

## 5. Discourses on Discretion and the Regulatory Agency

The authorisation process is a complex one that relies on the exercise of discretion. Those of the epistemic trade practices and competition policy community will understand how this discretion may be used and the outcomes it can deliver. But for others, the process is opaque. While legal and institutional factors can limit the exercise of discretion, so too can the regulatory strategies relied on. The Australian Competition and Consumer Commission's (ACCC) strategies have embraced many of the principles of responsive regulation, which rest on wide discretionary powers, and which, although difficult to contain, deliver many positive outcomes.

### Discretion as a 'Tube of Toothpaste'

Discretion here is considered from an interdisciplinary perspective.<sup>1</sup> The degree of discretion granted to regulatory agencies has increased significantly over the last century.<sup>2</sup> As the work of government extended in the second half of the twentieth century, so too did the work undertaken by government departments and agencies that relied on administrative discretion. The growth of discretionary powers in Australia has been largely a product of increased state regulation, which was direct during the 1960s and 1970s, and more indirect in the last three decades.<sup>3</sup> Discretion has been examined in different ways and the two groups of significance in this discourse have been legal philosophers and sociologists. Legal philosophers, while focusing primarily on the manner in which judges use discretion, have looked at the manner in which discretion can be curtailed. Sociologists, on the other hand, see discretion as all pervasive and are more sceptical about controlling its use.

Discretion can be simply defined as allowing the decision maker or official to choose from a number of legally permissible options. Discretion can be viewed both positively and negatively. Where an official uses discretion to pursue commonly acknowledged goals, it can be viewed positively and where the official's discretion is for the most part strictly determined by rules, discretion

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1 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986); Keith Hawkins (ed), *The Uses of Discretion* (1992); M Adler and S Asquith (eds), *Discretion and Welfare* (1981); Carol Harlow, 'Law and Public Administration: Convergence and Symbiosis' (2005) 79(2) *International Review of Administrative Sciences* 279.

2 Harlow (2005) 284.

3 Margaret Allars, *Introduction to Australian Administrative Law* (1990) 9. See also Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126, 126; Harlow (2005).

is a residual concept and can be viewed negatively as a 'lacuna in a system of rules'.<sup>4</sup> Both these views have coloured the way in which discretion is viewed and controlled. Nielsen has pointed to the Danish regulatory inspectors whose work is characterised by a high level of dialogue and where discretion is likely to deliver positive outcomes.<sup>5</sup> Alternatively discretion can be used negatively and Elaine Campbell has cited studies that examined the power of the police to stop and search.<sup>6</sup> The circumstances where this power is used is open to interpretation and Campbell pointed out that the power can only be exercised where police have reasonable suspicion before doing so. Simply being known to the police, however, or fitting a stereotype of suspicions through appearance or lack of conformity can also be sufficient to attract police attention.

Discretion has been described by Kenneth Culp Davis, the American legal academic, in the context of a public official within an administrative agency, as 'a public official [having] discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction'.<sup>7</sup> Davis was concerned with the arbitrary use of discretion and favoured rule-making, so forcing administrators to work inside a framework of rules. 'Rule-making, Davis hoped, 'could fill the gap by moving discretion up the hierarchy and containing the line bureaucracy inside a framework of "tick-this-box" type of rule'.<sup>8</sup> Davis's contribution has been criticised as an over-legalistic approach and the ability of rules to constrain discretion has been queried.<sup>9</sup> Robert Goodin pointed out that discretionary power can exist within rules, and that some kinds of discretion are not eliminable and the problems with discretion are insurmountable.<sup>10</sup> Facts can be interpreted differently by officials and different legitimate outcomes can result, indicating the presence of discretion. Different outcomes can arise because different weights are attached to the relevant factors or because different facts are emphasised, again pointing to the importance of discretion.<sup>11</sup> It has long been acknowledged that all rules require interpretation and all interpretative work involves discretion.<sup>12</sup>

The argument that the more vague a rule the greater the discretion, and the more specific and compelling the rule the less room there may be for discretion,

4 Robert Goodin, 'Welfare Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 232, 233, 234.

5 Vibeke Nielsen, 'Are Regulators Responsive?' (2006) 28(3) *Law and Policy* 396, 401.

6 Elaine Campbell, 'Towards a Sociological Theory of Discretion' (1999) 27(2) *International Journal of the Sociology of Law* 79, 86.

7 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

8 See Harlow (2005) 285.

9 See Robert Baldwin, *Rules and Government* (1995) 21; Goodin (1986) 232.

10 Goodin (1986) 233.

11 Administrative Review Council, Parliament of Australia, *Automated Assistance in Administrative Decision Making*, Report No 46, (2004) 12.

12 Galligan (1986) 260, See Baldwin, 'Why Rules Don't Work' (1990) 53(3) *Modern Law Review* 321.

has been discounted by many.<sup>13</sup> It has been contended that discretion and rules are not 'in a zero sum relationship such that the more rules there are the less the discretion there is and visa versa.'<sup>14</sup> A mass of detailed rules can in fact increase discretion rather than reduce it and may be too complex to facilitate compliance.<sup>15</sup> Julia Black has stated the presence of rules alone is not sufficient to limit discretion and the exercise of discretion will be governed by bureaucratic and organisational norms, as well as broader political and economic pressures and moral and social norms.<sup>16</sup> It is generally agreed that both rules and discretion have a place in regulation and 'it is not a choice between discretion and rules, but rather a choice between different mixes of discretion and rules'.<sup>17</sup> Discretion can be regulated procedurally as well as by rules, for example, by requirements to render the exercise of discretion accountable to others by reporting requirements and transparency that enables the appealability of discretion.

The notion that discretion can be managed in order to confine its exercise to certain actors and to limit the way in which those actors use it, has been widely discredited. Discretion is always present.<sup>18</sup> John Braithwaite, Toni Makkai and Valerie Braithwaite, in their study on regulating aged care, looked at the relationship between rules and discretion. They examined the historical shift in the United States from broad, vaguely defined standards to specific ones, which resulted in the Illinois code for nursing homes having over 5000 quality-of-care regulations in the 1980s.<sup>19</sup> This shift from broad-based standards to specific ones was intended to improve reliability, which the authors, using empirical studies, found did not eventuate. Having an impossible number of standards has meant inspectors tend to concentrate on some issues while neglecting others for a variety of reasons, including the institution's enforcement history or the inspector's professional background; this causes endemic unreliability.<sup>20</sup> The authors argued that, hand in hand with a paradox of reliability, is a paradox of discretion and stated:

More and more specific standards are written by lawmakers in the misplaced belief that this narrows the discretion of inspectors. The

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13 Julia Black, 'Managing Discretion' (Paper presented at the Australian Law Reform Commission Conference, Penalties: Policy, Principles and Practice in Government Regulation, Sydney, June 2001) 2; see also Goodin (1986) 232–34, Baldwin (1990) 16; Lorraine Gelsthorpe and Nicola Padfield (eds), *Exercising Discretion: Decision-making in the Criminal Justice System and Beyond* (2003) 5–16.

14 Black (2001) 2.

15 *ibid.*, 7; see also Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191.

16 Black (2001) 2; see also Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 70.

17 Carl Schneider, 'Discretion and Rules: A Lawyers' View', in Hawkins (1992) 49; Black, *Rules and Regulators* (1997) 20; Carol Harlow and Richard Rawlings, *Law and Administration* (1984) 105.

18 Black (2001) 2; see also Goodin (1986) 238.

19 John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (2007) 222–23.

20 *ibid.*, 224–25.

opposite is true: the larger the smorgasbord of standards, the greater the discretion of regulators to pick and choose an enforcement cocktail tailored to meet their own objective. A proliferation of more specific laws is a resource to expand discretion, not a limitation upon it.<sup>21</sup>

Sociologists have argued that an officer's own sense of discretion can shape the way it is exercised, and also that discretion is shaped by various external social, economic and political factors.<sup>22</sup> Sociologists see discretion as existing at every stage of administration: policy creation, policy implementation, and problem identification.<sup>23</sup> Even the manner in which evidence is gathered may be based on discretion.<sup>24</sup> Discretion is not just attached to rules and 'can be a property of rules, a property of behaviour, or a sense the people have of their freedom to act.'<sup>25</sup> Nicola Lacey has argued the sociologists' contribution will inevitably shape the strict legal construction of discretion today.

Anthony Giddens proposed a link between action and structure. The law as a structure can be enabling and permissive; it can provide a language of communication and signification of legally relevant incidents and it can establish norms for officers.<sup>26</sup> Giddens proposed that day-to-day life is a continuous flow of intentional action and many acts have unintended consequences which may also become conditions of action.<sup>27</sup> Christine Parker's study on cartels provides an example of the intended and unintended consequences of exercising discretion. Here Parker examines the effect that media attention, which accompanies a win in a cartel case, can have on the industry. The ACCC had been able to use this attention to inform and motivate business to comply with the Act, to shame business convincing them to rehabilitate and also as a dialogue for persuasion.<sup>28</sup> Publicity for the ACCC's actions was relied on heavily during the years when Allan Fels was chairman and it has been stated that 'In effect this became the shield for Fels' ACCC, creating an aura of power and public support that protected the agency from attacks by politicians and business.'<sup>29</sup> This is much like the approach of open dialogue combined with censure in the annual reports adopted

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21 *ibid*, 226.

22 Hawkins (1992) 20; Nicola Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm', in Hawkins (1992) 360, 364; Campbell (1999).

23 Lacey, *ibid*, 364.

24 See Administrative Review Council (2004) 14 where the Social Security Appeals Tribunal noted that decisions ultimately rest on assessing the evidence and making a judgment.

25 Richard Lempert, 'Discretion in a Behavioural Perspective', in DJ Galligan (ed), *A Reader on Administrative Law* (1996) 393.

26 Anthony Giddens, *Profiles and Critiques in Legal Theory* (1982) 30–31; see also discussion in Campbell (1999) 81–84.

27 Giddens (1982) 30–31.

28 Parker, Christine, Ainsworth, Paul and Stepanenko, Natalie, 'ACCC Compliance and Enforcement Project: The Impact of ACCC Enforcement Activity on Cartel Cases' (Working Paper, Centre of Competition and Consumer Policy, Australian National University, May 2004) 96–97.

29 Fred Brechley, *Allan Fels: A Portrait of Power* (2003) 279.

by Chairman Ron Bannerman, discussed in Chapter 2, which was successful in motivating a culture of compliance, as has been evident through the ACCC's history. There could, however, be unintended consequences flowing from such actions, as Parker illustrates of the Fels period — the adverse media attention given to one alleged price-fixing investigation involving oil companies resulted in many lawyers and compliance officers losing faith in the ACCC; this led to the development of attitudes of resistance, defiance or disengagement towards the regulator.<sup>30</sup> These events shaped the agency future trajectory — it made sectors of the trade practices community critical of the ACCC; many, including Fels, did not expect to be reappointed which created an atmosphere of uncertainty and undermined the assuredness of the ACCC and the officials within it; and the regulator faced review of its powers, including its use of discretion in the Dawson reviews that followed. Clearly, the manner in which the ACCC exercised its discretion in this area, before the raids on the oil companies which alleged had breached the law, by the regulator to gain evidence and adverse media coverage, was quite different to the manner in which it exercised its discretion after the raids.

Any examination of discretion must acknowledge Ronald Dworkin's categorisation of discretion. Dworkin characterised discretion as the 'hole in the doughnut' — discretion does not exist except as an area left open by a surrounding belt of restrictions.<sup>31</sup> Dworkin distinguished three senses of discretion, two 'weak' and one 'strong'. Strong discretion occurs where a person is not bound by the standards set by the authority in question.<sup>32</sup> For Dworkin, discretion in this sense does not exist as there are always existing principles, such as rationality and fairness, that govern any such decision.<sup>33</sup> Weak discretion is said to exist in two forms, the first where discretion requires some form of choice or judgment to be exercised by the decision-maker, even though standards exist; the second where the official has final authority for making a decision, which thereafter cannot be altered. For my purposes, strong discretion would not usually apply to regulatory agencies because their decisions are generally governed by principles in the form of internal guidelines and internal review mechanisms. This is the case with the ACCC and its interpretation of public benefit, governed by principles developed both by the ACCC in its guidelines and the Australian Competition Tribunal (ACT) in its decisions. The second type of weak discretion would not apply to most regulatory agencies because the decisions of such agencies are reviewable. The decisions of the ACCC in the authorisations area

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30 Parker, Ainsworth and Stepanenko, (2004) 98. Also see Valerie Braithwaite (ed), 'Responsive Regulation and Taxation' (2007) Special Issue *Law and Policy* 3; Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation. Threat, Motivational Postures and Responsive Regulation' (2007) 29(1) *Law and Policy* 137.

31 Ronald Dworkin, *Taking Rights Seriously* (2005) 31.

32 *ibid*, 31–33.

33 Galligan (1986) 20.

are reviewable by the ACT. It is the first type of weak discretion that would apply — that the officials in the ACCC have to interpret the standard of ‘public benefit’.

Denis Galligan has been critical of Dworkin categories of discretion arguing ‘discretion occurs at a variety of points within any exercise of power’<sup>34</sup> and it is shaped by other factors. Galligan argued discretion is a way of characterising power in respect of a certain course of action. In the case of discretion by officials in a regulatory agency, it begins with the official being aware of the purpose of the discretionary power and then determines the manner in which the purpose will be exercised. It can include the process of creating standards; settling what can come within existing standards; individualising and interpreting loose standards and assessing the relative importance of conflicting standards. It can also include choosing the policies, strategies, standards or procedures that may suit a particular situation.

Galligan proposed that discretionary power is based around two variables. The first is the scope that the official has for the assessment and judgement of the issues. In connection to this, Galligan stated there is discretionary power when there is a relative absence of guiding standards, accompanied by the inference that it is for the authority to establish its own.<sup>35</sup> Further, Galligan pointed out that, even where there are standards, they may require further exercise of discretion in the creation of more specific, individualised standards. This is clearly applicable to the ACCC’s determination on the meaning of public benefit. The phrase itself is not defined, nor are there any guiding standards in the legislation, leaving it for the regulator to determine its meaning. The choice of the term itself caused considerable controversy and its inclusion was criticised (discussed in Chapter 3). Jeffrey Jowell stated that the use of standards, such as ‘public interest’ or ‘fair and reasonable’, usually give decision-makers a high degree of discretion.<sup>36</sup> In the case of the ACCC, this is certainly true and it is left to the regulator to decide whether non-efficiency-based benefits, such as sustainability or improved safety conditions, will be recognised as public benefits. The discussion in this chapter demonstrates that many efficiency-based, as well as non-efficiency-based benefits have been recognised at various times. One controversial example is the empowering of small businesses; something ACCC officials have been recognising as a public benefit for some time has now been codified by virtue of the collective bargaining provisions.<sup>37</sup>

The second variable is the surrounding attitudes of officials as to how the issues are to be resolved. The regulatory institution itself may provide incentives and

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34 *ibid.*

35 *ibid.*, 23.

36 Jowell (1973).

37 See Sections 91AA–91AF *Trade Practices Act 1974* (Cth).



disincentives for people to make decisions in particular ways.<sup>38</sup> Here it is the institutional arrangements and the attitudes they engender that are important.<sup>39</sup> The mere existence of discretion does not necessarily mean that it is used. As Galligan has pointed out, 'what may be discretionary from an external, legal point of view, may be anything but discretionary from the internal point of view of officials within the system'.<sup>40</sup> Other institutional arrangements likely to influence the manner in which the decision will be exercised come from both within and outside the agency. Galligan stated that the official's own attitude to his powers, to the institutional framework, are important considerations in understanding how powers are exercised and reflexively shape the nature of the institution.<sup>41</sup>

All these factors apply to the ACCC. At different times, the officials within the organisation have focused on raising awareness and encouraging compliance rather than simply falling back to rule ritualism.<sup>42</sup> The regulator itself has, by and large, engaged in a dialogue with business, leading one study in 1987 to classify it as a 'modest enforcer' that used its discretion responsively to incorporate prosecution, fines and compliance.<sup>43</sup> External scrutiny has always been important to regulators and this comes in different forms, the most obvious form being the appeals to the ACT.<sup>44</sup> For example, in the *Qantas* decision, the ACCC did not approve the authorisation on the basis that the benefits were primarily going to the applicant and were not passed on to consumers. This decision was overturned by the ACT, which did not require that the benefit be passed on to the consumer.<sup>45</sup> Although ACCC staff indicated their concern at the decision of the ACT, they nevertheless accepted that all further decisions would be governed by the ACT's interpretation of public benefit.<sup>46</sup> Another form of scrutiny, usually regarded as particularly demanding, is the Senate Committee Hearings, at which senior officials of a regulatory agency are subject to strenuous questioning on the conduct of the agency by members of the committee. All these factors will shape the manner in which officials within the regulator exercise their discretion. These limits and constraints on discretion are discussed in greater detail in the following section.

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38 Hawkins (1992) 6.

39 Galligan (1986) 13.

40 *ibid.*

41 *ibid.*, 12.

42 Christine Parker and Vibeke Lehmann Nielsen, 'Do Businesses take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30(2) *Melbourne University Law Review* 441.

43 John Braithwaite, Peter Grabovsky and John Walker, 'An Enforcement Taxonomy of Regulatory Agencies' (1987) 9 *Law and Policy* 323.

44 See Karen Yeung, 'Does the ACCC Engage in "Trial By Media"?' (2005) 27(4) *Law and Policy* 549.

45 See *Re Qantas Airways Limited* [2004] ACompT 9 (12 October 2004).

46 Interview 2.

The metaphor of a ‘tube of toothpaste’ has been used to describe discretion — squeezing it from one area does not remove discretion; it merely moves the bulge to another area. The example of the use of conditions by the ACCC illustrates this point. An authorisation is determined on the basis that public benefit outweighs public detriment. In numerous cases, however, authorisation is granted on the basis of conditions that commonly address anticompetitive practices.<sup>47</sup> This illustrates that the ACCC’s use of discretion is moving from the area of identifying and balancing public benefit and public detriment to imposing conditions to restrict public detriment and is aimed at gaining positive outcomes. In other words, it is difficult to control the amount of discretion and the direction in which that discretion may move.

## The Constraints to Discretion

The traditional constraints on administrative power were expounded by AV Dicey in the late nineteenth century as part of his analysis of the rule of law. Dicey’s view on the rule of law clearly recognised the need to make agencies accountable, and one of the key features of the rule of law is the need to curb conferral of discretionary power to government officials in the interests of certainty and predictability. This approach views officials as being accountable to the courts.

The shortcomings of this construction of the rule of law have been discussed by many scholars.<sup>48</sup> Dicey’s main concern was the arbitrary exercise of discretionary powers and his emphasis upon those areas of personal liberties concerning arrest, search, seizure and detention.<sup>49</sup> The Diceyan view was to rely on the courts as the protectors of a person’s liberty against the arbitrary exercise of power by officials.<sup>50</sup> This approach, categorised as the red light theory of administrative law,<sup>51</sup> can be contrasted with the ‘green light’ theory of administrative law, which relies on the ‘realist’ and ‘functionalist’ jurisprudence that developed in the United States in the late nineteenth century. Rather than relying on judicial control of executive power, green light theorists rely on the political process. Whereas red light theorists are focused on external controls, the green light theorists would see the control of administrative activity as both internal, such as hierarchical supervisory measures, and external, such as being responsible to parliament. For red light theorists, the control is retrospective, green light theorists favour prospective control achieved through decision-making with administrative bodies, articulation and revision of policy, participation by

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47 Examples of such authorisations include: *Mercury Newsagency System*, 9 May 1984, *NSW and ACT Newsagency System*, 26 April 1984. See Chapter 6 for further discussion.

48 Allars (1990) 9–10; Harlow and Rawlings (1984) 38–40; Galligan (1986) 199–202.

49 Galligan (1986) 201.

50 Allars (1990) 9.

51 Harlow and Rawlings (1984) 29–66.



interest groups in policy formulation, and establishing internal review/s.<sup>52</sup> In Australia, as a result of the statutory reforms, compendiously referred to as ‘the new administrative law’,<sup>53</sup> there was a shift away from the Diceyan approach in the 1970s. Today a combination of factors, including legal, practical and moral constraints, influences the exercise of discretion.<sup>54</sup>

Although the notion of discretion carries connotations of the freedom to choose how to act, it also has a negative characterisation directed at constraining the exercise of discretion.<sup>55</sup> Much of the research concentrates on the manner in which discretion is constrained, the most fundamental being that the use of discretion must be for the purpose for which it is granted — it must constitute a lawful exercise of power. Discretion, however, may be constrained by non-legal factors, which include the amount of available resources, time, professional norms, and the political pressures to which the decision-maker perceives it to be subject.<sup>56</sup>

There have been numerous attempts to categorise the range of limits imposed on the exercise of discretion. I have distilled the main arguments on constraints on discretion in Table 5.1 which instills both the legally recognised constraints as well as the institutional constraints. The first three factors can be grouped together as legal constraints, widely accepted as necessary for a democratic society, governed by the rule of law, namely: authorised by law, procedural fairness, accountability, and rationality. The remaining six factors can be grouped together as institutional constraints, namely: nature of the task, efficiency and effectiveness, organisational issues, political and economic considerations, the overall attitudes of officials and, finally, a catch-all category titled ‘other factors’.

**Table 5.1: Constraints to discretion**

Authorised by law Procedural fairness Accountability	<b>Legal constraints</b>
Nature of the task Efficiency Organisational issues Political considerations Overall attitudes Other factors	<b>Institutional constraints</b>

Source: Author’s research.

<sup>52</sup> Allars (1990) 10.

<sup>53</sup> *ibid.*

<sup>54</sup> Galligan (1986) 30.

<sup>55</sup> Goodin (1986) 232; Dworkin (2005) 31.

<sup>56</sup> See Jeffrey Jowell, ‘The Legal Control of Administrative Discretion’ (1973) *Public Law* 180; see also Imelda Maher ‘The Rule of Law and Agency: The Case for Competition Policy’ (Working Paper No 06/01, International Economics Program 2006) 8; Black (1997) 246.

Discretion in the authorisation arena is framed by the legal limits. The institutional factors are, however, equally important — for example, a regulator and its officials who are receptive to the concerns of all stakeholders and able to negotiate with business will be more successful in gaining overall support and commitment for its actions from the wider community, including government, the trade practices community and consumers. Such a regulator will be much more successful in harnessing support than a regulator who goes by the book and whose officials are simply timekeepers.

## Legal Factors Constraining Discretion

### Authorised by Law

Clearly an officer exercises discretion over thousands of matters in a working day, including when to work and when not to work and what pictures to hang on the office walls. The discretion that concerns us in this discussion is that attached to giving effect to a rule. The exercise of discretion in this sense has the goal of advancing the purposes for which the powers have been granted.<sup>57</sup> Much of the delegation of discretion to an agency is through legislation, for example, the discretion given to the ACCC to determine the manner in which the term ‘public benefit’ may be interpreted. But discretion can also be called upon in other circumstances.

The discretion of police officers is an example of some of these other circumstances. An individual officer’s discretion can dictate how they will respond to complaints of crimes, who they decide to release and who they decide to prosecute, and how they will intervene in conflicts between members of families, employees or landlords.<sup>58</sup> All these circumstances are ways of interpreting the objects of the law. This may include determining how specific powers, for example, the power to investigate a robbery, can be used. Sometimes determining the objects of the law may not be a simple matter. Where the objects and/or purpose are a matter of conjecture, discretion must be exercised in determining the objects of the legislation. In effect, determining the objects and/or purpose becomes part of the discretionary assessment that has to be made.<sup>59</sup>

Matters which have become important to officials over a course of decisions or over a period of time may also be important in deciding the way in which the objects and purposes of the legislation should be determined. For example, information that officials in the immigration department have about the

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57 Galligan (1986) 30; Yeung, Karen, *Securing Compliance: A Principled Approach* (2004) 37; Baldwin and McCrudden, *Regulation and Public Law* (1987) 33; Administrative Review Council, above, n 14.

58 Schneider in Hawkins (1992) 53; Campbell (1999) 81–84.

59 Galligan (1986) 31; Campbell (1999) 81–84.

political condition of various countries will necessarily be taken into account in determining an application by an individual seeking refugee status. Likewise, the kinds of matters that may be taken into account by courts empowered to hear appeals will also be important in deciding the way in which the objects and purposes of the legislation should be determined.

Social scientists have pointed out the shortcomings of concentrating on whether discretion is authorised rather than the manner in which it is used. They argue discretion cannot always be identified in terms of explicit or implicit legal grants of discretionary power. While officials may be seen to have discretion, they may not in fact exercise it.<sup>60</sup> Studies indicate that officials probably behave in a more routine way than is generally acknowledged. The study by John Braithwaite, Peter Grabosky and John Walker pointed to some Australian regulators as being token enforcers. Conversely, it has also been noted that officials who appear to have little discretion may in fact exercise considerable power. Goodin's description of manipulation of discretionary powers by the gentry in connection with the penal sanction in eighteenth century England points to the misuse of these powers.<sup>61</sup> It is not uncommon for the receptionist of an organisation to play an important role in directing callers and, subsequently, on whether the complaints proceed and the manner in which such complaints are resolved. The first port of call in deciding whether to apply for authorisations is to approach the officials within the ACCC informally to discuss the potential anticompetitive effects of the conduct being proposed. This is often an informal telephone conversation, but it may be crucial in determining whether an authorisation application has to be made or whether immunity is going to be effectively granted.

In deciding authorisation applications, officers are required to determine the kind and the amount of public benefit in the context of section 90.<sup>62</sup> The object and purpose of the legislation was introduced via an amendment into the Act in 1995 in the form of section 2:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

On the matter of statutory interpretation, McHugh J in *Visy Paper Pty Ltd v ACCC* stated: 'Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly Wrong. Frequently, there is simply no "right" answer to a question of construction'.<sup>63</sup>

60 Baldwin and McCrudden (1987); Goodin (1986) 239–40.

61 Goodin (1986) 239–40.

62 See discussion in Chapter 3.

63 *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1.

The ACCC has addressed the issue of the scope of its discretion to the ACT in the *Medicines* authorisation and stated:

1. A factor which does not constitute an anti-competitive or public detriment because it is not causally related to the proposed conduct but is relevant in all the circumstances of the application. So a Voluntary Industry Code may regulate some, but not all, aspects of a certain area. Insofar as the Tribunal considered that a detriment arose from failure to regulate the remaining aspects of that area, it might consider that omission a reason not to exercise its residual discretion or to do so conditionally notwithstanding that the reason would not be causally related to the proposed conduct.
2. A factor which constitutes a public detriment which is neither an anti-competitive detriment nor a detriment entailed by a purported benefit (leading to the discount of that benefit) which is or is not causally related to the proposed conduct but which is relevant in all the circumstances of the application. This could include a morally offensive provision in an otherwise net beneficial code of ethics such as a provision that involved inappropriate discrimination.<sup>64</sup>

In stating the above, the ACCC is emphasising the need to show a causal connection between the proposed conduct and the public benefit or detriment. It is also acknowledging the power to grant authorisations based on conditions by virtue of section 91(3).<sup>65</sup> Regarding the scope of this discretion, the ACT stated:

The discretion conferred on the ACCC and on the Tribunal by s 88(1) is enlivened upon satisfaction of the necessary conditions as to public benefit set out in s 90. It is not in terms limited other than by the subject matter, scope and purpose of the TPA [Trade Practices Act] and the statutory context in which it appears: *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505; *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 84. The discretion is not narrowly confined given the enormous variety of circumstances to which it may have to be applied. It is neither necessary nor desirable to try to define its outer limits. It is sufficient to say that considerations relevant to the objectives of the Act may play a part in the exercise of the discretion even where the public benefit test has been satisfied.<sup>66</sup>

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<sup>64</sup> See *Medicines Australian Inc (2007) ACT*.

<sup>65</sup> See discussion in Chapters 2 and 6.

<sup>66</sup> See *Medicines Australian Inc (2007) ACT*.

The importance of translating such objects and purposes into specific policies is clearly recognised by the regulator, which has issued policy guidelines on the types of benefits that will be considered and the process that will be employed. My analysis shows that the types of benefits recognised during the different decades is more a reflection of the political, social and economic concerns that permeate the regulator and its officials' actions, rather than the guidelines themselves. For example, although the role of the public benefit 'enhancement of quality safety' has never been high on the regulator's lists, it has featured as important in the empirical study. Out of a list of 16 public benefits analysed for importance, it ranked top of the list in 1976 (Figure 3.3), third in 1984 (Figure 3.4), second in 1998 (Figure 3.5), sixth in 2003 (Figure 3.6), tenth in 2006 (Figure 3.7), sixth in 2008 and eighth in 2010 (Figures 3.8 and 3.9). Further the consideration given to both the non-economic efficiency benefits in authorisation applications reflect a flexible approach aimed at providing time to bring about structural change and proceduralisation of self-regulation.<sup>67</sup> This flexibility is not clearly expressed in the guidelines and indeed may be very difficult to achieve when the event has not yet occurred. This illustrates the importance of practice over lists and guidelines.

Manuals that list the types of authorisation decisions made have been maintained. In the 1970s and 1980s, some of these manuals categorised the decisions into types of industry, bringing together the historic knowledge of the market structure within which such industries operated. The ACCC regularly uses the conditions power under section 91(3) to grant authorisations under specific conditions. The most commonly imposed conditions are aimed at enhancing compliance and incorporating appeal processes with codes of conduct.<sup>68</sup> Today, this process is specialised and there are officers dealing with specific types of authorisations; for example, officers develop an expertise in merger authorisations or in the aviation industry or collective bargaining applications within the dairy industry.

### Procedural Fairness

The concept of procedural fairness is recognised as a guiding principle by most lawyers and is connected to the notion of natural justice. It has been translated into two main principles, usually in the context of judicial decision-making. The first principle is that the parties to a dispute should be given a fair hearing, the second that they should be heard by an impartial adjudicator.<sup>69</sup> Likewise

<sup>67</sup> See Chapter 6 for discussion on the manner in which conditions are used for this purpose.

<sup>68</sup> See Vijaya Nagarajan, 'Co-Opting for Governance: The Use of the Conditions Power by the ACCC in Authorisations' (2011) 34(3) *University of New South Wales Law Journal* 785.

<sup>69</sup> Galligan (1986) 32; Administrative Review Council (2004); Baldwin and McCrudden, (1987), 45.

an official's exercise of discretion is constrained by these principles because officials are required to act in an unbiased manner and allow those affected by decisions the opportunity to be heard.<sup>70</sup>

Studies undertaken by social scientists support the proposition that, whereas this notion may be well entrenched in judicial decision-making, it may not be applied with the same degree of consistency by officials deciding matters in independent statutory authorities.<sup>71</sup> Others have also argued the notion of procedural fairness is too broad and requires further clarification. Guiding principles that explain who should participate in the decision-making process and the manner in which they should do so have been called for.<sup>72</sup>

Black's contribution on regulatory conversations is useful here. She has painted a picture of some regulatory processes where communicative interactions are actively pursued, stating that this is more likely where 'regulators are given broadly defined and conflicting objectives to fulfil or principles to follow, where they operate in a dynamic context in which problem definitions are complex and the consequences of regulatory action uncertain'.<sup>73</sup> All of this appears to query the notion that procedural fairness can only be seen to operate where there are standard procedures and set guidelines. Rather Black saw regulatory conversations as vehicles through which new interpretive communities could grow with a view to ultimately changing behaviour.

Parker's work on the ACCC and compliance gives a clear example of the manner in which interpretative communities may be developed. Moving away from the strict concept of procedural fairness, the ACCC has utilised a range of strategies, including nurturing compliance professionals in the industry,<sup>74</sup> and coaxing the courts to go further in ordering companies to rectify the damage done and to put in place systems to prevent it happening again.<sup>75</sup> It was also able to use the undertakings power in section 87B to incorporate compliance procedures into corporate governance. For example, in the AMP case discussed by Parker, the company undertook to change its own standard contracts to incorporate provisions aimed at resolving future disputes.<sup>76</sup> Indeed the comments of the first chairman of the competition regulator are supportive of the notion of creating interpretative communities:

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70 Yeung (2004) 41.

71 Sainsbury in Hawkins (1992) 305.

72 Baldwin and McCrudden (1987), 45.

73 Black (1997) 172, Nielsen (2006).

74 Christine Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26 *Journal of Law and Society* 215, 227.

75 *ibid*, 221.

76 *ibid*, 222; see also John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 22.



Business groups and professional groups or institutes, particularly umbrella bodies, are a good means of reaching their members, whether companies or individuals, in an attempt to achieve compliance with the law by consultation and education instead of having to rely disproportionately on compulsion through courts. I have always engaged a lot in this process of open discussion, and so have my colleagues and the senior staff. I acknowledge at once that the TPC is not so much teaching as engaging in two-way contact from which it also is learning.<sup>77</sup>

Procedural fairness has been recognised as important by regulatory agencies and the ACCC clearly emphasises these notions in all its notices.<sup>78</sup> The procedures for authorisations are clearly spelt out in the *Guide to Authorisations* and the steps to be followed are available both in soft and hard copies.<sup>79</sup> Interviews with current staff and lawyers indicate that most authorisations involve legal or professional advice and these advisers are well versed with the procedures and processes in place. The processes and documentation related to authorisation are all available online and include formal as well as informal procedures. The formal processes include: applications for authorisations, submissions by interested parties and responses by the applicants, draft determinations by the regulator, provision for further submissions, and the opportunity to seek a public hearing. The informal processes include: the preliminary discussions that the applicants and their advisers, including lawyers and compliance officers in the trade practices community with experience on how the ACCC has used its discretion in the past, and with the officials in the ACCC; the manner in which officials may verify the assertions made in the submissions, which may include the hiring of consultants to study the particular industry or scenario, or by calling for the quantification of the alleged benefits that are likely to result for the proposed conduct; and, the advice that officials may seek from experts in the field that may include other members of the trade practices community or from consumer groups with whom the official has developed a relationship.

## Accountability

Accountability, in its simplest conception, means being required to give an account of one's actions — it can also be viewed as the ability to give account. The most commonly cited form of accountability is political accountability, where voters make elected representatives accountable for their actions and legislators make regulatory agencies accountable for their activities. Richard Mulgan has argued that this type of political accountability has been extended beyond its external focus. It has been applied to internal aspects of

77 Trade Practices Commission, Commonwealth of Australia, *Annual Report 1982–83* (1983) 166.

78 See Australian Competition and Consumer Commission (ACCC), *Annual Report 2004–05* for a discussion on accountability.

79 ACCC, *Guide to Authorisation* (2002); ACCC, *Authorisations and Notifications: A Summary* (2007).

official behaviour, including controlling the activities of officials within an organisation, making officials responsive to public wishes beyond simply being called to account and to democratic dialogue between citizens, in which no-one is being called to account.<sup>80</sup> Accountability is relevant to both the public and private sectors. In the public sector, it is important within the activities of public sector departments, as well as public sector commercial activities. In the private sector, accountability is relevant to commercial activities as well as non-profit activities.<sup>81</sup>

Accountability is a central tenet of administrative law scholarship, inquiring into the manner in which a public body and the officials within it, who have been given a good deal of discretion, can be held responsible for the manner in which the discretion is applied. The dominant view comes from Dicey's concept of the rule of law. It is geared to protect the rights of the citizen and requires the state and regulatory institutions within the state to be responsible for its exercise of power. It recognises the need to make regulators accountable and one of the key features of the rule of law is the need to curb the conferral of discretionary power of government officials in the interests of certainty and predictability.<sup>82</sup> As Jody Freeman has stated, this is usually done by rendering agencies indirectly accountable to the electorate via legislative or executive oversight and judicial review.<sup>83</sup>

Many have been critical of this model of accountability, arguing that it is not a true representation of agency decision-making.<sup>84</sup> Colin Scott proposed traditional accountability can involve both 'upwards' as well as 'horizontal' mechanisms.<sup>85</sup> Before proceeding any further, it is also worth bearing in mind the two key accountability questions in relation to this study: to whom is the accountability owed,<sup>86</sup> and for what is the ACCC accountable? Both these questions are addressed in Table 5.1.

Upward mechanisms of accountability are widely accepted (Table 5.1). It makes agencies such as the ACCC accountable to a variety of bodies. First the ACCC

80 Richard Mulgan, "Accountability": An ever-expanding concept? (2000) 78 *Public Administration* 555, 555–56.

81 See Neil Carter, Rudolf Klien and Patricia Day, *How Organisations Measure Success: The Use of Performance in Government* (1995); see also James Cutt and Victor Murray, *Accountability and Effectiveness Evaluation in Non Profit Organizations* (2000).

82 The other two key features are the ability to seek a remedy in courts should the government act illegally and the importance of equality before the law.

83 See Jody Freeman, 'The Private Role in Public Governance' (2000) 75(3) *New York University Law Review* 543, 546; see also Harlow and Rawlings (1984); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) 115.

84 Colin Scott, 'Accountability in a Regulatory State' (2000) 27(1) *Journal of Law and Society* 38; see also Colin Scott, 'Spontaneous Accountability', in Tony Prosser et al (eds), 'Law, Economic Incentives and Public Service Culture' (Working Paper Series No 05/129, Centre for Market and Public Organisation, University of Bristol 2005); see also Freeman 'The Private Role in Public Governance' (2000).

85 Scott (2000) 42.

86 These questions along with 'Who is accountable?' are referred to by Scott (2000) 38.

is accountable to the courts in a number of ways. Judicial review proceeds in the Federal Court, as can matters involving defamation,<sup>87</sup> breach of confidence, abuse of process,<sup>88</sup> or contempt of court proceedings.<sup>89</sup> Second, the ACCC is also accountable to parliament and is required to submit an annual report to the Commonwealth parliament. It is also required to appear each year before parliamentary committees, such as the House of Representatives Standing Committee on Financial Institutions and Public Administration and, on an irregular basis, before other committees, such as the Dawson Committee.<sup>90</sup> Third, and most important for this study, the ACCC is accountable to the ACT, which repeatedly reviews its decisions involving authorisations and regulated industries.

Horizontal mechanisms of accountability also impact on the ACCC's actions (Table 5.2). Many of these horizontal mechanisms developed in the 1980s in Australia, reflecting the dissatisfaction with the 'upward' mechanisms of accountability. The dissatisfactions stemmed from these systems becoming overloaded, being inordinately costly, and being too formal. By comparison, the horizontal mechanisms were informal, cost-free alternatives that possessed the advantage of allowing the freedom to access or scrutinise information closely, to arbitrate or negotiate an outcome and to settle on a range of non-adversarial alternative remedies.<sup>91</sup>

Horizontal mechanisms include complaints to the Commonwealth ombudsman by persons who believe the commission has treated them unfairly or unreasonably. The ACCC is subject to the *Freedom of Information Act* that allows parties to seek access to documents about investigations or complaints. External audits are another accountability mechanism, and these have been undertaken by the auditor-general, the Department of Finance and Administration in the past.<sup>92</sup>

Today, lawyers widely acknowledge the inadequacy of these traditional accountability measures. First, it has been pointed out that those traditional administrative law principles, with their gaze firmly on the public arena, are inadequate to fulfil a public interest mission in mixed economies where governments and private capital play shared productive roles.<sup>93</sup> Second, it has been noted that deregulation has resulted in regulators being given wider discretion to make determinations and negotiate compliance,<sup>94</sup> while little

87 See *Giraffe World Australia Pty Ltd v ACCC* (1999) ATPR 41-178.

88 See *Gardiner v Walton* (1991) 25 NSWLR 190.

89 See ACCC, *Annual Report 2004-05* (2005) 172.

90 *ibid*, 167.

91 See generally Harlow and Rawlings (1984) 401-04.

92 *ibid*, 172.

93 Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing', in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40, 63, 69.

94 For example, see *Royal Australasian College of Surgeons* A90765 30 June 2003 and *The Victorian Egg Industry Co-operative* (1995) A40072.

attention is being given to the accountability process that may be necessary in these circumstances.<sup>95</sup> Third, the regulators have been criticised as not making their decisions in a totally transparent manner because they operate on the basis of vague criteria responding more to overall economic objectives, where there may be confusing division of responsibilities between regulators and other government agencies.<sup>96</sup>

**Table 5.2: Traditional accountability mechanisms**

	To whom is the ACCC accountable?	For what is the ACCC accountable?
<i>Upward mechanisms</i>	Internal review	Manner in which each officer has dealt with the investigation
	Courts	Manner in which ACCC exercises its powers
	Tribunals	Authorisation decisions can be reviewed
	Parliamentary committees	ACCC could be accountable for specific or general activities
<i>Horizontal mechanisms</i>	Ombudsman	Decision where complaints are made
	External audit	Manner in which it has been carrying out its functions
	Freedom of information	Decisions made and the relevant information considered
	National Competition Council	Introduction of national competition policy

Source: Author's research.

Scott argued that such regulatory institutions have long been subject to less transparent accountability mechanisms than merely formal ones, such as parliamentary accountability. These may have included being accountable to Treasury, which controls the purse strings, or being accountable to consumer committees, which have an important say in decision-making.<sup>97</sup> Scott's contention that a regulatory institution is accountable to many other parties beyond those suggested by the traditional accountability mechanisms is undoubtedly true. Freeman pointed out that formal legal procedures and agency oversight may provide the appearance of adequate accountability, but informal mechanisms can play an important and undervalued role in the process.<sup>98</sup>

95 Cosmo Graham, 'Is There a Crisis in Regulatory Accountability?', in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998) 471.

96 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.

97 Scott (2000).

98 Jody Freeman, 'Private Parties, Public Functions and the New Administrative State' (2000) 52 *Administrative Law Review* 813, 854. For a different view proposing that self-regulation mechanisms could clash with the rule of law in France and Germany, see Jan Freigang, 'Is Responsive Regulation Compatible with the Rule of Law' (2002) 8(4) *European Public Law* 463.

Unlike those who advocate the development of a new administrative law to apply to these changing times,<sup>99</sup> Scott suggested extended accountability will develop in different ways depending on each policy domain.<sup>100</sup> I wish to explore one of the models developed by Scott — the interdependence model. This model identifies and maps out the manner in which actors are dependent upon each other in their actions. Scott argued this interdependence is a result of the dispersal of key resources of authority, information, expertise and capacity to bestow legitimacy, such that each of the principal actors has to constantly account to others for some of its actions within the space as a precondition of action. Scott applied this model to the telecommunications sector in the United Kingdom and examined the relationship between British Telecom (BT), the privatised telco, and OFTEL, a semi-independent regulator created in 1984. Interdependency explains why OFTEL is being constantly scrutinised by a number of players and is itself daily scrutinising these same players. Scott stated:

The accountability of BT to the regulator, OFTEL, is also more focused, in the sense that OFTEL has a considerable stake in getting its regulatory scrutiny right, being itself scrutinised closely by BT, by other licensees, and by the ministers, in addition to the more traditional scrutiny by the courts and by public audit institutions. OFTEL's quest for legitimacy has caused it to develop novel consultative procedures, and to publish a very wide range of documents on such matters as competition investigations and enforcement practices.<sup>101</sup>

In Scott's view, OFTEL's accountability under the interdependency model would include both traditional and extended accountability measures. Traditional accountability measures would see OFTEL being accountable to parliament, the courts, the ombudsman, and the Auditor as well as to BT. The interdependency model would mean that OFTEL is dependent on and affected by the actions of a much wider group, including: the minister for an annual report; the Mergers and Monopolies Commission which has the power to scrutinise some of OFTEL's actions; other licensees; the European Court of Justice; and consumers via the Telecommunications Consumer Council.

Applying this model to the ACCC gives a different picture of accountability (see Table 5.2). The ACCC is accountable to other industry participants in order to ensure that competition in the long-term either remains unchanged or is enhanced. Other industry participants are active in the authorisation process, either submitting individual comments or comments via an industry association on the proposed application. The names of all those parties are

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<sup>99</sup> See Taggart (1997).

<sup>100</sup> Scott (2000) 50.

<sup>101</sup> *ibid.*

usually listed in the determinations. The interests of consumers, employees and the community are represented in many authorisation decisions over the recent past, particularly in the wake of deregulation. In the *Gas Services* authorisation decision,<sup>102</sup> it was the Victorian Council of Social Services that challenged the application querying the contention that major benefits have resulted from the Victorian gas reform process.<sup>103</sup> The ACCC was careful in handling this claim, stating that it shared the concerns expressed and allowing the authorisation on other grounds.<sup>104</sup>

The actions of one regulator may impact on the activities of other regulators, and this is particularly likely where there is an overlap in their regulatory functions. One such example appeared in the decision involving the Australian Stock Exchange, which was seeking authorisation of its business rules because it could have breached section 45 of the *Trade Practices Act 1974*.<sup>105</sup> The Australian Securities Commission, as it was then known, made its concerns known to the ACCC. It stated that it was necessary for the proposed rules, which were the subject of the authorisation application, to meet the tests of market efficiency and investor protection required under the corporations law.<sup>106</sup>

The ACCC addressed these concerns via the imposition of conditions that it stated 'are likely to limit the anticompetitive use of such subjective and undefined rules.'<sup>107</sup> Another case involved the EFTPOS authorisation,<sup>108</sup> dealing with the regulation of payment systems, including interchange systems, which was eventually taken over by the Reserve Bank of Australia, which saw itself as the regulator of this space.<sup>109</sup>

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102 *Gas Services Business Pty Ltd* A90630–A90631, 19 August 1998.

103 *ibid.*, 8–9.

104 *ibid.*, 14.

105 *Australian Stock Exchange Limited* A90623, 1 April 1998.

106 *ibid.*, 26.

107 *ibid.*, 37.

108 *EFTPOS interchange fees* A30224, A30225, 11 December 2003, *Re EFTPOS Interchange Fee Agreement* [2004] ACompT 7 30.

109 The Reserve Bank of Australia, *Reforms of Australia's Payment Systems: Conclusions of the 2007/08 Review* (September 2008).



**Table 5.3: Extended accountability mechanisms**

To whom is the ACCC accountable?	For what is ACCC accountable?
Parties directly affected by the proposed conduct (eg other industry members)	For its decision, as it may affect the level of competition in the market
Parties indirectly affected by the proposed conduct (eg consumers)	To all parties who may be affected by the availability, price or quality of the product or for employment in an industry
Courts	Accountable for its actions, which may be in breach of legislation and common law
Australian regulators (eg Australian Securities Commission, Australian Prudential Authority and Reserve Bank of Australia)	Certain decisions may affect the way in which other regulators operate and the ACCC may be accountable to these regulators
Ministers	Particularly relevant where the minister may have discretion, eg access regime
Parliament	For actions to parliament and specific parliamentary committees
Overseas regulators (eg New Zealand)	Where the ACCC's actions may impact directly or indirectly on the competition elsewhere
Governments and governmental bodies (eg state governments)	Authorisation decisions may have ramifications for other sectors of the economy which are managed by separate government departments
Private regulatory bodies (eg Standards Australia)	Decisions may have serious consequences for the activities of the association which is regulating the conduct of its members
International regulatory bodies (eg UNCTAD, Standard and Poor's)	Increasingly accountable for regulation of global regulation of business activity
Trade practices professionals (eg lawyers, compliance officers, economists and other experts)	To comply with the objectives of the legislation and the spirit of the law as well as to show a loyalty to the regulator
Non-government organisations (eg Australian Consumers Association)	To ensure that the groups represented by such non-government organisations and a range of public interest issues are taken into account in deliberations
Media	Accountable to the media which disseminates information and evaluates the performance of the ACCC's decision

Source: Author's research.

The ACCC is aware of the impact that its decisions may have on the deliberations and actions of both state and federal governments as well as on the functions of government departments. This is illustrated by the *Steggles* authorisation, which involved an application in relation to the collective negotiation of chicken growers' contracts, where submissions were received from the SA Department

of Primary Industries, and the Queensland Department of Primary Industries as well as the SA minister for primary industry.<sup>110</sup> The interdependency model is useful in understanding the relationship between the ACCC and governments. Not only is the ACCC listening with care to these bodies, but governments are also dependent on the ACCC. This was explained by the commission in its decision regarding the SA Government's moves to deregulate its poultry industry:

The Commission understands that debate of the Bill in the Upper House had been adjourned until the receipt of the Commission's determination on application for authorisation A90595 lodged by Inghams Enterprises Pty Ltd ... The Commission has now been informed that since elections in late 1997, the SA Government is reviewing its priorities, and that in all likelihood the Bill would be reconsidered by the SA Lower House in late 1998.<sup>111</sup>

Whereas references to other regulators have been infrequent in the past, with the ACCC referring on occasion to New Zealand, such references have become more common in the age of global competition.<sup>112</sup> Links between different competition agencies are growing and there is a recognition that, without concerted international effort, the attempt at regulation will not be effective.<sup>113</sup>

With the increase in privatisation and greater reliance on self-regulation, professional associations have been playing an increasingly important role in regulation.<sup>114</sup> The ACCC has been facilitating this by closely examining the manner in which these bodies have governance mechanisms in place and by requiring certain safeguards to be incorporated. This is well illustrated by the number of instances in which the ACCC has incorporated dispute resolutions into the constitutions of associations, thereby ensuring that any member is able to have its/their grievances heard.<sup>115</sup> Although it may not be accountable to such bodies under the traditional accountability mechanisms, it is clear that they

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110 *Steggles* A30183, 20 May 1998, 15.

111 *ibid.*, 3.

112 See, for example, *Ansett Australia, Ansett International Limited, Air New Zealand and Singapore Airlines Limited* A 90649, A90655, 22 July 1998; *Australian Performing Rights Association Limited* A30186–A30193, 14 January 1998. A further example of the greater notice being paid to the manner in which other competition agencies function is illustrated by the recent ACCC, *Cracking Cartels: International and Australian Developments* (Paper presented at the Law Enforcement Conference, Sydney, 24 November 2004), which involved overseas representations including presentations by Canadian, US and Japanese authorities.

113 For example, this was emphasised at the ACCC 'Cracking Cartels' Conference, 2004.

114 This has been happening since the 1980s in Australia. See Parker (1999) on self-regulation and compliance.

115 See *New South Wales and Australian Capital Territory Newsagency System* (1984) ATPR (Com) 50-070, A30092–A30093, 26 April 1984; *Royal Australian Institute of Architects* (1984) ATPR (Com) 50-077, 7 September 1984.

are an important consideration in the decision-making process. By ensuring such mechanisms are in place, the ACCC is reducing the possibility of misuse of market power<sup>116</sup> and is facilitating the decentralisation of regulation.<sup>117</sup>

Non-government organisations (NGOs) have always been an important force in holding the competition regulator accountable. The private action launched by the Australian Federation of Consumers Organisation (AFCO) and Action on Smoking Health in the Federal Court against the Tobacco Institute Australia (TIA) is a vivid example of their influence. These NGOs successfully argued that a remedial advertisement, negotiated by the TPC and the TIA was misleading.<sup>118</sup> Justice Morling held in this case that the remedial advertisement was misleading and deceptive, breaching section 52 of the *Trade Practices Act* as nonsmokers were likely to be misled into believing that passive smoking is not harmful to health. Similar examples of the role of NGOs in holding the competition regulator accountable can be seen from the appointment of Allan Asher from the Australian Consumers Association to the TPC and the subsequent appointment of Louise Sylvan as deputy chairman of the ACCC.<sup>119</sup>

The role of the epistemic community has always been important, and more so with shifts in self-regulation. Compliance officers, competition lawyers, experts in aviation or shipping, all types of economists — including behavioural economists — are all part of this community and are responsible for giving effect to the law and working with the regulator to do so. So, for example, if an ACCC officer is criticised for how she has exercised discretion in the presence of many or most of the kinds of actors in Table 5.2 at a meeting of the Australian Compliance Institute, then this may be a powerful form of accountability because of its very multiplexity.

The role of the media in providing a positive spin has long been appreciated,<sup>120</sup> and the ACCC has been actively using the media for a number of purposes, including the dissemination of information and gaining positive publicity for itself.<sup>121</sup> The manner in which the ACCC has used the media in the past has been the subject of debate, including discussion in the Dawson Report.<sup>122</sup>

116 See Black (1997).

117 *ibid.*, 165.

118 *Australian Federation of Consumers Organisation v Tobacco Institute of Australia* [1991] FCA 137. See also John Braithwaite, 'Thinking Laterally: Restorative and Responsive Regulation of OHS' (Working Paper No. 13, Regulatory Institutions Network (RegNet), ANU, August 2003) 4.

119 See Tony Freyer, *Antitrust and Global Capitalism 1930–2004* (2006) 356.

120 See Michael Schudson, 'The News Media as Political Institutions' (2002) 5 *Annual Review of Political Science* 249; see also Jonathan Moses, 'Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion' (1995) 95(7) *Columbia Law Review*, 1811.

121 For criticisms on the manner in which the ACCC has used the media, see *Electricity Supply Association of Australia v ACCC* (2001) ATPR 41–838 [Dawson Review].

122 Dawson Report Committee of Inquiry, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* [Dawson Review] (2003) [Dawson Review]; see also Brenchley (2003) 249–51.

In relation to authorisations, however, the ACCC has made use of the media in less controversial ways. It has issued media releases in relation to authorisation decisions, particularly in areas that are either politically sensitive, such as collective negotiations<sup>123</sup> and medical services,<sup>124</sup> or areas of community concern, such as protection of the environment.<sup>125</sup>

Traditional accountability mechanisms do not acknowledge the manner in which the ACCC is influenced by and accountable to the diverse range of interests contained in Table 5.2. In a sense, it is possible to summarise the disparate accountabilities by describing the ACCC as accountable to a competition and consumer policy epistemic community.<sup>126</sup> The community constitutes a diffused and pluralised networking of accountability. This should be the first step in rethinking the process by which the ACCC determines an authorisation decision.

## Rationality

Rationality requires that decisions are based on reason and can be fully explained. Economic rationality is just one kind of rationality against which the ACCC is evaluated. Legal rationality is another master narrative against which ACCC discretion is recurrently evaluated. Four reasons for requiring officials to exercise their discretion rationally have been identified within that more legal discourse.<sup>127</sup>

- It is intended to reduce biased, capricious or arbitrary decision-making.
- The reasons for the decision must be capable of being explained in connection with the purpose for which the discretion is granted.
- It ensures that the official acts impartially.
- It ensures that there is consistency in the decision-making.

The ACCC, as with all administrative agencies, is scrutinised by a range of interested parties. It emphasises the logical and transparent manner in which it makes decisions, as set out in its guides and website.

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123 The ACCC authorised Inghams to continue collective negotiations with SA Chicken Growers, see ACCC, 'ACCC Proposes to Allow Inghams to Continue Collective Negotiations with SA Chicken Growers' (Press Release MR 312/02, 9 December 2002); see also 'ACCC Allows Tasmanian Vegetable Growers to Collectively Bargain' (Press Release MR 257/04, 18 November 2004).

124 See ACCC, 'ACCC Proposes Surgical College Reform to Help Address Surgeons Shortage', (Press Release MR 016/03, 6 February 2003).

125 See ACCC, 'ACCC Draft Decision Proposes to Allow Greenhouse Gas, Ozone Recovery Program' (Press Release MR 042/03, 27 February 2003).

126 Peter M Haas, 'Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1.

127 Galligan (1986) 140; Yeung (2004) xx; Goodin (1986) 244–46.

## Factors Influencing Discretion

### The Nature of the Task

Galligan has drawn attention to the exercise of discretionary powers and the kinds of tasks undertaken in using them. Tasks that are complex, involving many interests, may be suited to an approach that allows consideration of various possibilities and ensures the maximum representations of interests. On the other hand, decisions of a complex kind that are made regularly may be better governed by relatively settled, if oversimplified standards. In such cases, complexity is compromised in order to gain in efficiency and consistency. Galligan illustrated this proposition with two examples. Where the regulator is using its discretion to determine the site of an airport, it would be necessary to adopt an approach that allows for the maximum representation of interests. On the other hand, the decision on granting licenses to conduct public houses, which are being made regularly, could be determined by straightforward standards.<sup>128</sup> This issue has been examined by the Administrative Review Council, which concluded that full automation of decision-making is not appropriate where the decision-maker is required to exercise discretion once the facts are established.

In the authorisations area, the decisions are varied, and some are much more complex than others. The ACCC has adopted different strategies depending on the matter lodged. Preliminary enquiries are often directed to officials to determine whether an authorisation application may be necessary. Other officials develop expertise in specific areas and deal with those authorisation applications. Where the matters are complex, such as aviation or mergers, they may be handled by a group of officials who have developed expertise in the area. Where matters require further scrutiny, the power to call a pre-determination conference can be utilised to canvass the complex issues that may arise and benefit from open discussion.<sup>129</sup> There are, however, benign matters which raise the same issues and benefits, such as collective bargaining, which is now dealt with via a new and more efficient process.<sup>130</sup>

Clearly, the allocation of funds to the agency will affect its operations.<sup>131</sup> It will determine the types of strategies the agency will adopt — lesser funds will mean that the agency will have to be selective in deciding the cases it may enforce. Although a limited budget may not bar an agency from developing its role, it can impede effective enforcement, in particular when there are insufficient

128 Galligan (1986) 137; Yeung (2004); Nielsen (2006) 402–03.

129 Section 90A of the *Trade Practices Act 1974* (Cth).

130 Allan Fels and Tim Grimwade, 'Authorisation: Is it still Relevant to Australian Competition Law?' (2003) 11 *Competition and Consumer Law Journal* 187, 200.

131 Galligan (1986) 290; Goodin (1986) 241; see also Richard Grant Politics and Public Administration Section, Department of Parliament Services, *Australia's Corporate Regulators — the ACCC, ASIC and APRA* (Research Brief No 16, 14 June 2005) 23.

resources to deal with the number of cases.<sup>132</sup> The manner in which an agency can seek to deal with a limited budget is illustrated by the manner in which the European Union has sought to deal with its equivalent to authorisations. The exemptions process was abandoned in May 2004 mainly because of the cost burden placed by the system on the regulator. Now the regulator can challenge an agreement in court and the onus would be on the parties to the agreement to show that their agreement is not in breach of Article 81(3).<sup>133</sup> This amendment is moving away from a regulator-centred, prospective-approval-based regulatory approach to a court-based adversarial approach.

## Efficiency

Efficiency is often defined as the ability to accomplish a job with a minimum expenditure of time and effort. It refers to the relationship between resources and results.<sup>134</sup> More specifically there are two aspects of efficiency — productive efficiency and allocative efficiency. Productive efficiency refers to producing a good or service at the lowest cost. Allocative efficiency refers to resources being allocated in a way that maximises the net benefit gained through their use. Thus it refers to a situation in which the limited resources of a country are allocated in accordance with the wishes of consumers.

Whereas business organisations have acknowledged efficiency as an important goal, since the 1970s in the United Kingdom and the 1990s in Australia this has become more important in the context of government agencies.<sup>135</sup> Efficiency became the rationale for outsourcing and deregulating many government activities. The term New Public Management was coined to describe the shift in the way government agencies functioned,<sup>136</sup> with many scholars evaluating the consequences this shift has brought for administrative law.<sup>137</sup> It has meant that public administration is monitored by reference to the overriding criteria of value for money, illustrated by the establishment of the Office of Best Practice Regulation, which has a central role in assisting departments and agencies to meet the Australian Government's regulatory impact analysis requirements, and in monitoring and reporting on their performance, with an emphasis on quantification and cost benefit analysis.<sup>138</sup>

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132 Maher (2006).

133 *Official Journal of the European Communities*, 'Introduction', Council Regulation (EC) No 1/2003, (16 December 2002) para 3.

134 Galligan (1986) 129; Yeung (2004) 30.

135 Independent Committee of Inquiry into Competition Policy in Australia, Commonwealth of Australia, *National Competition Policy* [Hilmer Report] (1993); [Dawson Review] (2003).

136 Christopher Hood, 'A Public Management for all Seasons' (1991) 69 *Public Administration* 3.

137 Harlow and Rawlings (1984) 141.

138 Department of Finance and Deregulation, Commonwealth of Australia, Office of Best Practice Regulation (OBPR) 'Cost Benefit Analysis', which emphasises cost benefit analysis. <<http://www.finance.gov.au/obpr/cost-benefit-analysis.html>> at 15 October 2008.



## Organisational Issues

The design of the organisation, the ethos of the agency as well as its leader will have an influence on discretion. The organisational design of the regulator will determine the discretionary power granted to officials within it, as well as the manner in which the discretion is used. Detailed guidelines on how discretion should be exercised may do away with discretion completely and has been discussed in the context of automated expert systems.<sup>139</sup> For example, the Department of Veterans' Affairs has an automated expert system that guides the officer's decisions and ability to exercise discretion. The officers' ability to override the ultimate result of the expert system is limited, reducing the manner in which the officer could ultimately act.<sup>140</sup> Another example is the office of National Legal Aid which had a different take on its officers' use of discretion. Because the guidelines for legal aid are flexible and the range of circumstances that individuals find themselves in are not easily reduced to business rules, the officer's role becomes important and such decisions are not easily made by automated decision-making format.<sup>141</sup> Further, it may be possible for the guidelines to limit discretion. For example, the guidelines may prescribe certain modes of communication or certain language to be used for the communication and this might be difficult for some groups to engage with. Whereas in some agencies the guidelines may allow the officers to adopt a conciliatory stance, in others they could force officers to 'go by the book'.<sup>142</sup> Similarly, requiring all submissions to be made by lawyers or economists may reduce participation by groups without access to resources to employ professionals.

The ethos of the organisation, although difficult to define, is crucial to the manner in which the regulator functions. Here the dominant language and knowledge of discourse within the organisation will influence the exercise of discretion. This point has been illustrated by the manner in which doctors use discretion. Rather than using the term discretion, doctors use terms such as professional judgment and the exercise of clinical freedom.<sup>143</sup> Scientific knowledge is used by the profession to assert its position and the manner in which such information is regarded by the community. Likewise, the ACCC's emphasis on compliance rather than enforcement reflects its current ethos.<sup>144</sup> Similarly, emphasis by the ACCC on economic efficiency and its quantification has been a way to assert the rationality of decision-making. This is further driven by the need for such

139 G Smith, 'Discretionary Decision-making in Social Work', in Adler and Asquith (1981) 47, 48.

140 Administrative Review Council (2004) 13.

141 *ibid.*

142 Black (2001) 13.

143 T McGlew and A Robertson, 'Social change and the shifting boundaries of discretion in medicine', in Adler and Asquith (1981) 200, 201.

144 Parker and Nielsen (2006); Nielsen (2006).

agencies to be accountable for their actions and expenditures. This may, however, have the impact of ignoring non-efficiency benefits, such as improvements in health or promotion of healthy lifestyles.

The manner in which this discretionary power is communicated within the agency is important. Some regulatory agencies have broad guidelines aimed at increasing awareness and compliance. In a study on nursing homes, John Braithwaite and Toni Makkai looked at whether trust nurtures compliance — if treating regulated groups as worthy of trust would be repaid with voluntary compliance.<sup>145</sup> The study found that, although there was a correlation between trust and compliance, regulatory institutions should be able to deal both with cases where trust is respected and where trust is abused. Such practices, where implemented, would give officials within the regulatory institution wide discretion.

Where there are comprehensive standards and strict guidelines as matters of policy, strategy as well as procedure, the officials themselves may have little discretion. The study by Richard Lempert on the adjudicative discretion that Hawaiian state law provided to a public housing eviction board showed changes in the eviction process from 1969 to 1987. Lempert identified a number of behavioural factors that affected the exercise of discretion by the board. These included training sessions for board members in order to promote legalistic decision-making; not reappointing members with views regarded as too pro-tenant and new appointments to the board. Changes to the board size and the hearing process to allow more eviction action to be heard, use of lawyers in presenting the views of the Hawaiian Housing Authority, amendments to the legislation which provided further grounds on which appeals could be made could also affect discretion.<sup>146</sup>

Braithwaite, Grabosky and Walker conducted a study on enforcement approaches in enforcement agencies, which illustrates that many factors determine enforcement practices, including regulatory policy, enforcement practices and the attitudes of officials. Thus officers' use of discretion is a determinant of enforcement practices. The authors examined 101 Australian regulatory agencies and identified seven dominant enforcement types: conciliators, benign big guns, diagnostic inspectors, detached token enforcers, detached modest enforcers, token enforcers, and modest enforcers. The authors found most Australian enforcement agencies to be token enforcers that performed

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145 John Braithwaite and Toni Makkai, *'Trust and Compliance Administration'* (Working Paper No. 9, Compliance and Governability Program, February 1993) 11.

146 Lempert (1996) 373–76.

perfunctory rulebook inspections.<sup>147</sup> The TPC in this study was classified as a modest enforcer, which made use of a variety of enforcement methods including prosecution, fines, injunctions and adverse publicity.<sup>148</sup>

Christine Parker and Vibeke Nielsen examined business' opinions of the ACCC, which is of interest here. They used three indices to measure this: a strategic sophistication index, the procedural and substantive justice index and the flexibility index. The authors reported that opinions of businesses tended to be neither extremely negative nor extremely positive. Businesses saw the ACCC most positively in relation to its strategic sophistication. They also viewed the ACCC as an effective regulator, whose activities were beneficial to the Australian economy, but they were critical of the ACCC's use of the media.<sup>149</sup>

The leadership within the organisation will influence its operations as well as the operations of the officials within it. In discussing the enforcement style adopted by regulatory officials, leadership has been pointed to as an important factor.<sup>150</sup> Leadership style can determine the approach to regulation, the intra-agency commitment and competence, the networks that may be actively used, and the relationship that may develop with other agencies. The ACCC has had leaders with diverse personal styles, who have shaped the organisation. For example, the operational style of Bannerman was based on dialogue, as demonstrated by the following statement:

The TPA has always been a very public body, and I hope it remains so. It must often talk softly, sometimes talk firmly, and reach for the third alternative rather rarely. It needs to earn and retain respect in order to do its work effectively. The Commissioners have to be publicly known. They have to go onto platforms and into groups. They have to respond to urgent calls for conferences. While avoiding the risk of being remote, they have to avoid the opposite risk of being thought to identify with those whose conduct they must scrutinize.<sup>151</sup>

The leadership style will be important in defining the organisation in the public eye. This was an issue that was brought to the fore by Fels, whose use of the media kept the chairman and the regulator in focus. Explaining/defending his use of the media, Fels stated:

I have sought and maintained a high media profile because I believe my statements and media interviews help build a general culture of understanding and support for competition law. Accusations from some

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<sup>147</sup> Braithwaite, Grabovsky and Walker (1987) 323.

<sup>148</sup> *ibid*, 340.

<sup>149</sup> Parker and Nielsen (2006) 160.

<sup>150</sup> Yeung (2004) 188.

<sup>151</sup> Trade Practices Commission, (1983) [211].

quarters of being a media tart are a small price to pay for raising business and consumer confidence in competition law. The more people who realise their obligations and rights, the greater the degree of genuine competition within the economy.<sup>152</sup>

The background of the leader is also important, as demonstrated by the discontent among four of the state governments that refused to support the appointment of Graeme Samuel to the position of commissioner in 2003.<sup>153</sup> Samuel's track record was described as having been 'forged more in the boardrooms of corporate Australia than with the tens of thousands of small businesses who look to the ACCC as a buffer against the bigger players'.<sup>154</sup> There was, however, bipartisan support for the appointment of Ron Sims, an experienced regulator, to this position in 2011.

### Political Considerations

Institutional design can give politics an important role and can have an influence on discretion. Reliance on discretion, rather than rules, could provide an escape route for governments seeking to avoid difficult decisions.<sup>155</sup> This is certainly true of the Australian *Trade Practices Act*, which has relied on the granting of discretion to the regulator and left appeals in the hands of the tribunal rather than the courts.

Tony Freyer's analysis of antitrust regulation in Britain and the United States shows the different considerations faced by policy makers in the two countries that shaped the manner in which restrictive practices were regulated.<sup>156</sup> Paul Craig pointed out that the structure of the British antitrust legislation during the 1980s gave ultimate control to the political arm of government. He argued the important role played by the secretary of state in the initiation of monopoly and merger references, the preference given for public enforcement of competition policy rather than private enforcement, and the limited role provided to the judiciary all resulted in giving the government of the day an important role.<sup>157</sup>

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152 Allan Fels, ACCC Update, 13 June 2003, <[http://www.accc.gov.au/content/item.phtml?itemId=349239&nodeId=34326161a1928dde07b97cf4878b8390&fn=Update\\_13.doc](http://www.accc.gov.au/content/item.phtml?itemId=349239&nodeId=34326161a1928dde07b97cf4878b8390&fn=Update_13.doc)> at 10 December 2007; see also Parker, Ainsworth and Stepanenko, (2004).

153 See ABC Radio, 'States block ACCC appointment', *The World Today* 13 November 2002 <<http://www.abc.net.au/worldtoday/stories/s726027.htm>> at 8 February 2008.

154 ABC Television, 'Controversy surrounds ACCC appointment', *The 7.30 Report* 29 May 2003 <<http://www.abc.net.au/7.30/content/2003/s867709.htm>> at 6 January 2008.

155 Tony Prosser, 'The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Service', in Adler and Asquith (1981) 148, 149.

156 See Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America 1880–1990* (1992).

157 Paul Craig, 'The Monopolies and Mergers Commission: Competition and Administrative Rationality', in Baldwin and McCrudden (1987) 197, 217.

The role of politics can be overt but is commonly more indirect or subtle. An example of direct influence can be by virtue of the legislative design. This is illustrated by the access regime that provides for ministerial approval of certain access applications on the grounds of public interest.<sup>158</sup> Today, federal and state governments make submissions to the ACCC in relevant authorisation deliberations.

### The Attitudes of Officials

The outlook of officials working within the agency will shape the exercise of discretion. Braithwaite, Makkai and Braithwaite pointed to the manner in which the professional background of the inspection team can frame which standards they choose to enforce. In their study on aged care, they reported that if a nurse is inspecting the aged care premises it will be nursing deficiencies in the survey report, if a pharmacist, pharmacy deficiencies are the focus; a sanitarian, sanitary deficiencies; a lawyer, patient rights.<sup>159</sup>

Galligan pointed out that the manner in which officials apply their moral policy is complex. Here, there may well be defining national and institutional characteristics which shape this discretion. For example, it has been pointed out that in the American regulatory tradition businesses are treated with distrust whereas, by contrast in Japan, business executives are treated as honourable citizens.<sup>160</sup> This may well affect the way officials operate in making decisions. But it is likely to affect the official's perceptions of statutory purposes and to influence the interpretation put on them, as well as the formation of the subsidiary goals that are set in achieving overall purposes. It may also influence the agency's approach to enforcement. Galligan cited the example of pollution control. His study suggested that wilful or negligent rule breaking will influence whether the officer decides to take enforcement action. Enforcement in this study depends on the officer's moral judgement.<sup>161</sup> A study by David McCallum on the 1890s policy of removing Aboriginal children from their homes again demonstrates the important role of the official. In this case the manager of each mission station was empowered to make representations about whether the child could stay with the family or be removed by the Office of the Board for Protection of Aborigines. The author reported that 'some managers were more pressing than others in ensuring that children who were sickly were able to remain on the mission with their families'.<sup>162</sup> Interviews with ACCC staff support

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158 See Nagarajan, 'The Accommodating Act: Reflections on Competition Policy and the Trade Practices Act' (2002) 20(1) *Law in Context* 34.

159 Braithwaite, Makkai and Braithwaite (2007) 224.

160 Braithwaite and Makkai (1993).

161 Galligan (1986); Black (2001) 15.

162 David McCallum, 'Informal Powers and the Removal of Aboriginal Children: Consequences for Health and Social Order' (2007) 35 *International Journal of the Sociology of Law* 29.

the proposition that the officer's own attitudes influence the manner in which authorisations are conducted. For instance, officers from a consumer advocacy background asserted the need for giving attention to consumer's interest in the deliberations.<sup>163</sup>

The manner in which the decisions of officials are scrutinised shapes discretion. Of particular significance to lawyers is the manner in which decision-making can be constrained to ensure that discretion is exercised in accordance with the rules and for the overall proper legal purpose.<sup>164</sup> In this context, Galligan paid particular attention to the role of the courts, which, in many such instances, hear appeals to determine the amount of discretion that the decision maker possesses and whether this discretion has been exceeded. Clearly, over-emphasising such appeal decisions by courts, or other equivalent bodies, can give a distorted view of the activities in such regulatory agencies. It focuses more on their pathology rather than their day-to-day activities.<sup>165</sup> It does, however, ensure that there is outside scrutiny of the agency and allows an enquiry into whether the agency's activities are legal, whether the agency is competent, and whether it is exercising its powers in a proper manner.

Interviews with ACCC officers indicate that they have guidelines on the types of public benefits to be considered. Staff have specialties and are allocated tasks in specific areas, for example, mergers, electricity, or aviation. Flexibility exists on the manner in which staff go about gathering further information. Existing relationships with groups, such as consumer groups or expert witnesses, and advice obtained on submissions made by applicants will depend on the particular official.<sup>166</sup>

## Other Factors

Numerous other factors can also shape discretion, including the customs and norms in the nation and within the agency. The importance attached to the specific regulatory area will be reflected in the position that the agency occupies. Imelda Maher pointed out that the status of competition law varies from nation to nation in the European Union. While competition law has a high constitutional status in Germany, this has not historically been the case in the United Kingdom and reflects on the status and legitimacy of the agency. Further, the constraints can be cultural. Maher gave the example of a farmers' association where the association ignored the injunction secured under competition law

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163 Interview 8.

164 Allars (1990) 9; see also Allars, 'The Rights of Citizens and the Limits of Administration Discretion: The Contribution of Sir Anthony Mason to Administrative Law' (2000) 28 *Federal Law Review* 197; Schneider in Hawkins (1992) 47, 53.

165 Baldwin and McCrudden (1987) 55.

166 Interview 6.



and chose instead to pay a fine, and continue its prohibited boycotts.<sup>167</sup> These constraints are not necessarily fixed and can change as demonstrated by the cultural shifts experienced during the Bannerman years (discussed in Chapter 2).<sup>168</sup> Similarly the importance attached to competition law, clearly articulated by the adoption of the competition principles, has also been significant for the ACCC in giving it the status it had previously lacked.<sup>169</sup>

Relational distance has also been discussed as a relevant factor in regulation as ‘the quantity of law will vary directly with relational distance, the more law will be used in cases of disputes and visa versa’.<sup>170</sup> It has been argued that relational distance is important in offences affected by the relationship that the regulatory agency has with the offender. In cases where the conduct is continuing and offences are a result of a set of circumstances, such as cartel conduct, the relational distance is likely to be important. In cases, however, where the conduct is a one-off, discrete and relying on specific facts that can be communicated with ease, relational distance is likely to be less important.<sup>171</sup> In the case of the ACCC and authorisations where the public benefits claimed are quantifiable with ease, relational distance is likely to be of minor importance. Where the public benefits are not easily quantifiable, however, such as improved working conditions or increased work safety, relational distance may become more important.

## Discretion and Regulatory Strategies

Determining an authorisation application is a complex issue that can have long-term consequences. The ACCC, as with many other large regulatory agencies, faces many challenges in responding to the demands of governments, business, competitors, consumers, and other regulators. Regulatory theory has addressed the issue of how regulators can rise to these challenges. It may be trite to say that law is not static, but neither are the regulatory theories and regulatory approaches adopted by regulators. Carol 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.<sup>172</sup> It is relevant to an examination of regulatory agencies and regulatory scholars. Harlow pointed out the law’s contribution to public administration varies according to time and place. As the role of government has changed, so too has the direction

167 Maher (2006) 8–9.

168 See Chapter 2.

169 Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (2003).

170 Black (2001) 11.

171 *ibid*, 5, 11.

172 Harlow (2005) 279.

of administrative law, which is concerned with making administrators and regulators accountable. Regulatory scholars tend to be from a multidisciplinary background, which has added to the diversity and richness of the scholarship.

Harlow suggested that the dominance of administrators in the twentieth century saw regulatory scholars seeking to develop strategies of controlling the manner in which regulatory agencies used their discretion.<sup>173</sup> Considerable scholarship was devoted to the manner in which rules could be used and whether they constrained discretion or, rather, whether discretion flourished within such rules.<sup>174</sup> 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.<sup>175</sup> The importance of human rights as a discourse has also influenced public administration, which is required to deliver services economically, efficiently and without violating human rights.<sup>176</sup> The final episode Harlow discussed is global governance, 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 enforcement machinery, such as the European Commission, for enforcement and implementation.<sup>177</sup> Many of these discourses described by Harlow are evident in the ACCC's determination of authorisations. This change in the regulatory environment is illustrated by the role played by state and federal governments, which now make submissions and comment on authorisation applications just like any other private party. Likewise, the accountability push has witnessed much documentation providing maps of processes and a proliferation of specific rules.<sup>178</sup>

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173 *ibid*, 284–85.

174 *ibid*, 282–83. Also see the discussion on Discretion and its Meaning in Chapter 5 of this thesis.

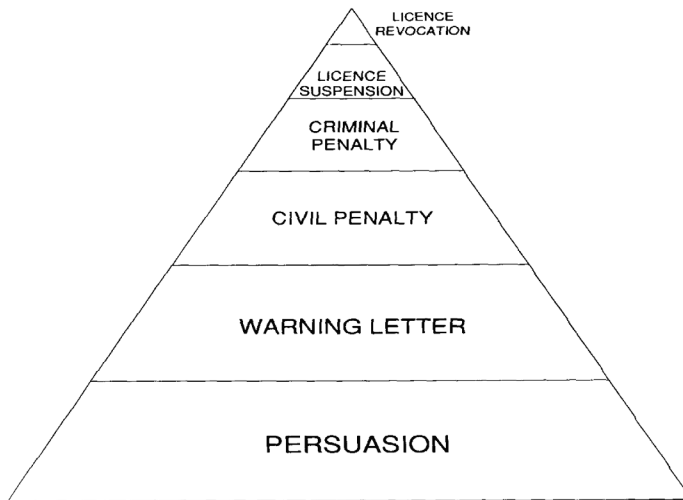
175 Harlow (2005) 291; see also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

176 Harlow (2005) 287; see also Bronwen Morgan (ed), *The Intersection of Rights and Regulation — New Directions in Sociolegal Scholarship* (2007).

177 Harlow (2005) 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 2002* (2005) 223.

178 See the lists on public benefit Trade Practices Commission, Commonwealth of Australia, *Authorisation* [pamphlet] (March 1990); ACCC, *Authorisations and Notifications, Guidelines* (May 1999) 7. See also Braithwaite, Makkai and Braithwaite (2007) 226.

There are a number of contributions by regulatory scholars that are particularly relevant to the process of authorisation determinations by the ACCC. Responsive regulation has influenced the manner in which the ACCC has directed much of its regulatory activity. A 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; they should be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention.<sup>179</sup> Scholars have proposed a variety of regulatory strategies in the form of a regulatory pyramid developed by Ian Ayres and John Braithwaite (reproduced in Figure 6.1). The amount of space at each layer reflects the amount of enforcement activity at that level.



**Figure 5.1: Example of the regulatory pyramid and regulatory strategies**

Source: Modified from Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

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, civil and criminal penalties, and licence suspensions. The model is a dynamic one that does not specify the types of matters needing consideration or the point in time when the regulator sees fit to move up the pyramid away from persuasion to penalties.

179 Ayres and Braithwaite (1992); Braithwaite *Restorative Justice* (2002) 231; Valerie Braithwaite (2007) 3.

This model has been criticised on many levels.<sup>180</sup> Some studies have found that, although persuasion may be a cheaper regulatory strategy, it is also more often subject to failure.<sup>181</sup> Many of these criticisms have been taken on board and the model has been reworked considerably given changing contexts, specifically the changing role of the state in regulation.<sup>182</sup>

Robert Baldwin and Julia Black sought to develop some of these ideas in their article 'Really Responsive Regulation'.<sup>183</sup> To be really responsive, it is not only the regulators' point of view but also the regulatee's points of view that matter and this is a continually reflexive process. They argued that to be really responsive, 'regulators have to [be] responsive not only to the compliance of the regulatee, but in five further ways'<sup>184</sup> — 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, the changes in each of these elements.<sup>185</sup> Baldwin and Black also argued this approach needed to be applied across all the different tasks involved in the regulatory activity. They proposed five elements for this approach: 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 failures; and modifying approaches accordingly.<sup>186</sup> This holistic approach is challenging for the regulator, requiring it 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, to be sensitive to all changes and be 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.

The responsive regulation model has been further developed by linking it to restorative justice. Here, John Braithwaite 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. The greatest emphasis, however, should be placed on restorative justice, reflected by its position at the base of the pyramid with the largest space devoted to it. Stepping up the pyramid are deterrence strategies, including litigation and revocation of licences. These may be used by the regulatory institution

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180 Two examples of these critiques can be found in Parker (1999) 223–25; and Baldwin and Black (2007) 59.

181 See Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (1997) 15–16.

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

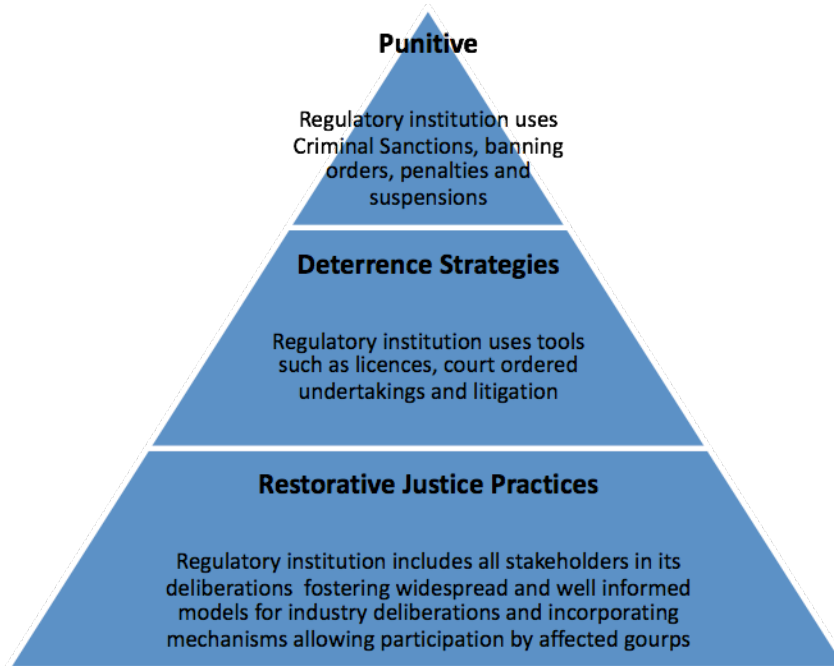
183 Baldwin and Black (2007).

184 *ibid.*, 61.

185 *ibid.*

186 *ibid.*, 76.

where restorative practices are not effective. At the top of the pyramid are punitive sanctions, including criminal penalties and imprisonment (Figure 6.2). The middle level consists of deterrence strategies including enforceable undertakings, formal settlements and restricted licenses which have been important to the ACCC's approach and which it has described as 'an integrated approach'.<sup>187</sup>



**Figure 5.2: Strategies available to the regulatory institution**

Source: Modified from John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 231.

Restorative justice is described as an approach where all the stakeholders affected by an injustice have an opportunity to discuss how it has hurt them, to discuss their needs and what might be done to repair the harm. 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.'<sup>188</sup> Restorative justice, it is proposed, works best with a spectre of punishment in the background, but never in the foreground. It is claimed to deepen democracy as it moves away from being a coercive imposition of responsibility upon citizens to responsibility as something autonomous that citizens take after listening to a democratic conversation that includes concerns, harms and duties.<sup>189</sup>

<sup>187</sup> Tony Freyer, *Antitrust and Global Capitalism 1930–2004* (2006), 361.

<sup>188</sup> Braithwaite (2008) 91.

<sup>189</sup> Braithwaite, *Restorative Justice* (2002) 10.

The democratic notions on which this is based come from the deliberative democracy discourse, 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’.<sup>190</sup> Parker has used deliberative democracy principles in developing a model that ‘gives the state a role in *facilitating* the permeability of private organisational systems and social power directly to civil society and the public sphere’.<sup>191</sup> John Parkinson and Declan Roche point to a number of deliberative democratic features that should be considered in attempts at implementing restorative justice practices; these could include regulatory bodies. Their study examined restorative justice programs involving criminal offences, but which apply equally to other areas. The features they pointed 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 is traditionally expected.<sup>192</sup>

Another group of scholars on regulatory capitalism are also relevant to this discussion.<sup>193</sup> They 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 operating 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 by the increasing role of partnership approaches to governance, where both corporations and NGOs have been mobilised to participate in collective governance processes.<sup>194</sup> The importance of networked systems, where regulators can network with corporations to bring about compliance or monitoring or reform, is recognised by Peter Drahos.<sup>195</sup> This group of

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

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

192 Parkinson and Roche (2004) 511–15.

193 See, for example, Braithwaite (2008); Michael Kempa, Clifford Shearing and Scott Burris, ‘Changes in Governance: A Background Review’ (Paper presented at the Global Governance of Health Seminar, Salzburg, 16 December 2005) <[http://www.temple.edu/lawschool/phrhcs/salzburg/Global\\_Health\\_Governance\\_Review.pdf](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) 12.

194 Kempa, Shearing and Burris (2005). See David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005) 3. See also Parker (2002).

195 Peter Drahos, ‘Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach’ (2004) 77(2) *Temple Law Review* 401; see also Michael Castels, *The Rise of the Network Society* (1996). Also see Parker, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’ (2006) 40(3) *Law and Society Review* 591.

scholars pointed to the inadequateness of national laws and advocated being more creative about responsiveness. This has been utilised by the ACCC in granting authorisations on conditions which often has the effect of increasingly compliance and providing appeal processes and complaints mechanisms.

To this scholarship has to be added the contributions of New Governance which sees the potential to nurture meaningful processes of cultural change within institutions that are decentred, experimental and founded on participation. These scholars see an expanded role for regulatory institutions.<sup>196</sup> 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 envisages coordinating bodies — including regulatory institutions — taking on new roles, such as assisting in benchmarking activities — 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. The description of the Bannerman style of chairmanship, discussed in Chapter 2, could be categorised as experimental — every technique from cajoling to public shaming (by being included in the annual reports) was utilised with the objective of bringing out the extent of cartel and collusive conduct prevalent in the Australian economy during the 1960s. Michael Dorf and Charles Sabel, scholars of the new governance variety, proposed that such agencies engage in experimentalist regulation — which would connect rule-making to monitoring, followed by regulatory improvements.<sup>197</sup> 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, which takes note of the shifting regulatory landscape and takes us beyond the familiar but flawed concepts of accountability to which we are accustomed.<sup>198</sup> Others who have contributed to new governance include commentators on management-based

196 Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

197 *ibid.*, 345.

198 See also Graine De Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (2006); Vijaya Nagarajan, 'From "Command to Control" to "Open Method Coordination": Theorizing the Practice of Regulatory Agencies' (2008) 8 *Macquarie Law Journal* 63; David Trubek and Louise Trubek, 'New Governance & Legal Regulation' (2007) 13 *Columbia Journal of European Law* 540; Neil Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) *Journal of Environmental Law* 179. Also see the discussion in Chapter 5.



regulation, meta regulation, principle-based regulation, hybrid regulation, decentered regulation, really responsive regulation, nodal governance and polycentric governance.<sup>199</sup>

Defining discretion is not an easy task and neither is it an easy task to show how discretion is perceived, used, constrained or limited. It is clear, however, that discretion exists within strict rules, broad principles and everything in between. The authorisation process is a complex one and, as this chapter illustrates through the empirical study, it represents an arbitrary exercise of discretion.

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199 See Parker, 'Meta Regulation: Legal Accountability for CSR' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007); Elinor Ostrom, 'A Polycentric Approach for Coping with Climate Change' (World Bank Policy Research Working Paper No 5095, World Bank, 2009; Drahos (2004); Cristie Ford and Natasha Affolder, 'Responsive Regulation in Context, Circa 2011 Preface' (2011) 44(3) *University of British Columbia Law Review* 463; Nagarajan, 'Regulating for Women on Corporate Boards: Polycentric Governance in Australia' (2011) 39 *Federal Law Review* 255.