

Preface

The Australian process for the competition regulator to authorise anti-competitive conduct on the basis of public benefit is a distinctive one. The path followed by the regulator in its early years was significantly influenced by its chairman, who established open lines of communication with a view to avoiding litigation, while at once scolding and cajoling, using discretion innovatively, and bringing business on board to see the underlying sense of the legislation. The philosophy of dialogue and responsiveness of these early years fell away during the 1990s as the regulator took on the responsibilities of a deregulated market and a decentred regulatory environment.

Using a combination of qualitative and quantitative methodologies, including an examination of authorisation determinations over three decades and interviews with past and current staff of the Australian Competition and Consumer Commission (ACCC), this book studies the manner in which the term public benefit has been interpreted. Although the role of economic efficiency factors has always been important in these determinations, so too have the non-economic efficiency factors, including the encouragement of governance networks, equitable dealings as a means of monitoring powerful players in a decentred market, and the incorporation of a dispute resolution mechanism into codes of conduct. The meta-regulatory shift towards procedural regulation of self-regulation by the ACCC can only be explained as a triumph of practice over theory. Extemporised practice has resulted in inclusivity deficits that have grown over time. This approach, while experimental and outcome driven, remains ad hoc and under-theorised, and comes at a great cost. It is proposed that the ACCC should reassess its performance, developing overarching principles, which are founded on a discourse that is more universal than economic efficiency and with a fundamental commitment to inclusivity. With this in mind a principle-based approach consisting of nine principles is suggested.

The first principle provides a broader theoretical framework for defining public benefit by first identifying the main human rights that embody public benefits and secondly, by extracting the immanent rights that have been recognised by the regulator in practice. These two sets of rights are used to create a set of heuristics, which become principles defining public benefit, while providing sufficient flexibility to accommodate regulatory challenges. This book addresses the inclusivity deficit by developing a further eight principles for promoting responsiveness, incorporating ongoing dialogue and fostering democratic participation. This is based on finding a place for participation by designing strategies for inclusion as well as crafting the art of practice whereby participation by stakeholders is nurtured.

This book, then, brings together the principles defining public benefit and promoting responsiveness and democracy as a set of nine broad principles that can provide the basis of a shared understanding for the trade practices communities. The regulator, in collaboration with these communities, will continue to imbue these principles with inclusive practices and shape these principles to suit the regulatory considerations of our time.