# 1. Competition Policy and the Authorisation Process

Competition law in Australia is spelt out in the *Competition and Consumer Act 2010* (Cth) and its predecessor the *Trade Practices Act 1974* (Cth). It is enforced by the competition watchdog, the Australian Competition and Consumer Commission (ACCC). The competition law provisions that are most familiar to people are those prohibiting mergers, cartel conduct and the proposed criminal penalties for cartel conduct. Much more important and much less well known, however, are the authorisation provisions within the Act. A significant part of the ACCC's work is geared to granting such authorisations. These provisions allow the ACCC to grant immunity from prosecution for a specified period of time and under certain conditions. Authorisation means that otherwise anti-competitive conduct can legally proceed, without the possibility of prosecution by the ACCC. On the one hand, anti-competitive conduct is prohibited by the Act and, on the other, it can be authorised by the regulator. A variety of conduct has been authorised in the past. Agreements between competitors, who share a vertical relationship, to set a levy on the goods they sell to customers has been authorised, as have agreements between companies, in a horizontal relationship, to fix the amount of goods supplied to another retailer, who may also be a competitor. Such agreements are anti-competitive but can be authorised.

The grounds on which authorisation can be granted are governed by the public benefit test.[1] The applicant has to satisfy the ACCC that the public benefit resulting from the proposed conduct outweighs the public detriment that is likely to result from the proposed conduct. The Act offers little guidance on how public benefit should be interpreted or who should be consulted when making the decision. The public benefit test remains vague, the meaning of the words 'public' and 'benefit' are difficult to define and the interpretation of the phrase is left in the hands of the ACCC. This discretion also carries responsibility. There are two main aspects of discretion in the context of the public benefit test that need to be noted. The first arises from the lack of clarity about the meaning of the phrase public benefit. The second aspect is the stakeholders, who should be consulted and whose views should be considered in determining the meaning of the phrase — the significance of this obligation, and how it can be fulfilled, is also unclear.

The meaning of 'public benefit' is a source of considerable debate. Some have argued benefit should refer primarily to economic efficiency factors, such as

1 Sections 90(6) and 90(8) *Trade Practices Act 1974* (Cth).

promotion of cost savings or improvement in administrative practices.[2] Others have argued benefits can also include non-efficiency factors such as the creation of jobs in a rural town. Still others have stated public benefits should be able to include factors such as increased personal security or improved environmental conditions.[3] It has also been contended that nothing can be regarded as a public benefit unless it flows through to the public or at the very least to the consumer.[4] These are the vexed questions that the ACCC has had to tackle when exercising its discretion.

The second aspect about discretion is that the ACCC has to decide whom to consult in making the decision about the interpretation of the phrase. The ambit of consultation will inform the meaning of the phrase. The views brought to the ACCC's attention by the applicant seeking the authorisation will be quite different to the views expressed by its competitors. It will be different again from the views of consumers or employees, who may be affected by the decision. Ideally the ACCC might engage with all the stakeholders, fostering participation in the tradition of deliberative democracy, to develop a balanced dialogue to which everyone can lay claim. But of course this ideal is not easily met. Small competitors may not have the time to raise their concerns with the ACCC. Consumers may not have the technical expertise to query the claimed public benefits the applicant may have established by relying on econometric data or expert evidence. Yet these will be the very groups affected by the decision.

This book sets out to explore some theories on how discretion is exercised and compares them to the ACCC's practice. It evaluates the way in which discretion is used by regulatory agencies and goes on to focus on the manner in which the ACCC has used its discretion in interpreting public benefit within the authorisation process.

## The Empirical Study

This book relied on an empirical study of authorisation determinations over four decades from 1976 to 2010. The study of public benefit in this book is restricted to the examination of authorisation determinations involving sections 45 and 47 of the *Trade Practices Act*, whereby authorisation can be granted by the Trade

2 For example, see Independent Committee of Inquiry into Competition Policy in Australia, Commonwealth of Australia, *National Competition Policy* (1993) [Hilmer Report] 99.

3 See Michal Gal, *Competition Policy for Small Market Economies* (2003) 55.

4 See Rhonda Smith, 'Authorisation and the Trade Practices Act: More about Public Benefit' (2003) 11 *Competition and Consumer Law Journal* 21; John Fingleton and Ali Nikpay, 'Stimulating or Chilling Competition' Office of Fair Trading (United Kingdom) (Paper presented at Fordham Annual Conference on International Antitrust Law and Policy, New York, 25 September 2008) <http://www.oft.gov.uk/news/speeches/2008/0808> at 25 October 2008.

Practices Commission (TPC) or the ACCC under section 90(6). The study does not include mergers, which operate under a different test detailed in section 90(9). The empirical research includes both quantitative and qualitative data. While the analysis relies on ACCC authorisation determinations, court and tribunal decisions generally, it makes special use of 244 authorisation determinations made over seven years. It is also informed by 19 interviews conducted with key people involved in the authorisation process.

The seven years studied are 1976, 1984, 1998, 2003, 2006, 2008 and 2010. The choice of the years was purposive rather than random. These years represent key periods in the development of competition regulation, often reflecting important policy shifts or focus. I have collated the data after taking into account an appropriate time lag to allow for the policy effects to filter through to the authorisation process. The first set of data, from 1976, gives a good understanding of how decisions were made in the early years of the creation of the TPC. The Act was only passed in 1974 after a good deal of disquiet; the 1976 decisions illustrate the contemporary decision-making process, and they act as a basis for comparisons over time. The second set of data comes from 1984, when there was a focus by the new Labor government under Bob Hawke on creating an efficient industrial base in Australia and on economic efficiency and self-regulation. The third set of data comes from 1998 — this year was selected for empirical analysis because it was well into the implementation of national competition policy, which had a significant effect on competition policy and the authorisation process. The fourth and fifth sets of data from 2003 and 2006 examine a period following the deregulation of essential facilities and the increased scope of the Act to regulate the conduct of professionals. Finally, the data in 2008 and 2010 have been collated to closely scrutinise how the ACCC has been trying to encourage a market economy while minimising market failure. Each of the years represents a snapshot of the manner in which the ACCC made its decisions. The objective was to collate data that will allow for an assessment of the ACCC's decision-making over four decades.

There were 35 determinations examined in each of the seven years, with the exception of 2008, in which there were 34 appropriate determinations, making a total of 244 authorisation determinations. It was the year the determination was made that was considered in selecting the determinations for the study, rather than the date the application was lodged. These determinations accounted for over 80 per cent of the total determinations made in the years 1984, 1998, 2003, 2006, 2010 and 100 per cent in 2008. Due to the poor reporting of determinations in 1976, it is difficult to estimate with certainty the number of the commission's determinations.

There were 16 public benefit factors coded for each determination as part of the study and these are contained in Table 1.1. Of these public benefits, 14 were recognised by the ACCC in 1999.[5] Two other public benefits that have been recognised by the ACCC have been added to this list. The ACCC began to actively endorse environmental benefits in 2001 and this has been added to the list as PB11, Steps to protect the environment, in Table 1.1.[6] The ACCC has always recognised that such lists are non-exhaustive[7] and, accordingly, PB16, Other, has been added as a catch-all category, for benefits that do not come into one of the other 15 categories.

**Table 1.1: Public benefit (PB) factors examined in the empirical study**

| Public benefit (PB) no | Meaning |
|---|---|
| PB1 | Economic development, for example, of natural resources through encouraging exploration, research and capital investment |
| PB2 | Industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs |
| PB3 | Expansion of employment or prevention of unemployment in efficient industries |
| PB4 | Expansion of employment in particular areas |
| PB5 | Attainment of industry harmony |
| PB6 | Supply of better information to consumers and businesses to permit informed choices in their dealings |
| PB7 | Promotion of equitable dealings in the market |
| PB8 | Promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain |
| PB9 | Development of import replacements |
| PB10 | Growth in export markets |
| PB11 | Steps to protect the environment |
| PB12 | Fostering business efficiency, especially when this results in improved international competitiveness |
| PB13 | Assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness |
| PB14 | Enhancement of the quality and safety of goods and services and expansion of consumer choice |
| PB15 | Promotion of competition in the industry |
| PB16 | Other |

Source: Author's research.

5 Australian Competition and Consumer Commission (ACCC), *Authorisations and Notifications* (May 1999) 6–7. These benefits are PB1 to PB10 and PB12 to PB15 in Table 1.1.

6 Allan Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' (Paper presented at the National Competition Policy Workshop, Melbourne, 12 July 2001) 7.

7 ACCC, (May 1999) 6, where it is stated the 'Public benefits recognised by the Commission and the Australian Competition Tribunal have included'. Also see Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' 8.

As the authorisation process involves the weighing of public benefit against the public detriment, it was important to examine the manner in which the ACCC has addressed detriments over time. Public detriment is focused on whether there has been a lessening of competition in the market and it has been acknowledged that this will include a reduction of competitors, increased conditions of entry and constraints on competitors. These three factors are coded as PD1 to PD3 in Table 1.2 below.[8] As with the public benefits, it was recognised that such lists are non-exhaustive and a fourth catch-all category, PB4 Other, was also coded for the 244 determinations.

**Table 1.2: Public detriment (PD) factors examined in the empirical study**

| Public detriment (PD) no | Meaning |
|---|---|
| PD1 | A reduction in the number of competitors |
| PD2 | Increased conditions of entry |
| PD3 | Constraints on competition affecting the ability of market participants to innovate effectively and to conduct their affairs efficiently and independently |
| PD4 | Other |

Source: Author's research.

Each of the 16 public benefits and 4 public detriments were coded. They were given a weight from 1 (not important) to 4 (very important) to indicate the weight attached to each of these factors by the commission in its determination. The explanation of the weights used is presented in the Appendix.

This study sought to further compare the different benefits and the importance given to them across the seven years of the empirical study. In order to do so, the weights attached to each public benefit and each public detriment were added together and the sum of these weights were used to plot a number of figures that are contained in chapters 3, 4 and 6. Where a benefit was seen to occur twice, such as cost savings in administration and cost savings in production, it was weighted twice. Other factors were also collated in the study including the type of industry that the applicant belonged to; whether conditions were imposed by the ACCC in granting authorisation; and, the type of conditions imposed as detailed in the Appendix.

8 Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' 9; also see the decisions of the Australian Competition Tribunal in *Victorian Newsagency* (1994) ATPR 41-357 at 42,683.

## Theoretical Frameworks

There are two main frameworks that inform this book: historical institutionalism and responsive regulation.

*Historical institutionalism* is a diverse field, which enquires into the development and function of institutions,[9] as well as the evolution of a new institution required to operate in a multicultural and multinational environment and the challenges posed therein.[10] It is useful as it relies on historical processes to explain the present.[11] This rejects the functionalist view of institutions and, rather, sees institutions as enduring legacies of political struggles.[12] Institutions are social and cultural constructions that embody the values of the time and the emphasis is on how these institutions emerge from and are embedded in concrete temporal processes.[13] Institutions in two different jurisdictions will evolve differently depending on the cultural and social constructions they embody. Tony Freyer's work on the history of comparative antitrust regulation,[14] examines the institutional trajectories taken by different institutions in regulating antitrust in different jurisdictions.

Further historical institutionalism is *institutionalist* — it focuses on institutions. Clearly institutions provide the site for political actors to pursue their interests and it is important to understand how politics has shaped the institution. Historical institutionalists develop this line and their central theme is that institutions play a much greater role in shaping politics.[15] As Kathleen Thelen and Sven Steinmo have stated:

> institutional analysis also allows us to examine the relationship between political actors as objects and as agents of history. The institutions … can shape and constrain political strategies in important ways, but they are themselves also the outcomes (conscious or unintended) of deliberate political strategies, of political conflict or of choice.[16]

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9 Colleen A Dunlavy, 'Political Structure, State Policy, and Industrial Change: Early Railroad Policy in the United States and Prussia', in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (1992).

10 Brigid Laffan, 'Becoming a "Living Institution": The Evolution of the European Court of Auditors' 1999 37(2) *Journal of Common Market Studies* 251; Paul Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis' (1996) 29(2) *Comparative Political Studies* 123.

11 Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 *Annual Review of Political Science* 369, 371.

12 Thelen (1999) 386.

13 ibid.

14 Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America: 1890–1990* (1992); Tony Freyer, *Antitrust and Global Capitalism 1930–2004* (2006).

15 Kathleen Thelen and Sven Steinmo, 'Historical Institutionalism in Comparative Politics', in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (1992).

16 ibid, 10.

The claim made by historical institutionalists is that actors may be in a strong initial position, seek to maximise their interests and, nevertheless, carry out institutional and policy reforms that fundamentally transform their own positions in ways that are unanticipated.[17] Institutions can be mediators of policy and the ways in which the policy is interpreted and applied. This is particularly relevant in an examination of the manner in which the institution, in this case the competition regulator, has shaped policy and can remake politics.[18] Historical institutionalism can help us understand how institutions can confer power on some actors while withholding power from others — in the words of Hall and Taylor historical institutionalists are explaining how institutions can be constitutive of political agency.[19] The institutions' role has a temporal quality and its priorities will change over time.[20]

Thus, an institution can shape policy, as the study by Stephen Wilks and Ian Bartle illustrates.[21] These authors examine the creation of independent agencies, which occurred at different times, to regulate competition policy in the United Kingdom, European Union and Germany. They argue that the original decision to delegate the task of competition regulation to such agencies was motivated by a need for governments to reassure citizens by appearing to act.[22] These agencies, however, each had different missions: the German mission was to defend the market economy, the European mission was market integration, and the British mission was to protect the public interest.[23] But the passing of time demonstrates that these 'agencies have become more activist and have contributed to policy through a demonstration effect, showing what can be done; as a source of technical expertise; and as an available agency of implementation to be enhanced or adapted by subsequent government.'[24] The consequences of creating agencies have been 'to populate the policy area with actors … who have their own priorities, interpretations, and influence'.[25]

Historical institutionalism relies on critical events to explain the origins of the institution and the path it follows. Critical events, large and small, can affect the manner in which the institution evolves. However distinction must be made between the critical events that are responsible for the foundation of the institution and other critical events. The moment of institutional formation

17 Pierson (1996) 126.

18 See Thelen and Steinmo (1992) 10; also see Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 961.

19 Hall and Taylor (1996) 942.

20 Colin Hay and Daniel Wilcott, 'Structure, Agency and Historical Institutionalism' (1998) 44 *Political Studies* 951, 954.

21 Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 153–4.

22 ibid, 149.

23 ibid, 165.

24 ibid, 149.

25 ibid.

is referred to as critical juncture. Other events that affect the institution's evolution, such as funding, political manoeuvering or global movements, are referred to as critical events.

The moment of origin or critical juncture is vital as it determines the path that the institution will follow. This critical juncture can be a lasting legacy and the institution's behavior will be shaped by its origins. But the moment of origin is not all there is. The historical development of institutions reveals that they are remade over time as a consequence of other events or actors. Wilks and Bartle's examination of independent agencies to administer law and policy in the United Kingdom, Germany and the European Union reveals that there were both expected and unexpected consequences.[26] They contend that, although the original decision to establish such agencies was motivated by a need to reassure the public, these agencies are far less independent than commonly supposed.[27] The way in which they have evolved not only differed from one jurisdiction to another, but there were also a number of unanticipated consequences, including the evolution of the agencies from a passive, symbolic defence of a competitive market economy to an aggressive promotion of market freedoms,[28] where the agencies escaped capture by business but stepped into 'the arms of lawyers and economists'[29] and where the 'old, broad, balancing public interest criteria employed by agencies' have been replaced by a 'far narrower and dogmatic focus on market efficiency'.[30]

Historical institutionalism provides a valuable lens to view the manner in which multiple political, economic and social forces came together to create the Australian competition regulator as the institution responsible for determining 'public benefit' and the manner in which that institution has mediated those forces to shape policy and apply it with existing legal culture. In order to understand the path an institution has travelled, it is useful to examine the critical juncture of its origin and the power vested in it as an independent agency to determine the public benefit within the authorisation process, and to explore the relationship between politics and the institution.

*Responsive regulation and restorative justice* is the second theoretical framework adopted in this study. The core idea of responsive regulation is that regulators should be responsive to the conduct of those they seek to regulate in deciding how to respond. Scholars have examined the manner in which responsive strategies can be incorporated into the competition regulators' practices, such as encouraging corporations to voluntarily include informal dispute resolution mechanisms or implement compliance programs that bring the conduct within

26 Wilks and Bartle (2002) 154 — for how historical institutionalism fits in to this analysis.
27 ibid, 149.
28 ibid, 170.
29 ibid.
30 ibid.

the boundaries of the law.[31] These responsive strategies can work alongside the conventional strategies of litigation and penalties. The ACCC has used a variety of responsive strategies through its history. One example of such a responsive strategy has been to grant authorisation on the basis that a complaint mechanism is adopted by the industry associations to regulate their actions. Another example is the granting of an authorisation on the condition that information about industry practices is made publicly available, thus allowing people both within and outside the industry to monitor the conduct of corporations.[32]

Criticism has been levelled at regulators adopting such approaches on the basis that they give unfettered discretion to the regulator to go beyond its grant of power. Scholarship on the manner in which regulators are constrained addresses these criticisms, arguing for the development of a new administrative law.[33] More recent scholarship has built on these contributions by providing the ideals that can guide all responsive regulators.[34] This book uses these scholarly contributions to evaluate the effectiveness of the ACCC's use of its discretion in the determination of public benefit within the authorisation process. It looks at the types of benefits that have been recognised, the processes employed and the terms on which authorisation has been granted.

Restorative justice has been more recently linked to responsive regulation in an effort consider mechanisms for allowing everyone affected by a decision the right to be included in the decision-making process.[35] An authorisation determination will affect conduct in the market and can impact on a wide cross-section of the community. Not everyone, however, can effectively participate in this process. The authorisation process makes room for submissions by interested parties and also provides, in certain instances, for the holding of a pre-decision conference, both of which are aimed at expanding the number of voices heard in the deliberations.[36] This book critically evaluates the manner in which the regulator has accommodated participation of stakeholders within its current decision-making process.

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31 See Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review* 209; John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (2002).

32 See *Re Allianz Australia Insurance Limited* A30217, A30218, 243 March 2004, 55 and *Medicines Australia* authorisation A90779, A90780 14 November 2003, 40.

33 See Jody Freeman, 'Private Parties, Public Functions and the New Administrative State' (2000) 52 *Administrative Law Review* 813, 854; Michael Taggart, *The Province of Administrative Law* (1997); Colin Scott, 'Accountability in a Regulatory State' (2000) 27(1) *Journal of Law and Society* 38.

34 Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59.

35 John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008); John Parkinson and Declan Roche, 'Restorative Justice: Deliberative Democracy in Action?', (2004) 39(3), *Australian Journal of Political Science* 505; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

36 This process, provided for by section 90A of the *Trade Practices Act*, gives applicants and interested parties the opportunity to discuss the draft determination and to put their views directly to a commissioner.

# Overview

The public benefit test relies on the discretion of the regulator to interpret it, and this book explores how the ACCC has used its discretion in interpreting this phrase and evaluates ACCC performance over the last four decades.

Chapter 2 studies the history of the current authorisation process and argues that the wide discretionary powers granted for the interpretation of the public benefit test are explained by the historical developments between 1960 and 1965. This was the period when Australia settled on a distinctive approach to competition regulation, including the creation of a secret register by a regulator with wide powers who was directed to use its powers to raise awareness and gain acceptance for the legislation. It is argued that this path set the regulator on its own trajectory, which later resulted in it working responsively to create workable competition in the market.

Chapters 3 and 4 deal with the term 'public benefit'. Chapter 3 examines the interpretation of public benefit, which has been far from straightforward. There are two main questions that have been debated for four decades. The first is whether the term 'benefit' should focus primarily on economic efficiency or whether it should be open more broadly to both efficiency benefits and other benefits, such as improvement in the quality of health or environment, which may not have an efficiency focus. The second question involves the term 'public' and whether this term should be given a wide or narrow interpretation. A wide view of the term would include any section of the community, including the corporations applying for authorisation or the shareholders of those corporations. According to this view a benefit that reaches the shareholders of the corporation will be acceptable. A narrow interpretation of the term would require the benefit to reach the public or at least the consumer. The chapter explores the discourses around these two questions, concluding that, while the ACCC has been both sensitive to the different views, its responses have been constrained by the decisions of the Australian Competition Tribunal (ACT).

Chapter 4 explores the types of public benefit recognised in authorisation determinations, relying on the data set of 244 determinations. It concludes that the ACCC has been open to recognising a variety of benefits as they have become relevant. It has always recognised benefits based on economic efficiency, such as promotion of cost savings and industry rationalisations. Alongside this, it has also recognised non-efficiency benefits, such as the increasing safety and quality of goods and services as well as the promotion of equitable dealings. The ACCC has worked with a list of public benefits adding to it as new benefits were recognised. It has not, however, developed a theoretical framework for its determinations. Nevertheless, these determinations have been responsive to

changing circumstances and needs. This ad hoc approach can be described as a triumph of practice over theory. The chapter concludes that the ACCC could remedy the criticism of being ad hoc by developing an overarching theoretical framework for public benefit. This would serve the applicant, all stakeholders and the regulator better than the current approach.

Chapters 5 and 6 focus on examining the use of discretion by the ACCC in applying the public benefit test. Using a multidisciplinary approach, Chapter 5 conducts a thorough examination of how the use of discretion by a regulatory agency is perceived and limited. It begins with the legal scholarship on discretion and goes on to consider the contributions of sociologists and political scientists which, it argues, better reflect the way in which regulatory agencies operate in practice. It draws on this multidisciplinary scholarship to develop a set of core values as well as a number of institutional, practical and moral factors that constrain the regulatory agency. It concludes that the operation of discretion by a regulatory agency is difficult to constrain and manage as it can exist both within strict rules or vague phrases, which remains the paradox of discretion. This discussion provides the basis for carrying out a detailed evaluation in Chapter 6 of how the ACCC has used its discretion.

Chapter 6 examines the use of discretion by the ACCC. It looks first at the regulatory scholarship that is useful to carry out such an examination and then classifies the manner in which the ACCC has exercised discretion in determining public benefit into four categories: epistemological discretion, procedural discretion, outcome-weighing discretion and immunity discretion. The chapter concludes that the ACCC has used its discretion in an experimental manner focusing on obtaining reasonable outcomes. Evidence shows, however, that not all stakeholders are engaging in the determination process. There is a need for greater consideration to be given to increasing the participation of certain groups representing non-business interests, which can include consumers and all citizens affected by decisions, by providing them with a voice in the decision-making process. It is argued that giving such groups a voice would make for a better process than the way the ACCC is currently operating.

Chapter 7 addresses the two main criticisms of the ACCC that are raised in earlier chapters: first, that the determination of public benefits would be better served by a broader theoretical framework giving greater direction to all stakeholders; and, second, that participation by non-industry groups in the deliberations should be increased. It proposes that a principles-based approach would be better able to address both these criticisms. It develops a set of heuristics based on human rights and ACCC practice to identify public benefits. This would provide an overarching theoretical framework to improve on the current ad hoc approach. This is then expressed as a principle, which is formulated as the first in the set of principles. Building on the literature on principle-based regulation

and responsive regulation, a set of nine principles are then proposed. These are aimed at lowering the barriers to participation, increasing inclusiveness and making the ACCC a more genuinely responsive regulator in this area.