements on any matters of collective concern, accountable to the people subject to those agreements, and conducted among equals'.³⁶ Parker has used deliberative democracy principles in developing a model that 'gives the state a role in *facilitating* the permeability of private organizational systems and social power directly to civil society and the public sphere'.³⁷ Parkinson and Roche point to a number of deliberative democratic features that should be considered in any attempts at implementing restorative justice practices; this could obviously include regulatory bodies. Their study examines restorative justice programs involving criminal offences which equally apply to other areas. The features they point to are: inclusiveness of all people affected by certain decisions; equality between participants; the transformative power of deliberative process which can create genuine bridges of understanding; scope and decisiveness as individuals appreciate the scope for participation that democracy offers; and decisiveness that such discretionary programs bring, as well as accountability which can be to a much wider population than traditionally expected.³⁸ A number of the ACCC's enforcement activities are in line with a number of these deliberative democracy principles.

One example where it may be seen to exist is in the negotiation of undertakings. This provides the ACCC the power to accept a written undertaking in connection with a matter in which it has power.³⁹ Generally this power has been used in the context of mergers and consumer protection offences.⁴⁰ Where the undertakings

³³ John Braithwaite, *Restorative Justice and Responsive Regulation*, above n 15, 91.

³⁴ *Ibid.*

³⁵ *Ibid.* 10.

³⁶ John Parkinson and Declan Roche, 'Restorative Justice: Deliberative Democracy in Action?' (2004) 39(3) *Australian Journal of Political Science* 505, 507.

³⁷ Christine Parker, *The Open Corporation: Effective Self Regulation and Democracy* (2002) 40.

³⁸ Parkinson and Roche, above n 36, 511–15.

³⁹ Section 87B *Trade Practices Act*.

⁴⁰ See Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' 67(2) *The Modern Law*

allow all interested parties a role in the negotiations, are made publically available, and allow for regular audit and review of compliance and effectiveness, they may be said to include the principles of deliberate democracy.⁴¹ Likewise, in the determination of authorisations, the Act makes provision for pre-decision conferences to be called. This occurs after the draft determination and prior to the final determination. It provides the opportunity for interested parties to discuss the draft determination and to put their views directly to a Commissioner.⁴² These conferences are only called on matters involving diverse interests and in some cases these conferences can be perfunctory. However, in certain complex cases, such as in the aviation industry where there are many counterfactuals proposed, the pre-decision conference may be an opportunity for an inclusive dialogue.⁴³ Many groups that may not make formal submissions still avail themselves of less formal avenues to express their views. Allowing avenues for such expression may increase empowerment and cooperation. However, on the downside, they could prove to be expensive, have the ability to increase animosity between the parties or provide the opportunity for strong arm tactics to be used.⁴⁴ As always, one regulatory strategy may not suit all situations.

DEMOCRATIC EXPERIMENTALISM

To this scholarship has to be added the contributions of Sabel and colleagues, who have proposed a new form of pragmatic governance that sees an expanded role for regulatory institutions; this they term democratic experimentalism.⁴⁵ It evades an easy definition, meaning different things to different people depending on the site, circumstances, time and players. It is best described as a pragmatic approach that rejects an all encompassing political ideology or historical meta-narrative.⁴⁶ Their proposal sees power as decentralised, to enable citizens as well as other actors to utilise their local knowledge to fit solutions to their individual circumstances. It also

Review 209; Parker, 'Compliance Professionalism and the Regulatory Community', above n 14; Karen Yeung, (2004). *Securing Compliance: A Principled Approach* ch 7.

⁴¹ Parker, 'Restorative Justice in Business Regulation?', above n 40, 243.

⁴² See section 90A; see also Australian Competition and Consumer Commission, *Submission to the Commission of Inquiry: Review of the Competition Provisions of the Trade Practices Act 1974* [Dawson Review] (2002) 249.

⁴³ See, for example, *Re International Air Transport Association*, A3485, A90408, 31 July 1984; *Re Qantas Airways Limited and British Airways Plc Applications for authorisation*, A30226, A30227, 8 February 2005.

⁴⁴ Karen Yeung, *Securing Compliance: A Principled Approach* (2004) 41.

⁴⁵ See Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) *European Law Journal*, 271; Charles Sabel and William Simon, 'Epilogue: Accountability Without Sovereignty' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (2006) 395–412; Charles Sabel, and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015.

⁴⁶ Michael Wilkinson, 'Between Constitutionalism and Democratic Experimentalism? New Governance in the EU and the US' (2007) 70(4) *Modern Law Review* 680, 681.

envisages coordinating bodies, including regulatory institutions, taking on new roles, for example, assisting in benchmarking activities, such as the setting up of regulatory standards for market actors and requiring these actors to share their knowledge with others facing similar problems. This new role is not a one-off regulatory strategy. Rather, under this proposal the regulatory institution engages in continuous monitoring and cumulative self-scrutiny, leading to reviewing existing approaches and formulating new regulatory standards. These regulators must learn to contend with evasive and deceptive conduct as well as other acts that prevent participation by those who may be affected. They must also learn to contend with those who use participation to frustrate, obstruct and paralyse.

It has been proposed that such agencies engage in experimentalist regulation – which would connect rule making to monitoring followed by regulatory improvements.⁴⁷ The regulator's role would be an active one, responsible for scrutinising the effect of the rule and changing the rule as necessary. This is indeed a dramatically different role for regulatory agencies that takes note of the shifting regulatory landscape and takes us beyond the familiar but flawed concepts of accountability to which we are accustomed. Democratic experimentalism is influencing many writers and policymakers. It has been particularly well received in Europe, where the dominance of one state has diminished and multiple institutions are involved in governance.

An example of experimental governance by the ACCC is the use of conditions when granting authorisations. A brief explanation of the authorisation process and where conditions fit into it is needed here. This is a process whereby conduct that might otherwise breach the anti-competitive provisions of Part IV can be authorised: given permission to proceed with immunity from prosecution. The authorisation tests involve a weighing up of the public benefit against the public detriment. Authorisations can also be granted subject to conditions.⁴⁸ As with all exercises of power by a regulatory agency, the power to impose conditions by the ACCC is constrained by the subject matter, scope and purpose of the statute.⁴⁹

Although the imposition of conditions usually involves limiting the public detriment or ensuring the claimed public benefit, there are times where there may be other collateral motives. Some of these motives include: setting up external and voluntary regulatory structures that allow appeal processes;⁵⁰ complaints mechanisms;⁵¹ external monitoring and reviews of business practices⁵² or codes of

⁴⁷ Dorf and Sabel, above n 45, 345.

⁴⁸ Section 91(3).

⁴⁹ Application by Medicines Australian Inc [2007] ACompT4, (27 June 2007) 31.

⁵⁰ See, for example, *Re Australian Stock Exchange*, A90623, 1 April 1998.

⁵¹ See, for example, *Re Federation of Australian Commercial Television Stations*, A11709, A21265, 12 September 1984.

⁵² See, for example, *Re Medicines* authorisations, A90779, A90780, 14 November 2003.

conduct⁵³; and independent representation on industry committees⁵⁴. These types of conditions do more than address anti-competitive conduct. They are steps in managing markets, market conduct and the actions of individual market actors. There may also be the possibility that such collateral purposes may be outside the scope and purpose of the statute. A collateral purpose served by conditions, which goes beyond the power of addressing public benefit or detriment, is the management of the market. The ACCC has used conditions to introduce independent and effective appeal processes that have the effect of ensuring anti-competitive practices will be scrutinised through the appeal, complaints or review process. They may also have the effect of introducing specific types of just practices and ethical conduct into the specific sectors of the market.

Appeal mechanisms have been introduced via conditions since 1984, when there were numerous codes of conduct being authorised. For example, in *Mercury Newsagency System*⁵⁵, *NSW and ACT Newsagency System*⁵⁶, *Master Locksmiths Association of Australia Ltd*⁵⁷ and *Royal Australian Institute of Architects*⁵⁸ the Commission required the inclusion of respective appeals processes. In *Re Australian Stock Exchange* the ACCC granted authorisation on the condition that the Australian Stock Exchange provide an adequate appeal mechanism for individuals whose registration as a trading representative was refused, suspended or withdrawn by the Australian Stock Exchange Board. It required that the constitution be amended to make provisions for such a procedure.⁵⁹ In the *Surgeons* authorisation the conditions addressed the composition of the Appeal Committee, requiring the Appeal Committee be comprised of a majority of members, including the Chairman; be nominated by the Australian Health Minister; and only a minority of members be Fellows of the College of Surgeons.⁶⁰ Similarly in the *Victorian Egg Industry Cooperative* authorisation, the conditions provided an independent appeal mechanism for producers in addition to the procedures provided under the *Commercial Arbitration Act 1984 (Vic)*.⁶¹

At other times the ACCC has granted authorisations subject to conditions that have called for complaints processes to be included. Although this may provide for anti-competitive practices to be publically aired, they may also go towards setting up and developing better governance practices within industries. In *Re Allianz Australia Insurance Limited* the ACCC granted authorisation to three large

⁵³ See, for example, *Re Australian Direct Marketing* authorisation, A90876, 29 June 2006.

⁵⁴ See, for example, *Re Medicines Australia* authorisations, A90779, A90780, 14 November 2003.

⁵⁵ 9 May 1984.

⁵⁶ 26 April 1984.

⁵⁷ 15 March 1984.

⁵⁸ A58 7 September 1984.

⁵⁹ *Re Australian Stock Exchange*, (1998) A90623 i–ii.

⁶⁰ *College of Surgeons*, A90765, 30 June 2003.

⁶¹ *Victorian Egg Industry Cooperative*, A40072, 13 September 1995, 29.

insurance companies to set up a single co-insurance pool specifically for the provision of public liability insurance to not-for-profits, which would otherwise contravene s 45. The conditions included complaints handling procedure consistent with the Australian standard AS4269-1995, as well as a requirement all complaints and their outcome are reported to the ACCC on a quarterly basis.⁶²

Another means of incorporating fair practices within the industry is by requiring independent review. In the *Surgeons* authorisation the ACCC was concerned with the exclusive role of the College of Surgeons in setting the standards for accrediting hospitals and training posts with hospitals. The conditions imposed included a requirement that the College establish a public independent review of the criteria for accrediting hospitals for the provision of various surgical training positions.⁶³ This condition was supplemented by others that involved the participation of the State Health Ministers in the nomination of hospitals for accreditation.⁶⁴

These conditions are important in creating new flows of information, thereby enhancing the accountability of the institution responsible for posting such information. It also allows interested parties, such as consumer groups, access to the information necessary to monitor the activities of such institutions. In many ways these conditions represent an example of democratic experimentalism – the strategies are far removed from command-and-control and they go beyond responsive regulation strategies as the regulator is effectively stepping out of the arena. Instead they are setting up better governance practices in the market, facilitating information flows to interested parties, and more generally coopting multiple parties in the job of regulating.

GLOBALISATION AND NEW MODES OF GOVERNANCE

Two other groups of scholars are also relevant to this discussion on regulatory agencies.⁶⁵ ‘Regulatory capitalists’ highlight the power exercised by global corporations in this field, as well as the lack of any coherent regulatory structure that can regulate such entities. In this arena many states have little influence. Rather it is webs of influence that operate in place of the regulatory structures as we know them. These webs include webs of coercion and webs of dialogue, providing both a disparate and complex regulatory panorama. Corporate power today is more influential than the power of many states. This power has been clearly recognised

⁶² Allianz authorisations, A30217, A30218, 24 March 2004, 55.

⁶³ *College of Surgeons*, A90765, 30 June 2003, 166.

⁶⁴ Ibid 167–8.

⁶⁵ See, for example, John Braithwaite, *Regulatory Capitalism*, above n 27; Michael Kempa, Clifford Shearing and Scott Burris, ‘Changes in Governance: A Background Review’ (Paper presented at the Global Governance of Health Seminar, Salzburg <http://www.temple.edu/lawschool/phrhcs/salzburg/Global_Health_Governance_Review.pdf> at 18 December 2007; David Levi-Faur and Jacinta Jordana, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598(1) *The ANNALS of the American Academy of Political and Social Sciences* (AAPSS) 598.

by the increasing role of partnership approaches to governance, where both corporations and Non-Government Organisations (NGOs) have been mobilised to participate in collective governance processes.⁶⁶ The importance of networked systems where regulators can network with corporations to bring about compliance or monitoring or reform is recognised by scholars, including Peter Drahos.⁶⁷ They point to the inadequateness of national laws and advocate being more creative about responsiveness. These arguments are relevant to competition regulation which usually has a global dimension. The ACCC leniency policy is an example of international coordination of regulatory authorities.⁶⁸ Such policies have been in place in the United States and Europe and they are also being introduced in Japan and Korea, where the ACCC has been active in providing guidance on policies and practices.⁶⁹ However, the coordination starts with having uniform laws, but goes beyond that. The competition regulators have joined to establish the International Competition Network, which serves the purpose of sharing information on commonly accepted standards of scrutiny when it comes to hardcore cartels.⁷⁰ Further the cooperation can also be in the form of mounting legal action involving the same conduct in different jurisdictions. For example, the ACCC has currently started action against airfreight carriers; this has also occurred in the United States.⁷¹ By doing so, regulators are recognising the shortcomings of national laws to regulate global conduct and actors. The regulatory agencies are seeing the importance of globalisation and entering into a period of networked global governance.

Another group of scholars important to this discussion advocate the open method of coordination. This is of particular relevance in the European Union, where many institutions, both from individual states and others representing the European Community, are going to be operating side-by-side in the creation of norms and

⁶⁶ See: Michael Kempa, Clifford Shearing and Scott Burris, 'Changes in Governance: A Background Review' (Paper presented at the Global Governance of Health Seminar, Salzburg <http://www.temple.edu/lawschool/phrhcs/salzburg/Global_Health_Governance_Review.pdf> at 18 December 2007.

⁶⁷ Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 *Temple Law Review* 401; see also Michael Castels, *The Rise of the Network Society* (1996).

⁶⁸ See Australian Competition and Consumer Commission, *Leniency Policy for Cartel Conduct* (2003) <<http://www.accc.gov.au/content/index.phtml/itemId/459479>> 20 March 2008.

⁶⁹ See Australian Competition and Consumer Commission, 'ACCCCount: A report of the Australian Competition and Consumer Commission activities', 1 July to 30 September 2008, 52, <<http://www.accc.gov.au/content/index.phtml/itemId/846908>> at 14 November 2008; see also Kevin Arquit, Simpson Thacher & Bartlett LLP, Jacques Buhart, Herbert Smith LLP, and Olivier Antoine, Simpson (ed), *Leniency Regimes: Jurisdictional Comparisons* (2007).

⁷⁰ Emil Paulis, 'International Cooperation against Cartels' (Paper presented at 'Cracking Cartels: International and Australian Developments' conference, Australian Competition and Consumer Commission, 4 November 2004, Sydney).

⁷¹ Australian Competition and Consumer Commission, 'ACCC launches its first case on alleged airfreight cartel' (Press Release, 28 October 2008) <<http://www.accc.gov.au/content/index.phtml/itemId/847215>> at 14 November 2008.

practices. This is a stark contrast to the conventional mechanisms of command-and-control. Rather, these norms and practices are going to be increasingly widespread, deliberate and explicit use of new forms of governance, such as ‘bench marking, mutual learning and peer pressure’.⁷² These scholars acknowledge that such strategies pose challenges to conventional accountability mechanisms. Maher discusses the governance of the Economic and Monetary Union as an example of this new hybrid form of governance.⁷³ The manner in which the European Monetary Union functions challenges our notions of governance. No single statute created this entity nor is there a single regulator in charge of governance; rather many institutions, including the European Council, European Commission, the Eurogroup (an informal Council formation for euro-zone members only) as well as the Member states, play a part. The powers come from a combination of treaty, statute and norms, such as the Stability and Growth Pact.⁷⁴ In such a context the manner in which regulatory agencies function today and the manner in which we understand these agencies to be constrained have little relevance. Although these issues may be particularly relevant to the European Union, it is also likely to resonate in Australia in the future as regulators find the need to have coordinated approaches to the new challenges of climate change and the carbon economy.⁷⁵ This will require sharing the regulatory space, mutual reinforcement of virtuous arbitrage across fragmented economies,⁷⁶ moving away from the national to the global and recognising public goods for people outside the nation’s jurisdiction.

CONCLUSION

As business has become more complex and networked so too has the job of regulating. Often in uncharted waters, regulating agencies have to regulate discretely so as not to upset markets, act tactfully to keep government satisfied, and be directly accountable to the Courts as well as business, media and stakeholders, at the same time as developing innovative regulatory strategies to govern innovative regulatory practices. This article has examined the changes in both governance strategies of regulatory agencies, as well as the regulatory scholarship that provides a framework for theorising these changes. At times regulatory scholarship has had an influence on governance strategies, as responsive regulation did during the 1980s. However, more often than not, regulatory scholarship is an attempt to understand and at times query the way in which regulators operate in an

⁷² Imelda Maher, ‘Economic Governance: Hybridity, Accountability and Control’, Project no CIT-CT-2004-506392, New Modes of Governance Project, Integrated Project funded by the 6th Framework Program of the European Union.

⁷³ Ibid 4.

⁷⁴ Ibid 5.

⁷⁵ For a discussion of some of these challenges, see Fiona Haines and Nancy Reichman, ‘The Problem that is Global Warming: Introduction’ (2008) 30(4) *Law and Policy* 385; For a discussion on water trading, see Australian Competition and Consumer Commission, *Water Trading: A guide to your fair trading rights when using brokers and exchanges* (2008) <<http://www.accc.gov.au/content/index.phtml/itemId/849223>> at 14 November 2008.

⁷⁶ Ibid.

increasingly complex and connected space. It is the means by which the practices of regulatory agencies can be re-evaluated. It is also the means by which we can connect such practices to fundamental principles of law, particularly procedural fairness and accountability. As we move to more complex types of regulation, focus on these fundamental principles may be lost. This only strengthens the need for regulatory scholars to continue their theorising.